

(1999) 03 BOM CK 0088
In the Bombay High Court
Case No : Criminal Appeal No. 3 of 1994

Ramnath Manal

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 16-03-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 294, 313
Penal Code, 1860 (IPC) — Section 301, 302

Citation : (1999) CriLJ 3986

Hon'ble Judges : V.K. Barde, J;J.A. Patil, J

Bench : Division Bench

Advocate : Vijay Sharma, for the Appellant; A.S. Rasal, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

J.A. Patil, J.—In Sessions Case No. 51 of 1993, the appellant/accused was tried on the charge of committing murder of Mangalabai w/o Ramrao Gaikwad by setting her on fire after pouring kerosene. The learned Sessions Judge, Aurangabad convicted the accused of the offence punishable u/s 302 of the I.P.C. and sentenced him to life imprisonment. Feeling aggrieved by the said order, the accused has preferred this appeal.

2. The prosecution case in brief is that the accused is a resident of Village Wahegaon, taluka Gangapur. He works as a mason. The deceased Mangalabai was his kept mistress and both of them were residing together in a slum area in Indiranagar at Pandharpur, taluka Aurangabad. The incident in question took place between 7 p.m. and 7.30 p.m. on 25-7-1992. According to the prosecution, the accused had disposed of four Gold beads belonging to Mangalabai and that led to a quarrel between the two. In the course of the quarrel, it is alleged, the accused poured kerosene on the person of Mangalabai and set her on fire. While doing so, the accused himself suffered some burn injuries but, he managed to run away. Mangalabai who was on fire, began to shout and her shouts attracted the

attention of the persons residing in the neighbourhood who rushed to the spot and appear to have put out the fire. Mangalabai is said to have disclosed to those persons that the accused had set her on fire.

3. At the relevant time, Head Constable Jadhav P.W.4 along with Constable Kharat P.W.6 were on patrolling duty in the same area. On coming to know about the incident, both of them visited the house and arranged to carry Mangalabai to Ghati Hospital in a rickshaw. According to the prosecution, Mangalabai disclosed to these two policemen also that it was the accused who had set her on fire. In the Hospital also Mangalabai made the same disclosure to Dr. Tenkale P.W.I 1 who examined her. It appears that information about the admission of Mangalabai in the hospital in burnt condition was given to Chhawani Police Station and, thereafter, A.S.I. Shinde P.W.13 was directed to make inquiry into the case. On the same night A.S.I. Shinde arranged to get a formal dying declaration Exh.30 of Mangalabai recorded through the Executive Magistrate Mehra P.W.9. In that statement also Mangalabai stated that she had a quarrel with the accused in connection with disposal of her gold weighing 4 Masas and that, the accused had, therefore, set her on fire. Mangalabai had sustained 100% of burns. She succumbed to the burn injuries on the same night at about 1.40 a.m.

4. On the basis of the dying declaration of Mangalabai, A.S.I. Shinde lodged his formal complaint Exh.42 and handed over the investigation of the case to P.S.I. Wakade P.W.15. The accused was absconding since the incident. Therefore, search to trace him was undertaken by the police. On 27-7-1992 Head Constable Mahale P.W.12 was proceeding to Wahegaon in search of the accused. He was accompanied by one Constable. On the way near Wahegaon he saw the accused coming in a bullock cart. The accused had burns on his person. The local Police Patil appears to have identified the accused. Head Constable Mahale then brought the accused to Chhawani Police Station and produced him along with his report; Thereafter, the accused was sent to the Hospital for treatment. It was found that the accused had sustained 41 % of burn injuries. In due course, P.S.I. Wakade completed investigation and filed charge-sheet against the accused for the offence punishable u/s 302, I.P.C. in the Court of J.M.F.C, Aurangabad.

5. During the trial in Sessions Court, the accused pleaded not guilty to the charge. His defence is one of total denial. He denied any concern with Mangalabai and further denied that he was residing with her at Indiranagar. The accused further denied to have set Mangalabai on fire. As regards the burn injuries suffered by him, the accused explained in his statement u/s 313 of Cr. P.C. that the roof of his house at Wahegaon was leaking and that his mother and wife had asked him to fix a water-proof cloth from inside. According to him, he placed a tin on a hearth and climbed on it in order to fix a waterproof cloth. He further stated that at that time, the flames in the burning hearth rose up as a result of which his Pajama caught fire and he fell down. Thereafter, his father took him a bullock cart for being admitted in hospital at Gangapur. According to

him, on the way the police met him and brought to the Police Station from where he was taken to Ghati Hospital. The; accused did not lead any evidence in his defence nor did he examine himself on oath.

6. In support of its case the prosecution examined in all 15 witnesses. The entire case is based on circumstantial evidence. The learned Sessions Judge accepted the prosecution evidence and rejected the defence put up by the accused. He held that at the relevant time the accused was residing with, Mangalabai. The learned Judge accepted the dying declaration of Mangalabai as recorded by the Executive Magistrate Mehra as true and correct. He rejected the explanation given by the accused as to the burn injuries sustained by him. In this view of the matter, the learned Judge proceeded to convict and sentence the accused as stated above.

7. Shri Vijay Sharma, the learned Advocate for the accused contended before us that the learned Sessions Judge was in error in placing reliance upon the dying declaration of Mangalabai. According to him, the prosecution has suppressed the genesis of the incident. He pointed out that initially one Kadubai was named as the culprit. However, the Investigating Officer failed to make any inquiry. Shri Sharma pointed out that the dying declaration Exh.80 does not bear any timing to show at what time it was recorded. He further pointed out that the certificate of fitness of Mangalabai to make a statement was given by the Doctor at 9.30 p.m. whereas the dying declaration Exh.80 came to be recorded much later. According to Shri Sharma, one cannot be certain that Mangalabai was in a fit mental condition to make a statement. He posed a question as to how the thumb impression of Mangalabai on the dying declaration Exh.80 could be obtained when as per the medical evidence, she had sustained 100% of burns. Shri Sharma also drew our attention to the fact that both, the Constable Kharat and Head Constable Jadhav did not make any report to the police station after Mangalabai was admitted in the hospital. This conduct on their part, Shri Sharma submitted, was inconsistent with their claim that Mangalabai had disclosed to them that the accused had set her on fire. Smt. Rasal, learned A.P.P. supported the order of conviction and sentence passed against the accused and submitted that there is absolutely no reason as to why independent witnesses should be deposed against the accused.

8. As already stated, the whole prosecution case is based on circumstantial evidence which consists of the following facts :

1. That, at the relevant time the accused and the deceased Mangalabai were residing together as husband and wife in the house of Sunderabai Sirsath where the incident took place.
2. That, on 25-7-1992 at about 7.30 p.m. Mangalabai suffered 100% of burn injuries and she died on the same night due to the said burn injuries.
3. That, immediately after the incident and prior to her death Mangalabai made disclosures to several persons to the effect that it was the accused who had set

her on fire.

4. That, the accused himself had suffered 41 % of burn injuries which were caused at a point of time when Mangalabai had sustained burn injuries-

9. We shall now refer to the evidence produced by the prosecution in relation to each of the abovementioned circumstances. Deceased Mangalabai was a married woman of about 45 years and she was having two major sons. It appears from the evidence of P.I. Wakade that her husband was residing at Newasa. However, she was not residing with her husband. According to the prosecution, Mangalabai was residing with the accused as his kept mistress and that both of them started living together in the house of Sundarabai Sirsath since about two months prior to the incident. Accused has denied his concern with Mangalabai and further denied the fact that he was residing with her in the house of Sunderabai Sirsath. The denial made by the accused in this respect is however, found to be without any force in view of the positive evidence of prosecution witnesses namely, P.W.1 Ashok, P.W.2 Sangita, P.W.3 Chandrabhagabai, P.W.5 Dr. Bhimrao Jadhav and P.W.7 Sundarabai the landlady. It is true that all, except Dr. Bhimrao Jadhav, were treated as hostile witnesses by the prosecution since they did not state anything about the disclosure made by Mangalabai after the incident. Nevertheless, their evidence clearly shows that at the time of the incident, the accused was residing with Mangalabai. P. W. 1 Ashok is a Washerman who carries his laundry business at a short distance from the place of the incident. He has stated that at the relevant time, he heard noise of a female person and also saw a crowd of people in front of the house of the accused. He pleaded ignorance about the relationship between the accused and the Mangalabai and stated that he did not listen to what she was shouting. P.W.2 Sangita is a school going girl who was residing with her mother Chandrabhagabai in a house which is at a distance of about 10-15 feet from the house where the accused was residing. Sangita stated that the accused was residing in a room in the house of Sundarabai Sirsath. She further stated that the accused was doing occupation of mason while his wife Sangita used to accompany him for labour work. P.W.5 Chandrabhagabai is the mother of Sangita and she also stated that Mangalabai had come to reside in her locality only two months prior to the incident. She further stated that Mangalabai was residing in the said house with her husband. She identified the accused as being the same person who was residing with Mangalabai. P.W.5 Dr. Bhimrao Jadhav is a private Medical Practitioner who had his dispensary in the same locality. He also stated that the accused was residing with a woman, whose surname was Gaikwad, in the house of Sunderabai Sirsath. The prosecution also examined the landlady P.W.7 Sunderabai Sirsath who stated that she owns a house at Pandharpur and that, through Chandrabhagabai she had given one of her rooms to one Mistri on rental basis. She further stated that the said Mistri was residing with his wife in the said house since about two months prior to the incident. Initially, Sundarabai showed some hesitation to identify the accused but, in the cross-examination, she volunteered that the other tenant residing in her rooms was in the relation of the accused sitting in

the dock. Thus, taking into consideration the evidence of all these five witnesses, it is absolutely clear that it was the accused who was residing with Mangalabai in the house of Sundarabai Sirsath where the incident of burning took place.

10. Coming to the next circumstance relied upon by the prosecution, it is the fact that Mangalabai had sustained 100% burn injuries and she died due to the same. In this respect, the evidence of Constable Kharat P.W.6 shows that he carried Mangalabai in burnt condition in a rickshaw and brought her to Ghati Hospital on the same night. The evidence of Dr. Tenkale P.W. 11 shows that Mangalabai was admitted in the Hospital at 8.45 p.m. On examining her, he found that she had 97% superficial and deep burns. The evidence of Dr. Paul P.W. 10 is to the effect that Mangalabai had suffered 100% burns and that she died at about 1.40 a.m. on the same night. The prosecution has produced the postmortem report Exh. 10 which was admitted by the defence u/s 294 of Cr. P.C. The said report shows that the post-mortem examination of the dead body of Mangalabai was carried on 27-7-1992 and at that time 100% superficial to deep degree burns were found on her body surface. The burns over chest, abdomen and thighs were superficial. The post-mortem report further mentions that the burnt skin was peeled off at places in flaps leaving reddish inflamed tissues beneath. Carbon depositions were seen over cheeks, neck, chest and abdomen. The burn injuries were found to be ante-mortem. The Medical Officer who carried post-mortem examination, opined the cause of death as "shock as a result of 100% superficial to deep degree burns". In view of this clear medical evidence, which is not at all disputed, it is obvious that Mangalabai died due to burn injuries sustained by her. However, this fact by itself would not be conclusive to establish the alleged guilt of the accused. It cannot be concluded that the death of Mangalabai was necessarily homicidal unless the other possibilities of her having received burn injuries in a suicidal attempt or accidental fire are ruled out.

11. The prosecution has, therefore, relied upon the evidence regarding the dying declarations said to have been made by Mangalabai to various persons during the period of about 3 hours after the actual incident of burning. In all there are five dying declarations out of which four are oral while the fifth is reduced to formal writing by the Executive Magistrate Mehra P. W.9. The four oral dying declarations of Mangalabai are said to have been by her to Dr. Bhimrao Jadhav P.W.5. Constable Kharat P.W.6, Head Constable Jadhav P. W.4 and Dr. Tenkale P.W.11. Before turning to the actual evidence about the dying declarations, it would be advantageous to refer to the relevant case law.

12. It is well-settled that great solemnity and sanctity is attached to the words of a dying person because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. The law regarding dying declaration has however, underwent a considerable change during the recent years. Earlier, the view was that a dying declaration cannot be acted upon and made basis of a conviction unless it is corroborated by other independent evidence. In Ram Nath Madhoprasad and Others Vs. State of Madhya Pradesh, ,

it was observed (Para 12)-

It is not safe to, convict an accused person merely on the evidence furnished by a dying declaration without further corroboration because such a statement is not made on oath and is not subjected cross-examination. The maker might be mentally or physically in a state of confusion and might well be drawing upon his imagination while he was making a declaration.

The same view was followed in *Khushal Rao Vs. The State of Bombay*, . In *Tarachand Damu Sutar Vs. The State of Maharashtra*, , it was; observed that a dying declaration is not to be believed merely because no possible reason can be given for accusing the accused falsely. It can only be believed if there are no grounds for doubting it at all.

13. The insistence on having supportive evidence to corroborate the dying declaration seems to have been relaxed in the subsequent decisions of the Supreme Court and a view was taken that dying declaration if found to be genuine and reliable, can form the sole basis of conviction. In *Lallubhai Devchand Shah and Others Vs. The State of Gujarat*, , a caution was given that a dying declaration must be closely scrutinised as to its truthfulness like any other important piece of evidence in the light of surrounding facts and circumstances of the case bearing in mind on the one hand that a statement is by a person who has not been examined in Court on oath and on the other hand, that the dying man is normally not likely to implicate an innocent person falsely. In *State of Assam Vs. Mafizuddin Ahmed*, , it was held that there can be conviction on the basis of dying declaration and it is not at all necessary to have a corroboration provided the Court is satisfied that the dying declaration is a truthful dying declaration and not vitiated in any other manner. In *State of Uttar Pradesh Vs. Ram Sagar Yadav and Others*, , it was observed (Para 13):-

It is well-settled that dying declaration can be acted upon without corroboration. There is not even a rule of prudence which has hardened into a rule that a dying declaration cannot be accepted unless it is corroborated. The primary effort of the Court has to be to find out whether the dying declaration is true. If it is so, no question of corroboration arises. It is only if the circum-stances surrounding the dying declaration are not clear or convincing that a Court may for its assurance, look for, corroboration to the dying declaration.

14. The evidence regarding the first oral dying declaration of Mangalabai is furnished by Bhimrao Jadhav P.W.5, a private Medical Practitioner of Pandharpur. His evidence shows that he was residing in the same locality. Bhimrao Jadhav has stated that in July, 1992 at evening time when Marathi news were being telecast, he heard shouts outside the house. He and his wife, therefore, came out of the house and saw a woman with fire on her person sitting in front of her house. Bhimrao Jadhav has further stated that the woman was saying that her husband had poured kerosene on her and that he had ran away by setting fire to her. According to him, she was also saying that her husband had disposed of her

gold beads. Bhimrao Jadhav has not specifically mentioned the name of the woman. However, there is no difficulty in identifying the said woman as deceased Mangalabai. We have already referred to the evidence which clearly shows that Mangalabai was residing with the accused in the house of Sunderabai Sirsath. In the cross-examination, he admitted that the said woman was not in a position to move and that she was lying with her face down. However, he denied the suggestion that when she was lying down with her face downwards, she was not speaking anything. There is nothing in the cross-examination which can create a doubt about the credibility of this witness. In the first instance, he is a respectable and responsible person since he is a private Medical practitioner. His conduct of rushing to the spot on hearing the cries of the woman is quite natural since he was residing at a short distance from the place of incident. There is absolutely nothing in the cross-examination to indicate that he is on cross terms with the accused or that he was interested in Mangalabai. Thus, he is absolutely an independent witness. There is, therefore, hardly any reason to disbelieve his version when he states that the woman i.e. Mangalabai was saying that her husband had poured kerosene on her and set her on fire. It was pointed out that in the alleged disclosure, Mangalabai referred to her husband and not to the accused. On this basis it was contended that the miscreant must be the husband of Mangalabai and not the accused. It is true that at the relevant time Mangalabai was residing with the accused as his kept mistress. It is therefore, not unnatural if she referred to the accused as her husband. But at the same time we cannot lose sight of the fact that her husband was alive. Therefore, reference to husband by Mangalabai does not necessarily mean the accused. The fact remains that Mangalabai did make a disclosure that she was set on fire after pouring kerosene on her body. However, to put the thing beyond reasonable doubt the prosecution will be required to show that the miscreant was no other person than the accused.

15. The second and third dying declarations⁵ are said to have been made by Mangalabai to Constable Kharat P.W.6 and Head Constable Jadhav P. W.4 respectively. The evidence of both these witnesses is to the effect that on the relevant day at evening time, they were moving on patrolling duty and that, in the course of the said duty, they happened to come to the area in which Mangalabai was residing. According to them, there they received information that one woman residing in the house of Sundarabai had received burns. The evidence on record further shows that Head Constable Jadhav then deputed Constable Kharat to go and see as to what was the matter. Constable Kharat P.W.6 has stated that he went to the house and found that one woman had burns on her person and that, on enquiry she disclosed her name as Mangalabai. Constable Karat then stated about the disclosure made by Mangalabai in the following words :

She stated before me that Mannal Mistry had disposed of her gold beads due to which there was a quarrel between the two, as a result of which Mannal Mistry became angry and poured kerosene on her and set her to fire....

Constable Kharat has then stated that he went back to Head Constable Jadhav and told him what was stated to him. Thereafter, both of them again came back to the house of Mangalabai.

16. The evidence of Head Constable Jadhav P.W.4 is also on the same lines on which Constable Kharat has deposed. He stated that on being informed by Constable Kharat, he immediately visited the spot and found that many people had gathered there. He further stated that the woman was seen outside her house and she was shouting in pains. About the disclosure made by the said woman, Head Constable Jadhav stated :

She was uttering as if addressing to the people gathered and also told me when I enquired as to the cause of burns. She was saying that Mannal Mistry had disposed of her gold beads in the shop and, therefore, there was a quarrel and after that quarrel due to anger, Mannal Mistry poured kerosene and set fire to her.

17. It will thus, be seen that both, Constable Kharat and Head Constable Jadhav clearly stated that Mangalabai made a disclosure to them soon after the incident and stated that Mannal Mistry had set her on fire after pouring kerosene. The evidence of both Constable Kharat and Head Constable Jadhav insofar as the same relates to alleged dying declaration made to them by Mangalabai, is attacked mainly on two grounds. The first is that admittedly both these Police Officers did not make any report to their Police Station informing about the incident as well as the disclosure made to them by Mangalabai. In fact, a serious, cognizable offence of attempt to commit murder was disclosed to both of them and as such, they ought to have realised the gravity and necessity of giving information to the Police Station promptly. Head Constable Jadhav stated he did not make any entry in the police record regarding what Mangalabai had stated. Constable Kharat on the other hand, stated that he did not report for registering the crime as the same is registered after M.L.C. It was suggested to both these witnesses that they did not report the matter to the Police Station since no disclosure as alleged was made to them by Mangalabai. Although, both of them have denied the suggestion, still we do not find much force in the said denial. The conduct of both these witnesses in not reporting the matter to the Police Station, therefore, creates a doubt about their claim that Mangalabai had disclosed to them as to who had set her on fire. This doubt is further strengthened on account of the delay in recording their statements. As already pointed out, the statement of Constable Kharat came to be recorded on the seventh day after the incident whereas that of Head Constable Jadhav on the third day of the incident. The investigation of the case started on 26-2-1992" itself. No explanation has however, come forth from PSI Wakade P;W.15 as to why there was delay in recording the statements of these two witnesses. In view of the above-mentioned infirmities, the submission that no disclosure as alleged was made to Constable Kharat and Head Constable Jadhav, gains strength.

18-19. The fourth dying declaration of Mangalabai is said to have been made to Dr. Terikale P. W. 11. His evidence is to the effect that at 8.45 P.M. the patient

Mangalabai was brought by constable Kharat. Dr. Tenkale examined her and found that the patient had 97% superficial and deep burns. He stated that he took history from the patient and she gave the history of one Manal and Kadubai causing her burns. Dr. Tenkale has noted the said history in the M.L.C. register, a true copy of which was produced at Exh. 38. The history of the case is noted therein as "homicidal burn by Manal and Kadubai." It is for the first time that the name of one Kadubai as being the associate of the accused in the alleged crime was revealed. We shall refer to this aspect a little later. In the cross-examination, Dr. Tenkale admitted that there is no specific reference in the M.L.C. register that the history of the case was given by the patient herself. He denied the suggestion that the history of the case was given by Constable Kharat as well as one relative by name Raut. In examination-in-chief, he has however, stated that two or three persons were accompanying the patient. The statement of Dr. Tenkale was recorded by P.S.I. Wakade much later i.e. 4-1-1993. Taking all these facts into consideration, the claim of Dr. Tenkale that the patient Mangalabai herself gave the history, of the burns, becomes difficult of acceptance.

20. The mainstay of the prosecution is the dying declaration recorded by the Executive Magistrate Mehra P.W. 9. The same is produced at Exh. 30 and therein Mangalabai is said to have disclosed that the accused Manal had kept her since about two months and that, there was a quarrel with him in connection with the disposal of a 4 Masas of Gold and that, therefore, he had set her on fire. Since the said dying declaration is reduced to writing, it becomes necessary to examine the evidence of Executive Magistrate carefully. According to him, after being requested to record the dying declaration of a woman admitted in Ghati Hospital, he went there in a rickshaw at about 10 P.M. or 10.30 P.M. Thereafter, he enquired with Dr. Paul about the patient and gave him a letter whether the said patient was in a condition to speak. Mehra has stated that the letter was also given by A.S.I. Shinde and that, the junior of Dr. Paul had certified on it that the woman was in a condition to speak. According to Mehra, he was then shown the said woman who had burn on her person. He stated that he put the said woman certain questions and found that she had answered the same clearly. According to him, at that time nobody was by the side of the woman. He further stated that he then recorded her statement, read it over to her and obtained her thumb impression below it. Thereafter, he handed over that statement to A.S.L Shinde and did not retain copy of it with him.

21. Shri Sharma, the learned Advocate for the appellant/accused submitted that there are certain infirmities in the dying declaration (Exh. 30) which make the same unacceptable. The first is that the dying declaration (Exh. 30) does not bear any endorsement of the Doctor certifying that Mangalabai was in a fit condition to make a statement. The dying declaration (Exh. 30) does not bear any timing as to when the recording thereof was started and when it was completed. Since Mehra came in the Hospital at about 10 or 10.30 P.M. and required some time to make preliminary inquiry with the Doctor, it is obvious that the said statement could not have been recorded before 10.30 P.M. The

certificate of fitness that Mangalabai was in a fit condition to make a statement was given by Dr. Paul P.W. 10 at 9.30 P.M. as is seen from the endorsement below the letter (Exh. 32) addressed to A.S.I. Shinde. This certificate would, therefore, at the most show that Mangalabai was conscious and in a condition to make a statement at 9.30 P.M. but, it cannot be presumed that she continued to be so after one hour when the dying declaration (Exh. 30) came to be recorded. It does not appear from the evidence of Mehra that any Medical Officer was present near Mangalabai when he recorded her statement. Mehra has stated that since he was told by Doctor that certification was already done, he did not feel it necessary to obtain it again. It cannot be said that the explanation given by Mehra for his failure to obtain due certification of the Medical Officer below Exh. 30 is, in any way, satisfactory. It cannot be ignored that Mangalabai had sustained 100% of burn injuries and that her condition was deteriorating. She succumbed to the burn injuries at 1.40 A.M. Having regard to these facts, it was, therefore, necessary for Mehra to have obtained fresh certification from the doctor to the effect that Mangalabai was conscious and in a fit condition to make a statement and that she continued to be so till the recording was completed.

22. Smt. Rasal, learned A.P.P. drew our attention to the dying declaration Exh. 30 and pointed out that the Executive Magistrate Mehra had put certain preliminary questions to Mangalabai to ascertain whether she was in fit condition to make a statement. The questions put to Mangalabai relate to her marriage, parental home, place of her in-laws, occupation of her husband and children. Mehra has stated that Mangalabai answered the questions clearly but, she was repeatedly asking for water. On the basis of this evidence, Smt. Rasal, submitted that Mangalabai was conscious and in a fit condition to make a statement at the relevant time. We are however, not very much impressed by this submission for the simple reason that the law as settled by the Apex Court does not dispense with the certification by the Doctor as to the consciousness and fitness of the concerned persons to make statement when the same is reduced to writing. Shri Sharma referred to the decision in *Irappa Vs. State of Karnataka*, wherein the following observations were made (at p. 1809 of Cri LJ):

It is an essential requirement and one on which could be no matter of compromise that the condition of the patient at the time when the dying declaration was made has to be assessed by the Doctor concerned and certified on the document at that very point of time. The Courts can never accept a situation whereby this very vital requirement is by-passed and the prosecution attempt to get over the infirmity by examining the Doctor at a much later point of time in order to try and cover up the lacuna. It is a well accepted position in law that where the condition of a patient is so serious, that is the Doctor must certify the consciousness levels. There can be no dispute about the fact that the patient in such cases is undergoing a lot of physical pain that the mental condition of the patient is also not very certain having regard to the nature of the injuries and the consequences thereof, but what is most important is that the Courts have always taken note of the fact that as soon as a seriously injured

person is brought to the hospital, the formal treatment is commenced, the most important of which is the administration of tranquillizers and pain-killers for purposes of controlling the trauma and reducing the pain. It is a medically accepted fact that these drugs have attendant side effects, the most important of which is drowsiness and it is for this reason that the Courts insist that the Doctor has got to certify that the patient was not only conscious but also was in a position to speak and was in a mentally fit condition to make a statement. The law with regard to dying declaration invariably lays down that the dying declaration must be in the form of question and answers and preferably recorded in the words of the patient. The principal reason for this is because a Court will be able to independently assess from the nature of the answers to precisely what was the condition of the patient. The contemporaneous certificate from the Doctor is more important because the Doctor would be in a position to indicate as to whether the mind of the patient was clear and whether having regard to the overall condition, the patient understood the questions and was in a position to give correct answer.

In Akbar Ashraf Khan Vs. The State of Maharashtra and another, , the fact were that although the Medical Officer had given a separate certificate that the victim was in a fit mental condition to give a dying declaration still, the Executive Magistrate who recorded the same had failed to obtain the endorsement of the Medical Officer below it certifying that the victim was in a fit condition throughout the time she made the dying declaration. This was one of the grounds on which the dying declaration came to be rejected. In Madhukar v. State of Maharashtra 1998 All MR (Cri) 1508, to which one of us (Barde, J.) was a party 1, did not accept the dying declaration of the deceased inter alia on the grounds that no certificate of doctor that the deceased was conscious to give a statement, was obtained.

23. In Jagga Singh Vs. State of Punjab, , the conviction of the accused for the offence u/s 302 was based mainly on the dying declaration of the deceased but, the Supreme Court while setting aside the conviction, pointed out that there was an important infirmity in the dying declaration which was recorded by the Assistant Sub-Inspector who failed to obtain endorsement of the Doctor who was present at that time, that the deceased was in a fit condition to make a statement. The Supreme Court observed that it is a settled law that for a dying declaration to provide the basis for conviction, the same has to be beyond any reproach. In Kishori Das Vs. State of West Bengal, , there were two dying declarations made by the deceased to the Magistrate and to the Investigating Officer but, none of them bore any endorsement of the Doctor about the physical and mental condition of the deceased to make statements. Relying upon the Supreme Court's decisions in Jagga Singh v. State of Punjab (supra) and Maniram Vs. State of M.P., , the; Division Bench of the Calcutta High Court declined to rely upon the said dying declarations. All these decisions which were cited before us by Shri Sharma thus, make it clear that it is absolutely necessary to have an endorsement of the Medical Officer on the statement of the deceased

to show that the deceased was throughout in a fit condition to make a statement. In the instant case, the certificate of fitness (Exh. 32) of Mangalabai as issued by Dr. Paul P.W. 10 relates to her condition which existed about more than one hour prior to the actual recording of the statement (Exh. 30) by the Executive Magistrate Mehra. Therefore, that certificate cannot be of any use to prove the condition of fitness or otherwise of Mangalabai one hour later.

24. The dying declaration (Exh. 30) bears thumb impression of Mangalabai. We have checked the same and we found that the thumb impression shows the ridges and curves. Shri Sharma submitted that Mangalabai had sustained 100% of burn injuries. He, therefore, questioned as to how in such a condition her thumb impression showing ridges and curves could have been obtained on Exh. 30. There is no explanation on this point coming forth from the Executive Magistrate Mehra. Shri Sharma drew our attention to the decision in *The State of Punjab Vs. Gian Kaur and Another*, wherein the Medical evidence was that the deceased had 100% burns but, her dying declaration bore thumb mark having clear ridges and curves. It was found that there was no satisfactory explanation as to how such a thumb mark could appear on the dying declaration particularly, when there was evidence of the Doctor that both the thumbs of the deceased were burnt. The Supreme Court, therefore, upheld the view taken by the High Court in not placing reliance upon the dying declaration.

25. In view of the above mentioned infirmities in the dying declaration (Exh. 30), we are of the opinion that the same cannot be relied upon. The learned Sessions Judge has not taken into consideration the above mentioned infirmities and, therefore, fallen into error to rely upon the same.

26. The foregoing discussion thus, makes it clear that the dying declaration (Exh. 30) which is reduced to writing is not free from doubts and as such unworthy of reliance. As regards the four oral dying declarations all, except the one made before Bhimrao Jadhav P.W. 5, are of doubtful nature. The dying declaration made by Mangalabai to Bhimrao Jadhav P.W. 5 does not clearly establish that it was the accused who had set her on fire. The reference made by Mangalabai to her husband does not rule out the possibility that it was her husband who had set her on fire. In short, all the aforesaid mentioned five dying declarations cannot be relied upon to hold the accused responsible for having set Mangalabai on fire.

27. The last circumstance relied upon by the prosecution is that the accused himself had suffered viz of burn injuries. In this respect, the evidence of Dr. More P.W. 8 shows that the accused was admitted in the hospital on 27-7-1997 at 10 P.M. and that, on examination it was found that he had 41% burn injuries on his right upper extremities, both (lower extremities etc. The accused has tried in his statement u/s 313, of Cr.P.C to explain his burn injuries by stating that he had placed a tin on a burning hearth and that, he climbed on it in order to fix a water proof cloth to prevent the roof from leaking. According to him, the flames rose up as a result of which his Pajama caught fire and he suffered burn injuries. We

do not think that this sort of explanation can be treated as true and genuine. No sane person would place a tin on burning hearth and climb on it to repair the ceiling. We have, therefore, no hesitation to discard this explanation as untrue. Smt. Rasal, pointed out from the evidence of Dr. More P.W. 8 that the burn injuries were suffered by the accused on 25-7-92 between 7 P.M. 8 P.M. It is not known on what basis Dr. More made such a statement because the history of the case noted by him in the M.L.C. Register, the extract of which is produced at Exh. 27 does not make any reference to the time or the place of burns. Dr. More has admitted this fact in his cross-examination. Consequently, it cannot be said that the burn injuries of the accused were caused at a point of time when the deceased had suffered the burn injuries.

28. We have thus, dealt with all the places of circumstantial evidence on the basis of which the prosecution has tried to establish the guilt against the accused. We however, find that the prosecution has not succeeded in proving beyond the fact that Mangalabai and accused were residing together at the relevant time and that, on 25-7-1992 at about 7.30 P.M. Mangalabai suffered 100% burns which were caused due to pouring of kerosene on her person and setting her on fire. The prosecution has however, failed to prove the material fact that it was the accused who had set her on fire. The prosecution evidence no doubt, raises a suspicion, however strong it may be, cannot take place of the proof. There is some scope for entertaining a reasonable doubt, the benefit of which will have to be given to the accused. Before concluding, reference may be made to the complaint (Exh. 42) on the basis of which the crime was registered. The evidence of A.S.I. Shinde P.W. 13 shows that on the basis of the statement recorded by Mehra he lodged his complaint (Exh. 42). The learned Sessions Judge has treated the same as F.I.R. in this case. In our opinion, the same cannot however, be treated as F.I.R. The F.I.R. is information given first in point of time of a cognizable offence to the officer in charge of a Police Station. The complaint (Exh. 42) was recorded at 1.30 A.M. on 26-7-92. It is however, found that much prior to that a telephonic message was received by the Police Station from Ghati Hospital at 9.15 P.M. on 25-7-92 and the same was recorded at Sr. No. 44 in the Station Diary of the Police Station. On our direction the prosecution has produced the Station Diary containing the relevant entry and in view of our order the same has been marked as Exh. 49. The relevant entry clearly shows that information was given to the Police Station on Phone by a Head Constable attached to the Police Chowki in Ghati Hospital that Mangalabai w/o Ramrao Gaikwad was admitted in the Hospital by Constable Kharat and that, the said Mangalabai disclosed that on 25-7-92 at 7 P.M. Maniyar Kadubai poured Kerosene on her and set her on fire. It is obvious that the information so recorded at Entry No. 44 is first in point of time and it discloses commission of a cognizable offence. Therefore, it would amount to F.I.R. This being the position, the contention of Shri Sharma that there was delay in sending the complaint (Exh. 42) to the Judicial Magistrate, loses to its weight.

29. In the above mentioned station Diary, which deserves to be treated as F.I.R.

there is reference to the name "Minier Kadubai" as being the person who had set Mangalabai on fire. It is not known as to who had disclosed the said name. The entry (Exh. 38) made by Dr. Tenkale P.W. 9 in the M.L.C. Register gives the history of the case as homicidal burns by Manal and Kadubai. It was contended before us that no action was taken against Kadubai though her name had transpired to be the miscreant. The evidence of P.S.I, Wakade P.W. 15 shows that he had recorded the statement of Kadubai. Any way, the mention of the name of Kadubai in the Station diary Entry No. 44 (Exh. 49) need not detain us as it is found that the prosecution has failed to prove beyond reasonable doubt that it was the accused who had set fire to Mangalabai.

30. In the result, the appeal deserves to be allowed. Hence the Criminal Appeal No. 3 of 1994 is allowed and the order of conviction and sentence passed against the accused by the learned Sessions Judge is hereby set aside. The appellant/accused is acquitted of the offence punishable u/s 301 of I.P.C. He be forthwith released from Jail. If he is not required for the purpose of any other case. The order regarding disposal of Muddemal property is however, maintained.