

(2009) 09 BOM CK 0075
In the Bombay High Court
Case No : Criminal Appeal No. 1156 of 2006

Santosh Dadu Sapkale

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 24-09-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 106
Penal Code, 1860 (IPC) — Section 302, 304

Citation : (2009) 111 BOMLR 4435

Hon'ble Judges : Roshan Dalvi, J;B.H. Marlapalle, J

Bench : Division Bench

Advocate : Daulat Khamkar, for the Appellant; V.B. Konde-Deshmukh, APP, for the Respondent

Final Decision : Dismissed

Judgement

Roshan Dalvi, J.—The appellant has challenged the judgment of the Second Ad-hoc Additional Sessions Judge, Pune, dated 4.12.2003 in Sessions Case No. 84 of 2003, under which the appellant was convicted of the offence punishable u/s 302 of the Indian Penal Code (IPC) and sentenced to suffer imprisonment for life and to pay a fine of Rs. 1000/-and in default of the payment of fine, to suffer rigorous imprisonment for six months.

2. The prosecution case is that the appellant committed murder of his wife by pouring kerosene on her person and setting her on flames in their matrimonial home on 25.7.2002 as he suspected her of having an affair with a neighborhood boy, one Rajendra. This aspect has been shown by the prosecution in the dying declaration of the deceased Meera, which has been recorded by the police officer who was sent by the concerned Police Station upon being informed of the medico-legal case noticed by the hospital and which statement has been treated as her FIR, upon which the criminal case came to be registered against the appellant. His wife, Meera expired on 28.7.2002 in Sassoon Hospital, Pune.

3. The prosecution has examined seven witnesses. PW1 is the mother of the deceased. PW2 is the Doctor who examined the injured Meera in the hospital upon her admission and thereafter, when the police officer enquired about her condition, gave the endorsement relating to her medical condition on her dying declaration. PW3 is the Assistant Sub Inspector (ASI) who recorded the dying declaration of Meera and who has proved the execution of the dying declaration. PW4 is a neighbour of the accused who extinguished the fire in the house of the accused upon hearing the screams of Meera and who has partly turned hostile. PW5 is the spot punch, who has turned hostile. PW6 is the Investigating Officer, who visited the spot of the incident, recorded the statement of the mother of Meera as well as the neighbour, obtained the postmortem report and forwarded the articles seized at the spot to the Chemical Analyser. PW7 is the Doctor who performed the postmortem and who has proved the postmortem report prepared by him. The prosecution case is essentially required to be seen from the dying declaration of Meera. It would have to be seen whether the conviction recorded by the learned trial judge could have been correctly recorded.

4. PW1, her mother, essentially deposed about the oral dying declaration of Meera. PW2, the Doctor in YCM Hospital, to which Meera was initially shifted, has deposed about the fact that Meera was conscious and well oriented and in a position to give a valid statement. PW3 has deposed about how he recorded the dying declaration. PW4, the neighbour, who has otherwise turned hostile, has shown what he did upon hearing Meera's cries. He has also deposed about Meera's inability to speak and the fact of she having become unconscious. PW5, the spot punch, who has turned hostile, has not been cross-examined. PW6 has shown the investigation carried out as also the state of the accused. PW7, the Doctor, who carried out the postmortem, has deposed about the cause of death and the extent of the burn injuries suffered by Meera.

5. The case of the accused is required to be considered at this juncture. It has been his case, as seen from his last answer in the statement u/s 313 of the Criminal Procedure Code that Meera sustained burn injuries when the stove in the house burst and she accidentally caught fire. He has further stated that he has not set her on fire. Hence it is seen that whereas it is the prosecution case that Meera died of homicidal burns, it is the case of the appellant that she died an accidental death.

6. The evidence of PW1, the mother of Meera, shows that the appellant and Meera performed a love marriage without informing her and lived happily thereafter. They initially lived in the house of Sunita, the sister of the accused. For about one month prior to the incident, they lived with PW1 in the same locality. PW1 found a separate room on rent for the appellant and Meera in that locality itself, to which they had moved, only 2 or 3 days prior to the incident. On 25.7.2002 at about 3:30 PM the appellant rushed to her house and informed her that Meera suffered burn injuries and that he also suffered burn injuries in an attempt to extinguish the fire. She rushed to their house. Meera told her that she

regretted having done what she had done. She told her that the appellant had an argument with her on account of one Rajendra and set her on fire. She and the accused took Meera to YCM hospital. The next day they shifted her to Sassoon Hospital. Meera expired in Sassoon Hospital on 28.7.2002.

7. Her cross-examination shows that the appellant and Meera did not have any quarrels. Meera had never complained to her. They were leading a happy married life. Neighbours had gathered in the house when she reached there. Meera was lying on the floor in burnt condition. Within half an hour they shifted Meera to the hospital. She was conscious. PW1 did not report the incident to the police. She did not file any FIR. Upon enquiry by the police she informed them of Meera's name and address. She informed the police that she did not know how the incident took place. She has refuted the appellant's case that Meera caught fire because the stove burst.

8. PW2, the Doctor who served in YCM Hospital, Pune has deposed that on 25.7.2002 Meera Sakpale (also stated to be Meera Sankpal) was admitted to the hospital at about 4:15 PM. She was brought by her mother to the hospital at about 2.30 p.m. (This is an obvious typographical error in the time which is mentioned instead of 3.30 p.m.) They both gave the history of homicidal burns. The hospital authorities informed the police about the case. Within 15 to 20 minutes, Pimpri police came to the hospital. When the police came to the hospital and met Meera, she was conscious and well oriented. The concerned police officer recorded her statement. PW2 endorsed in the margin of the statement the physical condition of Meera. He identified his endorsement which was put in his handwriting and he identified his signature.

9. His cross examination is with regard to the physical condition of Meera. She had suffered 96% burns injuries. He disagreed that such a patient would go in a coma; he agreed that such a patient gets dehydrated and when there is dryness of mouth the patient cannot talk easily. He refuted the suggestion that under such conditions the patient becomes unconscious. He deposed that in burn cases the pulse rate always increases. He also refuted the suggestion that burn patients cannot talk. He has clarified that recording of her statement was going on for 10 to 15 minutes. He had examined Meera prior to the recording of her statement, but he had not endorsed her physical condition on the statement then. He put his endorsement on the statement after it was recorded. His endorsement shows that the " patient is conscious and in a state to give valid statement." He did not know whether the police obtained Meera's thumb or her toe impression. He did not issue a separate certificate of her physical or mental condition. He did not make any entry on the hospital record about the recording of Meera's statement. He deposed that Meera's husband (the appellant) was also brought in the hospital by the mother of Meera. He refuted the suggestion that Meera was not well oriented when her statement was recorded.

10. PW3, the ASI, has deposed that on 25.7.2002, he received a telephonic information at about 4 PM from PW2 of YCM hospital that one patient by name

Meera Sakpale was admitted in the hospital. He immediately went to the hospital. He met Meera in the presence of the Doctor PW2. He inquired about the incident from Meera. She disclosed that on that day at about 3:30 PM the appellant came home from work. she served him the meal. While eating he raised dispute with her and abused her on suspicion of illicit relations with Rajendra, their neighbour. Thereafter he poured kerosene on her and set her on fire. PW3 recorded the statement of Meera and obtained her left hand thumb impression below the statement. He also signed the statement. He identified his signature and Meera's thumb impression. He deposed that the statements were true and correct. Upon such direct oral evidence, the dying declaration of Meera came to be proved and has been marked Ex.14 in evidence. PW3 also deposed that PW2, the medical officer, endorsed his opinion about Meera's capability of having recorded her statement in the margin of the statement. That statement was sent to the police station for registration of the crime, which came to be registered under CR No. 173 of 2002.

11. His cross examination shows that he reached the hospital at 4:30 PM. He met Meera. He completed recording her statement at about 4:35 PM to 4:40 PM. PW2, the Doctor, put his endorsement at about 5.05 PM at the counter. The Doctor was busy attending other patients when he recorded the statement of Meera. Meera's mother was not present when the statement was recorded by him.

12. PW4, the neighbour, deposed that he knows the accused who had married Meera. They resided near his house. On the date of the incident, he was at his house at about 3:30 PM. He heard cries from the house of the appellant. He rushed to his house. When he reached there he saw Meera in flames. By using a quilt he extinguished the fire. In the meantime the parents of the wife of the appellant and many persons gathered at the spot and shifted her to the hospital. She was not in a position to speak. She had not disclosed to him that her husband raised disputes with her and set her on fire.

13. His cross examination shows that Meera had become unconscious. He was the first person to reach the spot. Her parents arrived within 10 to 15 minutes.

14. PW5, the spot Panch, has not proved the spot Panchnama as he has turned hostile and has not been cross-examined.

15. PW6, the Investigation Officer, went to the spot and got the spot panchanama executed through PW5. He also recorded the statement of PW1 on the next day. The crime was registered at 6.05 PM. The accused was arrested on 26.7.2002. He caused the inquest panchanama to be made, obtained the PM report and sent the articles seized from the spot to the Chemical Analyser.

16. His cross examination shows that he took over the investigation at 4:30 PM after the telephonic message was received from the hospital at about 4 to 4:15 PM. He sent PW3 to the hospital and went to the spot of the incident. He has stated in his cross examination that the procedure of recording the statement of

the injured by the Magistrate was stopped. He could not say since when and how the procedure was stopped. He did not have any circular to that effect. His cross-examination further shows that during the investigation not a single witness came forward to state about the dispute between the appellant and Meera. It is also stated by him in his cross-examination that he had noticed burn injuries on both the hands of the accused, his legs, face and chest. The appellant had told him that he had received those injuries in an attempt to extinguish the fire.

17. PW7, the Doctor, who prepared the postmortem report, proved the report by identifying it. It has been marked Ex.15 in evidence. He had noticed 92% burn injuries on Meera. The cause of the death was " shock due to burns." He deposed that those injuries were sufficient to cause death in the ordinary course of nature.

18. His cross-examination shows that it is not necessary that the patient with 92% burns immediately goes in shock. He deposed that the percentage of burns in the head, neck and face were 6%. Such injuries were possible upon a stove bursting.

19. This is the extent of the evidence in this case. It can be seen that the case of the prosecution is that Meera had initially made an oral dying declaration to her mother. She repeated the said declaration to the police officer who recorded her statement and registered the crime. The statement shows what transpired after she had moved with a recently married husband in their new home in which she had lived happily with him until then. She has not made any statement relating to any complaint with her husband prior to the date of the incident. Even her mother has not made any complaint against the accused at all. She only deposed about what her daughter told her about the incident. Her evidence is completely without any embellishment. There is no material difference between the oral and the written dying declarations of Meera. The only reason for setting her on fire was the fact that the appellant suspected her of having an illicit relationship with one Rajendra, who was a neighbour living in the same locality where the appellant and Meera lived in the past one month when they had lived with Meera's mother in the same locality. What emerges from the evidence of PW1 is that Meera regretted having married the appellant as she did without informing her mother. That was naturally a part of the oral dying declaration made to her mother. That aspect is naturally not a part of the written dying declaration. She could not have mentioned that fact to the police officer. However, she told that both her mother and the police officer knew about the fact that her husband raised disputes with her on account of Rajendra and set her on fire. PW1 has deposed no more than what was actually told to her by her daughter. She did not even report anything to the police. She only gave the particulars of her daughter's name and address to the police On his inquiry. She did not even state about how the incident took place as she did not know it; she only told the police that the appellant had set her on fire upon being suspicious of her fidelity. Hence though she knew about that fact, she did not know how in fact the incident

happened and she only stated that fact to the police and not how it happened.

20. How the incident took place has been brought out in the evidence of PW3. That was upon inquiries made by the police officer. It is to the police officer that Meera has disclosed the time of the incident and as well as precisely how it happened. Meera has also made no other complaints against the appellant. They had lived happily until then.

21. Her dying declaration finds corroboration in the evidence of the Doctor, PW2, who is an independent witness, and is reflected in the patient's history recorded at the time of admission to the hospital. This evidence shows the history given by Meera herself as also her mother to PW2. This further lends credence to the fact that at the time of admission Meera was conscious. The Doctor had also examined Meera prior to the recording of her statement. PW3 had met Meera in the presence of the Doctor. The Doctor had endorsed in the margin of the statement her condition soon after it was recorded. Hence it is seen that the Doctor had examined Meera before the statement and endorsed about her condition after the statement. This was done in the hospital itself at the counter within minutes of recording the statement. PW3 has identified Meera's thumb impression and his own signature on the dying declaration; PW2 has identified his own endorsement. The dying declaration is recorded perfectly. There is nothing shown to discard the dying declaration as containing the true statement of what had transpired. We are satisfied that the written dying declaration is consistent with the oral dying declaration made to the mother.

22. It is the case of the appellant that the Magistrate has not recorded the dying declaration and hence it must be discarded as suspicious. It is true that only a police officer has recorded the dying declaration. Meera died 3 days after the dying declaration was recorded. A Magistrate could and should have been called to record a further dying declaration. However, the dying declaration itself has been treated as the FIR and the case has been registered on the dying declaration. Another police officer has investigated the FIR. It will have to be seen whether a dying declaration recorded by a police officer and endorsed by Doctor can be accepted in the absence of any other dying declaration recorded by any Magistrate and whether such a dying declaration can be the sole basis to uphold a conviction made thereupon by the trial Court. It will be apt to consider the jurisprudence in this behalf at this stage itself.

23. In the case of *Laxman v. State of Maharashtra* 2002 All MR (Cri) 2259 (SC) it has been held that recording of the dying declaration by the Magistrate is a rule of caution. Though it is the usual practice, there is no requirement of law in that behalf. There is also no specified statutory form required for recording it. The evidentiary value and the weight to be attached to it depends upon the facts and circumstances of each case. The court is required to be satisfied about the state of mind of the person making the statement. Hence even if it is not recorded by the Magistrate or even if it does not contain the endorsement showing the examination by the Doctor, if the person making it satisfied himself about the

condition of the deceased and if it is found to be truthful it can be accepted by the court.

24. In the case of State Vs. Singari and Another, the dying declaration came to be challenged before the Division Bench of the Karnatak High Court as it was not containing the doctor's certificate in the prescribed form regarding the fitness of the victim to make the statement. It was held that where the record can inspire confidence in the court's mind with regard to the veracity and credibility and also the acceptability of the dying declaration, a mere technical lapse would not water down its evidentiary value. In that case the dying declaration was accepted even in the absence of the doctor's certificate. Conviction on that basis was held to be correctly made. In that case the incident took place on 25/04/1994. The deceased died of gunshot injuries on 27/04/1994. He had stated about the three accused in his statement which came to be recorded after the duty doctor's sanction was taken by the police officer. The Doctor had examined the patient and opined that he was in a sufficiently fit condition to make a statement. The dying declaration did not contain the requisite certificate in the prescribed form. The contention that the doctor's certificate should have been superscribed on the dying declaration by the Doctor's endorsement was rejected. It was observed that there was a refinement of the law. The Supreme Court had held that where the record would inspire confidence in the mind of the court about the veracity, credibility and acceptability of the dying declaration, a mere absence of the certificate was not a good enough technical lapse to reject the dying declaration.

25. In the case of the Vidhya Devi and Another Vs. State of Haryana, the dying declaration recorded by a police officer and endorsed by a Doctor came to be accepted even though no further dying declaration was recorded by the Magistrate during the four days when the deceased lived after her dying declaration was recorded. In that case the deceased had stated that her husband, father-in-law, mother-in-law, sister-in-law and brother-in-law had tortured her in respect of dowry. She had earlier lodged a written complaint with the police. On 16.11.1993 at about 10:30 AM when her husband and father-in-law were away, her mother-in-law, brother-in-law and sister-in-law set her ablaze. Her mother shifted her to the hospital. The medical officer sent information to the police station. The police arrived in the hospital. The medical officer initially opined that the victim was not in a fit position to make the statement. Later, in the evening the police once again contacted the Medical officer with a written request. That time the Doctor opined that she was fit to make the statement. Before the police officer recorded the statement of the victim, the Magistrate was contacted. He refused to record any statement before the case could be registered. Hence the police officer himself recorded her statement. In the statement she made a complaint of dowry demands against the whole family. She complained about only 3 of her family members with regard to setting her on fire that day. She ultimately expired on 20-11-1993. The prosecution relied upon the FIR which was registered as a dying declaration. It

was contended that the dying declaration recorded by the police officer on 17/11/1993 could not be accepted as she was not in a fit and proper condition to give a statement and the dying declaration was recorded by the police officer. Since it was seen to have been recorded on obtaining the opinion of the doctor, it was signed by the deceased and hence was held not to have suffered from any infirmities.

26. This Court has also held in the case of the *Tejram S/o Ukandrao Patil v. State of Maharashtra* 2009 ALL MR (Cri) 1047 to which our attention has been drawn by the learned APP that though the dying declaration was not recorded by the Special Magistrate, it would be accepted if it was otherwise reliable. In that case the accused came home in a drunken condition and seeing his mother-in-law in the house he went into a rage, abused his wife and her mother and poured kerosene over his wife and set her on fire. Her mother, as well as the landlady who intervened, both tried to save her. In the process they all sustained injuries. The wife had sustained 100% injuries; the mother-in-law sustained 77% were injuries. The Special Judicial Magistrate recorded the dying declaration of the mother-in-law, but not of the wife. The wife's statement was recorded by the police officer who failed to obtain the medical fitness certificate from the Doctor regarding her physical and mental condition. Despite the absence of these two important facts, upon considering the evidence as a whole and placing reliance upon the case of *P.V. Radhakrishnan v. State of Karnataka* AIR 2003 SC 2859 and *Laxman Vs. State of Maharashtra*, the dying declaration of the wife showing homicidal death came to be accepted. It was observed that even the mother of the victim who was on the spot and attempted to extinguish the fire had serious burn injuries caused to her. Similarly the landlady suffered some burn injuries. Both the ladies along with the wife were admitted to the same hospital. The appellant himself was on the spot and suffered some burn injuries. The dying declaration showed the role played by her mother and the landlady. It also showed that the appellant was himself present and tried to pull his wife and in the process had sustained burn injuries. She also stated that people brought her to the hospital. The presence of the accused at the scene of the offence, the injuries to all, and the absence of any previous reason for the wife to end her life were the specific circumstances appreciated to fix the guilt upon the accused by placing reliance upon the dying declaration of the wife recorded by the police officer even without the doctor's endorsement. The observations of the Supreme Court in *Laxman's* case (supra) that the dying declaration could be recorded by the Magistrate, a doctor or a police officer were taken into account. The observations of the Supreme court that there was no legal impediment in admitting the dying declaration recorded by the police officer would guide us in this case in accepting the dying declaration of Meera. Consequently, as held in that case, we are satisfied that we can accept the dying declaration though it was not recorded by the Magistrate, if the other facts and circumstances of the case reflected its truthfulness and authenticity. In such circumstances there would be no legal impediment to make it the basis of conviction.

27. Before we revert to the facts of this case, we may refer to the judgment in the case of Subhash Soni and Another Vs. State of M.P., which has laid down the requirements for acceptance of a dying declaration thus:

1. Dying declaration does not necessarily require corroboration.
2. If it is true and voluntary it can be accepted even without corroboration to be a basis for conviction.
3. The court is to scrutinise the dying declaration carefully to observe whether the deceased was in a fit state to make the declaration.
4. If it is suspicious it should not be acted upon without corroborating evidence.
5. If the deceased was unconscious and could not have made it, it should be rejected.
6. A dying declaration which suffers from infirmity cannot form the basis of conviction.
7. It has not to be rejected merely because it does not contain all the details of the occurrence.
8. It has not to be discarded merely because it is brief. The court normally looks up to the medical opinion to see the fit medical condition of the deceased, but an eye witness account stating that the deceased was in a fit mental condition could be accepted over the medical opinion.
9. If the prosecution version differed from the dying declaration, the dying declaration could not be accepted.
10. Whenever more than one statement is made, the first in time was to be preferred. However if a plurality of the dying declaration is shown to be trustworthy and reliable, it had to be accepted.

In that case a doctor drove the deceased to the hospital in his car. He deposed that he heard the deceased replying to his friend the names of his assailants. The Doctor was an independent witness. His deposition was accepted. The deceased was injured in the leg and thigh. It was observed that lack of consciousness would be progressive. Hence the oral statement made before reaching the hospital was accepted.

28. Mr. Khamkar, learned Advocate for the appellant, relied upon the case of Shaikh Rafiq and Another Vs. State of Maharashtra, in which a Special Executive Magistrate was available but not called. The medical officer in the burns ward of the hospital was accompanied by the police officer who recorded the statement. Yet the fitness certificate of the Doctor was not obtained. The endorsement of the medical officer about the consciousness of the patient was also not obtained. Considering the dying declaration and the manner in which it was recorded, which was found to be unreliable and the incident ununderstandable. The dying declaration was, therefore, rejected. In that case the father of the daughter-in-

law of the accused was stated to have been in burnt. Accused 1 and 2 with their daughter-in-law had gone to the house of the deceased to settle their disputes and differences when the incident took place. It could not be explained how and why accused 1 and 2 would get kerosene or a matchstick to ignite him. The dying declaration was rejected as being wholly improbable. This case is, therefore, not an authority to show that a dying declaration which is not recorded by the Magistrate is to be discarded.

29. In the case of *Rajendra Narayan Mahajan v. State of Maharashtra* 2004 All MR (Criminal) 1586 it has been held that the dying declaration has to be scrutinised minutely and must inspire confidence to rely upon it. Indeed if it inspires such confidence there is nothing which shows that it cannot be accepted merely because the magistrate was not called.

30. Mr. Khamkar also relied upon the case of *Smt. Laxmi Vs. Om Prakash and Others*, to show why the dying declaration should be rejected. In that case 5 dying declarations were made. Each of them was rejected. The state of mind of the deceased at the time of the recording of the written dying declaration was called in question. That was the case in which there were continuous disputes between the husband and wife. The wife, who died of burn injuries, had left the matrimonial home. There was a divorce petition pending between the parties. They had sought to reconcile their differences. She had returned to her matrimonial home. She received burn injuries on 7/3/1982. She died on 8/3/1982, six years after her marriage. She left one female child aged five years. Her husband informed the police on telephone that his wife had set herself on fire by pouring kerosene on herself. She was taken in an ambulance to the hospital where her first dying declaration was made to a police officer accompanying her. A second dying declaration was made to the Doctor who recorded it in writing. Another police officer recorded the statement a little later in the day. The Magistrate recorded her dying declaration also. Her brother, who reached the hospital later, deposed about the oral dying declaration made to him. The court considered the circumstances in which these five dying declarations came to be made. The trial court, after having appreciated the evidence, acquitted the husband. The mother of the deceased filed an SLP, though the State did not appeal. The evidence led in the case was considered by the Supreme Court. The time of recording the five dying declarations was separately accounted for. PW1, who sought to be an eye witness, was a neighbour and friend. She did not mention about any dying declaration made to her. She only saw the wife in flames. She deposed that the deceased had confided in her that she would kill herself and get her in-laws implicated. Her physical condition, as deposed by the Doctor who treated her in the hospital, showed 85% deep burns and dehydration. Her condition was constantly deteriorating. The court observed how from hour to hour her condition deteriorated such that she could not have made so many dying declarations. The register maintained by the police recording the events that transpired was not produced. The record of the police did not show the mention of any dying declaration. The court also noted the long

history given by the police officer who recorded the first dying declaration which was inconsistent with the autopsy. The neighbours had not reported any dying declaration made to them, though they were present on the spot after the incident. The absence of the medical evidence that the deceased was in a fit condition to make all those statements made the dying declarations doubtful. Though the dying declaration was made to the brother, he did not contact the police to have the offence registered. It was observed that the weak points of a dying declaration served to put the court on its guard while testing its reliability and imposed on the court an obligation to closely scrutinise all the relevant attendant circumstances considering the medical condition of the deceased as well as her attitude of vengeance. Hence all the dying declarations were rejected in paragraph 29 of the judgment.

31. It has been observed in that judgment that the dying declaration made to a police officer is admissible in evidence. However, the practice is discouraged and the services of the Magistrate is called for in usual circumstances. It was observed that it was better and more reliable to have the dying declaration recorded by the Magistrate rather than the Investigating Officer when it was a bit doubtful.

32. We may mention that that case is completely different from the present case. The considerations that weighed with the court in that case upon scrutinising the evidence as a whole led the court to reject the dying declarations because it was made by a vengeful wife for settling scores by implicating the accused. This case is quite the reverse. The reliance upon it is rather misplaced. The oral dying declaration in this case is only as to the fact of the husband raising disputes about one Rajendra and setting Meera on fire. The written dying declaration upon inquiry by the police officer shows how the incident took place.

33. The law emerging from the aforesaid cases would guide us in accepting or rejecting the dying declaration recorded by PW3, the police officer in this case.

34. PW3 has taken care to meet Meera in the presence of the Doctor, inquire about her medical condition, get her examined before recording her statement, inquire with Meera about the incident, record the same, obtain her thumb impression, sign the same and obtain the endorsement of the Doctor about her fitness to make the statement thereon. Besides, the dying declaration was recorded at the earliest possible opportunity. It is consistent with the oral dying declaration made to her mother earlier.

35. Mr. Khamkar has tried his best to show us various reasons for rejecting the dying declaration as suspicious, none of which appeal to us. We may enumerate his arguments with regard to the rejection of the dying declaration. He contended that the mother did not know how the incident took place. The mother did not even lodge the complaint on the same day with the police. Her statement, which was recorded on the next day, shows that it was an afterthought. Hence he contends that the oral dying declaration itself should be

rejected. We have seen how Meera's mother has been an example of sobriety; she did not mention anything other than what Meera stated. She went to the hospital with the appellant, (the doctor's evidence shows that she brought him to the hospital.) She has proved to be a credible witness.

36. Mr. Khamkar contended that PW3 did not make any inquiry with the deceased to ascertain her consciousness. He did not record the time of the recording of the statement in the statement itself. The victim did not state about who extinguished the fire. The victim also did not state about how the accused received burn injuries. The Doctor-PW2 did not produce medical case papers. The Doctor was busy attending to other patients while the dying declaration was being recorded. Though the statement was completed at about 4:35 or 4:40 PM, the Doctor's endorsement was obtained only at 5.05 p.m. The endorsement was, therefore, not proper. He, therefore, contends that the written dying declaration is suspicious. We may mention that none of these factors is material or even relevant to impute lack of bonafides upon the dying declaration itself.

37. He further contends that PW4, the neighbour, who extinguished the fire, deposed that the deceased was unconscious at the spot and it was doubtful that the deceased regained consciousness since she received more than 90% burn injuries. The evidence of the Doctor shows that patients with such extent of injuries can be fit to make their statements. PW3 is the neighbour of the appellant. He has turned hostile. He has refuted his statement made to the police. He has been cross-examined by the APP. His cross-examination has revealed the falsity of the case of heroism of the appellant in getting burnt. His deposition about Meera's "unconsciousness" is brought out only when he was ostensibly cross-examined by the accused. It is seen to be an innocuous statement, pushed into the evidence without any other supporting material. It goes against the tenor of his deposition where he recounts the events of the date of the incident. His examination-in-chief shows what all happened in a sequence from 3.30 pm when he heard the cries for help from the house of the appellant. He reached her house first. He saw her in flames. He extinguished the fire. By that time Meera's parents arrived and many people had gathered. His evidence continues to show that "then" Meera was shifted to the hospital. His further evidence shows only that Meera was not in a position to speak. He did not depose about Meera's unconsciousness in the examination-in-chief. He stated about it only in his cross-examination when he was led to make that statement. He is shown to be a painter. He lived in a hutment colony. His evidence goes directly contrary to the medical opinion taken in the proper course by the police officer from the medical officer. We find no reason to accept his deposition in preference to the medical opinion as it would appear that he was attempting to hide the truth.

38. Mr. Khamkar contended that the dying declaration was given at the instance of her mother and that it was not corroborated by any other independent witness. It is not difficult for us to reject each of these contentions. PW3 has

deposed that the mother was not present when he met Meera. The dying declaration of the kind, as in this case, needs no further corroboration. Yet a tacit corroboration does surface on the record. Rajendra was another boy in the neighbourhood. The parties had lived in that neighbourhood for about a month. The evidence of the IO that not a single witness came forward to state about the dispute between the appellant and Meera stands to reason. There was indeed no apparent dispute between the appellant and Meera. It is only because he suspected her fidelity that he set her ablaze. That could not have been known by any of the neighbours. It was not his case that Meera died a suicidal death.

39. Therefore Meera's statement deserves acceptance. The statement of PW4, which is directly contrary to the dying Declaration, would, therefore, have to be rejected.

40. This brings us to the conduct of the accused himself. The learned APP showed us the case of the appellant in his 313 statement. It shows that he extinguished the fire. It makes no mention of any act of PW4, his neighbour. The deposition of PW4 shows that when he heard the screams at 3:30 PM he reached the spot immediately. The evidence of PW1 shows that the appellant rushed to her also at 3:30 PM and reported to her that Meera had suffered burns and also told her that in an attempt to extinguish the fire his hands were also burnt. If the appellant had extinguished the fire, there would have been no reason for PW4 to have extinguished the fire by using the quilt. The evidence of PW4 about extinguishing the fire has not been challenged by the appellant. That evidence makes no mention of any act of the appellant. It is not even suggested in his cross-examination that the accused did anything to extinguish the fire. The evidence of PW4 shows the complete absence of the appellant in his own house at the time his wife cried out. His absence is completely corroborated by the evidence of PW1, the mother, which shows the presence of the accused at 3.30 pm in her house instead. Besides, the evidence of PW4, which further shows that after he extinguished the fire, Meera's parents and others arrived at the spot. Even that does not show the arrival of the appellant at the spot. The appellant has accepted the deposition of PW1 that he had gone to her house at 3.30 pm on the day of the incident. Consequently, it is impossible to accept the appellant's case that he got burnt while extinguishing the fire which took place at that time.

41. However, it is a fact that the appellant also got burnt. That may not necessarily be only whilst extinguishing the fire. He could have got burnt in the process of setting his wife ablaze.

42. The appellant has placed much reliance upon his own burns. He mentioned that specifically to Meera's mother. When he went to the hospital, he got himself treated. He was not seen by the Doctor who has made a mention only about Meera and her mother. There is nothing to show that he was seen by the police officer PW3 also. He is not shown to have been by his wife's bedside. We have already seen his total absence in his own house and a complete void in the evidence of PW4 also. The police records show a medical certificate of the

appellant dated 29/7/2002. Upon the heavy reliance placed by the appellant on his own burn injuries and the case of being a victim of such burns made out by him, we were obliged to call for and consider the medical report of the appellant, though not relied upon or got produced by the appellant in the trial court. It shows a history of accidental burns while rescuing wife. His burns are shown to be only on the upper limbs. The right upper limb has only 4% burns; the left upper limb has only 3% burns. Hence the accused is shown to have suffered total 7% superficial to deep burns. The statement of the appellant recorded u/s 313 of the Criminal Procedure Code shows that he suffered burns to his hands and face. The medical certificate belies that statement. PW6, the IO, stated in his cross-examination that the accused had injuries on both his hands, legs, face and chest. This statement is completely uncorroborated by medical evidence and deserves total rejection. The case of the appellant's burns is highly exaggerated. To prove accidental burns, the appellant has put up an unproportionate effort to show and prove his burns, which has been contradicted by the medical evidence. That explains why his medical certificate was not got produced in evidence despite his claim to his burns.

43. It is the case of the appellant that his wife told him that the stove burst ("ablazed"). It is his case that she suffered accidental burns. Such fact has to be proved by the person who asserts it. It can be proved by showing the burst stove. The spot panchanama has not been proved by direct evidence of the burst stove since he turned hostile. In any case, it does not show any stove that had burst. The accused has made no effort to show the burst stove which alone could prove the accidental death stated by him as allegedly revealed to him by his wife. The accused has not shown to have played any role in extinguishing the fire. He is not shown to have cared for his wife in the hospital. Such conduct is totally inconsistent with a case of accidental death. Hence, in the absence of such evidence, the court must reject the case of accidental death.

44. The appellant has admitted his presence in the house when the incident took place. It was his case that after lunch, he went to wash his hands and on return from the wash room, he saw Meera in flames. He contended that she received burn injuries accidentally. This defence of the accused has been found to be false by the trial Court and we agree with the same. As the accused was present in the house when Meera was set ablaze, it was within his special knowledge as to how she was caught ablaze and it was, therefore, necessary for him to explain the same, as per Section 106 of the Indian Evidence Act and while doing so, he took a false defence of accidental death. This is an additional and very important circumstance against the accused which must point out a finger of guilt against him.

45. This is a case where a wife suffered burns in a matrimonial home soon after her marriage when she lived with her husband alone. Despite strenuous efforts, there is nothing shown to persuade us to reject Meera's dying declaration, Ex.14.

46. Mr. Khamkar, as a last resort, argued that if we were to come to the

conclusion that the dying declaration was reliable, the accused would fall within the purview of Section 304 of the IPC. He contended that the accused had not premeditated or preplanned the act. It was only whilst taking meal that the incident is shown to have happened. The couple was otherwise happily married. The accused also suffered burns and tried to extinguish the fire. He contended that there was no intention on the part of the accused to commit the offence.

47. Mr. Khamkar relied upon the case of Kalu Ram Vs. State of Rajasthan, . In that case the accused came home in an inebriated condition and demanded ornaments of his wife. When she refused he poured kerosene on her and wanted her to light the match. As she did not strike the match, he ignited one match stick but when the flames flared up he poured water to save her. It was held that he had not intended to cause the injuries of the deceased which she sustained. Hence the conviction u/s 302, IPC was altered to Section 304 Part-II, IPC. Similar was the case of Chandrakant G. Sonawane v. The State of Maharashtra in Criminal Appeal No. 1211 of 2002 in which the accused was seen to have caused burn injuries to his wife leading to her death, but had poured water on her thereafter to save her resulting in conviction u/s 304 Part-II, IPC.

48. We are not impressed by the reliance upon these judgments. If Meera had disclosed her affair to her husband and the appellant had set her ablaze, such an argument may have been correct. The accused suspected the fidelity of his wife. This suspicion was not spontaneous. Hence his action upon such suspicion cannot be said to be abrupt or unpremeditated. We may mention that contrary to the case of the accused, we have not even found that he tried to extinguish the fire or otherwise helped his wife in any manner. We have also not found that he suffered the burns to the extent stated by him or as deposed by the IO in his cross-examination. We do not find any accidental death of Meera. Hence homicidal death is established by the prosecution. Consequently, a case u/s 304, IPC is wholly ruled out. Since this case is unmistakably of homicidal death, these cases are wholly inappropriate to be followed.

49. We find that the learned Sessions Judge has correctly come to the conclusion about the accused having committed the murder of his wife by setting her on fire. The conviction is, therefore, maintained. The Appeal stands dismissed.