

(2007) 12 BOM CK 0056
In the Bombay High Court
Case No : Criminal Appeal No. 153 of 2006

Shivaji Date

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 19-12-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 8
Penal Code, 1860 (IPC) — Section 302, 307

Citation : (2007) 12 BOM CK 0056

Hon'ble Judges : P.R. Borkar, J;Naresh H. Patil, J

Bench : Division Bench

Advocate : S.J. Salunke, for the Appellant; S.D. Kaldate, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

P.R. Borkar, J.—Appellant -Shivaji S/o. Dattatraya Date preferred this appeal being aggrieved by the order of conviction and sentence passed by the learned I Adhoc Additional Sessions Judge, Ahmednagar in Sessions Case No. 84 of 2005 decided on 09.12.2005 whereby he was convicted of offence punishable u/s 302 of Indian Penal Code (for short "IPC") for committing murder of his wife Meenakshi and sentenced to suffer imprisonment for life and to pay a fine of Rs. 500/- in default to undergo rigorous imprisonment for one month.

2. It is case of the prosecution that the appellant and deceased Meenakshi married 17-18 years ago. They were blessed with two children son-Atul (P.W.3), daughter-Jyoti. Jyoti was residing with her maternal uncle P.W.4-Prakash Raghunath Waval for her education. P.W.3-Atul was residing with his parents. The appellant is a labourer. Deceased Meenakshi was a beedi worker. Appellant-Shivaji used to come home in intoxicated condition. He was addicted to liquor. He used to beat his wife in intoxicated condition. He was also suspecting her character. The appellant, deceased Meenakshi and P.W.3-Atul were residing in

one of the rooms owned by P.W.2-Sunil Narayan Deshmukh, who owned Deshmukh-Wada in Patil Galli of Bhingar area of Ahmednagar city. The rented premises in which the appellant, deceased Meenakshi and their son Atul were residing was consisted of one room.

3. On 16.01.2005 at about 10.30 p.m. the appellant came in drunken condition. He had brought mutton. He abused deceased Meenakshi and also said that she had illicit relations with others. At the same time he was saying that she should take meals with him. Deceased Meenakshi told him that it was her fasting day and she would not take meals. After meals P.W.3-Atul went to his friend's house for sleeping. Thereafter, the appellant started abusing deceased Meenakshi. The appellant also said that she was not behaving properly and she would be killed by him by setting her on fire. He poured kerosene on her person and set her on fire. Deceased Meenakshi raised shouts. At that time P.W.2-Sunil Deshmukh and other neighbours came. They poured water and extinguished the fire.

4. Thereafter, P.W.2-Sunil Deshmukh went and brought brother of Meenakshi, by name, P.W.4-Prakash Waval. Deceased Meenakshi was taken to the Civil Hospital, Ahmednagar and she was admitted. Doctor gave intimation about admitting deceased Meenakshi with burn injuries in the Hospital to Bhingar Police Station. P.W.8-Police Head Constable Meghraj Shivrai Dhanlagade was on night duty. He received the message. He went to Civil Hospital. P.W.5-Dr. Ashok Ghule told him that the patient was not in a position to give statement and therefore P.W.8-Head Constable Dhanlagade went back to the Police Station. On 17.01.2005 at about 11.00 a.m. he again went to Civil Hospital. He saw condition of the patient and approached P.W.6-Dr. Santosh Khandekar, who was on duty. P.W.6-Dr. Khandekar examined the patient and told P.W.8-Head Constable Dhanlagade that deceased Meenakshi was in a position to give statement. Accordingly, P.W.8-Head Constable Dhanlagade recorded dying declaration, which is at Exh.45. The Doctor made endorsement on the dying declaration. Thereafter, at about 12=30 noon, P.W.7-Special Judicial Magistrate Jayant Joshi also came to the hospital and contacted P.W.6-Dr. Khandekar and also recorded statement of deceased Meenakshi, which is proved at Exh.39. Thus, two dyeing declarations were recorded. It is also prosecution case that there was extra-judicial dying declaration before P.W.3-Atul, who is the son of deceased and accused-appellant, and P.W.4-Prakash, the brother of deceased Meenakshi. P.W.8-Head Constable Dhanlagade after recording dying declarations of deceased went to the spot of incident and drew panchanama. Thereafter, dying declaration before him was treated as FIR and crime was registered. The investigation was taken over by P.W.9-P.S.I. Pathan, who recorded statements of various persons. Initially, offence u/s 307 of IPC was registered, however, Meenakshi expired while in Civil Hospital on 25.01.2005 and therefore charge-sheet was sent against the appellant for offence u/s 302 of IPC.

5. So-far-as motive is concerned, P.W.2-Sunil Deshmukh-the landlord, P.W.3-Atul-son of deceased and the appellant, P.W.4-Prakash-brother of deceased have all

stated that the appellant was a drunkard. He used to beat his wife in drunkenness. He was also suspecting character of deceased Meenakshi. P.W.3-Sunil Deshmukh stated that once or twice the incident of beating under intoxication and suspecting character of Meenakshi by the appellant had taken place in his presence. Absolutely, there is no reason to disbelieve any of these witnesses, so-far-as this part is concerned.

6. It is argued before us that deceased Meenakshi committed suicide and it is not a case of homicide. Shri S.J. Salunke, appearing for the appellant argued that if we have regard to the totality of the circumstances and the admissions given by various witnesses, it is proved by pre-ponderous of probability that it is case of suicide rather than of homicide. On the other hand, learned APP Shri Kaldate argued that all dying declarations are reliable. Absolutely, there is no reason to suspect their veracity and reliability and therefore the appeal should be dismissed.

7. In this case the prosecution case mainly relies upon circumstantial evidence two oral dying declarations and two dying declarations which were recorded in writing.

8. P.W.2-Sunil Deshmukh is examined as the landlord and independent witness. On 16.01.2005, he heard shouts from the room of appellant-Shivaji, so he got up and ran to the house of appellant-Shivaji. Other tenants also gathered. They found that Meenakshi was on fire in the room of the appellant and the appellant was sitting in the room and he was not making any attempt to extinguish the fire. Thereafter, he went and informed the incident to the father and brother of Meenakshi and brought the father to his building on his vehicle.

9. In the cross-examination, P.W.2-Sunil Deshmukh stated in para No. 5 that on that day after the incident, when he came to the house of the accused-appellant, first he met the accused. He did not know who had extinguished the fire on Meenakshi, because there was crowd. He also did not make any enquiry with Meenakshi as to how the incident had taken place. Then he admitted that when after shouts he came to the room of the appellant-Shivaji, the door was chained from inside and he could not say who had opened it by giving kick. So, this admission in cross-examination falsifies earlier admission that the appellant was seen sitting in the room, deceased Meenakshi was on fire and appellant was not making any attempt to extinguish fire. In-fact, if the door of the room was chained from inside and somebody had to kick it to open it, in that case, it cannot be said that it was a case of homicide. It would be then a case of suicide, because the accused/appellant was outside.

10. The appellant in his statement u/s 313 of Criminal Procedure Code has stated that when he came home, he gave Rs. 60/- to his wife. His wife was asking money for paying rent and for paying price of grocery goods brought on credit. According to the appellant, there was quarrel over not arranging money for rent and dues. According to him, after meal, his son went to his friend and he went

out for answering nature's call. When he came back, the door of the house of chained from inside, so he gave call twice and knocked the door. While giving third call, he heard shouts of Meenakshi and saw flames from inside the house. At that time P.W.2-Sunil Deshmukh came there and they broke open the door with kick and poured water on the person of Meenakshi. There was no movements of deceased Meenakshi. Thereafter, the landlord brought his son and brother-in-law and they took his wife deceased Meenakshi to Hospital. He also stated that his brother-in-law and father-in-law gave him 2-4 slaps. He went to Police Station to lodge complaint regarding the incident, but it was not accepted. Police did not allow him to go to Hospital and thereafter he was arrested on 21st. Thus the appellant puts-forth the case of suicide and P.W.2-Sunil Deshmukh in cross-examination supports his case to some extent.

11. P.W.3-Atul, the son of appellant and deceased stated that after meals, he went to sleep in the house of his friend. However, there were guests at the house of his friend and therefore he came back. There were many persons in front of his house. His mother was shouting. His grandfather, maternal uncle and sister were present there. Clothes on the person of his mother were burnt and she was saying that his father had set her on fire. So, this is the first oral dying declaration. This was not supported by P.W.2-Sunil Deshmukh-the landlord in his examination-in-chief. In cross-examination, P.W.3-Atul stated that the house of his friend is at a distance of 5 minutes on foot. He then admitted that on that day, he learnt that his mother was burnt and therefore he came home from house of his friend at 11.00 p.m. After he came home, he asked his mother how it had happened. So, if his mother was wailing and shouting as to who had put her on fire, there was no question of asking him how she had got burn injuries. Moreover, as per his examination-in-chief, by the time he came, his maternal uncle P.W.4-Prakash, his grandfather and sister had came. This is relevant when we consider the evidence of P.W.4-Prakash.

12. P.W.4-Prakash Waval, the brother of Meenakshi stated that on the day of incident on 16.01.2005 he went to bed at about 10.00 p.m. At about 10.45 p.m. P.W.2-Sunil Deshmukh came and informed that his sister was burned and thereafter his father went with P.W.2-Sunil on Luna moped. P.W.4-Prakash went to the house of Meenakshi on bicycle. At that time deceased Meenakshi had burn injuries and she was crying loudly "Aai, Aai" (mother, mother). On his enquiry, his sister Meenakshi told him that her husband set her on fire. So, this is second oral dying declaration. It may be noted that P.W.3-Atul has stated that his mother was wailing and saying that his father had set her on fire. In cross-examination P.W.4-Prakash stated in para No. 5 that Atul was present when he reached the spot. On his enquiry, people gathered on the spot told him that his sister had set herself on fire in anger. This is inconsistent with the story that deceases was wailing and saying that her husband had set her on fire. People gathered would not have given different story, if Meenakshi was saying that her husband had set her on fire.

13. The evidence of P.W.3-Atul and P.W.4-Prakash regarding oral dying declaration become suspicious in the light of statement of Dr. Ashok Ghule, who had admitted Meenakshi in the Civil Hospital. He was present at 11.00 p.m. on 16.01.2005 in the Civil Hospital. Meenakshi was having burn injuries. P.W.6-Dr. Ghule in para 3 stated that the patient was brought by her brother P.W.4-Prakash Waval at about 11.00 p.m. on 16.01.2005. The patient's brother gave history of suicidal burns. History was not given by the patient herself, because she was having pains due to 95% burns. Original case papers are produced on record at Exh.35 and first entry is to the effect that history of suicidal burns at 10.00 p.m. brought by brother Prakash Waval, r/o. Laxmi Nagar, Nagardeole. So, this earliest entry on medical record at Exh.35 coupled with evidence of Dr. Ghule clearly falsifies the oral dying declarations. If P.W.2-Sunil Deshmukh had seen the accused/appellant inside the room doing nothing when Meenakshi was on fire, he would have told about it to P.W.4-Prakash. In any case, if Meenakshi had told P.W.3 Atul and/or P.W.4 -Prakash about history of setting her on fire, in that case P.W.4-Prakash would not have given history of injuries of suicidal burns. He would have stated that appellant-Shivaji had set his wife Meenakshi on fire.

14. Another circumstance, which is going against the prosecution is that neither P.W.3-Atul nor P.W.4-Prakash had gone to Police to lodge complaint against appellant-Shivaji. It is the statement of deceased before P.W.8 P.H.C. Dhanlagade, which was treated as FIR in this case. So this inaction on the part of P.W.4-Prakash for more than 12 hours negatives the possibility of oral dying declaration.

15. Dr. Ghule has also performed post-mortem on the body and he stated that deceased had 95% burn injuries. The injuries got infected and Meenakshi died due to septicemia due to 95% infected burns. The post-mortem report to that effect is at Exh.28. Meenakshi died on 25.01.2005 at about 6.30 p.m. as per para No. 4 of the post-mortem report.

16. So-far-as written dying declarations are concerned, before we come to the evidence of P.W.8-Head Constable Dhanlagade and P.W.7-Special Judicial Magistrate Jayant Joshi, we may consider the case-law cited before us. The learned Counsel for the appellant cited case of Shivaji S/o. Tukaram Patdukhe v. State of Maharashtra 2004 ALL MR 3220. In that case, the oral dying declaration as deposed by father and mother substantially differed from each other. The evidence of father and mother was also suffering from falsehood, contradictions and omissions. The reason for committing the murder was flimsy. Proper procedure was not followed in recording dying declaration of deceased and, therefore, could not be relied upon. Dying declaration made by deceased before a Head Constable was not brought on record. So in the facts of that case the appeal was allowed. In that case it is also observed that evidence of eye witnesses cannot be expected absolutely identical. Variations on minor aspects are natural, but if contradictions and variations are on vital aspects, they render evidence of such witnesses doubtful.

17. Learned A.P.P. Shri Kaldate cited four cases. First is *Kusa and Others Vs. State of Orissa*, . In that case it is observed that it is well established that although dying declaration should be carefully scrutinized, but if after perusal of the same, the Court is satisfied that the dying declaration is true and is free from any effort to prompt the deceased to make a statement and is coherent and consistent, there is no legal impediment in founding the conviction on such a dying declaration even if there is no corroboration.

18. The second case cited is *Laxman Vs. State of Maharashtra*, . In this case it is observed that:

There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the Court ultimately holds the same to be voluntary and trustful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and trustful nature of the declaration can be established otherwise. "

It is indeed a hyper-technical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind specially when the magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he recorded the dying declaration.

19. The learned A.P.P. also relied upon *Sohan Lal alias Sohan Singh and Ors. v. State of Punjab* (2003) SCC 534. It is observed that there was nothing on record to suspect the bona fides of Naib Tahsildar, who recorded the declaration. The Court was satisfied that the declaration was made by deceased who was in a fit mental condition while making the same. Irrespective of whether endorsement of doctor (about fitness of state of mind of declarant) proved in accordance with law or not, there was no reason to discard the said dying declaration.

20. The last case cited by Shri Kaldate, A.P.P. is *State of Karnataka Vs. Shariff*, . In that case dying declaration was recorded by police personnel. It was not in question-answer form. The deceased while making statement was speaking in Kannada and Urdu languages, and statement had been recorded only in Kannada language. It is held that in the facts and circumstances of the case the dying declaration was trustworthy.

21. The law regarding dying declaration is recently summarised by the Honourable Supreme Court in the case of *Dashrath alias Champa and Ors. v.*

State of Madhya Pradesh AIR 2007 SCW 6837. In para 12 and 13 their Lordships have laid down various principles.

It is observed that:

Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no scope of cross-examination. Such a scope is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence....

The dying declaration is only a piece of untested evidence and must like any other evidence, satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration.

22. So we will now find out whether the two dying declarations recorded by Head Constable Dhanlagade (Pw8) and Special Judicial Magistrate Jayant Joshi (Pw7) are free from any doubt and inspire confidence regarding their truth and veracity and that the dying declarations were not result of either tutoring or prompting or product of imagination. It must be absolutely safe to act upon them.

23. Pw8 Head Constable Dhanlagade stated that on 16.1.2005 he was on night duty at police station. He received message from the Civil Hospital that one lady by name Meenakashi was admitted in the hospital and she had burn injuries. So he took entry to that effect in the station diary, which is proved at Exh.43. It shows that intimation was only that Meenakashi was admitted in the hospital by her brother Pw4 Prakash Waval in the injured state and she had burn injuries. Head Constable Dhanlagade thereafter went to the Civil Hospital and enquired with Dr. Ghule and gave letter Exh.29. At that time the doctor examined the patient and gave endorsement that Meenakashi was not in a condition to give statement. In this case it is seen that some documents bear double exhibit number, once during evidence of concerned doctor and then again during evidence of concerned police officer or Magistrate. Thus letter given by Head Constable Dhanlagade is given Exh.43 during evidence of said Head Constable and it was given Exh.29 when Dr. Ghule proved his endorsement thereon.

24. Head Constable Dhanlagade stated that he went on next day i.e. 17.1.2005

to the Civil Hospital at 11.00 a.m. He saw the patient in a condition to give statement. Thereafter he went to Special Judicial Magistrate Jayant Joshi (Pw7), who was working in Labour Court, Ahmednagar and gave him letter Exh.38. Thereafter he came back to the Civil Hospital at about 12.00 noon and met Dr.Khandekar (Pw6) and gave letter to the doctor enquiring whether Meenakashi was in a condition to give statement. Office copy of that letter is at Exh.44. Doctor gave endorsement that she was in a fit condition. The endorsement is at Exh.33. Thereafter Head Constable Dhanlagade recorded statement of Meenakashi. It was read over to her and he obtained thumb impression of Meenakashi. Witness also stated that before recording the statement he was sure that the patient was conscious and in a condition to give a statement. The dying declaration is proved at Exh.45.

25. Thereafter Special Judicial Magistrate Jayant Joshi came. He also gave report to the doctor in order to ascertain that the lady was in a position to give statement and thereafter P.W.7-Joshi recorded statement of Meenakashi. At that time, Head Constable Dhanlagade, Jayant Joshi and the doctor were present near the patient. P.W.7-Joshi handed over dying declaration to him in sealed condition. Thereafter Head Constable Dhanlagade went to the place of incident, drew spot panchanama. He handed over custody of muddemal attached to Muddemal Clerk. A.P.I. Medhe perused the papers and Head Constable Dhanlagade registered offence u/s 307 of IPC as Crime No. 3 of 2005.

26. It is argued before us that the document at Exh.50 which is copy of F.I.R. shows that information was given to police on 17.1.2005 at 22.30-22.35, but entry in station diary was taken on 17.1.2005 at 6.30. It is argued before us that original copy of F.I.R. is Exh.45 and it shows that the crime was registered on 17.1.2005 at 4.35 p.m. Exh.50 is copy of F.I.R. register and it is this register which bears time of 22.30-22.35 as time of receiving information at the police station. It may be noted that the time on complaint Exh.45 is partly over written. It is argued before us that Head Constable Dhanlagade has treated the statement recorded by him of Meenakashi as F.I.R., but he did not register crime immediately. As per endorsement of doctor the statement was recorded by 12.30 noon on 17.1.2005. In cross-examination Head Constable Dhanlagade admitted that the police officer continues on duty for 12 hours. He was on duty from earlier night. The incident of burn had taken place within limits of Central Bit of their police station. He then admitted that he had given direction to A.S.I. Misal, incharge of Central Beat to enquire into case. The letter to that effect is proved by him at Exh.51. Thereby Dhanlagade had requested A.S.I. Misal to take further action since Meenakashi was admitted in Civil Hospital. The order is dated 16.1.2005, but below signature date is 17.1.2005. Head Constable Dhanlagade stated that A.S.I. Misal had not taken that order. So, it is argued before us that ordinarily A.S.I. Misal should have recorded statement of deceased and he should have prepared panchanama of the spot. It is not that A.S.I. Misal was on leave and in that case there would not be order in his name. It was suggested to P.H.C. Dhanlagade that though it was suicidal case, he prepared false record. He

admitted in cross-examination that it was necessary to register offence at the earliest. In this case, it appears that eventhough the dying declaration of Misal was recorded by Head Constable Dhanlagade at 12.30 noon, he did not immediately register the offence.

27. Evidence of P.W.9-Sherkhan Pathan, PSI, shows that he took over investigation of the present crime at about 6.40 p.m. on 17.01.2005. He also recorded statement of Meenakshi on same day but same does not bear any endorsement of Medical Officer on duty or thumb impression of Meenakshi. It appears that he recorded statement mainly to verify that the appellant had not brought mutton at 10.00,10.30 p.m. as recorded in earlier statements, but at 8.00, 8.30. Said statements cannot be on better footing than other two recorded by P.H.C. Dhanlagade or P.W.7-Joshi.

28. P.W.7-Jayant Joshi has stated that he was working as a Superintendent in Labour Court at Ahmednagar. He was appointed as the Special Judicial Magistrate on 17.01.2005 at 11.20 a.m. Police Head Constable Dhanlagade of Camp Police Station approached him with request letter for recording dying declaration of Meenakshi. He proved the office copy of the letter at Exh.38. According to him, thereafter, he took entry in the movement register and went to Civil Hospital, Ahmednagar. He reached at 12.30 noon approximately. First, he went to Consulting Room, but he learnt that the Doctor was in burn ward. Thereafter, he went to burn ward and met Dr. Khandekar. He gave letter to the doctor and requested him to give report whether Meenakshi was in a condition to give statement. Doctor told him that just prior to their meeting, he had examined the patient. She was conscious. Thereafter, Jayant Joshi recorded statement of Meenakshi. The statement was recorded in presence of Head Constable Dhanlagade. The statement is proved at Exh.39. He stated that it was recorded as told by Meenakshi and he had read over to her and she admitted it to be true and then he signed on it. Thumb impression of Meenakshi was also obtained. The statement was recorded between 12.40 to 1.10 noon.

29. P.W.4-Prakash has admitted in his statement that he was working as a Peon in the Labour Court, Ahmednagar. Special Judicial Magistrate-Jayant Joshi also admitted that P.W.4 Prakash was working in his office. They were serving together for 7-8 years prior to the incident and their relations were good. But, according to P.W.7-Jayant Joshi, when he recorded statement, he was not knowing that deceased Meenakshi was sister of P.W.4-Prakash. He came to know it later on.

30. It is argued before us that besides fact that P.W.4 Prakash and P.W.7-Jayant Joshi have been colleagues working in same office for 7-8 years, the powers of recording dying declaration are also conferred with Tahsildars and Naib Tahsildars and they are called Special Executive Magistrate and their offices are nearer than Labour Court and still Head Constable Dhanlagade approached P.W.7-Jayant Joshi instead of Tahsildar or Naib Tahsildar. It is further argued before us that after giving letter to P.W.7-Jayant Joshi, Head Constable-Dhanlagade did not wait for

P.W.7-Joshi to come and record statement. He rushed ahead and recorded statement of Meenakashi. Though both dying declarations are almost identical, in statement before Head Constable Dhanlagade, Meenakashi had given many more details and dying declaration is of one and half pages. Therein Meenakashi has stated that on 16.1.2005 at 10.30 to 10.45 her husband had brought mutton and was drunk. He asked Meenakashi to prepare mutton. He was also abusing her. He was saying that she had illicit relations with others and he went to the extent saying that Meenakashi had illicit relations with her son Atul. He also asked Meenakashi to take meals with him, but she refused on the ground that it was Sunday her fasting day. After meals, Atul went to his friend's house and accused started abusing more and said that her conduct was not good. He poured kerosene on her person and set her on fire. Atul came and extinguished fire. It may be noted that it is not case of Atul that he extinguished fire. In fact, according to him, he came much later when his grandfather and maternal uncle had come. The statement recorded by the Special Judicial Magistrate - Jayant Joshi is relatively shorter version.

31. It may be noted that Dr.Khandekar has endorsed on both the dying declarations after completion of the statement that the patient is in a fit condition to give statement. Admittedly such endorsements were made by the doctor after the statements were complete. Dr.Khandekar in his statement at Exh.32 has stated that he had examined the patient and patient was in a condition to give statement when both the dying declarations were recorded, but he admitted that he had not made any entry regarding patient being conscious and in fit condition before statement was recorded. P.W.7-Jayant Joshi Special Judicial Magistrate has admitted in his cross-examination while recording dying declaration of patient it is mandatory to first obtain remarks about physical and mental condition of the patient and then to proceed with recording and in the present case he obtained remarks only after recording the statement.

32. It is argued before us that in view of falsity of oral dying declaration, possibility of tutoring and Meenakashi for giving dying declaration cannot be ruled out. Only her relatives from parental side were with her. The conduct of Head Constable Dhanlagade in not immediately recording the crime but registering it after about 4 to 5 hours, if not after almost 10 hours and in going to spot and making panchanama before registering crime, creates doubt about his bona fides. Our attention was brought to the fact that PSI Pathan had taken over investigation at 6.40 p.m. and till then without registering the crime Head Constable Dhanlagade was taking various steps. In fact, his duty hours were over at 12.00 noon. A.S.I. Misal is not examined and there is no explanation why A.S.I. Misal did not take steps though crime was committed within his Beat. It is not that Head Constable Dhanlagade was superior of A.S.I. Misal.

33. It is also argued that Special Judicial Magistrate Jayant Joshi can not be said to be independent witness. P.W.4-Prakash -brother of deceased has thick relations with him. They had been working together for 8-9 years prior to the

incident. So possibility of tutoring Meenakshi and creating false dying declaration should be considered in the light of circumstances that oral dying declarations are not worthy reliance. Earliest information to the doctor while admitting Meenakashi was of attempt of suicide. Moreover, evidence of landlord P.W.2-Sunil Deshmukh raises further doubt whether really it was homicide or suicide. In cross-examination, landlord Sunil Deshmukh stated that accused/appellant was outside. The door of the room was chained from inside and door was opened by giving kick. Moreover, P.W.4-Prakash also admitted that persons gathered had told him that Meenakashi set herself on fire in anger. Such conduct of people is relevant u/s 8 of Evidence Act. Inaction on the part of P.W.4-Prakash or P.W.3-Atul in not informing Police regarding attempt of homicide by appellant, so also giving history by P.W.4-Prakash to Dr. Ghule of suicidal burns, raise question whether dying declarations are true and reliable.

34. As observed in the case of Dashrath (supra) the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. It should not be result of either tutoring, prompting or product of imagination. The Court must be satisfied that what is stated in the dying declaration was truth and it is absolutely safe to act upon it. In the present case it is difficult to say that it is proved beyond reasonable doubt that death of Meenakashi was not result of suicide attempt but it was result of homicidal attempt.

35. Here we may also refer to the motive stated. So far as the appellant is concerned his drunkenness, abusing his wife and suspecting chastity of wife had been usual feature. Nothing new happened on the day of incident. On the other hand, for Meenakashi besides abuses in drunkenness and usual allegations of unchastity, it is stated in Exh.33 that accused had gone to such a low level as to say that Meenakashi had illicit relations with their son Atul. So in the circumstances, it is possible that when Atul had gone to his friend's house and her husband had gone to answer nature's call outside, Meenakashi might have set herself on fire and when felt agonies of fire, raised shouts. People then gathered and extinguished the fire. So, possibility of defence being true cannot be said to be remote.

36. In this case, there is no eye witness. Conviction is based on dying declarations and circumstantial evidence. The dying declarations are not free from doubt. Perhaps they may be product of tutoring, prompting or imagination and the circumstances proved did not necessarily rule out possibility of theory of suicide, since the circumstances did not exclude hypothesis of suicide. The appellant is entitled to get benefit of doubt. In these circumstances we give benefit of doubt to the accused/appellant and allow this appeal and pass following order.

i. The Criminal Appeal is allowed.

ii. The judgment and order dated 9th December, 2005 passed by the I Adhoc Additional Sessions Judge, Ahmednagar in Sessions Case No. 84 of 2005

convicting the appellant-accused for an offence punishable u/s 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay a fine of Rs. 500/-, in default, to suffer rigorous imprisonment for one month, is quashed and set aside. The appellant is acquitted of the charge for which he was tried and convicted.

He be set at liberty forthwith if not required in any other crime. Fine amount, if paid, be refunded to the appellant.