
Yousuf Badshah Shaikh Vs State Of Maharashtra

Criminal Appeal No.498 Of 2014

Court: Bombay High Court (Aurangabad Bench)

Date of Decision: Nov. 22, 2021

Acts Referred:

Indian Penal Code, 1860 " Section 34, 302, 307, 498A#Code Of Criminal Procedure, 1973
" Section 235, 235(1), 313, 428, 437(A)

Hon'ble Judges: V.K. Jadhav, J; Shrikant D. Kulkarni, J

Bench: Division Bench

Advocate: S G Ladda, G O Wattamwar

Final Decision: Dismissed/Disposed Of

Judgement

V. K. Jadhav, J

1. This appeal is directed against the judgment and order of conviction passed by the Additional Sessions Judge, Jalna dated 21.7.2014 in Sessions

Case No.92 of 2013.

2. Brief facts of the prosecution case are as follows :-

a) Deceased Taslimbi was the wife of appellant-accused Yousuf Shaikh and their marriage was solemnized some 20 years back. They had two sons

and a daughter. Some 4 to 5 years prior to death, the appellant/accused Yousuf and his mother had started ill-treating deceased Taslimbi by suspecting

about her character. They used to insist her to bring certain amount from her parents for household expenses. Deceased Taslimbi had disclosed the ill-

treatment being extended to her on account of non-fulfilment of the said demand. She had also disclosed her brother PW 7 Shaikh Naim Shaikh

Kasam that the appellant/accused Yousuf has threatened to kill her.

b) The incident had taken place on 26.01.2013 at about 11.00 to 12.00 am. The appellant/accused Yousuf had quarreled with deceased Taslimbi on

account of some domestic reasons. Deceased Taslimbi therefore got annoyed and in the heat of anger stated that she would set herself on fire.

Thereupon, the appellant/accused Yousuf has pointed out the petrol can and told her to set herself on fire. Deceased Taslimbi, however, stated that

she would not set herself on fire. The appellant/accused Yousuf thereafter poured entire petrol from the can on the person of the deceased Taslimbi,

who was in sitting position and set her on fire with the help of matchstick. Deceased Taslimbi was thereafter taken to hospital.

c] On 27.1.2013 Gondi police station has received the MLC no.1915. API of Gondi Police Station has directed PW 8 PSI Somnath Shinde to visit

Government Medical College and Hospital, Aurangabad (Ghati) and to record the statement of the victim. PW 8 PSI Somnath Shinde has thereafter

visited the hospital and after completing the necessary formalities and also after obtaining the opinion of the doctor about the state of mind of the

deceased, recorded the complaint-cum-dying declaration exhibit 43 of the deceased Taslimbi. On the basis of the complaint-cum-dying declaration

exhibit 43, crime no.10 of 2013 for the offence punishable under sections 307, 498-A, 34 of the Indian Penal Code came to be registered at Gondi

Police Station. PW 8 PSI Somnath Shinde has carried out the investigation of the crime. PW 8 PSI Somnath Shinde has visited the spot and drawn the

spot panchnama exhibit 45. He has seized the plastic can in burnt condition and match box of plus two company from the spot under the spot

panchnama exhibit 45. He has also issued the letter exhibit 44 to Tahsildar on the same day for recording the dying declaration of the deceased

Taslimbi. He has also effected arrest of the accused by drawing arrest panchnama exhibit 46 and also issued the letter exhibit 47 to the Medical

Officer for medical examination of the accused. On 29.1.2013 PW 8 PSI Somnath Shinde has seized the clothes on the person of the accused at the

relevant time by drawing panchnama exhibit 49. On the same day he has recorded the statement of the witnesses. On 2.2.2013 victim Taslimbi died.

PW 8 PSI Somnath Shinde received postmortem notes on 5.2.2013. He has also received the inquest panchnama since carried out in the hospital by

the concerned police. He again recorded statement of the witnesses on 7.2.2013. Meanwhile, on 27.1.2013 itself Naib Tahsildar PW 3 Sanjay

Madhukarrao Gaidhani has recorded the dying declaration exhibit 31 of deceased Taslimbi. After completion of the investigation, API Kashid has fled

the charge-sheet against the appellant/accused and his mother Chotibi Shaikh. C.A. reports received afterwards also forwarded to the Court and they

are marked at exhibit 51 and 52 respectively.

3. The learned Additional Sessions Judge, Jalna has framed the charge vide exhibit 5 against the appellant/accused Yousuf and his mother Chotibi for

the offence punishable under sections 302, 498-A, r/w 34 of IPC. Both the accused pleaded not guilty and claimed to be tried. The prosecution has

examined ten witnesses to substantiate the charges levelled against the accused. The defence of the accused is of total denial. According to the

defence of the accused he has tried to save Taslimbi and in that process he has got burn injuries over his legs. Statement of the accused under section

313 of Cr.P.C. came to be recorded. The appellant/accused has examined his daughter Muskan aged 16 years as defence witness and also the

defence witness no.2 Bharati Nachan. After hearing both the sides, the learned Additional Sessions Judge, Jalna by judgment and order dated

21.7.2014 in Sessions Case No.92 of 2013 has convicted the appellant/accused Yousuf s/o Badshaha Shaikh for the offence punishable under sections

302 of IPC and the learned Additional Sessions Judge, Jalna has acquitted the accused no.2 Chotibi Shaikh for the offence punishable under sections

498-A, 302, r/w 34 of IPC. Operative part of the order reads thus :-

1. Accused No.1 Yousuf S/o Badshah Shaikh is convicted u/s 235 of Cr.P.C. of the offence punishable u/s 302 of IPC, and he is sentenced to suffer

imprisonment for life, and, to pay fine of Rs.2,000/- (Rs. Two Thousand), in default of payment of fine to suffer R.I. for six months.

2. Accused no.1 is acquitted u/s 235 (1) of Cr.P.C. of the offence punishable u/s 498-A r/w 34 of IPC.

3. Accused no.2 Chotibi w/o Badshah Shaikh is acquitted u/s 235 of Cr.P.C. of the offence punishable u/s 498-A, 302 r/w 34 of IPC.

4. Bail bond of accused no.2 shall stand cancelled.

5. Muddemal property, being worthless be destroyed after appeal period is over.

6. Accused no.2 Chotibee to furnish P.R. Bond of Rs.10,000/- and S.B. in the like amount in view of provisions of Section 437 (A) of Cr.P.C.

7. Since accused no.1 is in jail, set off be given to him u/s 428 of Cr.P.C. for his pre-detention period, if any, as per rules.

4. Learned counsel for the appellant/accused submits that the prosecution case entirely rests upon two dying declarations exhibit 31 and exhibit 43

respectively and there is no direct evidence in this case. Learned counsel submits that the dying declarations exhibit 31 and exhibit 43 are not

consistent on material parts. Both the dying declarations are not reliable and trust worthy. There is no corroboration to the dying declarations.

5. The learned counsel for the appellant/accused submits that the dying declaration exhibit 31 shown to have been recorded by PW 3 Naib Tahsildar

Sanjay Gaidhani, however, he has not got satisfied about the fit state of mind of the deceased to give the statement. Deceased Taslimbi had sustained

100% of burns. In the dying declaration exhibit 31 deceased Taslimbi had given a very brief statement and explained that at the time of the incident

only she herself and the appellant/accused was present. The learned counsel submits that in the complaint-cum-dying-declaration exhibit 43 allegedly

recorded by PW 8 PSI Somnath Shinde, deceased Taslimbi had made allegations in detail about the demand and as to how she was being ill-treated on

account of non-fulfilment of the said demands of cash amount of Rs.25,000/- to 50,000/-. In the said complaint-cum-dying declaration exhibit 43

deceased Taslimbi had also stated about the presence of her mother-in-law Chotibee and her own daughter Muskan at the time of incident. Learned

counsel submits that there is inconsistency between two dying declarations, and as such, both the dying declarations are not reliable and trust worthy.

6. Learned counsel for the appellant/accused submits that prosecution has examined PW 7 Shaikh Naim Shaikh Kasam, who is the brother of the

deceased. He has deposed about oral dying declaration allegedly made to him by deceased. On 26.1.2013 itself on receiving the information on phone

PW 7 Shaikh Naim Shaikh Kasam had been to the matrimonial house of the deceased Taslimbi at Shahagad and then went to Ghati Hospital,

Aurangabad. PW 7 Shaikh Naim remained there in the hospital with deceased Taslimbi till her death. Learned counsel submits that there was a

possibility of tutoring, however, the trial court has not considered the same.

7. Learned counsel submits that there is no corroboration to said dying declarations. It has come in the evidence of PW 8 PSI Somnath Shinde that

while drawing the spot panchanama exhibit 45 he has seized one five liters plastic can in burnt condition and one match box and also two burnt match

sticks from the spot. Learned counsel submits that even though said five liters plastic can of petrol was found in burnt condition, however, as per the

description of the said article recorded in the Muddemal Pavati, lid of the can was found in burnt (jam) condition. Learned counsel submits that it is

very unlikely to close the lid of the petrol can after the petrol in the can allegedly poured on the person of the deceased Taslimbi. Said lid was not in a

condition to open as it was totally burnt. Learned counsel submits that, thus the very use of the can in the alleged incident for pouring the petrol on the

person of the deceased Taslimbi appears to be suspicious.

8. Learned counsel for the appellant/accused submits that the appellant/accused has examined his own daughter Muskan. PW 8 PSI Somnath Shinde

has also deposed before the Court that he has recorded the statement of eye witness Muskan and deceased Taslimbi in her complaint-cum-dying

declaration exhibit 43 had also stated that her daughter Muskan was present at the time of incident. DW 1 Muskan has deposed that at about 10.30

am she was playing outside the house and she came in the house for drinking water. Her father appellant/accused was sleeping on the lap of her

mother. After drinking water, DW 1 Muskan sat near her mother (deceased Taslimbi) and her father went inside the latrine. DW 1 Muskan thereafter

deposed that there was a meat kept on stove for boiling. Her mother went towards the stove. Petrol can was lying near sewing machine. Electric

stove was on. There was a pot containing water over the said stove to boil it for bathing purpose. DW 1 Muskan further deposed that petrol from the

can fell on the ground as it was accidentally hit. Since electric stove was on, petrol caught fire. She ran outside the house and raised shouts. Her father

came outside of the latrine. Her father had extinguished the fire, however, mother has sustained burn injuries. Her father has also sustained burn

injuries on his legs. Her two aunts came there. Thereafter, her mother (deceased Taslimbi) was taken to Ghati Hospital, Aurangabad. Learned

counsel for the appellant/accused submits that except the suggestions, there is nothing in the cross- examination to disbelieve the evidence of DW 1

Muskan. Learned counsel submits that the Trial Court has not considered the evidence of DW 1 Muskan, whose presence on the spot at the time of

the alleged incident is not disputed by the prosecution. Learned counsel for the appellant/accused submits that the prosecution has failed to prove the

case beyond reasonable doubt and the appellant/accused is entitled for the benefit of doubt.

Learned counsel has pointed out that so far as dying declaration exhibit 31 is concerned, deceased Taslimbi has not stated specifically that the

appellant/accused after pouring the petrol on her person set her on fire with the help of match stick. Learned counsel submits that PW 11 Dr. Viay

Kamble, who has conducted postmortem examination on the dead body of the deceased Taslimbi has admitted in the cross-examination that 9%

burns over upper limb means burns all over the arms including the fingers and palms. It is also admitted by him that in case of 100 % burns over the

upper limb, its ridges and curves of the fingers do not appear. Learned counsel submits that in both the dying declarations ridges of thumb/toe

impression of deceased Taslimbi are seen.

9. Learned counsel for the appellant/accused, in order to substantiate his contentions, placed reliance on the following judgments :-

- i. K. Ramchandra Reddy and another Vs. Public Prosecutor reported in 1976 Supreme Court Cases (Cri) 473.
- ii. Suresh Arun Dodorkar Vs. State of Maharashtra in criminal appeal no.776 of 2003.
- iii. Sanjay Sakharam Ahire Vs State of Maharashtra in criminal appeal no.1061 of 2009 reported in 2013 SCC online Bom 1390.
- iv. Bhagirath Bhaurao Kanade Vs. State of Maharashtra reported in 1997 BomCR (Cri) 168.
- v. State of Maharashtra Vs. Sanjay Digambarrao Rajhans reported in (2004) 13 Supreme Court Cases 314.
- vi. P.Mani Vs State of Tamilnadu reported in (2006) 3 Supreme Court Cases 161.
- vii. Laxman Vs. State of Maharashtra reported in (2002) 6 Supreme Court Cases 710.
- viii. Manohar Dadarao Landge Vs. State of Maharashtra reported in 1999 SCC Online 608.
- ix. Balak Ram Vs. State of U.P. Reported in (1975) Supreme Court Cases 219.
- x. Madhukar s/o Shrimant Mhaske and another Vs. The State of Maharashtra reported in 1998 SCC online Bom 186.
- xi. Sau Kamalbai Haribhau Lastane Vs. State of Maharashtra through PSO Nandgaon Khandeshwar reported in 2019 SCC online Bom 757.
- xii. Munnu Raja and another Vs. The State of Madhya Pradesh reported in (1976) 3 Supreme Court Cases 104.
- xiii. Dadarao Shripat Thorat Vs. State of Maharashtra in criminal appeal No. 221 of 2014.

10. Learned APP submits that deceased Taslimbi had sustained 100% burns and PW 11 Dr. Viay Kamble has noticed superficial to deep burns over

body surface area. He has noticed superficial burns over head, neck, face and rest are the deep burns. The learned APP submits that dying

declarations exhibit 31 and exhibit 43 are consistent, reliable and trust worthy and inspiring the confidence. The learned APP submits that PW 3 Sanjay

Gaidhani, Naib Tahsildar has recorded dying declaration exhibit 31 briefly. However, in the said dying declaration exhibit 31 deceased Taslimbi had

stated that her husband was suspecting her character and on the day of the incident during the course of the quarrel her husband had poured petrol on

her. In paragraph nos.4 and 5 of the said dying declaration exhibit 31 she has named her husband/appellant-accused herein as a person responsible for

the incident and burns. The learned APP submits that PW 8 PSI Somnath Shinde has recorded the complaint-cum-dying declaration exhibit 43 in

detail, wherein, deceased Taslimbi has stated about the demands and beating extended to her on account of non-fulfillment of the said demands by the

accused, but also stated that the appellant/accused was suspecting her. Learned APP submits that deceased Taslimbi had given details of the quarrel.

PW 7 Shaikh Naim Shaikh Kasam, who happened to be the brother of deceased Taslimbi, has also deposed about the oral dying declaration made to

him by the deceased Taslimbi. On 26.1.2013 itself deceased Taslimbi has informed to him all the details of the incident. Learned APP submits that, in

the heat of anger deceased Taslimbi had stated that she would set herself on fire, and at that time, the appellant/accused reacted in a manner to show

her petrol can and further insisted her to pour petrol from the can on her person. However, when deceased Taslimbi had refused for the same, the

appellant/accused himself had poured the petrol on her person from the can and set her on fire with the help of match stick. Learned APP submits that

there is no inconsistency between the complaint-cum-dying declaration exhibit 43 and the oral dying declaration exhibit 31. Learned APP submits that

PW 3 Sanjay Gaidhani, Naib Tahsildar and PW 8 PSI Somnath Shinde have put certain questions to the deceased Taslimbi before recording her dying

declarations. Prosecution has also examined PW 2 Dr. Pravin Ladda. He has deposed that on 27.1.2013 at about 7.45 am when police gave him a

letter to give his opinion whether deceased patient Taslimbi was conscious, oriented and able to give statement. He has identified his endorsement

and signature below the endorsement on the letter exhibit 28. After completion of the recording of the statement, he has again examined the patient

Taslimbi and put his remark at the bottom of the exhibit 43 which also bears his signature. PW 2 Dr. Pravin Ladda has further deposed that on

27.1.2013, Naib Tahsildar Mr. Sanjay Gaidhani came for recording the dying declaration of Taslimbi at about 1.45 p.m. He has again examined the

patient Taslimbi and PW 2 Dr. Pravin Ladda put his remark on the letter of Naib Tahsildar that patient is conscious, oriented and able to give the

statement. Said remark is in his hand writing. Letter alongwith remark is marked at exhibit 29. PW 2 Dr. Pravin Ladda has further deposed that Naib

Tahsildar has recorded the statement in his presence.

11. Learned APP submits that spot panchnama is marked at exhibit 45. PW 8 PSI Somnath Shinde has drawn the spot panchnama in presence of

panch witness and seized one five liters plastic can in burnt condition and also one Plus-2 company match box and two used match sticks from the spot

of the incident. The learned APP submits that even the clothes of the accused came to be seized by drawing the panchnama exhibit 49. The shirt and

pant of the appellant/accused were smelling petrol. Learned APP submits that C.A. reports exhibit 51 and 52 are positive. The result of the tests for

the detection residues of petrol in exhibit 1-partially burnt plastic can put in a cloth parcel, green full shirt having burning mark Exh-3 of the

appellant/accused and exhibit 4 the light grey coloured full pant of the appellant/accused are positive. Learned APP submits that as per C.A. reports

exhibit 52, partially, burnt blackish hair and nail clippings of the deceased Taslimbi came to be analyzed by CA and results of the tests for the detection

of petrol residues on exhibit 1 i.e. partially burnt blackish hair are positive.

12. The learned APP submits that the Trial Court has rightly rejected the evidence of defence witness DW 1 Muskan. Learned APP submits that, if

the petrol on the floor caught fire due to electric stove then, there was no reason that residues of the petrol appears on the hairs of the deceased

Taslimbi. Learned APP submits that spot panchnama exhibit 45 indicates that spot of the incident is in the center of the room. There is nothing in the

spot panchnama to support the possibility as deposed by DW 1 Muskan. Learned APP submits that it is but obvious for DW 1 Muskan to support her

father. Learned judge of the trial court has rightly discarded her evidence. Learned APP submits that there is no substance in this criminal appeal and

the appeal is liable to be dismissed.

13. Learned A.P.P. in order to substantiate his contentions, placed reliance on the following cases:-

i) Purshottam Chopra and another vs. State (Government of NCT of Delhi), reported in (2020) 11 SCC 489.

ii) Laxman vs. State of Maharashtra, reported in 2002 AIR (SC) 2973.

14. We have carefully considered the submissions advanced by the learned counsel for the appellant-accused and the learned APP for the respondent

State. With their able assistance, we have perused the grounds taken in the appeal memo, annexures thereto, the record and proceeding and the case

laws cited by the respective parties.

15. The prosecution case rests upon two dying declarations exhibit 31 and 43 respectively and oral dying declaration to PW 7 Shaikh Naim. In both the

dying declarations, deceased Taslimbi had stated that the appellant/accused poured petrol on her person. So far as dying declaration exhibit 31 is

concerned, PW 3 Sanjay Gaidhani, Naib Tahsildar has used the printed format of the questions and recorded the answers in his hand writing after

putting the said printed questions to deceased Taslimbi. Deceased Taslimbi had stated that appellant/accused had poured petrol in reply to question

no.3 and in reply to question nos.4 and 5 named appellant/accused responsible for the incident and also specified the reason that the appellant/accused

by suspecting her character caused her injuries. In the complaint-cum-dying declaration exhibit 43 deceased Taslimbi had however, narrated the

incident in detail. She stated that on 26.1.2013 at about 11.00 am to 12 noon when she herself and her husband appellant-accused Yousuf and her

mother-in law Chotibi were present in the house, her husband picked up quarrel with her on account of some domestic reasons. Deceased Taslimbi

got annoyed and in the heat of anger stated to the appellant-accused that she would set herself on fire. Thereupon, the appellant-accused has pointed

out the petrol can and told her to set herself on fire. Deceased Taslimbi however, refused for the same. She had further stated in her dying declaration

exhibit 43 that she was in the sitting position and thereupon the appellant/accused took said petrol can and poured entire petrol on her person and

further set her clothes on fire with the help of match stick.

16. In both the dying declarations exhibit 31 and exhibit 43 respectively deceased Taslimbi had consistently made accusations against the

appellant/accused for having poured petrol on her person and set her ablaze. So far as the dying declarations exhibit 31 recorded by PW 3 Sanjay

Gaidhani, Naib Tahsildar is concerned, wording may be different, but both the dying declarations exhibit 31 and 43 are consistent on material parts.

17. PW 2 Dr. Pravin Ladda was working as Medical Officer in Ghati Hospital, Aurangabad and he was on duty on 27.1.2013. On 27.1.2013 police

gave him a letter soliciting his opinion whether patient Taslimbi was able to give the statement. Thus, PW 2 Dr. Pravin Ladda has examined the

patient Taslimbi on 27.1.2013 at about 7. 45 am. He put his endorsement on the said letter exhibit 28 that patient Taslimbi is conscious, oriented and

able to give the statement. Said endorsement is in his hand writing and it also bears his signature. After completion of recording of the statement by

police, PW 2 Dr. Pravin Ladda has again examined the patient Taslimbi and at the bottom of the dying declaration exhibit 43 again made endorsement

to the effect that patient Taslimbi was conscious, oriented and able to give the statement. Said endorsement also bears his signature.

18. On 27.1.2013 itself PW 3 Sanjay Gaidhani, Naib Tahsildar has approached to him for recording the dying declaration of Taslimbi at about 1.35

p.m. PW 2 Dr. Pravin Ladda has examined the patient and put his endorsement that patient is conscious. Said letter is at exhibit 29. The endorsement

is in his hand writing and also bears his signature. PW 2 Dr. Pravin Ladda has denied that no such dying declaration was recorded in his presence and

he has put wrong remarks on exhibit 28 and 29 on the say of the relatives of the deceased. He has also denied that due to 100% burns it was

impossible to obtain the thumb impressions. It further appears from both the dying declarations exhibit 31 and exhibit 43 respectively that PW 3 Sanjay

Gandhian, Naib Tahsildar and PW 8 PSI Somnath Shinde have also satisfied themselves about the conscious state of mind of deceased Taslimbi

before recording her statement. They have put certain questions to her about name, age etc., to which Taslimbi had answered in detail. Both of them

have read over the contents of statements to Taslimbi and she has admitted the same as true and correct. On both the dying declarations, there is an

endorsement to that effect. So far as the dying declaration exhibit 31 recorded by PW 3 Sanjay Gaidhani, Naib Tahsildar is concerned, it bears left toe

thumb impression of deceased Taslimbi and dying declaration exhibit 43 also bears impression of right thumb with the endorsement that both the palms

and fingers of deceased Taslimbi found in burnt condition.

19. We have carefully gone through the contents of the spot panchnama exhibit 45 and also the articles seized while drawing the spot panchnama.

One five liters burnt plastic can, one plus-2 company match box and two used match sticks came to be seized from the spot under the seizure

panchnama. It also appears that mattress on the cot also found burnt and clothes kept on the sewing machine also found burnt completely. In addition

to this, utensils, walls, roof and ceiling fan appears to be blackish in colour due to fame smoke. There is also reference to one electric stove (shegdi)

alongwith one pot containing water over the stove. There is no reference in the spot panchnama that four tiles found damaged or seen blackish in

color. Thus, the contents of the spot panchnama exhibit 45 not only corroborates the dying declaration exhibit 31 and exhibit 43 respectively, but also

rule out the possibility of sustaining burns by deceased Taslimbi, accidentally. Learned Judge of the Trial Court has rightly discarded the evidence of

DW 1 Muskan, who has deposed that petrol can got hit by leg of her mother, due to which the petrol from the can fell down. Since electric stove was

on, petrol caught fire. There is no damage to electric stove nor to the pot with water kept on it. There is nothing on the four tiles to suggest about

possibility of petrol fallen on the tiles accidentally and got fired due to electric stove. DW 1 Muskan seems to have supported her father with some

oblique motive. It is also pertinent that the appellant-accused has sustained injuries on his legs. Prosecution has examined PW 9 Dr. Abhay Gondikar,

who has examined the accused. He has noticed burn injuries over both feet of the appellant/accused Yousuf. It is pertinent that, though the appellant-

accused had tried to extinguish the fire, he had sustained injuries over his both feet and not on the hands or other parts of the body. Furthermore, C.A.

reports exhibit 51 and 52 are positive. The result of the tests for the detection residues of petrol in exhibit 1-partially burnt plastic can put in a cloth

parcel, green full shirt having burning mark Exh-3 of the appellant/accused and exhibit 4 the light grey coloured full pant of the appellant/accused are

positive.

20. In the case of Purushottam Chopra and another vs. State (Government of NCT of Delhi) (supra) relied upon by the learned APP for the

respondent-State, the Supreme court by referring the principles laid down by the Constitution Bench in the case of Laxman vs. State of Maharashtra,

(2002) 6 SCC 710 and by referring the principles laid in various cases decided earlier relating to dying declarations and its admissibility and reliability in

paragraph nos. 21 to 21.8 of the judgment observed as under :-

21. For what has been noticed hereinabove, some of the principles relating to recording of dying declaration and its admissibility and reliability

could be usefully summed up as under :-

21.1. A dying declaration could be the sole basis of conviction even without corroboration, if it inspires confidence of the Court.

21.2. The Court should be satisfied that the declarant was in a fit state of mind at the time of making the statement; and that it was a voluntary

statement, which was not the result of tutoring, prompting or imagination.

21.3. Where a dying declaration is suspicious or is suffering from any infirmity such as want of fit state of mind of the declarant or of like nature, it

should not be acted upon without corroborative evidence.

21.4. When the eye-witnesses affirm that the deceased was not in a fit and conscious state to make the statement, the medical opinion cannot prevail.

21.5. The law does not provide as to who could record dying declaration nor there is any prescribed format or procedure for the same but the person

recording dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making the statement.

21.6. Although presence of a Magistrate is not absolutely necessary for recording of a dying declaration but to ensure authenticity and credibility, it is

expected that a Magistrate be requested to record such dying declaration and/or attestation be obtained from other persons present at the time of

recording the dying declaration.

21.7. As regards a burns case, the percentage and degree of burns would not, by itself, be decisive of the credibility of dying declaration; and the

decisive factor would be the quality of evidence about the fit and conscious state of the declarant to make the statement.

21.8. If after careful scrutiny, the Court finds the statement placed as dying declaration to be voluntary and also finds it coherent and consistent, there

is no legal impediment in recording conviction on its basis even without corroboration.

21. It is thus clear that a dying declaration could be the sole basis for conviction even without corroboration if inspires the confidence of the Court.

In the instant case we are satisfied that deceased Taslimbi was in a fit state of mind while making the statement and it was a voluntary statement,

which was not result of tutoring and prompting. We do not think that the dying declarations exhibit 31 and exhibit 43 respectively are suspicious and

suffering from any infirmity such as want of fit state of mind of the declarant or of like nature.

22. On 26.1.2013 itself on receiving the information on phone, PW 7 Shaikh Naim Shaikh Kasam had been to the matrimonial house of the deceased

Taslimbi at Shahagad and then went to Ghati Hospital, Aurangabad. PW 7 Shaikh Naim remained there in the hospital with deceased Taslimbi till her

death. On enquiry, deceased Taslimbi stated that on the count of household matter, there was quarrel between her and both accused. Deceased

Taslimbi stated that on 26.1.2013 quarrel took place in between 11.00 am to 12 noon. Deceased Taslimbi further stated that she got annoyed and

stated that she would set herself on fire. She had also stated to her brother that her husband told her that petrol can is lying there and to pour it on her

person, and set herself on fire. However, she told the appellant/accused that she would not set herself on fire. She had further stated that her husband

poured petrol on her person, lit the match stick and set her on fire.

23. Deceased Taslimbi had sustained 100% burns, however, the percentage and degree of burns would not, by itself, be decisive of the credibility of

the dying declaration. PW 2 Dr Pravin Ladda on examination of the patient certified that patient Taslimbi was conscious, oriented and able to give the

statement. It has been suggested to this witness that in case of 100% burns to particular part of the body having burns gets rigid, it is impossible to

obtain thumb impression, however, he has denied it. It appears that an attempt has been made to show that it was impossible to obtain thumb/toe

impression on exhibit 31 and exhibit 43 respectively. PW 2 Dr. Pravin Ladda has denied that patient was not conscious, oriented and able to give the

statement at the time of recording of both the dying declarations.

24. In a case of K. Ramchandra Reddy and another Vs. Public Prosecutor reported in 1976 Supreme Court Cases (Cri) 473 (supra), relied upon by

the learned counsel for the appellant, the Supreme Court in paragraph no.6 of the judgment has made following observations :-

“Dying declaration is undoubtedly admissible under s. 32 of the Evidence Act and not being a statement on oath so that its truth could be tested by

cross-examination, the Courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it. While great

solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so

as to implicate an innocent person yet the Court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or

a product of his imagination. The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a

clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Once the Court is

satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration.”

25. In paragraph no.11 of the said judgment, the Supreme court has observed that the Magistrate recording the dying declaration must put direct

questions to the injured whether he was capable mentally to record the statement. In the facts of this cited case in paragraph no.11, the Supreme

Court has observed that the Magistrate further admitted that the injured was taking time to answer the questions and that the injured was very much

suffering with pain. There were 48 injuries on the person of the deceased out of which there were 28 incised wounds on various parts of the body

including a few gaping incised injuries on the body. In view of the serious injuries, the Supreme court found it difficult to believe that deceased would

have been in a fit state of mind to make a dying declaration. In the backdrop of these facts, the Supreme Court has observed that Magistrate appears

to have committed a serious irregularity in not putting direct questions to the injured whether he was capable mentally to give the answers. However,

the facts in the instant case are altogether different and as such the ratio laid down by the Supreme Court in the cited case is not applicable to the

facts of the present case.

26. In a case of Suresh Arun Dodorkar Vs. State of Maharashtra in criminal appeal no.776 of 2003 (supra), relied upon by the learned counsel for the

appellant, in paragraph no.9 of the judgment, the Division Bench of this Court has observed that dying declaration has to pass all test of reliability as

declarant is not available for cross-examination and in cases where there are multiple dying declarations and acceptance of one dying declaration

falsifies the other, the dying declarations have to be necessarily rejected. In the facts of the said case, in the first dying declaration exhibit 24 deceased

Vimal had stated that the appellant under the influence of liquor used to beat her as he was suspecting her character and while she was asleep, the

appellant had poured kerosene on her person and set her ablaze. In the dying declaration exhibit 27 deceased Vimal however had stated that in the

evening when she had sent the daughter of her neighbour for purchasing wheat, but as the said girl had not gone, she herself had gone and purchased

the wheat. According to her, the appellant on his return asked her as to why she had gone for purchasing the wheat and what was the relationship

between her and shopkeeper. The appellant went out of house and returned carrying a small plastic can of kerosene and when deceased Vimal asked

him about dinner, the appellant told her that he would not eat anything prepared by her as she was of loose character and on saying so her husband

poured kerosene on her and set her ablaze. In the backdrop of these facts, the Division Bench of this Court observed that in case of written dying

declarations court cannot pick and choose anyone dying declaration and all dying declarations have to be consistent in respect of the material aspects

of the incident.

In the instant case, both the dying declarations are consistent on material aspects and as such, inspire the confidence of the Court.

27. In a case of Sanjay Sakharam Ahire Vs State of Maharashtra reported in 2013 SCC online Bom 1390, relied upon by the learned counsel for the

appellant, the Division Bench of this Court in paragraph no.13 has made similar observations that "in cases resting on multiple dying declarations,

the dying declarations should be consistent in material particulars. If the dying declarations are at variance, it would not be open for the court to pick

and choose any one dying declaration which would suit the prosecution and to base a conviction on the said dying declaration. The Division Bench has

placed the reliance on the earlier case of Suresh s/o Arjun Dodorkar vs. State of Maharashtra [2005 ALL MR (Cri) 1599] (supra).

28. In a case of Bhagirath Bhaurao Kanade Vs. State of Maharashtra reported in 1997 BomCR (Cri) 168. (supra), relied upon by the learned counsel

for the appellant, in paragraph no.20 of the judgment, the Division Bench of this court has observed that "in such a situation, the position is that

there is a conflict between the dying declaration recorded by the Magistrate and the dying declaration which is in the medical case papers, regarding

the manner in which Govinda sustained injuries; whereas in the dying declaration recorded by the Magistrate Prabhakar Takle, Govinda stated that the

appellant poured petrol on him and thereafter lighted a match stick on his body and in the dying declaration contained in the medical case papers,

Govinda has mentioned that he was accidentally burnt. Thus, the facts of this case are altogether different and cannot be made applicable to the facts

of the present case.

29. In a case of State of Maharashtra Vs. Sanjay Digambarrao Rajhans (supra), relied upon by the learned counsel for the appellant, the

Supreme Court has also observed that "a dying declaration must inspire full confidence in its truthfulness and correctness and its intrinsic worth and

reliability can be determined from its tenor and contents where there are more than one dying declarations, they must be tested on the basis of

consistency and probability."

In the facts of the cited case there are contradictions between the statement and statement subsequently recorded by the Executive Magistrate in

respect of the motive and location of the petrol can on the scooter. It is also observed by the Supreme Court that the statement recorded by the

Executive Magistrate is also not totally reliable. Another statement recorded by the I.O. soon thereafter containing unnecessary minute details

allegedly given by the deceased, who was in serious condition, the Supreme Court has, therefore, refused to believe those dying declarations.

In the instant case, both the dying declarations are found reliable, consistent and probable. There are no contradictions. In the facts of the instant case,

we do not think that the investigating officer has recorded unnecessarily the minute details.

30. In a case of P. Mani Vs State of Tamilnadu reported in (2006) 3 Supreme Court Cases 161 (supra), relied upon by the learned counsel for the

appellant, the Supreme Court has observed that dying declarations must be wholly reliable and in case of suspicion, the Court should seek

corroboration. However, the facts of the case cited case are altogether different.

In the facts of the cited case, deceased was the wife of the appellant and they were not in good terms. Deceased nurtured grudge against him on the

belief that the appellant was having an affair with the another woman. On the day of the incident, deceased bolted the door of the house from inside.

Upon hearing the same and on seeing the smoke coming out of the room, PW 1, 2 and the appellant went back and broke open the door, however,

allegedly the appellant poured kerosene and set on fire the deceased. In the backdrop of these facts, the Supreme Court has observed that whether

reliance should be placed on the dying declaration. It is observed that the circumstances which have been brought on record clearly point out that what

might have stated in the dying declaration may not be correct. Thus, the observations made in the aforesaid case cannot be made applicable to the

facts and circumstances of the present case.

32. In a case of Manohar Dadarao Landge Vs. State of Maharashtra reported in 1999 SCC Online 608, relied upon by the learned counsel for the

appellant, the Division Bench of this Court in paragraph no.40 has made following observations :-

“40. The evidence with respect to the dying declaration recorded by the Executive Magistrate, thus, becomes doubtful. The learned Counsel for the

appellant has also argued that the prosecution has not brought on record, the case papers of hospital at Kaij to show to the Court, that the physical

condition of Savita was sufficiently good to make the statement. Only the certificate given by the Doctor on his subjective satisfaction is not sufficient.

The prosecution ought to have produced on record, the other data recorded by the Doctor on her case papers with respect to her pulse, blood

pressure, general physical condition, and nature of treatment given to her, for the Court to come to the conclusion, whether she was physically and

mentally fit to make the statement.”

In the facts of the case cited, the dying declaration of Savita was recorded between 12.10 midnight to 12.35 hours in the night between 3rd and 4th

June, 1993. She died at about 12.00 midnight at Ambajogai. Apparently, no care was taken by the I.O. to bring before the court the true facts of the

case. If as per the prosecution case, Savita died at midnight between 3rd and 4th June 1993 at Ambajogai, then definitely her dying declaration could

not have been recorded at Kai between 00.10 hours to 00.35 hours during the same night.

In the backdrop of these facts, the Division Bench of this Court has expressed the need of medical case papers of the hospital of the case to find out

physical condition of Savita at the time of recording her statement. Thus, the ratio laid down in the aforesaid case is not applicable to the facts and

circumstances of the present case.

33. In a case Balak Ram Vs. State of U.P. reported in (1975) Supreme Court Cases 219, relied upon by the learned counsel for the appellant, in the

facts of the cited case, the Supreme Court in paragraph no.51, 52 and 53 has dealt with the issue of multiple dying declarations and observed that it is

not prudent to base the conviction on a dying declaration made to an Investigating Officer. The prosecution relied very strongly on the three dying

declarations alleged to have been made by Tribeni Sahai. The first of these was made to Dharam Pal, the second to the Investigating Officer

Yogendra Sharma and the third was made in the Budaun hospital before the Sub-Divisional Magistrate.

In the facts of the said case, considering the haste made by the Investigating Officer, the Supreme Court has refused to consider the dying declaration

recorded by the Investigating officer.

In the instant case, on the basis of the statement cum-dying-declaration exhibit 43 recorded by the PW 8 PSI Somnath Shinde, crime came to be

registered initially for the offence punishable under sections 307 of IPC and, thereafter, PW 3 Sanjay Gaidhani, Naib Tahsildar recorded the statement

of the deceased on the same day after some hours. Thus, the ratio laid down in the aforesaid case cannot be made applicable to the facts of the

present case.

34. We have carefully gone through the following three cases i.e. a] Madhukar s/o Shrimant Mhaske and another Vs. The State of Maharashtra

reported in 1998 SCC online Bom 186, b] Sau Kamalbai Haribhau Lastane Vs. State of Maharashtra through PSO Nandgaon Khandeshwar reported

in 2019 SCC online Bom 757 and c] Dadarao Shripat Thorat Vs. State of Maharashtra in criminal appeal No.221 of 2014, wherein the Division Bench

of this Court has made certain observations in the facts of the case. The facts of those cases are altogether different and, thus, the observations made

in those cases cannot be made applicable to the facts of the present case.

35. In case of Munnu Raja and another Vs. The State of Madhya Pradesh reported in (1976) 3 Supreme Court Cases 104, relied upon by the learned

counsel for the appellant, it is observed in the facts of the said case that the investigating officer has not requisitioned the services of the Magistrate for

recording the dying declaration and, therefore, the Investigating officers are naturally interested in the success of the investigation and the practice of

the investigating officer himself recording a dying declaration during the course of investigation ought not to be encouraged.

In the instant case, facts are altogether different and thus the ratio laid down by the Supreme Court in the aforesaid case cannot be made applicable to

the facts of the present case.

36. In a case of Laxman Vs. State of Maharashtra reported in (2002) 6 Supreme Court Cases 710, the Supreme Court in paragraph no.3 has made

following observations :-

“3. The juristic 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 deathbed 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 looks 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.Ã¢â¬â¸

Bearing in mind the aforesaid principle, the dying declarations in the instant case complete the test laid down in the aforesaid case.

37. In case of Purushottam Chopra Vs. State (Government of N.C.T.) Delhi (supra), relied upon by the learned APP, the Supreme Court has referred

the principles relating to admission and acceptability of the statement made by the victim representing the cause of death, as laid down by Constitution

Bench in a case of Laxman Vs. State of Maharashtra reported in (2002) 6 SCC 710. In paragraph no.18.2 the Supreme court has referred the

principles summed up by the constitution bench in the Laxman's case as regards the acceptability of the dying declaration. Paragraph nos.18, 18.1,

18.2 and 18.3 reads thus :-

Admission and acceptability of dying declaration : The principles

18. The principles relating to admission and acceptability of the statement made by a victim representing the cause of death, usually referred to as a

dying declaration, are well settled and a few doubts as regards pre-requisites for acceptability of a dying declaration were also put at rest by the

Constitution Bench of this Court in the case of Laxman v. State of Maharashtra: (2002) 6 SCC 710.

18.1. In the said case of Laxman, conviction of the appellant was based on dying declaration of the deceased which was recorded by the Judicial

Magistrate. The Session Judge and the High Court found such dying declaration to be truthful, voluntary and trustworthy; and recorded conviction on

that basis. In appeal to this Court, it was urged with reference to the decision in Paparambaka Rosamma and Ors. v. State of Andhra Pradesh : 1999

CriLJ 4321 that the dying declaration could not have been accepted by the Court to form the sole basis of conviction since certification of the doctor

was not to the effect that the patient was in a fit state of mind to make the statement. On the other hand, it was contended on behalf of the State, with

reference to the decision in Koli Chunilal Savji and Anr. v. State of Gujarat: 1999 CriLJ 4582, that the material on record indicated that the deceased

was fully conscious and was capable of making a statement; and his dying declaration cannot be ignored merely because the doctor had not made the

endorsement about his fit state of mind to make the statement. In view of these somewhat discordant notes, the matter came to be referred to the

Larger Bench.

18.2 The Constitution Bench in Laxman summed up the principles applicable as regards the acceptability of dying declaration in the following :-

“3. The juristic 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 the deathbed 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 courts 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 always to 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 looks 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

ORDER

i. Criminal appeal is hereby dismissed.

ii. Criminal appeal accordingly disposed off.