IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.617 OF 2015

Chandrabhagabai w/o Namdev Jagle,
Age 84 yrs., Occ. Household,
R/o Katejawalga, Tq. Nilanga,
Dist. Latur.

... Appellant

... Versus ...

The State of Maharashtra
Through Police Inspector,
Police Station, Nilanga,
Dist. Latur.

... Respondent

...

Mr. G.K. Chinchole, Advocate h/f Mr. S.M. Vibhute, Advocate for appellant

Mr. S.J. Salgare, APP for respondent

...

WITH

CRIMINAL APPEAL NO.242 OF 2023

Sanjay Namdev Jagle,
Age 45 yrs., Occ. Labour,
R/o Katejawalga, Tq. Nilanga,
Dist. Latur.

... Appellant

... Versus ...

The State of Maharashtra
Through Police Inspector,
Police Station, Nilanga,
Dist. Latur.

... Respondent

...

Mr. G.K. Chinchole, Advocate (appointed) for appellant

Mr. S.J. Salgare, APP for respondent

...

CORAM : SMT. VIBHA KANKANWADI AND
Y.G. KHOBRAGADE, JJ.

RESERVED ON : 05th APRIL, 2023

PRONOUNCED ON : 28th APRIL, 2023

ORDER :

1 Both the appeals are arising out of the conviction awarded to the appellants by learned Additional Sessions Judge, Nilanga, Dist. Latur in Sessions Case No.23/2013 dated 10.02.2015. Appellant in Criminal Appeal No.617 of 2015 is the original accused No.2. It would be worth to mention here that she had filed the appeal challenging her conviction on 28.07.2015 together with application for condonation of delay. The delay was condoned and her appeal was registered. However, original accused No.1, who is her son, had not preferred any appeal. Criminal Appeal No.617 of 2015 came to

be admitted on 04.08.2015 and by order date 14.12.2015 her application for suspension of sentence came to be rejected. However, the hearing of the appeal was expedited. Though the paper book was ready, it appears that the matter was not got for circulation till 14.10.2020. The learned Advocate for the appellant was absent on that day and then the matter was posted for final hearing. Thereafter also it was not regularly taken up and no interest was shown by the learned Advocate for the appellant. When the matter was on board on 29.07.2022 and the learned Advocate for the appellant Chandrabhagabai was absent, this Court directed learned APP to verify whether original accused No.1 Sanjay Namdev Jagle has filed any appeal challenging his conviction or not. When the matter was on board on 19.01.2023, learned APP produced letter from Superintendent of Jail, Central Prison, Aurangabad stating that inquiry was made with original accused No.1 Sanjay about his appeal and then he told that he has not preferred any appeal, but made a statement that due to poor financial condition he cannot make arrangement for the money, but has intention to file appeal through legal aid. Therefore, by said order dated 19.01.2023 this Court provided legal aid to accused Sanjay by appointing Advocate and asked him to work out the appeal. Accordingly, the appointed Advocate then filed appeal bearing Criminal Appeal No.242 of 2023 on behalf of accused Sanjay to challenge his conviction, which was along with criminal application for

condonation of delay of 2893 days. By order dated 15.03.2023 the said delay was condoned and the said appeal was tagged with Criminal Appeal No.617 of 2015. This is how both the appeals are now heard.

2 The prosecution story is that deceased Shalubai was the wife of accused No.1 Sanjay and daughter-in-law of accused No.2 Chandrabhagabai. The marriage between Shalubai and Sanjay took place about 15 years prior to the incident and they had three children. The occupation of accused No.1 was agriculture. A dispute arose between Shalubai and both the accused on account of partition of the land and the house around 10.30 a.m. on 28.02.2013. Both the accused abused and assaulted deceased by fist blows and thereafter accused No.2 Chandrabhagabai poured kerosene on the person of Shalubai. Accused No.1 ignited the match stick and put Shalubai to fire. Shalubai herself tried to extinguish the fire, but in that process she had sustained severe burn injuries. She was then taken to Rural Hospital, Nilanga and then shifted to Civil Hospital, Latur. Her Dying Declaration was recorded by PW 3 Assistant Sub Inspector Mr. Ranzunjare. The said Dying Declaration was treated as First Information Report and offence vide Crime No.26/2013 came to be registered under Section 307, 504, 506 read with Section 34 of the Indian Penal Code. Her supplementary statement came to be recorded. Further, the second Dying Declaration came to be recorded

through the Executive Magistrate. Shalubai expired on 08.03.2013 due to the burn injuries and then the offence under Section 302 with 498-A of the Indian Penal Code came to be added. In the meantime, the Investigating Officer had carried out the spot panchnama and recorded statements of witnesses under Section 161 of the Code of Criminal Procedure. Certain articles were seized from the spot while drawing spot panchnama. After Shalubai's death inquest panchnama was prepared and dead body was sent for postmortem. Postmortem Report was collected. Supplementary statements of the witnesses were recorded and after completion of investigation charge sheet was filed.

3 After the committal of the case learned Additional Sessions Judge, Nilanga framed charge for the offence punishable under Section 302, 498-A, 504, 506 read with Section 34 of the Indian Penal Code against both the accused. As they pleaded not guilty, trial was conducted. Prosecution has examined in all 12 witnesses to bring home the guilt of the accused. The accused has not led any evidence in defence, but their statements under Section 313 of the Code of Criminal Procedure explaining the incriminating circumstances have been recorded.

4 After hearing both sides and perusing the evidence on record,

learned Trial Judge held both the accused guilty of committing offence punishable under Section 302 read with Section 34 of the Indian Penal Code and they have been sentenced to imprisonment for life and to pay fine of Rs.1,000/- (Rupees One Thousand only), in default to suffer rigorous imprisonment for three months. The present appeals challenge the said conviction and sentence.

5 Heard learned Advocate Mr. G.K. Chinchole, who was holding for learned Advocate Mr. S.M. Vibhute, for the appellant Chandrabhagabai in Criminal Appeal No.617 of 2015 as well as in the capacity as Advocate appointed by this Court (Amicus Curiae) for appellant Sanjay in Criminal Appeal No.242 of 2023 as well as learned APP Mr. S.J. Salgare for respondent/State in both the matters. Perused the Record and Proceedings.

6 It has been submitted on behalf of the appellants that case of the prosecution rests on two Dying Declarations Exh.31 and Exh.67. Exh.31 is recorded by PW 3 ASI Mr. Ranzunjare, whereas Exh.67 has been recorded by PW 10 Saudagar Tandale, Naib Tahsildar-cum-Executive Magistrate, Latur. The learned Trial Judge failed to consider that both the Dying Declarations were not consistent. In Dying Declaration Exh.31 the name of accused Chandrabhaga has been properly written as Chandrabhaga Namdev Jagle,

however, in Exh.67 her name has been referred as 'Chandrakala'. This difference goes to the root. Further, Exh.67 bears the endorsement by Medical Officer on printed form. Therefore, it cannot be said that there was proper application of mind and the endorsement is given after thorough examination of Shalubai. Exh.31 is stated to have been recorded between 6.00 p.m. to 6.30 p.m. on 28.02.2013, whereas Exh.67 has been recorded on the same day between 7.00 p.m. to 7.10 p.m. Prior to recording both Dying Declarations relatives have arrived and the possibility of tutoring deceased cannot be ruled out. Learned Trial Judge wrongly held that both the Dying Declarations are trustworthy. It has come on record that Shalubai had sustained 78% burns, which were superficial to deep burns. It is, therefore, hard to believe that she was in a position to speak at the relevant time. Prosecution failed to consider the testimony of PW 9 Namdeo, who is the father-in-law of deceased. He was admittedly present in the house at that time. His presence has not been stated in both the Dying Declarations. No doubt, he has turned hostile and initially claimed ignorance about the marital life of Sanjay and Shalubai, but then he has stated that there were no disputes between them in respect of partition of land and house. In his cross-examination by learned APP he admitted that Shalubai was in the house where she is residing with Sanjay when she caught fire around 10.00 to 10.30 a.m. He has stated that he was taking bath and Shalubai and Sanjay

were there in their room. He admitted that Shalubai came out of the house running sustaining burn injuries and he had tried to extinguish the fire by pouring water. He also admitted that he has received burn injuries to his right hand and below eyes. But in his cross-examination by accused he has stated that both the accused arrived at the spot after getting knowledge about the incident. Therefore, from the testimony of the prosecution witnesses itself it was brought on record that both the accused were not present in the room when Shalubai caught fire. Shalubai used to cook food in her room and, therefore, possibility of accidental fire has been raised. The testimony of PW 4 Dr. Vikas Mahadeo Kumare, who had conducted the autopsy, does not show that kerosene residue was found on the body of Shalubai. Brother and two sisters of deceased have turned hostile. Under such circumstance, there was no evidence to prove motive. It could not have been held by the learned Trial Judge that the offence has been proved beyond reasonable doubt. The conviction awarded is based on wrong appreciation of evidence and, therefore, bad in law, which deserves to be set aside.

7 Per contra, the learned APP supported the reasons given by the learned Trial Judge and submitted that two Dying Declarations Exhs.31 and 67 have been duly proved by the prosecution and the accused persons have failed to bring such evidence on record that those Dying Declarations are the

outcome with tutoring by the relatives. If the relatives had no intention to say anything in respect of incident, especially death of Shalubai, they would not have interfered by the act of tutoring and if they had tutored, they would have been consistent, but that does not appear to be the case because brother and two sisters of the deceased have turned hostile. The motive is reflected in the Dying Declaration Exh.31. There was dispute in respect of partition. No doubt, it is that way clearly mentioned, but the possibility cannot be ruled out that Shalubai was insisting Sanjay that he should demand partition from his father which had led to the said dispute. He relied on the decision in **Laxman vs. State of Maharashtra** (the Constitutional Bench of the Hon'ble Supreme Court) reported in **AIR 2002 SC 2973 : 2002 6 SCC 710**, wherein it has been held that -

> "The justice theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with.

Since the accused has no power of cross-examination, the court insist 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, however, has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. 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 eyewitnesses 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. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. 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 truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

7.1 Further, he relied on recent decision in **Balu Sudam Khalde and another vs. State of Maharashtra** [**2023 SCC OnLine SC 355**], wherein the distinction between Section 299 and Section 300 of the Indian Penal Code has been explained. He further submitted that though PW 9 Namdeo Jagale had turned hostile and he had given admissions in respect of some facts in his cross-examination conducted by APP, but those questions were not put to the accused persons in their statement under Section 313 of the Code of Criminal Procedure and, therefore, that incriminating circumstance cannot be considered.

7.2 He pointed out the ratio laid down in **State of U.P. vs. Mohd. Iqram and another** reported in **2011 (8) SCC 80**, wherein after relying mainly on **Sharad Birdhichand Sarda vs. State of Maharashtra** [AIR 1984 SC 1622] and other cases, it was observed that - *it is the duty of the Court to examine the accused and seek his explanation on incriminating material that has surfaced against him. The provision is mandatory in nature and casts an*

*imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Circumstances which were not put to the accused in his examination under Section 313 of the Code of Criminal Procedure cannot be used against him and have to be excluded from consideration.*

In all fairness the learned APP submitted that even if we exclude those admissions by PW 9 Namdeo; yet, both the Dying Declarations were sufficient to prove the guilt of the accused beyond reasonable doubt. So also, the accused persons have not explained as to how Shalubai caught fire, the burden had shifted on them under Section 106 of the Indian Evidence Act to explain the said circumstance and, therefore, the conviction deserves to be confirmed. There is no merit in both the appeals.

8 Perusal of the entire record would show that the case of the prosecution is not based on two Dying Declarations, but there are in all three Dying Declarations. One of them has been titled as 'supplementary statement' (पुरवणी जबाब). Giving wrong title to the document will not take the said statement beyond purview of Section 32 of the Indian Evidence Act. That document is also required to be considered, as the prosecution has led

evidence to prove the said third document i.e. supplementary statement Exh.73. The prosecution story as goes on is with the disclosure of the incident by deceased Shalubai in Dying Declaration Exh.31 when she was admitted in Government Hospital, Latur. Exh.31 has been recorded by PW 3 ASI Mr. Ranzunjare. He has stated that after he had received the wireless message from Nilanga Police Station through Gandhi Chowk Police Station Exh.30; went to the burn ward. Dr. Gagan Dhall was present. On his request Dr. Gagan examined Shalubai and gave the endorsement and thereafter he has recorded the statement of Shalubai. After the statement was recorded, he read over the contents of the same and Shalubai agreed it to be true and correct. Thereafter her left hand thumb has been taken. Again Dr. Gagan examined her and found to be in fit state of giving statement. It is to be noted that by giving letter he had also invited Tahsildar, Latur to record the Dying Declaration of Shalubai. In his cross-examination questions were asked to him and he has answered to those questions, which will have to be considered in this case and it is found that those questions have been asked, which were in fact left out in the examination-in-chief. He has stated that along with the Doctor he had also got the fact confirmed that a patient was in a fit condition to record statement. He had verified it by putting questions to patient. He had asked her name, how many children she has, who is her husband and what is her education. Though he has stated that he has not

recorded those answers to his questions, this fact has been extracted in the cross and, therefore, accused persons cannot now deny the fact if so extracted. Some such questions have been asked which would indicate that this witness has written down those facts in his language. But if we consider those alleged improvements, those are in respect of time i.e. the manner in which the time has been written. We cannot give much importance to the same as certainly spoken words are different than its written form, but that does not mean that such statement was not made at all. Though he has admitted that the hands of the patient were burnt; yet, there is no specific suggestion that the left thumb had also received severe injuries making it impossible to take the thumb impression. Therefore, independently also the prosecution has proved Dying Declaration Exh.31 through PW 3 ASI Mr. Ranzunjare. PW 5 Dr. Gagan Dhall is the Medical Officer, who was on duty at the relevant time and he has stated about examining Shalubai at the request of PW 3 Ranzunjare, as he had the intention to take her statement. Upon examination he had found her to be in fit state to give statement. Exhaustive cross has been taken, however, it has been stated in his cross-examination that from the case papers which he had brought he could say that injection cerazon, gentamycin, dynapar, pantop, fortvin were given to Shalubai and out of those medicines fortvin was the pain killer having some side effect of sedation. But he has denied that Shalubai was under the effect of sedative

when the statement was recorded.

9 PW 10 Saudagar Tandale was the then Naib Tahsildar and Executive Magistrate, Latur, who recorded the Dying Declaration Exh.67. He has also given the details, as to how he went to Civil Hospital, Latur, requested Dr. Gagan to give endorsement after examination. After the patient was examined and the endorsement, he has recorded her Dying Declaration. It was between 7.00 p.m. to 7.10 p.m. He has also stated that after recording the statement it was read over to her and she admitted it to be true and correct, thereafter her thumb mark was taken. There is thorough cross-examination to this witness also, however, nothing contradictory could be transpired. As regards certification of Exh.67 is concerned, again it is by PW 5 Dr. Gagan. Dr. Gagan in his testimony has stated as to how after examining the deceased he had given the said endorsement. In order to prove further Dying Declaration i.e. supplementary statement, which came to be recorded on 02.03.2013, prosecution has examined PW 12 then PSI Mr. Rajaram Paddewad. He has stated that he has taken over the investigation and thereafter on 02.03.2013 he went to hospital where Shalubai was admitted. He met Dr. Gagan and made inquiry about the health condition of Shalubai. After the endorsement was given he has recorded the statement (supplementary statement) of deceased Shalubai. As regards the Dying

Declaration Exh.67 is concerned, the cross-examination conducted on behalf of the accused persons does not make any impression and falsify the same. Again in the testimony of Dr. Gagan he has stated about the procedure he had undertaken before giving endorsement on Exh.73. As aforesaid, there is nothing contradictory in the cross-examination of the Medical Officer which will render any of the Dying Declarations inadmissible. Those are properly proved.

10 After considering that Exh.31, 67 and 73 as proved Dying Declarations, it is then required to be seen, whether those were consistent with each other. Exh.31 has been treated as First Information Report and its contents have already been narrated. Now, if we consider Exh.67, what is not disclosed is the reason for the quarrel between deceased and accused Sanjay, but she was certain in Exh.67 that after Chandrakala i.e. accused No.2 had poured kerosene on her person accused No.1 Sanjay had ablazed her. The role attributed to accused Nos.1 and 2 is same. Exh.73 is rather an explanatory Dying Declaration. She has stated in Exh.73 that at the time of settlement of marriage, both the accused had told that they are having six acres of land, however, accused No.1 was having only ½ acre of land and accused Nos.2 and her husband were having 1½ acre land. She was demanding more land for the livelihood as her husband was having only ½

acre land and it is stated that accused No.2 and her husband were having 1½ acre land. When she demanded more land, the said dispute arose and both the accused together had ablazed her. No doubt, Exh.61 does not give details but it is stated that there was dispute between herself and her husband on that day and thereafter she was put to fire. We do not find Exhs.31, 67 and 73 in consistent with each other.

11 It is trite law that sole dying declaration can be made basis of conviction, if at all it qualifies the test of truthfulness, voluntariness and if it is free from suspicion and doubt. There are various rulings of Hon'ble Apex Court regarding evidentiary value of Dying Declaration. It has been held time and again that accused being deprived of cross-examination, Court has to be very careful and cautious while assessing Dying Declaration. It is expected that Court should be on guard that the statement of deceased was not a result of either tutoring, prompting or product of imagination. It is further expected of the Court to satisfy itself that the deceased was in a fit state of mind to give dying declaration. In the case of **Paniben vs. State of Gujarat [(1992) 2 SCC 474]**, the Hon'ble Supreme Court has laid down the principles governing Dying Declaration, which are as follows :

> (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration.

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail.

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.

12 The above principles are affirmed, relied, summarized and applied in various other rulings, namely, **Surinder Kumar vs. State of Punjab [(2012) 12 SCC 120], Madan vs. State of Maharashtra [(2019) 13 SCC 464].**

13 Similarly, very recently Hon'ble Apex Court in the case of **Ganpat Bakaramji Lad vs. State of Maharashtra [2018 ALL MR (Cri) 2249]**, has also reiterated certain tests to be put to use before accepting that Dying Declaration. It has been held thus -

> "In respect of the dying declaration, the general principles to be kept in mind are
>
> (i) that it is not a weaker kind of evidence and it stands on the same footing as other evidence, and (ii) that there is no absolute rule of law that it cannot form the sole basis of conviction, unless corroborated by other independent evidence. The first step required to be taken in every case, is to consider the three-fold questions as under :
>
> (a) Whether a declarant had an opportunity to observe and identify the assailant or the accused?,
>
> (b) Whether a declarant was in a conscious and fit condition at the time of recording the statement?, and
>
> (c) Whether the Court is so convinced of the truthfulness and voluntary nature of the statement of the declarant that it inspires confidence to such an extent that it can be the sole basis of conviction?
>
> The absence of an endorsement in the dying declaration - (a) by a doctor regarding the fitness of mind of the declarant, or (b) that the statement was read over and explained to the declarant, who found it to be correct, cannot be the reason for holding that the dying declaration is unacceptable, if the Court is otherwise satisfied that such a dying declaration inspires confidence.

The rejection of the dying declaration cannot be on the solitary instance of absence of endorsement of reading over and explaining the declaration and the declarant confirming it to be true. It will always depend upon the facts and circumstances of each case. We are clearly of the view that it will be a cumulative effect of the facts and circumstances of the case, which will determine such issues. The presence or absence of a particular fact or circumstance or a situation in a given case may become significant, whereas it may become insignificant in another case. The mode and manner of appreciation of evidence differs from case to case, though the principles of appreciation of evidence may be the same. The perception of the matter in each case and the manner of the appreciation of evidence differs from person to person. Hence, there cannot be a strait-jacket formula or hard and fast rule which can be laid down.

Neither the provision of Section 32(1) of the Evidence Act nor any decision of the Apex Court prescribe any particular format in which a dying declaration is to be recorded. It can be oral as well as written. In case of oral dying declaration, the question of existence or insistence upon reading over and explaining the declaration to the deceased does not arise. If that be so, how can such insistence be in respect of written dying declaration? It is not the requirement of any statute or of the decision of the Apex Court that a written dying declaration must contain a column to be duly filled in that the statements of the declarant are read over and explained to him and that he found it to be true and correct. Such a requirement therefore cannot be held as mandatory.

The observations in the cases of **Shaikh Bakshu 2007 ALL SCR 2407** and **Kantilal (2009) 12 SCC 498**, are based on the facts and would not, therefore, constitute a precedent or a *ratio decidendi* or

> even an *obiter dicta* to hold that bearing such an endorsement in the dying declaration is must. In our view, it would be unjust to reject the dying declaration only on such hyper technical view, which hardly of any help in the matter of criminal trials."

14 We may also consider the Constitution Bench decision of Hon'ble Supreme Court in **Laxman vs. State of Maharashtra, 2002, Cri. L.J. 4095**, wherein it was held that -

> "Absence of certification of doctor as to fitness of mind of declarant will not render dying declaration unacceptable. What is essentially required is that the person who records it must be satisfied that deceased was in fit state of mind. Certification by doctor is rule of caution. The voluntary and truthful nature of declaration can be established otherwise also."

15 It is further observed in **Laxman vs. State of Maharashtra,** (supra) that -

> "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."

16 Further, we may also rely on **Vikas and others vs. State of Maharashtra [2008 (2) B. Cr. C. 235 (SC)]**, wherein it has been observed

that, special sanctity accorded to evidence of Dying Declaration should be respected. Unless there are clear circumstances brought out showing that person making statement was not in expectation of death, admissibility of Dying Declaration should not be questioned. Section 32(1) of the Evidence Act is an exception to the general rule that hearsay evidence is no evidence. Section 32(1) of the Evidence Act makes a statement of the deceased admissible. Those statements made by a person as to the cause of his death or to any of the circumstances of the transaction which resulted in his death, are admissible when the person's death comes into question. The essential requirement of such statement to be accepted as evidence would be that the person who makes such statement is under the expectation of death. The special sanctity has been given to such statements as it is believed that a person on the death-bed will not speak lie.

17 Thus, taking into consideration the legal position as above stated in the various authorities and also the assessment of fact made out by us, we conclude that the Dying Declarations are properly and legally proved and they are giving a clear picture. All the Dying Declarations have arrayed both the accused with specific role attributed to them. It cannot be said that act of pouring of kerosene and igniting the match stick throwing it on the informant on whom already kerosene was poured; cannot be said to be without

intention of committing murder. Definitely, both the accused had knowledge about the consequences of the acts done by them. Therefore, when the Dying Declarations are inspiring confidence, conviction can be based on the Dying Declarations.

18 It is usually say that 'man may lie but circumstances do not'. There may be many reasons for a person resiling from his earlier statement, but the entire testimony of such witness cannot be discarded and they will have to be considered in their proper perspective. PW 6 Shankar Sontakke is the brother, PW 7 Gayabai Kamble and PW 8 Sangita Survase are the sisters of deceased. They have turned hostile, however, it is to be noted that PW 6 Shankar in his cross-examination taken on behalf of the State after he was declared hostile supports the prosecution, but we have taken into consideration the ratio laid down in **Mohd. Iqram** (supra) and also the decision in **Sharad Birdhichand Sarda** (supra). We will have to observe that the statement of the accused under Section 313 of the Code of Criminal Procedure has not been properly prepared by the learned Trial Judge. In **Mohd. Iqram** (supra) the Hon'ble Supreme Court has reminded the Trial Courts as to how the obligation cast on the Courts for putting incriminating circumstances before the accused and solicit his response should be adhered to and, therefore, those circumstances, which were not put to the accused in

his statement under Section 313 of the Code of Criminal Procedure, cannot be used against him. Here, we would like to say it further that "incriminating circumstances/evidence" cannot be restricted to whatever has been stated by the prosecution witness in examination-in-chief. It extends to the documents which have been admitted by the accused and also the answers given by the prosecution witnesses after the questions in the nature of cross were allowed to be put by the prosecution to such witnesses. Admission of a document by the accused may be from one angle, but if it is to be used against the accused, then, there has to be a question in respect of the same in the statement of the accused under Section 313 of the Code of Criminal Procedure. Otherwise the said admitted documents also cannot be considered/used against the accused. Here, in this case, when the questions were put in the nature of cross to PW 6 Shankar, he has given answers in the affirmative and thereby he had supported the prosecution. But, as aforesaid, those questions, which were relating to the incriminating circumstances, cannot be used against the accused now, as they were not put in the statement under Section 313 of the Code of Criminal Procedure. We would also like to say that it is not only the job of the Presiding Officer of any criminal trial to prepare the questions to be put under Section 313 of the Code of Criminal Procedure to the accused, rather after the insertion of sub-section (5) of Section 313 of the Code of Criminal Procedure with effect from 31.12.2009 the Court can take help of

prosecutor as well as defence counsel in preparing relevant questions, which are to be put to the accused under Section 313 of the Code of Criminal Procedure and further the Court may permit filing of written statement by the accused as sufficient compliance of Section 313 of the Code of Criminal Procedure. Statement under Section 313 of the Code of Criminal Procedure after conclusion of the prosecution evidence is mandatory requirement and, therefore, when the provisions give liberty to the Court to get the help of prosecutor as well as the defence Advocate in preparation of statement under Section 313 of the Code of Criminal Procedure, then it becomes the duty of the prosecutor concerned as well as the Advocate representing the accused to see that necessary incriminating circumstances have been put in such questionnaire. Similar is the case of the testimony of PW 9 Namdeo. Namdeo is the father-in-law of deceased Shalubai and in his examination-in-chief he has turned hostile but when permission was given to put the questions in the nature of cross, he has given certain admissions. But those admissions have not been put to both the accused as incriminating circumstances in their statements under Section 313 of the Code of Criminal Procedure and, therefore, those admissions cannot be considered at all. From the cross-examination by learned APP of PW 6 Shankar he has admitted that after the dispute, Shalubai had come to stay with him with her children and he was maintaining Shalubai and after demise of Shalubai his two

daughters are with PW 6 Shankar. It is also admitted by him that after the disposal of the case accused has agreed to maintain his children and, therefore, it is necessary to acquit accused No.1 Sanjay. This cannot be taken as the incriminating circumstances, because it is relating to the fact that why he has turned hostile. These answers can be definitely considered, which were to impeach the credit of witness. The reason behind the hostility of the witness has been tried to be brought on record and that will have to be considered. PW 6 Shankar, PW 7 Gayabai and PW 8 Sangita had come to the Court together on the day of their deposition. Therefore, we can definitely say that they altogether were interested in getting the acquittal of Sanjay in view of his daughters to be maintained. As regards PW 9 Namdeo is concerned, his son as well as wife are the accused here. The fact that he had burn injuries has also otherwise come on record in Dying Declaration Exh.73 and Exh.50, which is the injury certificate of PW 9 Namdeo and it has been admitted by accused. It shows that he had received burn injuries to right hand dorsum as well as to chest and abdomen to the extent of 1% or 2% respectively. He was examined on 28.02.2013 at about 12.10 p.m. At the most, then it can be said that at the most he was present and had tried to extinguish the fire, but for the obvious reasons he was not supporting the prosecution story and, therefore, we say that man may lie but circumstances wont. There is sufficient evidence brought on record by the prosecution by

proving three Dying Declarations that it is accused No.2 who had poured kerosene and accused No.1 had set Shalubai to fire by igniting the match stick and thrown it on Shalubai.

19 PW 4 Dr. Vikas Kumare is the Medical Officer, who conducted autopsy and proved Postmortem Report Exh.36. In column No.17 he has specifically stated that on right upper limb there was spare palmare and the percentage of the burn was 7%, on left upper limb there was spare posterior and the percentage of the burn was 5% of distal 1/3rd. He has denied that even the ridges of the left thumb were burnt. Therefore, the left thumb appearing on the three Dying Declarations can be said to have been properly taken by the writers. The cause of death of deceased Shalubai is, "septicemia due to burn". Now, the effect of Dying Declaration and the Postmortem Report would show that the accused No.2 Chandrabhagabai had poured kerosene on the person of deceased and accused No.1 Sanjay set her to fire. When such act is done, it can be presumed that the persons doing such act have the knowledge that the said act will cause death of the other person. Thus, when such act is done with knowledge, then the offence can be said to have been proved beyond reasonable doubt.

20 PW 1 Ramhari was the panch to the spot panchnama, so also PW

2 Kishor. They both have turned hostile. They both are from the caste of the accused and neighbours. Therefore, their hostility will not be fatal to prosecution. The said panchnama has then been proved by the I.O. The other witnesses are police officers who have role to play in the investigation.

21 Thus, on re-assessment of the evidence which is permissible by the Appellate Court we conclude that the prosecution had proved all the three Dying Declarations beyond reasonable doubt and those were sufficient to convict the accused persons. The act of the accused persons was with intention to kill. The learned Trial Judge has rightly held that the prosecution has proved the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. The acquittal of both the accused from the offence punishable under Section 498-A, 504, 506 read with Section 34 of the Indian Penal Code is also proper and legal. The said finding does not call for any kind of interference by this Court. There is no merit in the present appeals, and the same deserve to be dismissed. Accordingly, both the appeals stand dismissed. The fees of appointed Advocate is quantified at Rs.10,000/- (Rupees Ten Thousand only), to be paid by the High Court Legal Services Sub Committee, Aurangabad.

**( Y.G. Khobragade, J. )** **( Smt. Vibha Kankanwadi, J. )**

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