

(2017) 08 BOM CK 0080
In the Bombay High Court
Case No : 139 of 2002

Sanjay S/o. Bhimrao Dahake

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 11-08-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#) - Power to examine the accused
[Indian Penal Code, 1860](#), [Section 448](#),
[Section 354](#), [Section 107](#) Se

Citation : (2017) 08 BOM CK 0080

Hon'ble Judges : Rohit B. Deo

Bench : SINGLE BENCH

Advocate : F.N. Hedri, H.R. Dhumale

Judgement

1. The appellant seeks to assail judgment and order dated 25.2.2002, in Special Case 15 of 1997 by and under which the learned 2nd Adhoc Additional Sessions Judge, Chandrapur, was pleased to convict the appellant for offence punishable under Sections 306, 354 and 448 of the Indian Penal Code (IPC). The appellant / accused is sentenced to suffer rigorous imprisonment for two years for the offence punishable under Section 306 and rigorous imprisonment for one month for the offences punishable under Sections 354, 448 of the Indian Penal Code. The appellant is however, acquitted for offence punishable under section 3 read with Section 11 of Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act, 1989.

2. The case of the prosecution may be articulated thus:- Deceased Mangala, daughter of Manik Kumare, had entered into a wedlock with one Vasanta Madavi and from the said wedlock, she has a daughter Jaishree. Due to ill-treatment at the hands of Vasanta, Mangala was residing with her father since March, 1995. The incident allegedly occurred on 2.9.1996 when Mangala was alone in the house. Her parents had gone to attend Bhajan. The accused came to her house at 10.30 p.m. and sought sexual favour which Mangala refused. The accused

attempted to undress Mangala. Mangala ran away from the house and went to the place where Bhajan was ongoing. She slept at her house alongwith the other family members on the night of the date of incident. On next day, Manik Kumare who had gone to Zoting Takli for his personal work, returned home at 8.30 p.m. As he was informed that his daughter Mangala had set herself on fire and was admitted in the Civil Hospital, Chandrapur, Manik Kumare went to the Civil Hospital and inquired about the incident in response to which Mangala narrated the incident of 2.9.1996 and told Manik that as the incident had affected her, she took the extreme step.

Statement of the injured Mangala was recorded by Head constable Bhoyar who then was attached to the Police Post at the Civil Hospital. The recording is stated to be in the presence of the medical officer. Head Constable Bhoyar gave intimation of the incident to Ramnagar Police Station. P.S.I. Jadhav who then was attached to Ramnagar Police Station visited the hospital and recorded the statement of Mangala in the presence of the medical officer on the basis of which offence was registered against the accused. The statement of the injured was also recorded by the Executive Magistrate Shri. Pekade. This dying declaration was forwarded by the Executive Magistrate to Ramnagar Police Station. On the next day, P.S.I. Jadhav conducted spot panchanama in presence of panch witnesses. Mangala succumbed to her injuries at around 2 pm on 4.9.1996. P.S.I. Jadhav conducted the inquest panchanama and referred the dead body for post mortem examination. The statement of witnesses were recorded, post mortem report was received from the hospital and the culmination of the investigation resulted in presentation of the chargesheet in the Court of Chief Judicial Magistrate, Chandrapur, who committed the case to the Court of Session.

3. The learned Sessions Judge framed charge at Exh. 7, the accused pleaded not guilty and claimed to be tried. The prosecution examined five witnesses. The Executive Magistrate Shri. Pekade who recorded the dying declaration of deceased Mangala on 3.9.1996, is examined as P.W.1. He claims to have inquired with the medical officer about the state of health of Mangala and her fitness to give statement. P.W. 1 claims that the medical officer after examining Mangala certified that she is in fit condition to give her statement. The medical officer issued certificate to the said effect under his signature. P.W. 1 claims to have recorded the dying declaration only after receiving such certification. P.W. 1 claims to have recorded the dying declaration as per the say of the deceased. P.W. 1 deposes that Mangala stated that in the night accused came to her and sought sexual favour, which she refused. P.W.1 further claims that according to Mangala, the accused attempted forcible intercourse and ran away from her house since Mangala resisted. He deposes that the deceased Mangala disclosed the incident to neighbours and relatives of accused. He further deposes that Mangala stated that as she could not tolerate the incident, she committed suicide. The examination in chief ends with P.W.1 proving the dying declaration at exh. 10. In the cross examination, P.W. 1 admits that he did not make inquiry as to the extent of the burn injuries. He admits that he is not in a position to

identify the medical officer by name, who was allegedly present when the statement was recorded. P.W. 1 claims that after completion of recording of the statement, he again called the medical officer and obtained his signature on the statement. He admits that he did not separately make any inquiry as to whether Mangala was in a position to give her statement. He denies the suggestion that the parents of Mangala were present in the hospital. He further denies the suggestion that Mangala did not give any statement and that the alleged statement does not bear the thumb impression of Mangala. He states that he has no knowledge of Mangala's father being a policeman and denies the suggestion that the statement was prepared at the instance and as per the say of the father of Mangala.

4. P.W. 2 - Subhadrabai Kumare is the mother of the deceased. She states that Mangala set herself afire at 6 pm when she was alone in the house. She states that Mangala was admitted in the District Hospital, Chandrapur by her and one Prakash who is the elder brother of the accused. She claims that on the night before the incident, she was told by Mangala that the accused came to her and sought sexual favour which she refused. P.W. 2 states that she was informed by Mangala that the incident affected her mind and she took the step of setting herself afire. She deposes that Mangala died in the hospital on the next day at about 2 pm and till her death she was talking. Her cross examination reveals that Mangala married Vasanta Madavi on 13.3.1994 from which wedlock the couple have a daughter. Mangala was ill-treated by her husband and was driven out of the house after about 1 to 1 ½ years of marriage. P.W.2 however denies the suggestion that Vasanta used to visit her house to ask Mangala to return and on her refusal, Mangala used to be assaulted by her husband under the influence of liquor. P.W. 2 denies the suggestion that it was Mangala's desire that accused should marry her. She denies the suggestion that quarrel took place between Mangala and accused since the accused refused to marry Mangala. She denies the suggestion that her husband was in police service. She denies the suggestion that the brother of the accused promised to give some amount to maintain the daughter of Mangala, which he did not give and that the accused is falsely implicated due to grudge. She denies the suggestion that Mangala committed suicide due to ill-treatment from her husband Vasanta Madavi. She denies the suggestion that Mangala was not in a condition to talk when she was admitted in the hospital. She admits that brother of the accused was present in the hospital till the death of Mangala.

5. P.W. 3 - Manik Kumare is the father of the deceased. He claims to have inquired about the incident from Mangala when he visited her in the hospital. He claims that Mangala told him that the accused sought sexual favour from Mangala. He claims that according to Mangala sexual favour was sought for the accused and his friends. P.W. 3 states that Mangala told him that she could not tolerate the said conduct and hence set herself afire. P.W. 3 also claims that till her death, Mangala was talking. He admits that Mangala was ill-treated by her husband Vasanta Madavi. In the cross examination, he denies that Mangala's

husband used to visit his house and assault Mangala. He further denies that unknown persons used to visit his house and some persons of the locality had complained about such visits. He denies the suggestion that after the death of Mangala, he demanded amount from accused towards maintenance of Mangala's daughter. He denies the suggestion that Mangala committed suicide due to ill-treatment meted out by her husband and the allegations made against her by the residents of the locality. He denies the suggestion that Mangala was desirous of marrying the accused and since the accused refused, he was falsely implicated.

6. P.W. 4 - Ganpat Bhojar was then attached to City Police Station Chandrapur. He states that after he visited Mangala in the hospital he requested the medical officer to certify if Mangala was in a position to give her statement and the medical officer accordingly issued fitness certificate pursuant to which P.W. 4 visited Ward 5 where Mangala was admitted. P.W. 4 states that he asked the persons sitting near Mangala to leave the Ward and thereafter recorded the statement of Mangala in the presence of Medical Officer. P.W. 4 deposes that Mangala told him that on 2.9.1996 at about 10 pm, when she was alone in the house, the accused came and asked for sexual favour. P.W. 4 states that according to Mangala, she told the accused to perform marriage and then she would have sexual relationship with him. P.W. 4 states that according to Mangala, the accused ran away from her house and on the next day, she disclosed the incident to one Jyoti, the wife of brother of accused. P.W. 4 states that Mangala told him that she felt defamed and took the extreme step. P.W. 4 states that he obtained the thumb impression of injured Mangala before the statement and also obtained a certificate from the medical officer that Mangala had given her statement. The statement / dying declaration is proved by P.W. 4 at exh. 28. In the cross examination, P.W. 4 denies suggestion that Mangala was not in a position to talk and was not in a physical and mental condition to give her statement. He denies the suggestion that he did not make any enquiry with the medical officer about the condition of the patient. He further denies the suggestion that he prepared the statement at the instance and as per the say of the relatives of Mangala. He denies the suggestion that he obtained the certificate of medical officer on the statement subsequently. He admits that he is not in a position to disclose the name of the medical officer. He however denies the suggestion that the statement Exh. 28 does not bear the signature of Mangala.

7. P.W. 5 -Nitin Jadhav was then attached to Police Station Ramnagar, Chandrapur as P.S.I. He states that he visited the Civil Hospital, Chandrapur in view of a telephonic message received from the Police Post that Mangala is admitted with burn injuries. He states that he made inquiries with the medical officer as to whether Mangala is in a position to give her statement. He claims that medical officer issued a certificate that Mangala is in a fit condition to give her statement. P.W. 5 states that in view of the fitness certificate, he proceeded to record the dying declaration as per the say of the injured. He claims that Mangala told him that on 2.9.1996 at about 10 pm, the accused came to her

house and sought sexual favour. She "obstructed" and the accused ran away. P.W. 5 states that Mangala told him that on the next day she disclosed the incident to other persons including Jyoti Dahake, Babu. P.W. 5 claims that Mangala told P.W. 5 that since she could not tolerate the incident she took the extreme step. P.W. 5 claims that after recording the statement, he read over the same to Mangala who admitted the same. P.W. 5 claims to have obtained the thumb impression of the injured below the statement. P.W. 5 states that after recording the dying declaration, he again obtained the certificate of medical officer. The medical officer certified that Mangala was conscious during recording of the statement. P.W. 5 identifies his signature and proved the dying declaration Exh. 32. P.W. 5 also proved the printed F.I.R. exh. 33. P.W. 5 states that he arrested the accused, conducted the spot panchanama and upon receipt of the information that Mangala died in the hospital conducted the inquest panchanama. P.W. 5 states that he received the dying declaration recorded by the Executive Magistrate and the post mortem report and upon completion of investigation, presented the chargesheet. In the cross examination, P.W. 5 admits that he can not disclose the name of the medical officer who issued the fitness certificate. He admits that he is not in a position to tell the percentage of burn injuries received by Mangala. He denies the suggestion that Mangala was not in a position to talk and was not mentally fit to give her statement. P.W. 5 denies the suggestion that Manik Kumare, the father of Mangala was present when he recorded the statement of the deceased. P.W. 5 denies the suggestion that the statement is not recorded as per the say of the injured Mangala. P.W. 5 denies the suggestion that during the investigation it transpired that Mangala was suffering assaults from her husband Vasanta Madavi. He denies the suggestion that Mangala and her father had lodged a report in the Police Station complaining of such assaults. He states that he is not aware of criminal prosecution under Section 498-A of the Indian penal Code instituted against the husband of Mangala. He admits that he did not record statements of the persons residing in the houses adjacent to the house of the deceased. He denies the suggestion that the accused is falsely implicated at the instance of Manik Kumare, the father of the deceased. The defence of the accused, as is revealed from the tenor of the cross examination and the statement under Section 313 of Criminal Procedure Code is of total denial and false implication. The motive for false implication is stated to be strained relationship due to quarrel between accused and the deceased. The accused stated in the statement recorded under Section 313 of Criminal Procedure Code that Mangala use to visit his house frequently which he did not like which led to a verbal altercation.

8. I have heard Miss. F.N. Hedri, learned counsel for the Appellant and Shri. H.R. Dhumale, learned Additional Public Prosecutor for the State and have given my anxious consideration to the evidence on record and the reasons recorded by the learned Session Judge. For reasons articulated infra, I am not in a position to hold that the prosecution has proved the offence punishable under Section 306, 354 and 452 of the Indian penal Code beyond reasonable doubt.

9. Both the learned counsel are in unison that the entire prosecution case hinges on the three dying declarations (Exh. 28, Exh. 32 and Exh. 10) recorded by P.W. 4, P.W.5 and P.W. 1 respectively. The learned counsel for the appellant would submit that if the three dying declarations are excluded from consideration, there is no even an iota of evidence to bring home the charge under Section 306, 354 and 448 of the Indian Penal Code. In all fairness, the learned Additional Public Prosecutor Shri. Dhumale does not rebut the said submission. The learned Additional Public Prosecutor would however urge that the three dying declarations are consistent and the learned Sessions Judge did not commit any error in accepting the dying declarations as reliable and confidence inspiring. The learned counsel for the appellant Miss. Hedri would urge, relying on a Division Bench Judgment of this Court in Datta s/o. Tukaram Malwad Vs. The State of Maharashtra, 2014 ALL MR (Cri) 3967, that the three dying declarations must be excluded from consideration on the short ground that there is absolutely no endorsement that "the contents of the dying declaration were read over to deceased Mangala and were admitted by her." The learned counsel for the appellant invites my attention to the relevant observations of the Division Bench which read as thus: "18. When the Court is called upon to appreciate the evidence of written dying declaration, the Court has to be extremely cautious and examine with meticulous care of the evidence regarding recording of the dying declaration. Merely because witnesses came forward and deposed about the recording of the dying declaration, it should not impel the Court to immediately accept the dying declaration. It has to be remembered that the declarant is not available for cross-examination and, therefore, the prosecution must prove, apart from the truthfulness of the contents, the factum of recording of the dying declaration as well as the fact that the declarant was in a fit mental condition to give the statement to show that after recording of dying declaration the same was read over to the declarant and the declarant has admitted its contents."

"29. This dying declaration is very seriously challenged by the learned defence counsel by pressing into service two reported decisions of this Court namely [I] 2012 ALL MR (Cri) 2453, Paikuji Shankar Ataram V/s. State of Maharashtra and [ii] 2012 ALL MR (Cri), 2753, Tukaram Dashrath V/s. The State of Maharashtra. He submitted that, in absence of an endorsement in Exh. No. 38 that after completion of recording of the statement, the contents of said statement were read over to Kavita and she admits it to be true, necessarily this dying declaration is to be rejected. If dying declaration (Exh.No.38) is scrutinized, there appears no endorsement on the said document that the scribe i.e. P.W. No. 11 Vilas Jogdant has read over the statement to Kavita and thereupon Kavita has admitted the contents of the same. In Paikuji's case, cited supra, P.W. 5 Shri Shrihari Kanhuji Thamke was the Executive Magistrate. He recorded the dying declaration of patient by name Tulsabai w/o. Paikuji Atram. Before the Court, during trial, P.W. No. 5 Shrihari Thamke deposed that, he read over statement to her and she admitted the contents to be correct as per her say. Same is the position in present case. While making the pronouncement on the dying

declaration recorded by P.W. No. 5 Thamke, in Paikuji's case, cited supra, this Court proceeds to record the finding that, merely because it is mentioned in printed proforma that, statement is read over to deponent, it cannot be presumed that actual exercise of reading over same and getting it endorsed to be correct was actually followed. In the said reported case, in printed proforma, there was clause that the statement was read over to the deponent. In case at hand, even in that printed proforma noting that statement was read over to the patient, is absent ".

"30. To rule out any remote infirmity, it is necessary that there has to be an endorsement on the dying declaration that the contents were read over and admitted to be correct and as per the say of the deponent. The said cannot be treated as an empty formality, since the deponent is not available for cross examination. This endorsement according to us is most vital piece in as much as the declarant is not available for cross examination. The contemporaneous document Exh. No. 38, on which the endorsement to the effect that it was read over to Kavita and after that she admitted the contents thereof as true, is absent. Since the present case is solely depends on the dying declaration, such endorsement or certification by the scribe is almost importance. In absence of that, it is really difficult to visualize as to really, after the completion of dying declaration the contents were read over to Kavita, as claimed by P.W. No. 11 Vilas Jogdand for the first time in the Court."

"33. It will be very useful here to mention the reported decision of Hon'ble Apex Court, reported in (2007) 11, Supreme Court Cases, 269 : [2007 ALL SCR 2407] Shaikh Bakshu & Ors V/s. The State of Maharashtra. It will be very useful to extract relevant portion of the aforesaid authority of the Hon'ble Apex Court which reads thus, "there was no mention in the dying declaration that it was read over and explained to the deceased. The trial court and the High Court concluded that the even though it is not so stated, it has to be presumed that it was read over and explained. View is completely unacceptable.""

10. The learned Additional Public Prosecutor Shri. Dhumale does not dispute the factual position that in none of the three dying declarations, there is an endorsement that "dying declarations were read over to the deceased Mangala" and that "the contents were admitted by deceased." learned Additional Public Prosecutor would however submit that in all three dying declarations (Exh. 28, Exh. 32 and Exh. 10) recorded by P.W. 4, P.W.5 and P.W. 1 respectively, there is a column "9" which is worded thus, "whether the dying declaration given by you is correct?" and the answer recorded is "yes". Miss. Hedri would submit that mere mention in the printed proforma that the statement is either read over to the declarant or that the statement is recorded as per the say of the declarant, is not conclusive and it can not be presumed that the statement is actually read over to the declarant and the same is admitted to be correctly recorded by the declarant. She invites my attention to the judgment of the Hon'ble Supreme Court Shaikh Bakshu & Others Vs. State of Maharashtra, (2007) 11 Supreme Court Cases

(Cri.)269 and in particular to the following observations:- "13. The trial court, however, held the dying declaration to be credible because the Medical Officer was present when the dying declaration was recorded. There was no mention in the dying declaration that it was read over and explained to the deceased. The trial court and the High Court concluded that even though it is not so stated, it has to be presumed that it was read over and explained. The view is clearly unacceptable."

The learned counsel has further invited my attention to a Division Bench Judgment of this Court reported in Abdul Riyaz Abdul Bashir Vs State of Maharashtra, 2012 ALL MR (Cri.) 2188 and in particular to paragraph 8 which reads thus:

"8. On perusal of Exh. 63, it appears that in column no. 2 the deponent had given the detailed narration of the incident and has stated that her mother-in-law had exhorted her husband to eliminate Nargis. Nargis got enraged and doused herself with kerosene and when she was changing her clothes, her husband ignited the match-stick and because the neighbours had raised the cries, her husband attempted to extinguish the fire. In column no.5, it is stated that she had sustained burn injuries to her face, both hands, chest and back. The reply to column no. 7 is also stated. However, column no. 8 pertains to the fact that the statement as recorded was read over to the deponent and proved to be correct as per the say of the deponent. The said column is left blank. To rule out any remote infirmity, it is necessary that there has to be an endorsement that the contents were read over and admitted to be true and correct. The said column cannot be treated as an empty formality since the deponent is not available for cross -examination. Hence it is a material inherent infirmity in the dying declaration and, therefore, cannot inspire confidence of the Court. It , therefore, appears that the statement was never read over to the deceased and there is no endorsement to that effect. When the declaration was not read over to the deponent and hence not admitted by the deponent to be correct and recorded according to her say, then such a dying declaration cannot be a foundation for sustaining the conviction. Merely because it is mentioned in the printed proforma that the statement is read over to the deponent, it can not be presumed that the actual exercise of reading over the statement and getting it endorsed to be correct , was actually followed. In fact the said column is blank and, therefore, the said fact can not be assumed. The learned counsel for the appellant has relied upon the judgment of the Apex Court reported in (2008) 1 Supreme Court Cases (Cri) 679- Shaikh Bakshu and others .vs. State of Maharashtra wherein it is held by the Apex court that "there was no mention in the dying declaration that it was read over and explained to the deceased. The trial Court and the High Court concluded that even through it is not so stated, it has to be presumed that it was read over and explained". The Apex Court has held that the said view is unacceptable. The learned counsel for the appellant has also relied upon the judgment reported in 2004 ALL MR (Cri) 3220 in the case of Shivaji Tukaram Potdukhe .vs. State of Maharashtra wherein it is held that "when the declaration

was not read over to Durgabai and she had not admitted the contents thereof to be correct, according to us, the dying declaration can not be made foundation for sustaining the conviction". We have observed that it is doubtful whether the signature on Exh. 63 is that of deceased Nargis since the accused by taking recourse to Section 155 of the Indian Evidence Act has examined an independent witness who has deposed that the signature on the Nikahnama was made by Nargis in his presence and , therefore, in the present case we find that the written dying declaration at Exh. 63 cannot be made the sole basis for recording the conviction. Notwithstanding the fact that it was recorded by the Magistrate, the discrepancies in the written dying declaration are such that they would not inspire the confidence of the Court".

11. In the light of the authoritative enunciation of law by the Hon"ble Supreme Court and the Division Bench of this Court, the contention of Miss. Hedri that all three dying declarations must be excluded from consideration deserves acceptance. The learned counsel for the appellant would further urge that three dying declarations (Exh. 28, Exh. 32 and Exh. 10) recorded by P.W. 4, P.W.5 and P.W. 1 respectively, must also be discarded in the teeth of the admitted fact that deceased Mangala suffered 94% burns and the extensive burns would render the possibility of the deceased being in a mentally and physically fit condition to give her statement is extremely remote if not existent. She would urge that although P.W. 4, P.W.5 and P.W. 1 who have recorded the dying declarations Exh. 28, Exh. 32 and Exh. 10 respectively are in unison chanting the mantra that before recording the dying declaration the medical officer was asked to give a certificate of fitness that such certificate of fitness was as a fact given and that post recording of the dying declaration the medical officer certified that the deceased Mangala was in the physical and mental state to give her statement, the medical officer or doctor who allegedly examined Mangala and certified her to be in a fit condition to give statement has not been examined. She would invite my attention to the admission of P.W. 4, P.W.5 and P.W. 1 that each of them was not in a position to even identify the medical practitioner by name. The learned counsel would further urge by inviting my attention to the post mortem report Exh. 22 that in view of the extensive nature of injuries suffered by deceased Mangala including extensive burns on her upper limbs, the alleged thumb impression /s on the three dying declarations deserve consideration only for rejection. The learned counsel submits that the thumb impressions on the dying declarations are suspicious and not worthy of any credibility to say the least. She would further bring to my notice certain inconsistencies in the contents of the alleged dying declarations and would urge that the credibility and reliability of multiple dying declarations must be decided on the touchstone of consistency.

12. The learned Additional Public Prosecutor Shri. Dhumale invited my attention to the judgment of the Hon"ble Supreme Court in Ramesh and others Vs. State of Haryana, (2017) 1 SCC 529 and urged that the fact that the deceased Mangala suffered 94% burn injuries is not decisive of the admissibility of the dying declaration. He would submit that in Ramesh and others Vs. State of

Haryana, although the deceased had suffered 100% burns, the Hon'ble Supreme Court upheld the findings recorded by the High Court that the extent of burn injuries can not be a ground for discarding the dying declaration. Shri. Dhumale is absolutely justified in submitting that the extent of burn injuries is not conclusive and the credibility and reliability of the dying declaration must be tested on judicially recognized parameters. It would be apposite to refer to the relevant observations of the Hon'ble Supreme Court in Ramesh and others Vs. State of Haryana. "31. Law on the admissibility of the dying declarations is well settled. In Jai Karan v. State (NCT of Delhi), this Court explained that a dying declaration is admissible in evidence on the principle of necessity and can form the basis of conviction if it is found to be reliable. In order that a dying declaration may form the sole basis for conviction without the need for independent corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable and free from blemish. If, in the facts and circumstances of the case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the court on strict scrutiny finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence, neither extra strong or weak, and can be acted upon without corroboration if it is found to be otherwise true and reliable. There is no hard-and-fast rule of universal application as to whether percentage of burns suffered is determinative factor to affect credibility of dying declaration and improbability of its recording. Much depends upon the nature of the burn, part of the body affected by the burn, impact of the burn on the faculties to think and convey the idea or fact coming to mind and other relevant factors. Percentage of burns alone would not determine the probability or otherwise of making dying declaration. Physical state or injuries on the declarant do not by themselves become determinative of mental fitness of the declarant to make the statement (see Rambai v. State of Chhatisgarh).

"32. It is immaterial to whom the declaration is made. The declaration may be made to a Magistrate, to a police officer, a public servant or a private person. It may be made before the doctor; indeed, he would be the best person to opine about the fitness of the dying man to make the statement, and to record the statement, where he found that life was fast ebbing out of the dying man and there was no time to call the police or the Magistrate. In such a situation the doctor would be justified, rather duty-bound, to record the dying declaration of the dying man. At the same time, it also needs to be emphasised that in the instant case, dying declaration is recorded by a competent Magistrate who was having no animus with the accused persons. As held in Khushal Rao. v. State of Bombay, this kind of dying declaration would stand on a much higher footing. After all, a competent Magistrate has no axe to grind against the person named in the dying declaration of the victim and in the absence of circumstances

showing anything to the contrary, he should not be disbelieved by the court (see *Vikas v. State of Maharashtra*).

"33. No doubt, the victim has been brought with 100% burn injuries. Notwithstanding, the doctor found that she was in a conscious state of mind and was competent to give her statement. Thus, the Magistrate had taken due precautions and, in fact, the medical officer remained present when the dying declaration was being recorded. Therefore, this dying declaration cannot be discarded merely going by the extent of burns with which she was suffering, particularly, when the defence has not been able to elicit anything from the cross examination of the doctor that her mental faculties had totally impaired rendering her incapable of giving a statement".

"36. In view of the specific certification by the doctor about the fitness of the deceased that she remained fit while recording the statement, the mere effect that she had suffered 100% burns would not, ipso facto, lead to the conclusion that the deceased was unconscious or that she was not in a proper state of mind to make a statement. At this stage, it would also be relevant to point out that no challenge was made by the defence to the aforesaid statement of the deceased on the ground that it was not made voluntarily or it was made by any extraneous circumstances or was the result of tutoring. In fact, even as per the appellants, it is they who had taken the deceased to the hospital and no other person known to her had come in her contact before the statement was recorded. On the contrary, P.W. 3 and P.W. 4 (father and brother of the deceased respectively) have not supported the prosecution version, which aspect shall be dealt with later at the appropriate stage and, therefore, the question of tutoring does not arise at all".

"37. On examination and analysis of the dying declaration in the aforesaid perspective, we do not find any reason to discard it having regard to the legal position on the subject already noticed above by referring to relevant case law. It is trite that dying declaration is a substantive piece of evidence and can be made the basis of conviction once the court is convinced that dying declaration is made voluntarily and is not influenced by any extraneous circumstances".

A perusal of the judgment in *Ramesh and others Vs. State of Haryana* would reveal that the endorsement / certification made / recorded by the doctor were proved in the trial. The fact that a medical practitioner was asked to examine the injured and to issue a certificate of fitness does not appear to be in dispute nor is the certification of fitness as a fact appears to be in dispute in *Ramesh and others Vs. State of Haryana*. In the factual matrix of the present appeal, I am confronted with a scenario which is hardly confidence inspiring. I have perused the record and proceedings and the exhibited dying declarations. Neither the alleged endorsement of witness nor the name and details of the medical practitioner is legible. The witnesses who have recorded the multiple dying declarations are not in a position to disclose the name of the medical practitioner / s who allegedly examined the deceased Mangala and certified that

she was in a fit condition to give statement. In the teeth of the evidence on record, I find it absolutely unsafe to rely on the three dying declarations to uphold the conviction. I must reiterate, that the learned Additional Public Prosecutor fairly stated that if the three dying declarations are excluded from consideration, there is no evidence to record a finding of guilt.

13. Despite the view which I have taken, since it has been argued at length albeit *arguendo*, by the learned counsel for the appellant, I consider it appropriate to deal with the submission of the learned counsel for the appellant that even if the dying declarations are accepted as reliable and substantive evidence, the findings of the learned Sessions Judge that an offence punishable under Section 306 is made out, is unsustainable and falls foul of the settled legal position. The learned counsel relied on the judgment of the Hon^{ble} Supreme Court in *Sanju alias Sanjay Singh Sengar Vs. State of Madhya Pradesh*, AIR 2002 SC 1998, to urge that the alleged seeking of sexual favour from the deceased is not indicative of either an intention that Mangala should be driven to commit suicide nor is suggestive of knowledge that such seeking of sexual favour from Mangala may drive her to take extreme step. She has invited my attention to Section 306 & 107 of the Indian Penal Code to urge that unless instigation is proved in the facts of the present appeal, the accused could not have been even charged much less convicted for offence punishable under Section 306 of the Indian Penal Code. The relevant observations of the Hon^{ble} Supreme Court in *Sanju alias Sanjay Singh Sengar Vs. State of Madhya Pradesh*, read thus: "13. Reverting to the facts of the case, both the courts below have erroneously accepted the prosecution story that the suicide by the deceased is the direct result of the quarrel that had taken place on 25th July, 1998 wherein it is alleged that the appellant has used abusive language and had reportedly told the deceased "go to and die". For this, the courts relied on the statement of Shashi Bhushan, brother of the deceased, made under Section 161 Cr.P.C. when reportedly, the deceased, after coming back from the house of the appellant, told him that the appellant had humiliated him and abused him with filthy words. The statement of Shashi Bhushan, recorded under Section 161 Cr.P.C. is annexed as annexure P-3 to this appeal and going through the statement, we find that he has not stated that the deceased had told him that the appellant had asked him to "to go and die". Even if we accept the prosecution story that the appellant did tell the deceased "to go and die", that itself does not constitute the ingredient of "instigation". The word "instigate" denotes incitement or urging to do some drastic or unadvisable action or to stimulate or incite. Presence of *mens rea*, therefore, is the necessary concomitant of instigation. It is common knowledge that the words uttered in a quarrel or in a spur of the moment cannot be taken to be uttered with *mens rea*. It is in a fit of anger and emotional. Secondly, the alleged abusive words, said to have been told to the deceased were on 25th July, 1998 ensued by quarrel. The deceased was found hanging on 27th July, 1998. Assuming that the deceased had taken the abusive language seriously, he had enough time in between to think over and reflect and, therefore, it cannot be

said that the abusive language, which had been used by the appellant on 25th July, 1998 drove the deceased to commit suicide. Suicide by the deceased on 27th July, 1998 is not proximate to the abusive language uttered by the appellant on 25th July, 1998. The fact that the deceased committed suicide on 27th July, 1998 would itself clearly pointed out that it is not the direct result of the quarrel taken place on 25th July, 1998 when it is alleged that the appellant had used the abusive language and also told the deceased to go and die. This fact had escaped notice of the courts below."

14. I am inclined to accept the submission of the learned counsel for the appellant / accused that even if dying declarations are considered admissible *arguendo*, on the face of the contents of the dying declarations, the accused could not have been prosecuted much less convicted for an offence punishable under Section 306 of the Indian Penal Code. The appeal is allowed.

The judgment and order dated 25.2.2002, in Special Case 15 of 1997 by the learned 2nd Adhoc Additional Sessions Judge, Chandrapur, is set aside.

The bail bond stands discharged. Fine paid, if any, be refunded to the appellant / accused.