(2010) 03 BOM CK 0028

Bombay High Court (Nagpur Bench)

Case No: Criminal Appeal No. 307 of 2004

Janrao Bhute, Ashok Bhute, Pandurang Dhawale and Sau. Rekha Bhute	APPELLANT
Vs	
State of Maharashtra	RESPONDENT

Date of Decision: March 5, 2010

Acts Referred:

- Criminal Procedure (Amendment) Act, 2008 - Section 15
- Criminal Procedure Code, 1973 (CrPC) - Section 161, 172, 173, 311, 313
- Penal Code, 1860 (IPC) - Section 302, 307, 34

Hon'ble Judges: P.D. Kode, J; A.P. Lavande, J

Bench: Division Bench

Advocate: R.P. Joshi, for the Appellant; Y.B. Mandpe, APP, for the Respondent

Final Decision: Dismissed

Judgement

P.D. Kode, J.

The appeal and the application preferred therein by the appellants under Sections 311 and/or 391 of the Code of Criminal Procedure are disposed by this common judgment. By present appeal, appellants/accused have thrown challenge to judgment and order dated 19th March, 2004 convicting them for commission of offence punishable u/s 302 read with 34 of Indian Penal Code and sentencing each of them to undergo imprisonment for life and pay a fine of Rs. 1000/- (Rs. One thousand only) and in default to undergo R.I. for two years, passed by learned Additional Sessions Judge, Amravati, in Sessions Trial No. 83 of 1997 of the said Court.

2. The said session case had arisen out of the charge sheet submitted by Nandgaon Peth Police Station against the appellants for commission of such offence as a result of investigation of FIR No. 16/1997 initially registered with the said police station for

commission of offence punishable u/s 307 read with Section 34 of I.P.C. by PW3 API Baburao Tayde after receipt of dying declaration Exh.72 of victim Sahebrao Bhimrao Aware recorded by PW2 Prakash Dabhade, Special Judicial Magistrate at Irwin Hospital, Amravati on 2.2.1997.

3. It is the prosecution case that PW2 had been to said hospital after receiving letter of requisition from the Police for recording dying declaration of the said patient. PW2 had issued requisition letter Exh.71 to the Medical Officer, Ward No. 4 at said hospital for examining the patient Sahebrao Bhimrao Aware resident of Nandgaon and having sustained 63% burn injuries and certifying whether said Sahebrao was in fit condition to give a statement. PW4 Dr. Deshmukh on duty after examining Sahebrao at about 10.45 p.m. had given certificate Exh.86 upon the requisition letter to the effect "certified that patient is conscious, oriented well time and date and patient is fit for D/D".

4. It is further prosecution case that thereafter PW2, after persons surrounding the patient had withdrawn them as asked by him, had recorded dying declaration Exh.71 of Sahebrao in presence of PW4 Dr. Deshmukh in question and answer form in his own handwriting. PW2 had signed the same and taken thumb impression of the patient thereon. He had read over the same to the patient and patient had admitted the same to be correct and PW2 had made endorsement to such effect below the dying declaration recorded and so also PW4 Medical Officer after examining the patient had certified that patient was conscious and oriented.

5. It is prosecution case that during the said dying declaration, said Sahebrao had given his residence as Takli Jahangir and occupation as cultivation. To the main question asked as to what had happened, he had narrated that Ashok Bhute - appellant No. 2, Pandurang Dhangar - appellant No. 3, had caught hold of him and wife of Janrao Bhute i.e. appellant No. 4 had brought kerosene can from the house and Janrao Bhute appellant No. 1 had poured kerosene from said can on his entire person from head and after taking a match-stick from Pandurang - appellant No. 3, had ignited it and set him on fire. As a result thereof, he had sustained burn injuries on entire person from mouth and to vital part. With regard to the reason for the incident, Sahebrao narrated that from the lane appellant No. 3 had called him to the narrow lane of house of Ashok (appellant No. 2). Appellant No. 1 told him "why did he lodge report in the Police Station against his brother Ashok (appellant No. 2)", thereon Sahebrao had told him since appellant No. 1 had lodged report, he had also lodged report. At that time, appellant No. 1 told Sahebrao "Foknicha Tu Majla". Appellant No. 1 had asked his wife to bring kerosene container. At that time, Sahebrao had tried to free himself from his clutches but he had caught Sahebrao firmly. Firstly appellant No. 1 had beaten him. Then appellant No. 1 along with said other persons had set him on fire. With regard as to where and when incident had occurred, Sahebrao had replied that incident had taken place yesterday at about 9.30 O'' clock in the night in the lane towards the house of appellant No. 2 at Takli

Jahangir.

6. PW3 API after registration of the FIR had drawn spot panchanama Exh.79 and seized one tin of kerosene and burnt pieces of clothes from the spot in presence of panch PW1 Bobde and one another, under seizure memo Exh.80. He had also recorded statement-cum-dying declaration Exh.84 as per say of victim on 2.2.1997. On 4.2.1997 he had seized clothes of appellant No. 3 in presence of same panch PW1 under seizure memo Exh.81 and that of appellant No. 2 under seizure memo Exh.82. He had seized clothes of appellant No. 1 on 13.2.1997 under seizure memo Exh.83 again in presence of panch PW1 and another. PW3 had also recorded the statement of the witnesses and forwarded seized property to Chemical Analyser and received report Exh.65 about the same. At the conclusion of the investigation, he has charge sheeted the appellant as stated hereinabove. Upon committal of said case above stated sessions trial, was registered against the appellants.

7. The said trial was taken up by learned Additional Sessions Judge, Amravati. The charge Exh.35 was framed on 13.9.2002 against the appellants for commission of offence punishable u/s 302 read with 34 of the Indian Penal Code. Each of the appellant had pleaded not guilty to the said charge vide their pleas respectively at Exh.36 to 39.

8. The prosecution at the trial had examined above referred four witnesses. Needless to add that except panch PW1 who was required to be declared hostile, the rest of three witnesses had given evidence in consonance with part played by them in said episode as described hereinabove.

9. The defence of the appellants was of total denial. During the answers in examination effected u/s 313 of Cr.P.C. of each of the appellant, none of them had taken any specific defence, except stating that the circumstances appearing against him/her in the evidence and put to said appellants either being false or being unaware about the same. Significantly enough none of them had assigned any specific reason for witnesses having deposed falsely against said appellants or anything regarding the case.

10. Thus prosecution case had mainly rested upon the evidence of PW 2 and PW 3 and the dying declaration recorded by each of them and corroborative evidence of PW 4 and the documentary evidence corroborating the oral testimonies of these witnesses regarding sending/requisitioning then for recording dying declaration, endorsement made/certificate given and regarding the material collected during the investigation. The trial court accepted the evidence of PW2 and 3 and came to the conclusion of Exhs.72 and 84 being dying declarations of deceased Sahebrao Awari recorded by them respectively being established by prosecution. It also came to the conclusion that deceased had died due to the burn injuries sustained due to being set on fire by the appellants after pouring kerosene on his person. The trial court also came to the conclusion that by committing such act in furtherance of common

intention the appellants have committed murder of deceased.

11. After the appeal preferred by the appellants in 2004 was listed for final hearing, the appellants preferred the above mentioned Criminal Application No. 88 of 2010 purporting to be an application u/s 311 and/or 391 of Cr.P.C. for summoning the material witnesses and taking additional evidence. By the said application appellants prayed for summoning persons whose affidavits were annexed with the said application and examining them u/s 311 of Cr.P.C. or alternatively permitting the appellants to lead additional evidence of all the said persons u/s 391 of Cr.P.C. in the interest of justice and in peculiar facts and circumstances of the case. The appellants also prayed for summoning investigating officer PW 3 API Tayade, if required and passing appropriate direction.

12. In short, it the contention of the said appellants/applicants in the said application that incident in question was witnessed by not less than 15 to 20 persons in the village and deceased heavily drunk abusing appellants and threatening outside the house of appellant No. 2 that they should withdraw the complaint lodged by them against him otherwise he will set himself ablaze and falsely implicate all of them. The deceased brought one can from his house to the spot and again started abusing and threatening and emptied the can upon his person and then took out a match-box tied in dhoti at his waist and lit the match-stick which got extinguished. So again lit another match-stick and took it towards his head and suddenly he caught fired. Afterwords shouting in pain deceased fell down in small Nala. Some of the villagers witnessing the incident got frightened and ran away after noticing that deceased was burning. Somebody called the brother Nana Aware and wife of deceased Vimlabai and then he was taken to General Hospital.

13. It is further contention of the appellants in said application that police had enquired about the incident from the people at village and had also recorded number of statements of the persons who had witnessed the incident. Wife of the appellant No. 2 Varsha had given a report on 2.2.1997 i.e. on very next day of incident enumerating the facts and even the name of some of the witnesses including seven eye witnesses still the investigating officer had not filed statement of single eyewitness along with the chargesheet and preferred to file two dying declarations with some inconsequential statements.

14. Though the investigation officer had filed report dated 2.2.1997 lodged by wife of appellant No. 2 Smt. Varsha in the Court. But to the misfortune of the appellants their counsel Adv. Shri Vishwas Vaidya did nothing. The said counsel proved out to be worse than even prosecutor and had not put any questions to the investigating officer regarding the report nor examined Smt. Varsha Bhute in defence. The investigating officer had also filed along with chargesheet one report dated 30.1.1997 lodged by appellant No. 2 about the threats being given by deceased and another report filed by appellant No. 3 stating same facts about threats, dated

29.1.1997. However the counsel for the appellants did not put a single question to the investigating officer on said report. The appellants had narrated the real facts as disclosed by the eyewitnesses to their counsel and had even taken the said eyewitnesses to the office of counsel but he had not paid any heed to it and kept on saying that there is no need to examine them and that nothing will happen and they would be acquitted. It is further contention of the appellants that after closure of the prosecution case before examination of appellants u/s 313 of Cr.P.C. the said counsel has instructed them that accused have only to answer to the questions asked by the court in the form of "True or False" or "I do not know" and nothing further.

15. It is further contention of appellants in the application that thus their counsel had failed to act in spite of instructions given to him regarding eyewitnesses and taking eyewitnesses to the counsel for hearing their narration. Their counsel had not bothered to examine them as witnesses nor had bothered to ask the questions to the investigating officer about the same. The applicant had engaged him on being told by some villagers to approach said counsel. The applicants/appellants being simple agricultural labourer did not understand intricacies of criminal trial and had never faced a criminal trial and had acted in a manner as told by their counsel believing him and hence not narrated their tale to the court.

16. It is further contention of the appellants that PW 3 has misled the court by filing one sided chargesheet and by suppressing the statements of many eyewitnesses recorded by him and thus committed a fraud on the court by suppression. The judgment of conviction is result of the same even the prosecutor had acted like a persecutor in not being fair to examine Smt. Varsha wife of appellant No. 2 and further in not proving the earlier report lodged by appellant No. 2 and 3 and thus the trial has turned out to be unfair and had resulted in failure of justice. The appellants also filed affidavits of 10 persons mentioned in paragraph No. 6 of application for summoning them for examination or permitting applicants to lead additional evidence.

17. It is also contention of the appellants that the villagers were shocked after their conviction and had sent representation signed by 310 villagers including to the Hon''ble President of India recording the details of the incident and injustice caused to the appellants and for making fair enquiry and the same being forwarded to the Government of Maharashtra and, thereafter, to this Court. It is further contention of the appellants that except appellant No. 4 all of them being in jail, they could not file complaint against their counsel upon the similar lines of matters as stated in the application and now would be taking steps against the said counsel. Similarly appellants being in jail at the time of presentation of appeal the memo for the same was routinely drafted by their earlier counsel on the basis of the judgment and copies of available depositions. The appellants having recently about a month back having engaged their present counsel, after their instructions the present

application was filed.

18. The learned Counsel for the appellants urged that the matters from the application preferred can be appreciated only after appreciating the matters pertaining to their conviction and hence firstly he would be arguing the appeal and thereafter the application.

19. The learned Counsel for the appellants thereafter urged for allowing the appeal and setting aside the order of conviction and sentence passed by the trial Court on the count of:

a) the trial court having manifestly erred in coming to the conclusion of guilt of the appellants for the offence of murder being established on the basis of the dying declarations relied.

b) the trial court miserably missed that even the matters in the dying declarations fail to establish sufficient motive for the appellants for committing such serious crime in a manner as alleged in so called dying declarations and same itself sets out possibility of dying declarations being not true or at least the possibility of false implication of the appellants.

c) the trial court miserably missed that matters in the dying declarations themselves denotes the deceased having animus against the appellants due to complaint being lodged against him and as such the said matter itself raises the strong possibility of false implication of the appellants.

d) the trial court failed to appreciate that the matters from spot panchanama which denotes that the alleged incident has taken place within thickly populated village and as such in all probability witnesses would have been present and would have observed the incident if at all the same had taken place in a manner as stated in the dying declarations.

e) the trial court failed to appreciate that non examination of eyewitnesses by the prosecution is itself an factor denoting that the matters stated in the dying declarations are far from true.

f) the non examination of persons in the vicinity of spot to establish at least the presence of the appellants at the relevant place or fact of quarrel having taken place is indicative of the relevant matters being concocted and/or the same belies any incident as stated in the dying declarations having occurred.

g) the finding of kerosene on the clothes of appellants looses all the significance as the same squarely rests upon the tainted word of the investigation officer coupled with the fact of there being gap of a day or more in effecting the alleged seizure after arrest of the appellants and there being unexplained delay in forwarding seized articles to Chemical Analyser.

h) the evidence of PW 3 fails to establish that statement of deceased recorded by him can be regarded as a true voluntary, reliable dying declaration made by deceased to him and himself having properly recorded the same. The evidence of the said witness is miserably silent regarding the manner in which he had recorded the same.

i) the prosecution having failed to place on the record any requisition being issued to PW2 for recording a dying declaration of the deceased creates grave doubt about his claim of having recorded dying declaration of deceased as claimed by him.

j) the evidence of PW2 fails to establish that dying declaration made by the deceased was voluntary as his evidence fails to reveal any care being taken by him to ascertain that the deceased was not making a statement due to tutoring in spite of the fact that his evidence shows that the deceased was surrounded by people and he had to drive them out.

k) the evidence of PW 2 also fails to establish the deceased having made dying declaration to him and himself having recorded the same properly.

l) dying declaration does not inspire confidence and deserve to be discarded and consequently there being no other evidence to link the appellants with the offence for which they are convicted, they deserve to be acquitted.

20. The learned Counsel for the appellants with regard to the application urged that considering the nature of evidence adduced by the prosecution being confined to the dying declarations placed before the Court and no eye witness being examined at a trial requires allowing the application made by the appellants for serving the ends of justice for the reasons stated in the application. He urged that considering the matters stated in the application i.e. the appellants having not taken steps due to being not advised by the counsel, the prayer in the application deserves to be considered to avoid occurring of travesty of justice. He urged that the application deserves to be allowed having regard to the facet that the other version of the story being not placed before the Court by the investigating officer and support for the same is duly found from the earlier reports filed by appellant No. 2, his wife and so also the persons who had witnessed the incident having sworn affidavits which are tendered along with the application. He urged that the same will not be liable to be discarded on the count of delay in view of fact of statements being recorded would be borne by the case diary. The learned Counsel thus contended that hence the application be allowed in a manner as deemed proper by the Court and in the said event after additional evidence is taken on the record the matter be decided.

21. The learned Counsel for the appellants also placed reliance upon the following decisions i.e. in respect of:

I) Dying declaration:

i) Mohamed Hanif Ansari v. State of Maharashtra reported in 2008 ALL MR (Cri) 2083,

ii) Mohan Lal and Ors. v. State of Haryana reported in 2007 ALL MR (Cri) 847 (S.C.).

II) Case diary/Use of by the Court:

i) Bachan Singh and Another Vs. State of Bihar, ,

ii) Sidharth Vs. State of Bihar, ,

iii) Hemanta Kumar Mondal Vs. The State of West Bengal, ,

iv) Angadh v. State of Mah. reported in 2007(2) Mh.L.J. 394,

v) State of Kerala Vs. Raghavan etc., ,

vi) Ramesh Wamanrao Babhulkar v. State of Maharashtra reported in 1995(2) Mh.L.J. 724.

III) Supression and Concealment by Police:

i) Raghunath and Ram Kishan and Others Vs. State of Haryana and Others, ,

ii) Ashish Batham Vs. State of Madhya Pradesh, ,

iii) Subhash Chand Vs. State of Rajasthan, .

IV) Fair trial R/W Section 311 and 391 of Cr.P.C.:

i) Zahira Habibullah Sheikh and Another Vs. State of Gujarat and Others, ,

ii) Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, ,

iii) State Inspector of Police Vs. Surya Sankaram Karri, ,

iv) Smt. Shakila Abdul Gafar Khan Vs. Vasant Raghunath Dhoble and Another, ,

V). Representation by lawyer has to be meaningful and effective:

i) Kishore Chand Vs. State of Himachal Pradesh, ,

ii) State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, ,

iii) Kunnummal Mohammed and Another Vs. State of Kerala, ,

iv) Panchu Gopal Das Vs. The State, ,

VI) Benefit of doubt:

Rang Bahadur Singh and Others Vs. State of U.P., ,

VII) Role of Public Prosecutor:

Shiv Kumar Vs. Hukam Chand and Another, .

VII) CHARGE

Basavaraja and Others Vs. State of Karnataka, .

22. The learned APP vehemently opposed the application made by the appellants by stating the same being an after thought application. He urged that an application Exh.45 was made before the trial Court and trial Court had ordered the defence counsel for taking steps for obtaining the copies of the document. He urged that the appellants or their counsel having not availed the said opportunity at the said stage and so also having not said anything during the examination u/s 313 of Cr.P.C., nor having bothered to cross-examine the witnesses upon the relevant aspect nor having bothered to call and examine anybody in support of their defence for the matters which are now alleged and even the present application being not preferred at the time of preferring the appeal and the same being preferred at belated stage i.e. after about 7 years clearly indicates that an ingenious effort is being made to come out of conviction recorded by the trial court after assessment of evidence. He urged that such an inference is inevitable as even up-till today no action has been taken by the appellants against the counsel for the aspects for which the blame is now alleged to him in the application. He urged that application u/s 311 or u/s 391 presupposes cogent reasons for allowing the same. The said provisions cannot be allowed to be misused for covering the wrong which otherwise cannot be corrected in an appeal. He urged that the application made after a gross delay for making up of lacunae cannot be permitted at this stage.

23. The learned APP supported the impugned judgment and order and submitted that the evidence on record clearly makes out a case of accused having committed murder of the deceased. He urged that the evidence of PW 2, PW 3 and PW 4 inspires confidence in view of the same being supported by corroborative evidence and the same clearly establishes that Exh.72 and Exh.84 are true, voluntary and reliable dying declarations made by the deceased and properly recorded by them. He further urged that both the dying declarations again corroborate each other. He urged that merely because investigating officer has not precisely deposed about the manner in which he recorded dying declaration and/or deceased then being in fit condition to make a statement, the dying declaration will not be liable to be rejected on the said count. He urged that prosecution cannot be allowed to suffer merely because of a lapse on the part of the investigating officer. He urged that in the instant case dying declarations inspire confidence, the same speak about the role played by each of the appellants and acceptance of the same clearly establishes the appellants having committed the offences for which they were convicted and sentenced by the trial Court and as such no interference would be warranted with the judgment and order impugned in the appeal and the appeal be dismissed.

24. We have given thoughtful consideration to the submissions advanced by both the parties and carefully perused the record and the decisions pointed.

25. The learned Counsel for the appellants has not disputed the deceased having died on 3.2.1997 due to burn injuries sustained by him. Additionally the said facet has been also established by P.M. Notes Exh.88. The reference to the said document

reveals that deceased Sahebrao Bhimrao Aware had sustained 78% burn injuries all over head, neck, face chest, abdomen and back as described in column No. 17 of the aid document. Additionally the probable cause of death given by Dr. Bhoyar who had performed an autopsy also reveals of deceased having died due to the shock due to extensive burn injuries of 78% suffered by him. Since it is neither case of prosecution nor even the case of defence of Sahebrao having sustained the said injuries in any accident, the said aspect considered along other evidence i.e. dying declaration of the deceased would be sufficient to come to the conclusion of the deceased having met with homicidal death in event of said evidence of dying declaration is found to be acceptable after the assessment in light of the submissions advanced by the rival parties.

26. In order to establish the said facet, the prosecution has mainly relied upon the dying declarations of the deceased recorded by PW2 and PW3 and the evidence of PW4 Dr. Deshmukh who had examined the patient before recording of his dying declaration and after the same was recorded. Now firstly taking the evidence pertaining to dying declaration recorded by PW2, his own evidence reveals that since 1997 he was working as a Special Judicial Magistrate and on 2.2.1997 he had been to Irvin Hospital, Ward No. 4 as he had received requisition letter from Police to record dying declaration of the patient. He had issued requisition Exh.71 to Medical Officer at the said place for certifying whether the patient was able to give his statement and thereon Medical Officer (PW4) had examined the patient and certified below the requisition letter that patient was conscious and able to give the statement.

27. The evidence of PW2 further reveals that thereafter as asked by him person present surrounding the patient had withdrawn themselves and himself, Medical Officer and patient were only present at the said place. He had given the name of the said patient being Sahebrao Bhimrao Aware resident of Jahagir Takli. He had deposed of the patient having told him that Ashok Bhute, Pandurang Dhangar held him, wife of Janrao Bhute brought a kerosene can from the house, Janrao Bhute took the said can and poured kerosene on his person, Janrao took match box from Pandurng Dhangar and lighted match stick and set him on fire, as a result he sustained burn injuries. The cause behind the incident was that the accused said to him as to why the report of Ashok was lodged with Police Station and victim then said as accused had lodged the report therefore he had reciprocated it. Janrao then had abused him, all the accused persons had beaten him and finally he was set on fire.

28. PW2 had further deposed that when PW2 had asked him about the place of incident, he had told PW2 that Pandurang Dhangar had called him, he had been to the lane near Ashok Bhute''s house and told the time of incident to PW2 as 8.30 p.m. The evidence of PW2 reveals that he had recorded dying declaration, in question and answer form in his handwriting. The same was bearing his signature and thumb

impression of the patient. The dying declaration was read over to the patient and he had admitted it to be correct and an endorsement to that effect being taken by PW2. He has vouched Exh.72 being the said dying declaration and Medical Officer having again examined the patient and certified that the patient was conscious and oriented.

29. Now carefully scrutinizing the evidence of PW2 in the light of the answers elicited in the cross-examination, the same does not reveal any of them having the effect of shaking core of his testimony i.e. he had been for recording of dying declaration and has recorded the same in a manner as disclosed from his evidence and Exh.72 being the said dying declaration. The close scrutiny of his evidence reveals that except bringing on the record that the requisition received by him was not on record and himself having not asked any questions for ascertaining whether the victim was giving tutored version, no other material has been brought on record. Though it is true that his evidence reveals that he had asked the persons surrounding the victim to withdraw themselves before dying declaration and thus his evidence shows presence of persons nearby victim before PW2 had reached at the said place, still merely because of the same or PW2 having admitted of not having questioned to ascertain whether deceased was giving tutored version it is difficult to accept the submission of the learned Counsel for the appellants that prosecution had not excluded the possibility of dying declaration being tutored one and on the contrary the said evidence probabalises Exh.72 being tutored version. It is difficult to accept the said submission as one cannot expect of persons close to victim would not be visiting him in the hospital. Thus mere presence of such a person by itself cannot be said to be a ground denoting that the deceased was tutored. The same is the case regarding PW2 having not asked the questions to the deceased regarding the relevant aspect. As a matter of fact asking of any such question would have been unnecessary presupposition and without any other material being pointed for supporting such a theory, it would not have been expected from PW2 to ask such a question.

30. In addition to the aforesaid, the matters deposed by PW2 are found corroborated by matters stated in requisition Exh.71 issued by him to the Medical Officer. It is true that on behalf of appellants it was brought on record that the requisition said to have been issued by Police to PW2 for recording dying declaration, was not brought on record. However, hardly any significance can be given to the said aspect in view of the fact of PW2 having been to the said Hospital is found corroborated by Exh.71 and so also by the evidence of PW4 i.e. the Medical Officer at the said hospital. The evidence of PW2 is also found corroborated by the matters stated in the dying declaration. Thus claim of PW2, upon independent scrutiny does reveal core of his testimony of Exh.72 being the dying declaration made by the deceased to him and recorded by him, has remained undaunted after cross-examination.

31. In the context of the evidence of the said dying declaration, the evidence of PW4 reveals on 2.2.1997 he had received requisition letter Exh.71 for certifying whether the patient was fit to give his statement and he had examined the patient, the patient was conscious and well oriented and he was fit for recording dying declaration and PW4 had given such certificate below requisition and signed the same and Exh.86 i.e. upon Exh.71 being the said certificate. The same further shows that thereafter Special Judicial Magistrate has recorded dying declaration of the patient and PW4 had again examined the patient and certified that patient was all over conscious and oriented while the dying declaration was recorded. He had given certificate Exh.87 at 10.27 a.m. while earlier certificate was issued by him at 10.00 a.m.

32. Now scrutiny of the evidence of PW4 reveals no significant matters being elicited during the cross-examination of PW4 rendering his evidence unacceptable. Though during the cross-examination of PW4 it is brought on record that physical fitness and mental fitness being two different things, still considering the aspect upon which PW4 had given the certificate, it is difficult to accept that the relevant answers elicited during the cross-examination can be useful to the appellants for advancing their case. Without unnecessary dilating upon each of the answers given to the question asked during the cross-examination to PW4, it can be safely said that none of the answers therein reveals that the deceased was not in a condition to make a statement as certified by PW4. Thus the evidence of PW4 duly corroborates the evidence of PW2.

33. Now taking up another dying declaration, the evidence of PW3 Baburao reveals that on 2.2.1997 while being attached with Nandgaon Peth Police Station, he received a dying declaration of Sahebrao Bhimrao Aware and thereon he had registered crime on the basis of the said dying declaration Exh.72. His further evidence reveals of having visited the spot, drawn spot panchanama Exh.79 and having seized one tin of kerosene and burnt pieces of clothes from the spot under seizure memo Exh.80. He has also deposed of having seized the clothes of the accused under seizure memo Exh. 81 as narrated hereinabove while narrating the prosecution case. The material part of his evidence reveals that on 2.2.1997 he had recorded the statement of victim and the same bears his signature. He has also deposed of himself having recorded the same as per the say of the said victim. His further part of evidence reveals regarding the remaining investigation in the said crime effected by him.

34. Now scrutiny of his evidence does not reveal any significant circumstance being elicited during the cross-examination rendering his claim of having recorded dying declaration Exh.84 of the victim at the hospital unbelievable. Such an inference is obvious as except giving suggestion to PW3 of deceased having not made dying declaration to him and/or victim being unconscious right from his admission in the hospital and having died during the unconsciousness which was denied by him, no

other significant circumstance has been elicited during the same.

35. It is indeed true that as criticized by the learned Counsel for the appellants that the evidence of PW4 does not reveal of himself in detail having deposed manner in which he had recorded said statement/dying declaration of the deceased. It is also true that as criticized his evidence also does not reveal that prior to recording of the same he had approached the Doctor in the Irwin Hospital to ascertain whether the victim was in a position to make a statement or that the same was recorded during the presence of Doctor. It is also true that as criticized the same is also not recorded in question and answer format. However, it is difficult to accept that because of these aspects the said dying declaration will be liable to be discarded as canvassed on behalf of the appellants.

36. Such a conclusion is inevitable as it is not the case of prosecution of the same being recorded by PW3 in such a manner, still the core of the evidence of PW3 of deceased having made such a statement to him and himself having recorded the same, had remained unshattered after the cross-examination. Similarly the learned Counsel for the appellants had also not pointed out any other material on the record for coming to otherwise conclusion that on the relevant date and time victim could never have been in a position to make a dying declaration to PW3 or PW3 could not have recorded the same. It is true that PW3 is from the Police Department. However, merely because of the said fact a conclusion cannot be jumped that he has falsely staked such a claim and that too without there being any circumstance indicating/justifying such an inference. It is true that the said dying declaration is not containing the certificate of the Doctor of then victim being in a position to make a rational statement. However, the fact of PW3 having claimed of deceased having made such a statement and himself having recorded the same impliedly denotes of victim then being in a position to make a statement, as such a conclusion arising out of the evidence of PW3 is fully spelt out from the said evidence.

37. In addition to the aforesaid considering the matters from the said dying declaration which is placed before the Court also to some extent justifies/supports such a conclusion as the same within itself reveals the rational of the matters found recorded therein. Though the said dying declaration is not in question and answer form, bear reading of the same is indicative of the same being recorded in response to the questions asked by PW3 to the deceased. In addition to the aforesaid, the said matters are found in consonance with the matters stated in the dying declaration recorded by the Special Executive Magistrate Exh.72.

38. In addition to the aforesaid, matters stated in the dying declaration are also found corroborated by various other circumstances such as the matters stated in spot panchanama Exh. 79 regarding can found, burnt clothes at spot being seized under Memo Exh.80, clothes of some of the accused immediately seized all containing smell of kerosene and so also the burn injuries found on person of deceased as established by the autopsy notes Exh.88. The evidence on the record

also do not reveal of PW2, PW3 and PW4 having any reason to stake a false claim regarding the matters deposed by them or themselves having any animus against the appellants for staking a false claim. In short hardly any material has surfaced on record creating even semblance of doubt regarding the dying declarations relied by the prosecution being not true, voluntary and reliable dying declaration made by the deceased.

39. Now in the context of the submissions of learned Counsel for the appellants that merely because dying declarations alleges appellants being perpetrator of the crime, the same will not deserve credence unless and until there exists some other independent evidence for corroborating culpability of the appellants as instances are not unknown of even dying person in certain contingencies having spoken lies i.e. due to not knowing the name of real culprits or due to vengeance and in the said context reliance placed by him in a case of Mohd. Hanif Ansari v. State of Maharashtra and Mohanlal and Ors. and even accepting existing possibility of dying person also speaking false hood in certain contingencies still the said submissions cannot be accepted in the instant case.

40. In the same context it will be necessary to say that even the decision in the case of Mohanlal (supra) relied by learned Counsel for appellants and the principles governing dying declarations reproduced in the same from earlier decision in a case of Smt. Paniben v. State of Gujarat reported in AIR 1992 SC 1817 itself reveals that dying declaration after being found to be true and voluntarily can be used for basing conviction upon the same without corroboration. Similarly the said principles amongst other also reveals that the corroboration would be required for acting upon the dying declaration only in the event of the same being found to be suspicious.

41. Having regard to the same and in the instant case hardly any circumstance having surfaced on the record for inferring any suspicion regarding the matters stated in the dying declarations it is difficult to accept that the conviction cannot be fastened on the basis of the said dying declarations which after scrutiny of evidence are found to be true, voluntary and reliable. It is true that the matters from the dying declarations also reveal the complaint being lodged by the deceased and other party against each other. However, merely because of the same conclusion cannot be drawn that the same indicates that the deceased has reason to falsely implicate the appellants. As a matter of fact it is well known that enemity is a double edged weapon. Thus on the said basis the same also denotes motive for appellants to commit the crime. Apart from the same considering the account of crime committed as disclosed from dying declaration it is difficult to accept that the same has any shade of inferring the appellants being falsely roped by the deceased due to himself not knowing real culprits.

42. Now with regard to further submission of learned Counsel for the appellants that even in event of acceptance of said dying declarations; the matters from the

same do not disclose commission of the offence of murder and/or the same discloses commission of lesser offence, it is difficult to accept the said submission considering the reason for which and manner in which such acts were committed by the appellants. Having regard to the aforesaid, it is difficult to find any fault with the conviction of the appellants recorded by the trial Court after reappraisal of the evidence.

43. Having due regard to the settled principles of criminal law that the guilt is to be determined on the basis of the evidence adduced at trial and during the cross examination of the most material witnesses examined at trial i.e. investigating officer PW3 defence have not brought on the record that there were other eyewitnesses to the incident in which the deceased has sustained burn injuries and not even bothered to suggest to either PW3 or to the other witnesses to such effect, it is difficult to accept that without any rational basis it can be presumed that there were eyewitnesses to the incident which is said to have occurred in the heart of thickly populated village. Needless to add that even for later aspect also hardly material has been brought on record.

44. Even in the aforesaid context carefully perusing the matters in the spot panchanama Exh.79 it is difficult to accept the said submissions canvassed. The same is obvious that even the said document does not reveal existence of houses other than that of Parasram Ghore, appellant No. 2 and of Mahadeo Glabrao Wasu near the spot of the incident. Thus merely such houses are situated at the said place it is difficult to accept that there would have been an eyewitnesses present for the crime occurred. Hence merely because no eyewitnesses are examined at trial the matters in the dying declarations cannot be doubted without there being any foundation for other persons being present at the time of incident and having witnessed the same. The same is obvious as essential the test for determining whether the witness not examined was a material witness being whether he could have given evidence regarding part of prosecution tale which had remained to be unfolded at a trial due to his non-examination and the test being not whether he could have given evidence in favour of the opposite party.

45. The careful consideration of the evidence adduced at trial does not indicate any such sort of case being made/alleged on behalf of the appellants. Hence it is extremely difficult to accept such submission which is now tried to be canvassed by making application of nature made in the instance case. Apart from none of the prosecution witness and significantly enough even the investigating officer being not put any such a case and further even the appellants during their examination effected by the court u/s 313 of Cr.P.C. having not taken such stand nor even made any attempt to examine any witness for supporting such a theory of defence, it is difficult to find any substance in such contention now tried to be taken by making such application.

46. In the same context it is further difficult to accept that such state of affairs have occurred due to failure of their counsel to take necessary steps in spite of appellants having instructed him to do so as alleged in the application, as hardly any support has been found for accepting such a contention, now emerged after about the lapse of six to seven years after the trial court had convicted and sentenced the appellants. It is significant to note that no application of present nature was made on behalf of appellants while preferring appeal or soon thereafter in spite of different counsel being engaged by them for preferring the appeal. Needless to add that no action has been taken by the appellants for such a long period against earlier counsel and only for namesake now it is averred in the application that they would be taking such action. Thus learned APP was right in his submission of there being no merits in the application and the same being an after thought application preferred for coming out of the situation faced by the appellants in some manner.

47. No doubt, that the law is not the mistress of the procedure. However, still the procedure is prescribed for maintaining uniformity and discipline for criminal proceeding all over the country from the angle of equality and to avoid arriving of situation of chaos and maintaining balance to see that due to the procedure prescribed no party to the proceeding is able to draw any unfair advantage of own wrong. Having regard to the said principle entertaining such an application, would be wholly illegal and would be laying down a wrong precedent.

48. In the same context it will be necessary to say that the diligence being also one of the principle of foremost importance to be taken into consideration while judging the version of a party hardly any credence can be given to some of the affidavits which are submitted along with the application which again within themselves fail to reveal a plausible reason for not taking prompt action for the long period of about 13 years after the incident.

49. Similarly the careful consideration of provisions of Code of Criminal Procedure regarding the investigation and particularly that Section 173 in clear term reveals that the officer in-charge of police station after completion of investigation is required to submit the report amongst other with such material as stated in Sub-clause (5) of the said section. Having regard to the same, it is difficult to accept the submission canvassed by the learned Counsel for appellants of there existing the statement of other eye witnesses recorded during the course of investigation as stated in some of the affidavits tendered and not forwarding the same along with the said report or not examining the said witness at trial, the fraud was committed by the investigating officer.

50. It is difficult to accept such a submission as considering the scheme under the Code regarding the investigation nowhere contemplates forwarding of all statements of witnesses recorded during the course of investigation along with the said reports. Needless to add that law requires the investigating officer amongst other to forward to the Magistrate along with the report only the statement of

witnesses recorded u/s 161 of Cr.P.C. of all the persons to whom the prosecution proposes to examine as its witnesses. The grievance made thereto also appears to be uncalled for after considering the fact of the appellants having made an application at Exh.45 before the trial court and in spite of order the defence counsel having failed for taking the steps for obtaining the copies of documents.

51. Now with regard to the submission canvassed by learned Counsel for appellants for calling the case diary carefully considering the provisions of Section 172 of Cr.P.C. prior to amendment made to it by virtue of Section 15 of the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009) and the one which had come in force in the present year and thus during the year 1997 in which the chargesheet was submitted the diary being not required to contain the statement of witnesses recorded during the course of investigation it is difficult to find any substance in the submission of the learned Counsel for the appellants for calling the said diary and ourselves perusing the same to ascertain whether there were eye witnesses for the crime i.e. persons mentioned in the application or otherwise. At the cost of repetition it will be necessary to say that without any foundation being led in the evidence of investigating officer for such a facet, it is difficult to find any substance in such submission canvassed.

52. Now considering the decisions in the case of Bachan Singh and Anr.; Sidharth and others and Hemanta Kumar Mondal (supra) relied by the learned Counsel for the appellants in the context of calling the case diary and after considering the purpose for which such a diary can be called by the criminal court as stated in the said decisions it is difficult to accept that the said decisions can be said to be useful to the appellants for advancing the case for calling the said diaries for ascertaining whether the same is revealing whether there were other eyewitnesses as contended in the application. With regard to the other decisions upon the same aspect pointed out by the learned Counsel for the appellants recited hereinabove, the perusal of the same also does not reveal that the same being useful to the appellants for supporting the proposition that the appellate Court can call the case diary for the purposes as contended by the appellants. Needless to add that the said decisions are altogether upon the different aspects.

53. Regarding the decisions relied by the learned Counsel for the appellants upon the aspect of suppression and concealment by police and/or fair trial; the careful perusal of the same reveals the relevant observations being made in facts and circumstances of the said cases, it is difficult to accept that the same are useful to the appellants for advancing their case in which no such stand of suppression was taken before the trial court apart from being established.

54. With regard to the decisions in the case of Kishor Chand and Navjot Sandhu and in the case of Kunal Swami Mohd. (supra) relied by the learned Counsel for the appellants ,the perusal of the same clearly reveals that same relates to the appointment of advocate as amicus curiae and/or by the court and the same not

relating to appointment of advocate made by the parties themselves as happened in the instance case, it is difficult to accept that the ratio of the said decisions can be said to be useful to the appellants in any manner for advancing the belated case of fault of advocate appointed by them by the application preferred. Since there cannot be any doubt about the principles laid in the decisions relied by learned Counsel for appellants on the point of benefit of doubt and role of public prosecutor no threadbare dilation about the same would be necessary except stating that the same are also not useful to the appellants in support of application preferred as hardly any case has surfaced on record of there existing two views possible upon the evidence adduced at trial considering the aspect of grant of benefit of doubt or prosecutor having failed in performing his duties.

55. Since it is settled legal position that mere defect occurred in charge framed by itself would not be fatal to the prosecution unless and until thereby prejudice has been caused to the accused occasioning miscarriage of justice and no such thing being pointed out in the instant case merely because certain details regarding precise place of offence being not found mentioned in the charge but the same having resulted into appellants being unable to understand the case which they were required to meet at trial and thereby prejudiced being caused to them being not spelt from the record nor agitated at early stage before trial court cannot be said to be a ground for finding fault with the decisions arrived by the trial court as tried to be canvassed by the learned Counsel for the appellants on the basis of decision in the case of Basavaraja and Others Vs. State of Karnataka, .

56. As a net result of the aforesaid discussion it is difficult to accept of the appellants having made out any case within the four corners of Section 391 and/or 311 of Cr.P.C. and on the contrary allowing such application at this stage would be encouraging flagrant violation of the provisions of Code of Criminal Procedure. We do not find any merit in the said application and hence the same is dismissed.

57. As a net result of the aforesaid discussion, we do not find any substance in the appeal preferred and as such the same also stands dismissed. Since appellant No. 4 has been released on bail during the pendency of this appeal, she is directed to surrender before the trial Court within a period of four weeks from today, failing which the trial Court to take the steps for taking her in custody for undergoing the sentence awarded. The bail bonds executed by appellant No. 4 shall stand discharged upon her surrender.