

(2003) 11 BOM CK 0004
In the Bombay High Court
Case No : Criminal Appeal No. 360 of 1998

Saraswati Shivanand Kumbhar and Another
Vs

APPELLANT

State of Maharashtra

RESPONDENT

Date of Decision : 12-11-2003

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2004) 2 DMC 32

Hon'ble Judges : V.K. Tahilramani, J;J.N. Patel, J

Bench : Division Bench

Advocate : T.E. Mane, No. 1 and Rahul S. Kate, No. 2, for the Appellant; V.R. Bhosale, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

J.N. Patel, J.—Heard Mr. T.E. Mane, the learned Counsel appearing for the appellant-accused No. 1, Mr. Rahul S. Kate, the learned Counsel appearing for the appellant-accused No. 2 and Mrs. V.R. Bhosale, the learned A.P.P. appearing for the State.

2. The appellants have been indicted for a charge of having committed an offence u/s 302 read with Section 34 of I.P.C. i.e., committing murder of Smt. Anita w/o Mallinath Kumbhar who was the wife of their brother-in-law by pouring kerosene on her person and setting her ablaze on 29th day of September, 1997 at about 12.45 p.m. in the landing space of staircase going towards the terrace of the residential Block No. A/6 situated at Homkar Nagar, Bhawani Peth, Solapur. The learned IInd Additional Sessions Judge, Solapur, by judgment and order dated 18th February, 1998 found the appellants-accused guilty of the offence u/s 302 read with Section 34 of I.P.C. and convicted and sentenced them to suffer imprisonment for life which is the subject matter of challenge in this appeal.

3. Briefly stated the facts which led to the prosecution of the appellants, were as

under:

4. Mr. Malliakarjun Kumbhar the husband of deceased Anita along with Anita had come to reside with his brothers in Homkar Nagar, Solapur. According to the prosecution, the relations between them were not cordial and the appellant-accused No. 1 Saraswati who was the wife of Shivnand Kumbhar and Vidya w/o Vijaykumar used to always accuse her of not cooperating with them in performing the household duties and committing theft of money and also threatened her of dire consequences. It so happened that on the fateful day on 29th September, 1997 at about 12.45 p.m. the deceased Anita Kumbhar was noticed engulfed with fire on the terrace of the house by the neighbours i.e., Dr. Shivnand Nakate (P.W. 1) whose attention was drawn to her as she was saying "Vachava Vachava". Therefore, Dr. Nakate went to the terrace from the house of Mrs. Ganbote. In the meantime, another neighbour Smt. Shobha Raikar (P.W. 2) also reached the spot. They extinguished the fire and tried to save Anita. Dr. Nakate then put one Chaddar on the body of Anita, The relatives of Anita were informed. Anita was removed to the Hospital of Dr. Prakash Ghatole (P.W. 5). Dr. Ghatole gave her preliminary treatment and advised that as her condition was serious, she should be taken Civil Hospital and therefore, she was taken to Civil Hospital and got admitted. On being admitted at Civil Hospital, the information reached police as it was a medico-legal case and, therefore, ASI Mohammad Isak Aminsahab Shaikh (P.W. 8) who was on duty, got the information from Police Constable Tendulkar on telephone. In turn, Mohammad Shaikh (P.W. 8) informed Ramkant Ghunghardare (P.W. 9) Police Sub-Inspector, Jail Road Police Station. PSI Ghunghardare went to the Civil Hospital and recorded statement of victim Anita, on the basis of which, he registered the offence against the appellants-accused for having committed offences u/s 307 read with Section 34 of I.P.C. vide C.R. No. 366 of 1997 of Jail Road Police Station.

5. It appears that the brother of victim Shri Shrishail Adling Kumbhar (P.W. 3) was not satisfied with the treatment given to the victim in the Civil Hospital so he got her discharged and again took her to the hospital of Dr. Prakash Ghatole (P.W. 5) where the victim Anita Kumbhar succumbed to her injuries. During the period the victim Anita was admitted in Civil Hospital and was under the treatment of Dr. Sudhir Bakhale (P.W. 6), Executive Magistrate Shri Ahmed Badesahab Shaikh (P.W. 7) also recorded her dying declaration which is at Exhibit-33. During the course of investigation, the police prepared the spot Panchnama (Exhibit-20) which has been proved by examining Haribhau Hingmire (P.W. 4) one of the Panchas to the spot Pan Porensic. The police seized certain articles from the spot which were in the nature of plastic can containing bluish colour liquid, partly burnt saree which were sent to Forensic Analysis Laboratory for analysis. The inquest Panchnama of the body was performed and it was sent for postmortem examination. As the defence did not dispute the fact that the victim Anita died because of shock due to 83% burns, it appears that the prosecution has not examined the Medical Officer who conducted the post-

mortem examination i.e., Dr. A.S. Kanaki, of which report is Exhibit-14 and cause of death certificate is Exhibit-13. On concluding the investigation, the charge sheet was filed against the appellants-accused and thereafter, the case was committed to the Court of Sessions at Solapur.

6. The charge for having committed murder of Smt. Anita Kumbhar was framed at Exhibit-1 against the appellants-accused, to which, they pleaded not guilty and claimed to be tried. It is their case that they have been falsely implicated and the victim Anita has probably committed suicide.

7. The prosecution in support of their case, has examined P.W. 1 Dr. Shivanand Nakate (neighbour), P.W. 2 Smt. Shobha Raikar (neighbour), P.W. 3 Shrishail Kumbhar brother of the deceased Anita, P.W. 4 Haribhau Hingmire was the Panch and the P.W. 5 Dr. Prakash Ghatole who had initially treated the victim Anita and subsequently after she was discharged from the Civil Hospital and P.W. 6 Dr. Sudhir Bakhale Medical Officer, who attended the victim at the Civil Hospital, P.W. 7 Mr. Ahmed Shaikh is the Executive Magistrate who recorded the dying declaration, ASI P.W. 8 Mohammad Isaq Shaikh who deposed about the fact that he received the information in respect of the victim Anita being admitted with burn injuries, in the Civil Hospital from Police Constable Tendulkar and P.W. 9 PSI Mr. Ramakant Ghunghardare who was the Investigating Officer. In addition to placing reliance on the spot Panchnama, inquest Panchnama, C.A. report and so on. The learned Trial Court found that the prosecution has proved their case against the appellants/accused and based their conviction mainly on the two dying declarations for coming to the conclusion that they are guilty of having committed an offence u/s 302 read with Section 34 of I.P.C.

8. Mr. Mane, the learned Counsel appearing for the appellant No. 1 submitted that the prosecution has failed to establish as to whether the deceased Anita died homicidal or suicidal death. It is submitted that possibility that Anita might have committed suicide, cannot be ruled out as can be seen from the facts and circumstances brought on record. Mr. Mane has drawn our attention to the fact that the prosecution has not been able to bring the evidence to the effect that the appellants-accused were present in the house when unfortunate incident occurred and most probably Anita being frustrated may be by domestic quarrel, might have taken a decision to put an end to her life by taking opportunity of the fact that no member was present in the house and committed suicide. It is submitted that it is only when she had set herself ablaze, she shouted for help which attracted the neighbours, some of whom, had reached her and even tried to save her also, do not speak about the presence of the appellants-accused in the house at the time of incident and, therefore, in this background, it would be very difficult to connect the appellants-accused with the crime.

9. Mr. Mane submitted that even the brother of deceased Anita i.e., P.W. 3 Shrishail does not support the prosecution case that it is the appellants-accused who are responsible for pouring kerosene on her person and setting her ablaze and his evidence is exculpatory in nature. It is submitted that this was earliest

opportunity available to the victim Anita who was in a fairly good state of mind and physical condition even after having suffered 83% burn injuries, there was no reason why she would not have disclosed to her own brother P.W. 3 Shrishail the fact that the appellants-accused are responsible for setting her ablaze.

10. Mr. Mane, submits that the spot Panchnama Exhibit-20 is not disputed by the appellants-accused as the incident had occurred in the house and victim Anita did suffer burn injuries. It is submitted that the prosecution case rests solely on the two dying declarations i.e., one recorded by PSI Ghunghardare which was treated as an F.I.R. Exhibit-41) and the other is by the Executive Magistrate Shri. Shaikh i.e., dying declaration Exhibit-33. Mr. Mane submits that there is one more attempt made by the prosecution to bring on record that even the victim Anita gave the history of burn injuries to Dr, Prakash Ghatole which the Court will have to appreciate in the background that Dr. Ghatole is the family doctor of the victim's family and well-known to them and in the course of investigation, the police did not feel it necessary to seize the medical case papers (Exhibit-26 collectively) and it is for the first time, these papers were produced by Dr. Ghatole in his evidence before the Court. He has drawn our attention to the endorsement made by Dr. Ghatole insofar as history of injuries recorded by him is concerned and submitted that Dr. Ghatole though in his evidence before the Court tried to support the prosecution that the victim Anita told him that appellants-accused had poured kerosene on her person and set her ablaze, that is supported by contemporaneous record prepared by him, it appears to be tampered particularly that the victim Anita having mentioned the names of her "Jaus" as Saraswati and Vidya (wives of brothers of husband of victim Anita). It is submitted that this is manipulated by Dr, Ghatole probably at the instance of brother of the victim Anita i.e., Shri Shrishail or her relatives so as to falsely implicate the appellants-accused.

11. Mr. Mane, therefore, submits that this Court will have to examine as to whether the two dying declarations on which the learned Trial Court has based his findings and convicted the appellants-accused, deserves any credence or not, because by the time, these two statements came to be recorded, there was sufficient opportunity available to the relatives of the victim Anita to have tutored her and, therefore, it cannot be said that the dying declarations were voluntary and truthful. Mr. Mane, the learned Counsel for the appellant-accused No. 1 has pointed out to us that Dr. Sudhir Bakhale (P.W. 6) has candidly admitted in his evidence so also the Executive Magistrate Ahmed Shaikh (P.W. 7) that the relatives of the victim were very much present in the hospital when her statement came to be recorded by the police as well as by the Executive Magistrate though, it has been stated that they were kept out at the time of recording statement and, therefore, it is a fit case where the benefit of doubt should be extended to the appellants-accused.

12. Mr. Rahul Kate, the learned Counsel appearing for the appellant-accused No. 2 submitted that he would only add to the submission made by Mr. Mane and

pointed out to this Court that (two statements i.e., one recorded by PSI Ramakant Ghughardare which was treated as an F.I.R. (Exhibit-41) and other recorded by (the Executive Magistrate P.W. 7 Shaikh i.e., dying declaration (Exhibit-33) are not consistent so far as the victim Anita has assigned different roles to the appellants-accused. In the statement recorded by the police, it is stated by the victim Anita that the appellant/accused Vidya poured kerosene and accused Saraswati set her ablaze by lighting a match-stick, whereas, in the dying declaration (Exhibit-33) she has stated that it was Saraswati who poured kerosene and Vidya lit fire and this also is sufficient to discard these two dying declarations. It is, therefore, submitted that it will be unsafe to rely upon these two dying declarations and uphold the finding of guilt arrived at by the learned Trial Court and sustain the conviction and sentence.

13. Mrs. Bhosale, the learned A.P.P. submitted that it is well settled principle of law that if the dying declaration made by the victim inspires confidence and is found by the Court to be voluntary and truthful and is supported by the attending circumstances, then the conviction can be based on such evidence. It is submitted by the learned A.P.P. that there is no reason why the two dying declarations i.e., the F.I.R. (Exhibit-41) recorded by PSI Ghughardare and dying declaration (Exhibit-33) recorded by the Executive Magistrate should not be accepted. It is submitted that PSI Ghughardare (P.W. 9) as, well as Mr. Ahmed Shaikh (P. W. 7) have recorded the statements of the victim Anita (on being satisfied that the victim Anita was) mentally and physically fit to make a statement, which is supported by the evidence of Dr. Sudhir Bakhale (P.W. 6) who was the Medical Officer who examined the victim Anita on both the occasions and gave his certificate on both the dying declarations.

14. The learned A.P.P. submitted that it is usual excuses and plea taken by the accused in such cases that the victim has been tutored by her relatives. It is submitted that no such case is made out by the appellant/accused by even making a suggestion to these officers that she was tutored by her relatives or at their instance, she is falsely implicating the appellants-accused. The learned A.P.P. fairly conceded the fact that though the prosecution has not led any independent evidence to show the presence of two appellants-accused in the house at the time of incident but then this lacuna by itself will not destroy the case of the prosecution and in all probabilities, these two ladies who are wives, are bound to be at home and taking advantage of the situation that there was no one present in the house, they decided to get rid of the victim Anita and while she was going towards the terrace, could catch her up at the landing space of the staircase and poured kerosene on her and set her ablaze. It is submitted that the inconsistencies pointed out by the learned Counsel for the appellant/accused No. 2 are not material so as to discard dying declarations because what is ultimately made out that the victim Anita was set ablaze by pouring kerosene on her person by these two accused. It is submitted that the Court should appreciate that the victim Anita suffered 83% burn injuries and though she was conscious to give her statement, it cannot be expected of her to factually remember and recall at

that stage as to who poured the kerosene and who had set her on fire. This by itself, cannot be a ground to discard the dying declarations. It is submitted that the neighbours have unfortunately not supported the prosecution and particularly Smt. Raikar (P.W. 2) has been declared hostile who was the best witness available to the prosecution, therefore, the prosecution having established its case beyond shadow of doubt, the Trial Court was justified in convicting the appellant/accused for having committed murder of the deceased Anita and, therefore, the appeal deserves to be dismissed.

15. The only point which arises for our consideration is whether the appellants-accused can be held responsible for causing death of deceased Anita Kumbhar by pouring kerosene on her and setting her ablaze?

16. The learned Trial Court has mainly placed reliance on the two dying declarations in order to arrive at the finding that the appellants-accused are guilty of having committed murder of deceased Anita. These two dying declarations are in the form of complaint of deceased Anita recorded by PSI Ghughardare which was treated as an F.I.R. and the one recorded by P.W. 7 Shri Ahmed Shaikh, Executive Magistrate. Dr. Sudhir Bakhale (P.W. 6) was examined by the prosecution on the point of admission of Anita the deceased in the Civil Hospital, Solapur on 29th September, 1997. According to his evidence before the Court, he examined her, at that time, PSI of Jail Road Police Station was also present. He made enquiries with him relating to the physical and mental condition of Anita as he wanted to record her dying declaration. Therefore, the Medical Officer examined her and put questions to Anita in order to find out her mental condition and he found her to be conscious and able to speak and, therefore, he made endorsement before recording the dying declaration of Anita and signed the same. Thereafter, PSI Ghughardare recorded dying declaration of Anita in his presence and after her dying declaration was recorded, the Doctor gave his endorsement below the dying declaration that victim Anita was conscious throughout. According to the Medical Officer, dying declaration was recorded at 3.30 p.m. and completed by 4.00 p.m. On the same day, another dying declaration of Anita was recorded by Shri Ahmed Shaikh, Executive Magistrate (P.W. 7) in his presence which he has also confirmed that it was recorded after he certified Anita to be in a fit condition to make a declaration. It has come in the evidence of P.W. 6 Dr. Bakhale that at the relevant time her relatives were present but they were kept outside the room. Though the Medical Officer in his cross-examination has stated that he does not remember the contents of the dying declaration, we do not think that this is material for our consideration as the Medical Officer is examined only on the point that when the PSI and the Executive Magistrate recorded her dying declarations, she was mentally and physically in a fit condition to make such a statement. Therefore, we do not find that there was any lapse on the part of the prosecution in bringing on record the fact that Anita's dying declarations were recorded by these two persons i.e., PSI Ghughardare and Executive Magistrate P.W. 7 Shri Ahmed Shaikh.

17. PSI Shri Ghughardare (P.W. 9) gave evidence that on 29th September, 1997 he was serving in Jail Road Police Station at about 3.00 p.m. when P.C. Rathod gave information regarding the incident and he handed over the letter to him stating that Saraswati and Vidya poured kerosene on the person of Anita and they lit the fire. Therefore, he informed him to go to the Civil Hospital. The said letter is placed at Exhibit-35. Pursuant to which, he visited Civil Hospital at about 3.15 p.m. and met Doctor and saw Anita was in the burn ward. He asked Medical Officer as to whether she was in a fit condition to give her statement or not and when she was so certified, recorded her statement which is at Exhibit-41. In Exhibit-41 on the basis of which offences came to be registered against the appellant/ accused, it was stated by Anita that on 29th September, 1997 when there was no one at home except appellant/accused Nos. 1 and 2 at about 12.45 p.m. she was going to the terrace to bring their clothes, at that time when she was climbing the staircase, her elder sister-in-law Saraswati suddenly came there. She held her hand by the wrist. She was followed by her other sister-in-law i.e.; appellants-accused No. 2 Vidya. According to her, appellant-accused Saraswati caught hold of her and appellant-accused Vidya poured kerosene on her person from a plastic can of blue colour and appellant-accused Saraswati lit a match-stick and set her ablaze. Thereafter, she shouted "Vachava Vachava" and on hearing the shouts, the neighbours came there. Out of them, Dr. Nakate placed Satranji on her person and that she was brought to the hospital by her brother. In her statement recorded by P.W. 7 Shri Ahmed Shaikh (Executive Magistrate) in answer to the question No. 6 as to how you suffered injuries on your person, she stated that on 29th September, 1997 in the afternoon at about 12.45 her elder sister-in-law Saraswati held her hand and poured kerosene on her and her younger sister-in-law Vidya had lit match stick and set her ablaze because of which, she suffered burn injuries on her chest, neck, both hands, ears, back and thighs. The cause for this act on their part, has been explained by her in answer to question No. 11 that these appellants-accused used to accuse her that she is a ghost and she is in the habit of stealing money from the house and for this reason they had burnt her. The contentions of the learned Counsel appearing for the appellant-accused No. 2 that there is a discrepancy in the two dying declarations, as regards the role attributed to the appellant-accused i.e., in the dying declarations Exhibit-41, it is alleged that Vidya had poured kerosene on deceased Anita and Saraswati had lit the match stick and set her ablaze, on the other hand, in the dying declaration (Exhibit-33) which has been recorded by Executive Magistrate Mr. Shaikh, it is the other way i.e., Saraswati had caught hold of her hands and poured kerosene on her and Vidya had lit match stick and set her ablaze, appears to be correct. The learned A.P.P. has tried to reconcile this discrepancy by saying that the fact remains that both the appellant-accused participated in committing crime of ghostly murder of hapless victim Anita and if the Court appreciates this in the backdrop that the victim had suffered burn injuries to the extent of 83% this by itself should not be sufficient to discard two dying declarations. We may not like to express our opinion as regards the inconsistency at this stage without considering further evidence on record.

18. So far as the fact that victim Anita died because of shock due to 83% burns, is not disputed. It is also not challenged that the victim died due to kerosene being poured on her person and by setting her ablaze. But this by itself could not make out a case as to whether the victim Anita died homicidal death or it was suicide because characteristics in such a case of burns, would be almost similar and identical and unless the prosecution brings on record sufficient evidence, may be in the nature of direct or circumstantial to establish the fact that the victim Anita died homicidal death, it would be very difficult to arrive at a conclusion as to whether it was homicidal or suicidal. Needless to say that in the given facts and circumstances, burn injuries were suffered accidentally is ruled out. The prosecution has examined P.W. 4 Haribhau Hingmire before whom the spot Panchnama was prepared and from the spot, plastic can containing kerosene, match-stick, match box, burnt pieces of Sari and clothes were seized and sent to the Chemical Analyser. The C.A. Report Exhibit-42 is also positive as the Chemical Analyst has found that all these articles were having kerosene. According to the C.A. Report, results of the tests for the detection of kerosene residues on Exhibit-2 i.e., partly burnt Sari wrapped in paper labelled "B" was positive and, of course, in the plastic can, it was found to be a sample of kerosene,

19. Now we propose to examine the witnesses who first reached on the spot after they heard the shouts of the deceased Anita as "Vachava Vachava". Out of them, Dr. Nakate (P.W. 1) and Smt. Raikar (P.W. 2) are examined by the prosecution. Dr. Nakate (P.W. 1) is the neighbour and has his house at a distance of 15 feet from that of the appellant-accused. According to him, on 29th September, 1997, he was present at about 12.30 p.m. and after having taken his meals, when he was sitting in his house at about 12.30 p.m. he heard shouts as "Vachava Vachava" (Save me Save me). Therefore, after hearing shouts, he came in front of his house from where the house of the appellant-accused is visible. He saw Anita on the terrace who was under flames. Therefore, he went to the spot in order to save Anita. According to him, he went to the house of Anita through the house of one Mr. Ganbote. At that time, Mrs. Ganbote was present in her house. So he went towards the terrace, put one chuddar on the body of Smt. Anita. Her clothes were burnt. At that time, Mrs. Ganbote and one Mrs. Raikar were also present. They tried to extinguish the fire. He has categorically stated that at that time Smt. Anita was conscious. There was no conversation between him and Anita when he went towards the spot in order to see her. He was afraid so, therefore, he left the spot and, thereafter, he went to his dispensary. The conduct of Dr. Nakate has been deprecated by the learned Trial Court and rightly so, as he admitted in his evidence that he did not give treatment to her nor did he try to remove her for treatment. Only on 30th September, 1997 he came to know that Anita has expired in the hospital. So except for responding to the call of deceased Anita and extinguishing fire, the evidence of Dr. Nakate is of no assistance to the prosecution. P.W. 2 smt. Raikar has failed to support the prosecution case and, therefore, what we find is that the prosecution has not

been able to bring on record who was responsible for setting Anita ablaze by examining any witnesses. The fact remains that at the earliest opportunity Anita has not stated about the complicity of the appellant-accused and even about the presence of the appellant-accused in the house at the time of incident.

20. The next important witness examined by the prosecution is Shrishail (P.W. 3) who is the brother of deceased Anita. This witness in his evidence before the Court has spoken about the quarrel amongst sister in laws and Anita over the matters of trifle nature which he learned from his sister Anita. According to him, on the date of incident, he was working in the market yard. His brother told him regarding the incident. Therefore, he went to the house of appellant-accused. He saw that his brother was removing Anita for treatment in a rickshaw. Therefore, he went there and took her to the hospital of Dr. Ghatole who examined the victim and told him that since her condition was serious, she should be taken to Civil Hospital. Therefore, Anita was taken to Civil Hospital. According to him, she was admitted in Civil Hospital at 1.00 p.m. and since he was disturbed in view of the fact that his sister Anita has sustained injuries, he did not make any inquiry with her regarding cause of burn injuries, He confirms that the statement of Anita was recorded by the police as well as by Magistrate and at the relevant time, they were standing outside the ward. Since, the brother of deceased Anita was not satisfied with the treatment given to Anita in Civil Hospital, therefore, he removed Anita for the treatment to the dispensary of Dr. Ghatole, In his examination-in-chief itself, he has clearly stated that his sister Anita did not tell him that accused used to suspect that she used to commit thefts and in the absence of husband of the accused, one Tailor used to meet them and she did not like their behaviour. In cross-examination, though he was specifically questioned on the issue, he stated that his sister did not tell him regarding the cause of burn injuries while she was being taken to the dispensary or Civil Hospital and while Anita was being taken to the dispensary of Dr. Ghatole or to the civil hospital, she was in a position to speak in cross-examination of this witness, an omission has been brought on record that this witness has not stated before the police that the statement of his sister was recorded in the civil hospital by the police as well as by the Magistrate, to which he has deposed before the Court. Well we do not think that it is of any importance to the prosecution or to the defence. But one thing is clear that even Shrishail (P.W. 3) does not say anything in his evidence to show that his sister Anita suffered burnt injuries due to the act of the appellants-accused. It is very unnatural on the part of this witness who was brother of the victim Anita, not to have enquired from Anita as to how she suffered burn injuries and on the part of Anita for not disclosing that her two sister-in-laws i.e., appellants-accused are responsible for causing burn injuries to her. There is no reason why we should not accept the evidence of this witness as truthful and if that is so then it creates sufficient doubt in one's mind whether Anita suffered burn injuries due to the acts committed by the appellants/accused.

21. In cases of homicidal death, statements made by a person since deceased,

are admissible to prove the case and circumstances of death. They fall in the category of dying declarations and admissibility of such statement is permitted u/s 32 of Evidence Act. Section 32 is an exception to the rule of hearsay and makes admissible a statement of a person who dies whether death is homicide or a suicide, provided statement relates to the cause of death exhibits circumstances leading to death. Further it is now well-settled that the dying declaration if found acceptable can be a foundation for conviction, it is neither rule of law nor a prudence that dying declaration cannot be acted upon without corroboration. But then the Court has to be satisfied that the dying declaration is true and voluntary and it can base, a conviction on it without corroboration. In the peculiar facts and circumstances of the case, we are of the opinion that it would be most unsafe to rely upon two dying declarations which are pressed into service by the prosecution to prove their case and is the only material to show the complicity of the appellants-accused. We would have accepted the dying declarations without hesitation if it was made at the earliest opportunity which was available to the victim when the neighbours including Dr. Nakate (P.W. 1) on hearing the shouts, rushed to the spot, thereafter, when she was in the safe hands of her own relatives i.e., her brothers including P.W. 3 Shrishail who were carrying her to the hospital. But on both these occasions, neither the witnesses nor the victim felt it necessary to disclose how she suffered burn injuries. Not only P.W. 3 Shrishail, the brother of victim Anita but also to P.W. 6 Sudhir Bakhale, P.W. 9 P.S.I. Ghugardare and Executive Magistrate Mr. Shaikh have admitted this fact that relatives of the victim Anita were standing outside the ward when the dying declarations were being recorded. It appears that this probably made available to the deceased Anita sufficient opportunity of tutoring, prompting or imaging and in all probabilities, when she has lost hope of surviving, the possibility of implicating the appellant-accused, cannot be completely rules out.

22. In arriving at a conclusion about the guilt of the accused, the Court has to judge the evidence on the record and in every case, the final analysis would depend on its own facts. This is such a case where we find that the deceased Anita having not disclosed the names of her killers i.e., the appellants-accused on the earliest opportunity, it would be most unsafe to rely on her two dying declarations and, therefore, this is a fit case where the benefit of doubt deserves to be extended to the appellants-accused.

23. It is also pointed out to us that the learned Trial Court led much emphasis to the two dying declarations in order to convict the appellant-accused. In our opinion, the Trial Court ought to have taken into consideration overall view of the matter and it is only thereafter tested or scrutinised two dying declarations which also does not appear to be consistent insofar as the role attributed to the two appellant-accused, is concerned. We may also like to record that the police had already got the information through Police Constable Tendulkar that the victim was set ablaze after pouring kerosene on her person. But the prosecution has not taken sufficient care to place before the Court the source of information from

where Police Constable Tendulkar learnt about the complicity of the appellant-accused and passed it on to his superiors as the evidence brought on record, does not disclose this.

24. In view of the aforesaid discussion, we are inclined to extend benefit of doubt to the appellant/accused. Therefore, the appeal is allowed. The judgment and order of conviction and sentence dated, 18th February/1998 recorded by the learned IInd Additional Sessions Judge, Solapur, in Sessions Case No. 253 of 1997, is quashed and set aside. Both the appellant-accused to be released forthwith, if not required in any other case.