
(2007) 09 BOM CK 0010
In the Bombay High Court
Case No : Criminal Appeal No. 63 of 2005

Vasanta Gajbhiye

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 27-09-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374
Penal Code, 1860 (IPC) — Section 302, 307, 498A

Citation : (2007) 109 BOMLR 2214

Hon'ble Judges : D.D. Sinha, J;B.P. Dharmadhikari, J

Bench : Division Bench

Advocate : R.M. Patwardhan, for the Appellant; T.A. Mirza, APP, for the Respondent

Final Decision : Allowed

Judgement

B.P. Dharmadhikari, J.—By this Criminal Appeal filed u/s 374 of the Criminal Procedure Code, the appellant is challenging the judgment dated 29.12.2004 delivered by the 6th Ad-hoc Additional Sessions Judge, Nagpur, in Sessions Trial No. 346 of 2001, whereby the said Court has found him guilty of an offence punishable u/s 302 of Indian Penal Code and he has been sentenced to suffer R.I. for life as also to pay fine of Rs.1,000/-and in default to suffer R.I. for six months. He has also been found guilty of an offence punishable u/s 498-A of Indian Penal Code and has been sentenced to suffer R.I. for two years and to pay fine of Rs.500/-or in default to suffer R.I. for three months. The substantive sentences are to run concurrently.

2. The case of the prosecution is that on 5.4.2001 at his house at Adam, the appellant committed murder of his wife deceased Seema. He also used to subject her to mental as well as physical cruelty falling u/s 498-A of Indian Penal Code. The marriage of the appellant with Seema was performed on 27.6.1999 and the appellant was in service as a Teacher in a School at village - Kini run by the Zilla Parishad, Nagpur. The appellant and deceased resided together at Adam with

parents of the appellant viz., Shrawan Gajbhiye and Manjula Gajbhiye. The deceased also gave birth to a son by name Sanket who at the time of incident was 9 months old. The appellant used to travel to and fro between Adam and Kini to attend his duties. Father of deceased had given a gold ring of 5 grams to the appellant at the time of marriage, however, the same was not being seen in the finger of the appellant since prior to about 1 1/2 years of the incident. The deceased Seema, therefore, used to enquire about said gold ring and the appellant used to quarrel with her and beat her. The prosecution also alleged that the appellant had illicit relations with one Ukabai wd/o Nehru Khobragade, who is the daughter of his mother's sister. The appellant used to keep condoms in pockets of his pants and deceased Seema used to remove the same. On that count also appellant beat deceased and gave trouble to her. On 5.4.2001, Seema woke up at about 6.00 AM and she cleaned her house and boiled milk on the hearth. She also boiled water and then asked appellant to wake up to take bath. Her father-in-law Shrawn had gone to his field and mother-in-law was sitting in the courtyard. The appellant woke-up at about 7.00 AM and scolded the deceased saying that all ladies in the neighbourhood were already awake and had already removed cow dung from cow shed but the deceased had not done her job. He assaulted the deceased by means of fist blows. Thereafter the deceased fed milk to her son and handed him to her mother-in-law in courtyard. She entered the house and the appellant closed the door of the house and poured kerosene oil from plastic can on her person and set her on fire by lighting match stick. She shouted. Her neighbours Mukund Gajbhiye and Bhura Gajbhiye and others came to her house, extinguished the fire by pouring water. Thereafter the appellant along with 3-4 persons shifted her by a jeep to Government Medical College & Hospital, Nagpur. PW-5 - Baba Titarmare, who was working as Head Constable at the relevant time at Police Station, Kuhi, received the information forwarded from Police Booth at Government Medical College and Hospital, Nagpur, on 6.4.2001 and he rushed to Hospital and recorded dying declaration of Seema vide Exh. 30. He also issued requisition to Executive Magistrate, Nagpur, for recording dying declaration and Executive Magistrate recorded dying declaration which is at Exh. 24. The Head Constable - Mahadeo Rithe registered Crime No. 52 of 2001 u/s 498-A, 307 of Indian Penal Code against the appellant. While undergoing medical treatment, Seema died on 7.4.2001. Head Constable - Bala Titarmare prepared spot panchnama (Exh. 32). He seized plastic can containing rocket, one broken match stick, burnt pieces of clothes of Seema by drawing seizure panchnama (Exh. 33). He also recorded statement of witnesses during investigation. After death of Seema, offence u/s 302 of Indian Penal Code was added and appellant came to be arrested on 7.4.2001. Further investigation was handed over to Police Inspector Dhone, who then sent seized articles to Chemical Analyser and after completing investigation submitted charge sheet in the Court of Judicial Magistrate First Class, Kuhi, on 6.6.2001. The said Court thereafter committed the matter for trial to Sessions Court. The learned Ad-hoc Additional Sessions Judge framed charges vide Exh. 14 which were denied by the appellant. Hence, the prosecution led evidence and

after completing trial and recording statement of appellant u/s 313 of Criminal Procedure Code, the learned Court below passed the judgment of conviction which is impugned in this appeal.

3. We have heard Shri Patwardhan, learned Counsel for the appellant and Shri Mirza, learned Additional Public Prosecutor for the respondent.

4. Shri Patwardhan, learned Counsel for the appellant has contended that there are no eye witnesses to the incident and the conviction is based only upon dying declarations. He contends that dying declarations are shrouded with suspicious circumstances and therefore could not have been relied upon. He argued that though the incident had taken place on 5.4.2001 at about 8.00 O" clock in the morning, the dying declaration has been recorded by PW-5. Bala, on the next day and he has not put any time upon it. It is contended that he did not obtain any fitness certificate regarding the condition of Seema from doctor attending her and he further states that Bala thereafter got dying declaration recorded through PW-4 - Dhanraj. He states that Dhanraj has mentioned that he started recording of dying declaration at 6.00 PM on 6.4.2001. He points out that First Information Report has been registered on 6.4.2001 at 11.15 PM. In this background, he invites attention to Exh. 29 i.e. the information given by police booth at Government Medical College & Hospital, Nagpur, to Police Station, Kuhi, and he points out that said information was sent at 10.15 AM on 5.4.2001. He heavily relies upon the condition of patient as mentioned therein. He argues that when patient was not fit to make statement at 10.15 AM on 5.4.2001, there was no question of recording any dying declaration of the deceased on 6.4.2001 more than 24 hours after the incident. He contends that doctor did not certify that deceased was fit to give dying declaration and therefore only PW-5 - Bala has not placed on record the certificate of doctor. He contends that even name of doctor has not been disclosed by him. He further points out that PW-4 - Dhanraj, Executive Magistrate, who knew how to record dying declaration, did not obtained any fitness certificate from the doctor. He points out that in cross-examination Dhanraj has admitted that the patient was not conscious throughout and was also groaning because of pain. He argues that the case is of 100% burns and in such circumstances these two dying declarations i.e. Exhs. 30 and 24 are unreliable and could not have been acted upon to punish the appellant. He invites attention to deposition of PW-2 - Anjirabai and PW-3 - Ranjanabai. Anjirabai is the mother of the deceased while Ranjanabai. is her maternal aunt and he points out that the statement of both these ladies are recorded by police for the first time on 7.4.2001 after death of Seema. He, therefore, argues that these statements are managed and theory of oral dying declaration by the deceased Seema to them is an after thought. He contends that had Seema really disclosed to them the fact that the appellant poured kerosene on her person and set her on fire, these two ladies would have immediately gone to police booth to report the offence so that appellant could be arrested. He argues that the appellant has been arrested on 7.4.2001 and according to him in these circumstances, the evidence of these ladies is also of no use to the prosecution.

He has placed reliance upon the judgment in the case of Mohan Lal and Ors. v. State of Haryana reported at 2007 (2) Crimes 177 in support of his contention. He has also taken the court through other evidence and material to contend that when deceased was brought by Jeep to Nagpur by various persons, none of them has been examined by the prosecution. He contends that the deceased had also named (as alleged) certain persons in her dying declarations but those persons are also not examined. He argues that in the above background, evidence of these independent and unrelated persons was of great importance and non-examination of these persons has vitiated the entire trial. He has placed reliance upon the judgment of the Division Bench of this Court in Manohar v. State of Maharashtra reported at 2000 (2) Mh. L.J. 3. He further argues that in these circumstances, when dying declarations are not free from doubt and possibility of fabrication cannot be ruled out, the appellant is entitled to be acquitted. He further states that it was only accident in which the deceased Seema got burnt. He states that it has come on record that at the time when Seema caught fire, the appellant was not with her and he was in the bath room. He, therefore, contends that the appellant was not the person last seen in the company of the deceased and therefore, there is no presumption against him in the matter. He further contends that the appellant has relied upon the material already on record to show his innocence and he relies upon the Division Bench judgment of this Court in the case of Bhagirath Bhaurao Kanade v. The State of Maharashtra reported at 1996 (4) Crimes 65, to contend that benefit of uncertainty in this respect must be given to the appellant accused.

5. The learned Additional Public Prosecutor has, however, placed strong reliance upon dying declarations at Exhs. 30 and 24 and has further contended that oral dying declarations made to PW-2 and PW-3 are also sufficient to sustain the conviction. It is argued that there is no inconsistency or contradiction in any of the dying declarations and hence the objections to the same raised by the appellant need to be rejected. It is contended that information at Exh. 29 forwarded by police booth at Government Medical College and Hospital at Nagpur was received at concerned police station and thereafter the said police got knowledge of the incident and then arrangements were made to record dying declaration. It is contended that in these circumstances, there is no delay in the matter at all. The attention is also invited to the report of Chemical Analyser at Exh. 38 to contend that the kerosene residue was detected on the clothes of deceased. It is argued that in cross examination of PW5, the map of spot as also seizure of plastic can has already been accepted and proved. The learned APP relied upon the judgment of the Hon'ble Apex Court in the case of Laxman Vs. State of Maharashtra, , to state that reliance upon dying declarations by Court below is justified and no interference is warranted in appeal.

6. The fact that death of deceased Seema is not natural is not in dispute before us. The fact that she got 100% burn injuries on 5.4.2001 at about 8.00 AM at her residence is also not in dispute. The prosecution has examined Ravindra Rehapade. PW-1, who is panch on spot and he was declared hostile. PW-2 -

Anjirabai w/o Ashok Bansod is the mother of deceased who went to Government Medical College and Hospital at Nagpur, after the deceased was admitted there on 5.4.2001. PW-3 - Sou. Ranjanabai w/o Rajkumar Bansod, is maternal aunt of the deceased who met her on 5.4.2001 at Government Medical College and Hospital, Nagpur. We are required to consider evidence of both these ladies in some details little later. PW-4 - Dhanraj Nimbaji Bhalekar is Naib Tahsildar, who recorded dying declaration of deceased on 6.4.2001 and PW-5 - Bala Sadashivrao Titarmare was at the relevant time Head Constable attached to the Police Station, Kuhi and he has also recorded dying declaration and has also recorded spot panchnama and seizure panchnama. He also issued requisition to PW-4 for recording dying declaration. He has also proved the fact of forwarding of seized articles to Chemical Analyser by Police Inspector Dhone and Chemical Analyser's report as well as Post mortem report. The post mortem report and the reason for death as recorded therein i.e. septicemia due to burns has not been disputed by the appellant. We have to therefore consider two dying declarations i.e Ex.30 & Ex. 24 first.

7. Shri Patwardhan, learned Counsel for the appellant, contended that the recording of two dying declarations by prosecution on 6.4.2001 was deliberate and was done with a view to anyhow implicate the appellant. He also contended that first PW-5 recorded dying declaration at Exh. 30 and thereafter PW-4 has recorded dying declaration at Exh. 24. However, on record before us, there is no material to show as to which one of the dying declarations came to be recorded first.

8. The evidence of PW-5 which is relevant for the purposes of dying declaration Exh. 30 recorded by him shows that on 6.4.2001, he was present at police station when he received information from police booth located at Government Medical College and Hospital, Nagpur, about admission of Seema (deceased) on 5.4.2001 with burn injuries. As per orders of P.I. he came to hospital for recording her dying declaration. He has proved the information received vide Exh. 29. He has thereafter stated that he issued requisition to doctor to find out whether Seema was in fit condition to give statement and doctor made endorsement that she was fit to give statement. He then recorded dying declaration of Seema as per her say, read it over to her and then she put her thumb mark on dying declaration and he also signed it. He identified that thumb mark and his signature and stated that contents are correct. The dying declaration was then exhibited as Exh. 30. He states that thereafter he went to Police Station and handed over dying declaration and on the basis of said dying declaration, Head Constable - Mahadeo registered Crime No. 52 of 2001 u/s 498-A read with Section 307 of Indian Penal Code against the appellant. Printed FIR is Exh. 31 which bears his signature. Thereafter he has stated about recording of Spot panchnama Exh. 32, seizure of kerosene can, match box and torn pieces of petticoat and Saree vide Exh. 33 and recording of Inquest Panchnama (Exh. 34). He has also pointed out Post mortem report (Exh. 35). He has thereafter stated that on 6.4.2001 he issued requisition to Executive Magistrate, Nagpur, for

recording dying declaration of Seema vide Exh. 33. In his cross examination, he accepted that Head Constable Ashok Sayare working at Police Booth in Government Medical College and Hospital, Nagpur, stated that patient had sustained 100% burn injuries and she was not fit to give statement. He has also stated in Exh. 29 that she received burn injuries due to explosion of stove. He stated that stove was not on the spot when he visited it and therefore he did not seize the stove. He further stated that requisition issued to doctor before recording of dying declaration was not on record and he could not tell the name of the doctor who issued fitness certificate. He denied that he did not issue requisition to doctor and he did not record dying declaration of Seema. He stated that he put several questions to Seema and she gave answers to the same and he did not make note of the questions and replies given to it anywhere. He stated that during investigation it transpired that gold ring of 5 gms. was given to the accused/ appellant in marriage was lost and on that count quarrel used to take place between the appellant and Seema. He stated that on 7.4.2001, he recorded statement of four witnesses who were residing at Adam and he also recorded statement of six witnesses who were resident of Nagpur. He stated that during investigation he gathered that some persons collected near the house of the appellant and one Shekhar Shende went to the house and extinguished the fire of Seema. Sheshrao Khobragade and Dhanraj Choudhari had followed Shekhar Shende. He denied that during investigation he came to know that the parents of the appellant were not at home and the appellant was in bath room. He accepted that Seema has stated in her dying declaration that father of the appellant had gone to field and his mother was present at the time of incident. He stated that Shekhar Shende said in his police statement that parents of appellant/accused were not at house and Shekhar saw accused standing in the courtyard of the house. He denied that at the time of occurrence the appellant was in the bath room of his house. He accepted in cross the map of the spot drawn by him and he pointed out that the incident had taken place in the bed room of the house of the appellant.

9. The perusal of dying declaration dated 6.4.2001 (Exh. 30) recorded by him shows that deceased stated that she was residing at the address mentioned at its top and was doing household work. She has given her date of marriage and that she was residing with parents of appellant and having a son aged about 9 months. She stated that her husband was a Zilla Parishad Teacher at Kini and was daily going to Kini and coming back. She has then stated about her waking up at 6 O'clock and cleaning of house and boiling of milk on the hearth and then boiling of water. She has stated that she awoke her husband and asked him to take bath. Her father-in-law had gone to field and mother-in-law was sitting in the courtyard. Her husband had woken up at about 7 O'clock and scolded her by pointing out that other ladies in the neighbourhood had already woken up and had cleaned cow dung. He beat her with fists. She stated that she administered milk to her little child and gave him to her mother-in-law and again came in the house. She stated that her husband suddenly closed the door of the house,

poured kerosene from the container on her person and ignited the match stick and threw it on her person and thus set her on fire. She shouted and persons residing nearby viz., Mukunda Gajbhiye, Bhura Gajbhiye and other persons came running. 2-3 persons extinguished the fire by pouring water. Her husband and 3-4 persons from village then put her in a jeep and brought her to Government Medical College and Hospital, Nagpur. Thereafter she has stated that her father had given a gold ring weighing 5 gms. to her husband at the time of marriage and since last one year said ring was not seen in the finger of her husband and hence she used to ask him about it. Her husband used to beat her after altercation. She stated that she also used to see packets of condoms in her husband's pockets and she used to take out those packets without asking him and therefore also he used to beat her. He subjected her to harassment by beating and she had narrated said fact to her parents once or twice. She stated that her husband used to utter that she is daughter of beggars. At the end she again stated that her husband closed the door of the house, poured kerosene from the container on her person and set her on fire with match stick. She has stated that her dying declaration was correctly recorded as per her version. Thereafter there is thumb impression of Seema and under the words before me., there is signature of PW-5. In margin, S.D.P.O. (sub divisional police officer) has on 7.4.2001 made endorsement seen with his signature and date.

10. The document at Exh. 29 --information received by PW-5 at Kuhi shows that it was forwarded as per information from Chief Medical Officer at Government Medical College and Hospital, Nagpur. It states that Seema sustained 100% burn injuries as her Saree got fire on account of flaring up of stove while cooking food in the house on 5.4.2001 at 8 O" clock and she was admitted to casualty on 5.4.2001 at 10.30 O" clock by her husband. Vasanta Shrawanji Gajbhiye. It also states that patient was not fit for giving statement. After receipt of this information, PW-5 came to record dying declaration in the light of this intimation. Though in chief, he has spoken about requisition given to doctor to verify fitness of Seema and though he has stated that doctor has issued the fitness certificate stating that Seema was fit to give statement, alleged requisition has not been placed on record. The fitness certificate allegedly issued by doctor is also not on record. Not only this, PW-5 could not tell the name of the doctor who issued fitness certificate before recording dying declaration. This omission assumes importance in the facts and circumstances of the case in hand and also in view of same omission in dying declaration at Exh. 24 recorded by PW-4. DhanraJ.

11. PW-4. Dhanraj has stated that he was at the relevant time working as Naib Tahsildar at Nagpur and on 6.4.2001 he got requisition from the Police Station, Kuhi, for recording dying declaration of Seema. He identified the said requisition which is Exh. 23. He accordingly went to doctor with the requisition and doctor gave him permission for recording dying declaration. He then disclosed to Seema that he wanted to record her dying declaration and she expressed her readiness for the same. She then told him that on 5.4.2001 appellant asked her to give milk and therefore she lighted stove for boiling milk. As some time was required

for boiling milk, the appellant beat her by kick blows. She further told him that she had kept water for him to take bath. Then she returned back to her room and the appellant followed her, closed the door of the house, poured kerosene on her person and set her on fire. He stated that he recorded dying declaration as per her say and read over its contents to her. She admitted its contents to be correct. He obtained her thumb mark on dying declaration. He stated that as first thumb mark was not properly put, he obtained second thumb mark of her left hand on the dying declaration. He has also placed his signature on the dying declaration. He stated that doctor also made endorsement on the said dying declaration as seen It was marked as Exh. 24 and immediately thereafter he added that Sub-Divisional Police Officer made endorsement i.e. seen. In cross examination he accepted that there was no endorsement by doctor on dying declaration. He stated that he did not put time in dying declaration indicating when recording was started and when it was complete. He stated that he did not take note anywhere about grant of oral permission for taking dying declaration of Seema and he did not obtain written permission from the doctor to record dying declaration. He stated that he has not placed on record copy of requisition. He stated that Seema had sustained 100% burn injuries and he put 4-5 questions to her and he did not take note of those questions. He took entry of answers given by Seema in her dying declaration and he did not record dying declaration of Seema in question- answer form. In cross examination, he stated that he went to Ward No. 4 at about 6.00 PM and relatives of Seema were present with her but he removed them at the time of recording dying declaration. He denied initially that Seema was groaning but immediately thereafter in next breath he stated that she was groaning. Thereafter he stated that she was unconscious to some extent but immediately in next breath again he has stated that she was not unconscious. He denied that Seema was unconscious and she did not talk with him.

12. The requisition at Exh. 23 issued by PW-5 to PW-4 is dated 6.4.2001 and it is apparently prepared as per Exh. 29. It also mentions that Seema got 100% burn injuries due to sudden flaring up of stove. PW-4 has received it at about 5.45 PM on 6.4.2001. Exh. 24 is dying declaration which mentions the time as 6 O' clock in the evening in Ward No. 4. It mentions name and address of Seema and then it records that Seema has started giving dying declaration by mentioning. I state truth on oath. Seema stated that she was married and had one son aged about 9 months. Her husband was a teacher in School at Kini. She has stated that at about 8 O' clock in the morning, her husband demanded milk. Since delay occurred in serving milk, her husband beat her with fists and at that time her little child was with her. She lighted stove in order to boil milk and while boiling milk, he also beat her with kicks. She had kept bucket full of water for bathing. When she entered the house, appellant followed her. He closed the door of the house and after pouring kerosene on her person, he himself set her on fire. Then there is thumb impression of Seema on Ex. 24 and thereafter PW-4 has put a remark that he personally recorded the statement and he has placed her

signature and date as 6.4.2001 below it. In margin word "Seen" is written and there is a signature of S.D.P.O. with date 7.4.2001. Then there is endorsement of Police Inspector addressed to Head Constable Buckle No. 907 to register an offence u/s 307 of I.P.C. and make investigation.

13. Thus, again this dying declaration shows that PW-4. Executive Magistrate has not obtained any fitness certificate from the doctor. He only states that doctor gave him permission for recording dying declaration. He himself does not say that he put any questions to Seema to ascertain her fitness & to find out whether she was in a fit condition to give dying declaration. On the contrary, he has tried to state that doctor has made endorsement on said dying declaration as ".Seen" but later on he pointed out that it was by S.D.P.O. and corrected himself immediately. In cross examination, he has stated that Seema was groaning, obviously due to pain though initially he denied it. He also stated that she was unconscious. This evidence along with the fact that there is no verification of fitness of the deceased Seema either by him or by doctor clearly casts a serious doubt about the entire process of recording of dying declaration. Stand of witness that doctor gave him permission to record dying declaration shows that he was very much aware of such condition and its importance. Exh. 23 which required this witness to record Seema's dying declaration mentions the fact of stove flaring up suddenly and Seema sustaining 100% burn injuries. If PW-4 had received Exh.23, it was necessary for him to obtain fitness certificate from Doctor before recording dying declaration. However, he has not done so. Exh. 23 is obviously prepared after receipt of Exh. 29 because it mentions the same fact. It also was prepared before alleged dying declaration recorded by PW-5 - Bala otherwise the language of Exh. 23 would have been different and PW-5 - Bala would have mentioned in it that Seema was burnt by her husband as per information gathered by him.

14. The information (Exh. 29) clearly mentions that Seema was not fit for giving statement and she had sustained 100% burn injuries. In view of this position, it was obligatory on the part of PW-4 and PW-5 to obtain fitness certificate of the deceased Seema before recording of her dying declaration. They ought to have mentioned said verification & satisfaction in the respective dying declarations recorded by them. The evidence of PW-4. Dhanraj shows totally unsatisfactory state of affair in this respect. Neither he himself has taken any trouble to find out whether Seema was fit to give her dying declaration nor he obtained any such certification from doctor. His cross examination shows that Seema was in pain, groaning and was also unconscious. In view of this position, dying declaration recorded by PW-4 at Exh. 24 cannot be accepted.

15. PW-5 has not given any time of his arrival at Nagpur or the time at which he started recording statement of Seema or time of its completion. In view of receipt of Ex. 29, he was aware of fact that Chief Medical Officer had stated that Seema was unable to give any statement. It is not the case of prosecution that said mention is at the instance of appellant Still PW5 has made incorrect

statement about obtaining the fitness certificate from doctor in his examination-in-chief. Not only this, his statement that FIR was registered on the strength of Ex. 30 is contrary to record. It is, therefore, apparent that in view of this position, dying declaration at Exh. 30 also cannot be accepted and acted upon. Evidence of PW4 Dhanaraj also reveals that Seema was in pain, groaning and unconscious. As per story of PW 4 & 5 doctor was very much available there and in the above background it can not be concluded that they were not aware of vital necessity of doctor's fitness certificate. PW-5 has stated that after recording statement of deceased Seema at Exh. 30, he went back to Kuhu and handed over the same to Head Constable - Mahadeo who then registered Crime No. 52 of 2001 u/s 498-A, 307 of Indian Penal Code against the appellant. He has also proved First Information Report at Exh. 31. He has, therefore, stated that FIR was registered on the strength of statement recorded by him. Perusal of FIR reveals that the police station has received information of the incident dated 5.4.2001 on 6.4.2001 at 23.15 hrs. General Dairy Reference Entry No. is also mentioned as 39 of 2001 with time 23.15 hrs. and type of information is stated to be oral. PW-5 has been mentioned as informant. This material, therefore, shows that intimation at Exh. 29 was not received by police station before 23.15 hrs. on 6.4.2001. It is, therefore, also apparent that when intimation itself was not received by police station before 23.15 hrs., PW-5 could not have recorded any dying declaration of Seema and PW4 could not have recorded any dying declaration at 6.00 PM on 6.4.2001 before that. Para 15 of First Information Report shows that Mahadeo has mentioned therein that he was on duty from 2000 hrs. to 0800 hrs. and during his duty hours, Head Constable Bala Titarmare, PW-5 brought and produced dying declaration and statement of patient named Sau. Seema. It is, therefore, apparent that First Information Report separately mentions dying declaration (Exh. 24) recorded by PW-4 and statement Exh. 30 recorded by PW-5. Thus, PW-5 has also been falsified by First Information Report even in this respect.

16. In the circumstances no definite finding about the recording of dying declarations Ex.24 & 30 is possible. However, there are also two oral dying declarations on record. At this stage, it is to be noted that arrest of the appellant/ accused on 7.4.2001 is not in dispute. The first oral dying declaration is to PW-2 - Anjirabai, mother of deceased. We are only referring to the relevant portion of her evidence in this respect. In para 4 of her deposition, she has stated that telephonic message was received by her sister-in-law at village Pimpalgaon and then one Sidhartha came from Pimpalgaon at her house and informed that Seema got burnt and was admitted to Government Medical College and Hospital. She came to hospital and enquired from Seema as to how she sustained burn injuries. Seema told her that in the morning the accused beat her since she did not wake up early in the morning and was not doing household work. She told that Seema disclosed to her that the appellant asked Seema to feed milk to her child and accordingly she fed milk to her child and kept water for bath of the appellant. Seema then entered the house to clean the same and the

appellant followed her from back. The appellant picked up plastic can of rocket and poured the same on her person and set her on fire by a match stick and closed the door from inside. Seema told her that because of that she sustained burn injuries. In cross examination, she accepted that the appellant shifted Seema to Government Medical College and Hospital, Nagpur by a jeep and the appellant also informed uncle of Seema who resides at Nagpur about admitting Seema in Hospital and Ghansham then informed them. She accepted that along with her husband, uncle and aunt of Seema went to the hospital and they all were near the bed of Seema till her death in the hospital. She accepted that Seema was in severe pain and she was groaning. However, she denied that Seema was unconscious and did not talk with anybody. She denied that after occurrence, the neighbours had gathered and at that time appellant came from bath room and was standing in the courtyard of the house.

17. Sau. Ranjanabai., PW-3 is Aunt of Seema and she has also stated that Seema told her that the appellant beat her saying that she did not work and there was quarrel between Seema and appellant. Seema told that she was cleaning the house and at that time the appellant poured five litres of kerosene from the plastic can on her person and set her on fire by a match stick and went away out of the house. In cross examination she denied that Seema was completely burnt or was groaning or was unconscious.

18. It is to be noted that Seema expired on 7.4.2001 and police statement of both these ladies is recorded thereafter. If one goes by record, on 6.4.2001, two dying declarations Ex. 24 & 30 were already with police. When we are not in a position to accept these two recorded dying declarations, we find it highly risky to rely upon the depositions of these two closely related women of the deceased. If the fact of burning by husband was disclosed to them on 5.4.2001 itself by deceased Seema, why no action was taken by them to see that the appellant was immediately arrested or at least offence was registered against him. They or other relative could have gone to Police booth located in Government Medical College and Hospital, Nagpur, and lodged complaint in this respect but that also has not been done. In these circumstances, and particularly after considering the conduct of experienced and trained persons like PW-5 and PW-4 in not ascertaining or obtaining fitness certificate from the doctor though doctor was very much present in ward, it is clear that the theory of oral dying declarations introduced through later statements of PW-2 and PW-3 is also not free from doubt and cannot be accepted.

19. The dying declarations at Exhs. 24 and 30 do not inspire confidence for one more reason. Dying declaration at Exh. 24 recorded by PW-4. Dhanraj expressly mentions statement by the deceased Seema that she lighted "stove" in order to boil milk. Even deposition of PW-4 confirms this statement. However, dying declaration/ statement recorded by PW-5. Bala does not mention any stove and he has used the word "hearth" there. The oral dying declarations made to PW-2. Anjirabai and PW-3. Ranjanabai does not expressly mention any hearth or stove.

As already stated above, PW-5 has stated that he did not seize any stove as there was no stove on the spot. PW-5 is the person who has recorded spot panchnama Exh. 32. When spot panchnama is seen, it discloses that one old iron stove was kept on the floor in the room and by the side of said stove and other articles one key brand match box in crumpled state was lying, match sticks were also lying there. The plastic ceiling of said middle room was burnt as it was affected by heat. Thus, from spot panchnama and dying declaration at Exh. 24, it appears that stove was very much there. In this background, the statement as contained in information dated 5.4.2001 forwarded by police booth at Government Medical College & Hospital, Nagpur, to Police Station, Kuhi, assumes importance because it states that Seema sustained 100% burns because of catching of fire by her saree on account of flaring up of stove.

20. In her statement at Exh. 30 recorded by PW-5, Seema is shown to have given names of Mukunda Gajbhiye, Bhura Gajbhiye etc. She has also mentioned that her husband and 3-4 persons from village took her in jeep and brought her to Government Medical College & Hospital, Nagpur. Time of about two hours was required to reach the hospital at Nagpur. The prosecution has not examined these witnesses to show the condition of deceased during said journey. If she was burnt and fire was extinguished and she named certain persons who were present on spot or extinguished fire, the prosecution ought to have examined those persons to point out what Seema disclosed to them. Similarly, the persons travelling with Seema in jeep could have thrown some light upon the incident or upon her health. These persons who are not relatives and are independent, were also not examined by the prosecution. The intimation (Exh. 29) forwarded by Police booth at hospital on 5.4.2001 to Kuhi police shows that it was prepared at 10.15 AM and it was prepared as per instructions of Chief Medical Officer, Government Medical College, Nagpur. The information clearly mentions that Seema was not fit to give any statement. It is to be noted that on 5.4.2001 at 10.15 AM there was no question of any manipulation and certainly the Police Officer at Police booth could not have recorded a wrong fact. The fact is recorded by him as informed by Chief Medical Officer. In this background, reaching of the said information at Police Station, Kuhi on next day at about 23.15 hrs. is very surprising. Not taking necessary cognisance of condition of Seema disclosed therein by Police or by PW4 or by PW5 is also shocking. All these facts therefore must be held against prosecution and in favour of appellant.

21. Though PW-2 and PW-3 have tried to state that the appellant had illicit relations with one Ukabai or appellant was giving amounts to his relatives, in view of the above discussion, we find it not necessary to go into that aspect of the matter. The fact that kerosene residue found on the clothes of the deceased. Seema is also, therefore, not important. The question was whether the deceased sustained burn injuries because of sudden flaring up of stove or not. The prosecution has not made any efforts to seize that stove though it is mentioned in Exh. 29 as also in Exh. 23. It is not the case of prosecution that this mention is at the instance of appellant. It is not their case that appellant fabricated false

story of accident to mislead police and to conceal crime. The argument of learned APP that the appellant has not taken any specific defence about the incident in his statement u/s 313 of Criminal Procedure Code is hardly of any relevance in this respect. There is no evidence on record apart from dying declarations mentioned above that the appellant and deceased were together in the room when the incident occurred. In the absence of such evidence, we find that it was not necessary for the appellant to take any specific defence in his statement u/s 313 of Criminal Procedure Code. Also there is no other evidence of any cruelty by appellant against deceased to sustain his conviction u/s 498A of Penal Code.

22. *Laxman v. State of Maharashtra* (supra) is a Constitutional Bench judgment of the Hon'ble Apex Court in which the Hon'ble Apex Court has in para 3 pointed out that since the accused has no power of cross-examination, the court insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The Court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. In the facts of present case, we find that the evidence of PW-4 and document of prosecution (exhibit 29) itself establish necessity of independent proof of fitness of Seema, We find its absence fatal to the case of the prosecution.

23. In *Mohan Lal and Ors. v. State of Haryana* (supra), the Division Bench of this Court has found that the persons who extinguished the fire ought to have been examined as they had gone to the house immediately and they could have stated as to what the deceased was saying to the accused at the time of incident. We have already highlighted above the effect of failure of prosecution to examine persons allegedly named by Seema as those who extinguished the fire or those who came with her in jeep to Nagpur.

24. *Bhagirath Bhaurao Kanade v. The State of Maharashtra* (supra), is the Division Bench judgment of this Court in which the dying declarations disclosed that the appellant poured kerosene on the deceased and history given by victim and recorded in medico legal register revealed that the burns were accidental. The doctor who examined the patient first was not examined and said entry in medico legal register was first in point of time. The Division Bench found that there was conflict in dying declaration as recorded in said entry and dying declaration appearing in medical case papers. Therefore, after observing that the prosecution has to establish that case "must be true" and not "may be true", Division Bench gave benefit of doubt to the appellant and allowed his appeal.

25. In view of the discussion above, we find that there is no legal and valid dying

declaration on record which can be acted upon and used against the present appellant. We are, therefore, not in a position to hold that prosecution has established beyond doubt the charge of murder of Seema against the appellant. We, therefore, find ourselves unable to sustain and maintain the judgment dated 29.12.2004. Accordingly, said judgment is quashed and set aside. The appellant is acquitted of offences punishable u/s 302 read with Section 498-A of the Indian Penal Code. Consequently, fine amount, if any, recovered from him should be refunded to him in accordance with law. The appellant be set at liberty if he is not required in any other matter. Criminal Appeal is accordingly allowed.