

Datta Vs. the State of Maharashtra

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Court : Mumbai Aurangabad

Decided On : Feb-06-2014

Judge : S.S. Shinde & V.M. Deshpande

Appeal No. : Criminal Appeal No. 428 of 2011

Appellant : Datta

Respondent : The State of Maharashtra

Judgement :

Oral Judgment:(V.M. Deshpande, J.)

Feeling aggrieved by the Judgment and Order of conviction passed by the learned Ad Hoc Additional Sessions Judge, Latur dated 25th July, 2011 in Sessions Case No.92 Of 2010, by which the Court below convicted the appellant for the offence punishable U/Section 302 of the Indian Penal Code, 1860 (In short, the I.P.Code) and directed that the appellant should suffer imprisonment for life and to pay fine of Rs.3000/- and in default payment of fine, he was further directed to undergo rigorous imprisonment for six months, the appellant has approached before this Court.

2. The prosecution case is in very narrow compass and the same is given as under:-

The appellant is a mechanic by profession. Deceased Kavita was his wife. The date of incidence is 10th May, 2010 at 2.00 p.m. Their marriage took place prior to two years of the incident. The couple was residing as a tenant in the house of one Devidas Lahubande, which is situated at Balaji Nagar, Latur. The deceased Kavita suffered 91 % burn injuries. Kavita died on 16th May, 2010 at 2.30 p.m. The cause of death is found in the post mortem report Exh.No. 29 as septicemia due to 91% superficial to deep burns partly infected?.

The prosecution case further proceeds that, on suffering burn injuries, Kavita was admitted into Civil Hospital, Latur. On her admission, Civil Hospital, Latur reported about her admission to the Police.

On receipt of the information about the admission of Kavita in burnt condition, P.W.No.12 Shahaji Ghadge, Asstt.Sub Inspector went to the burn ward of Civil Hospital, Latur to record the statement of Kavita. He gave requisition to the Doctor and requested to certify, whether Kavita is in a position to give her statement. Upon that, attending Doctor namely Dr. Meghraj Chawada (P.W.No.10) opined that, Kavita was not in a position to give her statement, therefore, permission was not given to P.W.No.12 A.S.I. Shahaji Ghadge to record her statement.

On the next day i.e on 11th May, 2010, P.W.No.12 A.S.I. Shahaji Ghadge again visited the Civil Hospital, Latur and met to Dr.Chawada and enquired about the condition of Kavita, upon which, Dr. Chawada gave permission to P.W.No.12 A.S.I. Shahaji Ghadge to record the statement of Kavita, as she was in a position to give her statement. Accordingly, P.W.No.12 A.S.I. Shahaji Ghadge recorded the statement of Kavita. Said statement is at Exh.No.42, on the record. As per the said statement, Kavita disclosed that, prior to two years back her marriage took place with the appellant. Both resides as a tenant in the house of Lahubande at Balaji-Nagar. Kavita in the morning at 10.00 a.m. demanded money from him to purchase rice however, the appellant did not give stating that he is not having money with him; resulting into quarrel between them. Her statement further discloses that, thereafter, the appellant went for his work and then at 2.00 O'clock when she was cooking, the appellant returned to the house. Thereafter, he made a telephonic call to P.W.5, the maternal uncle of Kavita. That time, maternal uncle of

Kavita asked the appellant that when he will come to his house for meal on account of æDhonde Jevan? /kksaMs tso.k (fest for the son-in-law) Upon that, the appellant replied that, his niece Kavita is serving better dhonde(stone) to him and then insulted the maternal uncle by saying that, they are not fit to be a relatives. The statement further discloses that, on account of said fact, quarrel took place between them and the appellant asked the Kavita to leave the house. That time, Kavita replied that she will not leave the house. Upon that, the appellant poured kerosene on her and set her ablaze. Due to which, Kavita, came out of house and one Shivkanya (P.W.No.4) daughter-in-law of landlord Lahubande poured water on her. The admission paper of Kavita are placed on record Exh.No. 36 and in the paper book at page Nos. 106 to 137 show that, she was admitted in the hospital by the appellant.

The prosecution case further proceeds that, on 11th May, 2010, PW No.11 Naib Tahasildar “ Vilas Jogdand received a letter of A.S.I. Shahaji Ghadge requesting him to record the statement of Kavita. Accordingly, he went to record the statement of Kavita after intimating the Tahasildar. He reached to Civil Hospital, Latur and went to burn ward. PW 10 Dr. Chawada was present in the burn ward. He disclosed his intention to Dr. Chawada to record the statement of Kavita. Dr. Chawada, according to the prosecution, examined Kavita and found that, Kavita is in position to give her statement and accordingly, PW 11 Vilas Jogdand recorded her statement. Said statement of Kavita is recorded by PW 11 Vilas Jogdand in æQuestion “ Answer? form. In the said dying declaration again she has disclosed that, she was set ablaze by her husband i.e. present appellant. Said dying declaration of Kavita recorded by PW 11 Vilas Jogdand, is at Exh.No. 38 on the record.

3. Crime No. 101 Of 2010 came to be registered with Gandhi Chowk Police Station, Latur against the appellant for the offence punishable U/Section/s 307, 498(A) of the I.P.Code. The investigation was entrusted to PW 13 P.S.I. Dnyaneshwar Dongare. During the course of investigation, he visited the spot of incidence, he prepared spot-panchnama Exh.No. 23. The appellant was arrested on 11th May, 2010. According to P.W.13 Dnyaneshwar Dhongare, at the time of his arrest, one T-shirt and one full pant was seized under the seizure panchnama

Exh.No.48. During her medical treatment, Kavita died and, therefore, offence was converted into offence punishable U/Section/s 302, 498(A) of the I.P.Code.

4. The Investigating Officer, on completion of the investigation submitted the Charge-Sheet on 9th August, 2010.

5. The learned Ad hoc Additional Sessions Judge, Latur on 10th January, 2011 framed Charge (Exh.No.10) against the accused for the offences punishable U/Section/s/ 302, 498(A) of the I.P.Code.

6. In order to bring home the guilt, the prosecution has examined as many as 13 witnesses and also relied upon two dying declarations Exh.Nos. 42 and 38.

7. The learned Ad hoc Additional Sessions Judge, Latur as indicated in the opening paragraph, convicted the appellant “ original accused for the offence punishable U/Section 302 of the I.P.Code however, the appellant was acquitted for the offence punishable U/Section 498(A) of the I.P.Code. From perusal of record, it appears that State has not preferred Criminal Appeal challenging the acquittal of original accused (present appellant) for the offence punishable U/Section 498(A) of the I.P.Code.

8. That, while recording the conviction against the appellant, the learned Ad hoc Additional Sessions Judge, Latur found that, both the dying declarations Exh.Nos. 42 and 38 recorded by PW 12 A.S.I. Ghadge and P.W. No.11 Vilas Jogdand respectively are truthful version of deceased Kavita and these two dying declarations can be safely relied upon for recording the conviction. According to the reasoning recorded by the learned trial court, considering the evidence of Doctor, A.S.I. Ghadge and Vilas Jogdand necessarily lead to inference that the appellant was the author of injuries sustained by deceased Kavita.

9. We have heard Shri. Joydeep Chatterji and Mr. S.D. Kaldate, learned A.P.P. and also perused the entire record with the assistance of learned counsels. It was strenuously argued before this Court by the learned counsel appearing for the appellant that, prosecution has completely failed to prove its case beyond reasonable doubt. According to the learned counsel, dying declarations cannot be

relied upon by the prosecution, since those dying declarations completely failed to inspire confidence. According to the learned counsel, there is serious doubt about the fact that, really P.W. 10 Dr. Chawada examined deceased Kavita and gave certificate prior to recording of her dying declaration by P.W. 12 A.S.I. Ghadge. According to the learned counsel, evidence of P.W. 12 A.S.I. Ghadge and P.W. 10 Dr. Chawada is contradictory one, which cast serious doubt about the certification of mental fitness to record the statement hence, according to the learned defence counsel, Exh.No. 42 dying declaration recorded by P.W. 12 A.S.I. Ghadge cannot be basis for recording the conviction.

10. In so far as Exh.No.38, another dying declaration of Kavita recorded by PW 11 Vilas Jogdand is concerned, the same is very seriously criticized by the learned counsel appearing for the appellant on the ground that, there is no certification found in Exh.No.38 that after completion of recording of dying declaration, the same was read over to the declarant (deceased Kavita) and she admits the contents thereof to be correct and as per her say.

11. Further according to the learned defence counsel, in view of post mortem report Exh.No. 29, both the upper limb suffer 9% burn injuries and as per the testimony of PW 9 Ramrao (panch witness to inquest panchnama Exh.No.33) skin over the fingers of deceased Kavita were peeled, therefore, according to the learned defence counsel, both the dying declarations are required to be rejected; because the thumb impression on both the dying declarations clearly show ridges and curves. He placed reliance on following authoritative pronouncements to buttress his point in respect of his submissions in respect of dying declaration is concerned, namely:-

(i) 2012 All M.R. (Criminal), 2453, Paikuji Shankar Ataram V/s.State of Maharashtra.

(ii) 2012 All M.R. (Criminal), 2753, Tukaram Dasharath V/s. The State of Maharashtra.

12. Per contra, the learned A.P.P. for the State submitted that, both the dying declarations inspire confidence. Both the dying declarations are recorded by PW

12 A.S.I. Ghadge and Naib Tahasildar Vilas Jogdand after permission was granted to them by PW 10 Dr. Chawada. There is no discrepancy in both the dying declarations in respect of incidence, which clearly suggested that both the dying declarations are truthful version of the deceased Kavita. He also submitted that, dying declaration can form the sole basis of conviction and required no further corroboration. He also submitted that, even the dying declaration recorded before the Police Officer is admissible and can be relied for conviction. The learned A.P.P. for the State placed his reliance on following authoritative pronouncements:-

(i) AIR 2002, S.C. 2971, Laxman V/s. State of Maharashtra.

(ii) 2012 All M.R., S.C.R., 1063. Bajju @ Kiran Singh V/s. State of M.P.

(iii) AIR 1983, S.C., 164. Ramawati Devi V/s. State of Bihar.

13. In the present case, P.W.No.1 Navnath Bhanudas Sabale was examined as a panch. This witness has turned hostile. P.W.No.2 Hiranman Dhondiba Kamble was examined by the prosecution and through his evidence, the prosecution has proved spot panchnama Exh.No.23. Spot panchnama reveals that the Investigating Agency has seized one stove and one match-box from the spot of incidence and those articles were sealed by the Investigating Agency.

14. P.W.No.3 Dnyaneshwar Devidas Lahubande was the another panch on Exh.No.23 however, said panch witness turned hostile. P.W.No.4 Shivkanya Dnyaneshwar Lahubande is daughter-in-law of the landlord of the appellant. From her evidence, it appears that, since she resiled from her police statement, in respect of the quarrel between the appellant and deceased Kavita on 10th May, 2010 at 10 O'clock in the morning, she was declared hostile. However, her evidence is in conformity with the dying declaration Exh.No.42 and dying declaration Exh.No.38 that she poured water on deceased - Kavita.

15. P.W.No.5 is Murlidhar Pandharinath Muje, the maternal uncle of deceased Kavita. Though this witness has claimed that when he went to the hospital and enquired with Kavita as to how she sustained burn injuries, according to this

witness, Kavita told him that she poured kerosene on her person and set her ablaze. This witness was declared hostile. Looking the quality of evidence of this witness, we are of the firm view that, so called oral dying declaration made to him by Kavita, is to be rejected in its entirety.

16. Then we have the evidence of P.W.No.6 Dr. Kiran Prabhakar Gojamgunde, who carried autopsy on dead body of Kavita on 16th May, 2010. He has proved post mortem report Exh.No.29. According to the column No.17 of the post mortem report, except burn injuries, he found no other injuries on the body of Kavita. The injuries on the upper limb of both the right hand and left hand were 9% indicating there-in that, upper limbs were completely burnt. Even the inquest panchnama Exh.No.33 clearly shows that, both the hands were completely burnt, which is proved by P.W.9 Ramrao Yadavrao Wakle.

17. As indicted in the preceding paragraphs, then we have Doctor Meghraj Jayantilal Chawada (P.W.No.10), who has examined Kavita and gave certificate that, Kavita was in a condition to make her statement while recording her both the dying declarations, by P.W.No.11 Vilas Jogdand and P.W.No.12 Shahaji Ghadge. Thus from the entire evidence as adduced by the prosecution, it is clear that, there is no eye witness. The entire case of the prosecution rests on two dying declarations namely (i) Exh.No.42 recorded on 11th May, 2010 by P.W.No.12 A.S.I. Shahaji Ghadge and (ii) Exh.No.38 recorded on 11th May, 2010 by P.W.No.11 Naib Tahasildar " Vilas Jogdand. Now, let us examine as to whether the appellant can be convicted and can be sent to serve life imprisonment on the basis of these two dying declarations.

18. When the Court is called upon to appreciate the evidence of written dying declaration, the Court has to be extremely cautious and examine with meticulous care of the evidence regarding recording of the dying declaration. Merely because witnesses came forward and deposed about the recording of the dying declaration, it should not impel the Court to immediately accept the dying declaration. It has to be remembered that the declarant is not available for cross-examination and, therefore, the prosecution must prove, apart from the truthfulness of the contents, the factum of recording of the dying declaration as well as the fact that the

declarant was in a fit mental condition to give the statement to show that after recording of dying declaration the same was read over to the declarant and the declarant has admitted its contents.

19. Further from Exh.No. 33 inquest panchnama, it is clear that, her both hands were completely burnt. Even the post mortem report Exh.No. 29 shows that both the upper limb were burnt to the extent of 9% which indicates the said fact. Not only that, P.W. 9 Ramrao Wakale, panch on the inquest panchnama (Exh.No.33) admitted that, skins over the fingers of deceased were peeled. However, on careful examination of thumb impressions which are found on Exh.Nos. 38 and 42, it shows ridges and curves on the thumb impressions which creates very serious doubt about the said thumb impressions.

20. Firstly, we would like to take dying declaration Exh.No.42 recorded by P.W.No.12 A.S.I. Shahaji Ghadge. Evidence of P.W.No.12 A.S.I. Shahaji Ghadge reveals that, on 10th May, 2010 when he was on duty at Civil Hospital, Latur, he received intimation from the Medical Officer that a lady by name Kavita Malwad was admitted in burn ward. Accordingly, he went to the burn ward to record her statement. It appears from the record that, he went there on 10th May, 2010 at 5.00 p.m. However, that time, P.W.No.10 Dr. Chawada told him that, Kavita is not in a position to give her statement. Said fact is confirmed by P.W.No.10 Dr. Meghraj Chawada. It appears that, on the next day i.e. on 11th May, 2010, P.W.No.12 A.S.I. Shahaji Ghadge again went to burn ward and meet to Dr. Chawada. He accordingly, gave permission to P.W.No.12 A.S.I. Shahaji Ghadge to record the statement of Kavita and accordingly, statement of Kavita was recorded.

21. On close scrutiny of the evidence of P.W.No.10 Dr.Meghraj Chawada and P.W.No.12 A.S.I. Shahaji Ghadge, a serious doubt is created about the entire recording of dying declaration. As per the evidence of P.W. No.12 A.S.I. Shahaji Ghadge, when he met to Dr. Chawada, on 11th May, 2010, Dr. Chawada told him that, Kavita is in a position to give her statement. As per P.W.No.12 A.S.I. Shahaji Ghadge, this fact was told to him orally. P.W.No.12 A.S.I. Shahaji Ghadge has not deposed before the Court that, in his presence, Dr. Chawada examined Kavita and certified and / or made endorsement about the fitness. Contrary to this, P.W.No.10

Dr. Chawada deposed before the Court that on 11th May, 2010 at 9.00 a.m. A.S.I. Shahaji Ghadge came to him and disclosed him that he wants to record the statement of patient “ Kavita. Then, Dr. Chawada claims that on examination, he found that, patient “ Kavita was fully conscious, therefore, he permitted A.S.I. Shahaji Ghadge to record her statement. Not only that, according to this witness, he made pre-statement endorsement on the paper and he confirmed said pre-statement endorsement.

22. The learned Judge of the Court below has marked said endorsement as 'A'. It will be useful to reproduce the endorsement 'A' that appears on Exh.No. 42, which reads thus:-

Statement recorded by ASI Mr. S.R. Ghadge in my presence. Statement record started at 9:30 AM. During record of whole statement she was fully conscious, well oriented to time, place and person. She is in a state of compos mentis. Hence, certified.

sd/xxx

Dr. M.J. Chawada,

Astt. Professor,

Department of Surgery,

GMCH, Latur.

From the aforesaid endorsement, it is very clear that, Dr. Chawada has not examined Kavita, prior to recording her statement. What is stated in the said endorsement is that the statement was recorded by A.S.I. Mr. S.R. Ghadge in his presence and during recording of oral statement, Kavita was fully conscious and well oriented and she was in a state of compos mentis.

23. No doubt true that, it is not at all necessary that there should be Doctor's certificate prior to recording of dying declaration that the patient is fully conscious and well oriented. In view of the reported decision of Hon'ble Apex Court, reported in **(2002) 6, S.C.C. 710 Laxman V/s. State of Maharashtra**, merely because

there is no certificate of Doctor to that effect as to the fitness of the declarant's state of mind, that does not rendered the dying declaration a worthless paper. However, even if scribe, who recorded said dying declaration satisfy himself about the mental state of the declarant prior to recording of statement that the declarant is in fit state of mind and then he proceeded to record the declaration, is enough for the Court to reach to the conclusion that the patient was in a fit mental state for giving the statement to the scribe.

24. In this backdrop, if the evidence of P.W. No.12 A.S.I. Shahaji Ghadge is scrutinized then it is very clear that, no where he has deposed before the Court that prior to recording the dying declaration of Kavita (Exh.No.42) he satisfied himself that Kavita was in a fit condition and / or she was in position to give her statement before him and thereafter, he proceeded to record her dying declaration. In that view of the matter, Exh.No.42 clearly fails to pass the test in respect of factum as to whether Kavita, the deceased, was in a position to give her statement to P.W.No.12 A.S.I. Shahaji Ghadge.

25. P.W.No.12 A.S.I. Shahaji Ghadge deposed before the Court that, when the statement of Kavita was recorded, police Constable Garje was present with him. He did not speak about the presence of Dr.Meghraj Chowada. It will be useful to extract the relevant portion from his examination-in-chief itself which reads thus, æwhen I recorded the statement of Kawita, myself and police constable Garje were present?. In that view of the matter, authenticity in respect of endorsement 'A' on Exh.No.42 receives a great jolt. Not only that, in the cross-examination, P.W. No.12 A.S.I. Shahaji Ghadge states before the Court as under:-

æ... The doctor made endorsement A and B when he was in his chamber in the civil hospital. The medical officer has not examined Kawita in my presence.

26. The aforesaid statements of fact made by P.W. No.12 A.S.I. Shahaji Ghadge, as brought through his examination before the Court, leads us to disbelieve evidence of P.W. No.10 Dr. Meghraj Chawda, in as much as, now before the Court there are two versions, therefore, doubt creates, as to really Dr. Chawda examined Kavita prior to recording her statement and after completion of recording her statement. Therefore, when there is serious doubt about the said fact, which could

be deduced from the available evidence on record; it will be very unsafe to accept the dying declaration Exh.No.42 and according to us, said dying declaration cannot be made basis for convicting the appellant / accused.

27. Now, there remains another dying declaration Exh.No.38 recorded by P.W. No.11 " Vilas Jogdand. At the relevant time, Vilas Jogdand was working as Naib Tahasildar at Latur. He received a letter from ASI Ghadge requesting him to record the statement of Kavita. Though said letter is dated 10th May, 2010 however, he received said letter on 11th May, 2010. Accordingly, on 11th May, 2010 in the morning at 10.00 a.m. he reached to the Civil Hospital, Latur and went in the burn ward. There he met to Dr. Chawada. He showed letter to him and expressed his desire to record the statement of Kavita. He requested Dr. Chawada to examine the patient and asked permission to record her statement, if she is in position to give her statement. As per his evidence, he asked the parents of Kavita to leave the place. Thereafter, Dr. Chawada examined Kavita in his presence and found that, she is conscious and well oriented and fit to give her statement. Accordingly, he made endorsement 'A' on the piece of paper, which was used for recording the dying declaration. Thereafter, this witness has recorded her statement. From the dying declaration Exh.No.38 recorded by this witness, it is clear that, said statement is in Question " Answer form. The same appears to be a printed proforma. The first question appears to be æfull name, age, resident of and like that other formal questions are appearing. Question No.10 is æHINDI? To answer this question the Kavita has stated like her statement in Exh.No.38. Question No.19 is æHINDI? ** To this, answer is æHINDI?. Then we find the thumb impression of Kavita on Exh.No.38.

28. Now this dying declaration is the only material, which can be used against the appellant in as much as, it has passed the test in respect of her mental fitness and orientation to give her statement. Not only that, Dr. M.J. Chawada has opined on the same paper that, Kavita is in fit position to give her statement. From the questions put to declarant " Kavita, at the time of recording her statement and certificate by Doctor, it is clear that even the scribe to this dying declaration has satisfied himself about the metal condition and fitness of the declarant's state of mind. From the evidence of P.W.No. 10 Vilas Jogdand, it is clear that he deposed

in the Court that he read over the contents of statement to Kavita and she admitted the contents, to be true and correct.

29. This dying declaration is very seriously challenged by the learned defence counsel by pressing into service two reported decisions of this Court namely [i] 2012 All M.R. (Criminal), 2453, Paikujji Shankar Ataram V/s. State of Maharashtra and [ii] 2012 All M.R. (Criminal), 2753, Tukaram Dasharath V/s. The State of Maharashtra. He submitted that, in absence of an endorsement in Exh.No.38 that after completion of recording of the statement, the contents of said statement were read over to Kavita and she admits it to be true, necessarily this dying declaration is to be rejected. If dying declaration (Exh.No.38) is scrutinized, there appears no endorsement on the said document that the scribe i.e. P.W. No.11 Vilas Jogdand has read over the statement to Kavita and thereupon Kavita has admitted the contents of the same. In Paikujji's case, cited supra, P.W. 5 Shri Shrihari Kanhuji Thamke was the Executive Magistrate. He recorded the dying declaration of patient by name Tulsabai w/o Paikujji Atram. Before the Court, during trial, P.W.No. 5 Shrihari Thamke deposed that, he read over statement to her and she admitted the contents to be correct as per her say. Same is the position in present case. While making the pronouncement on the dying declaration recorded by P.W.No. 5 Thamke, in Paikujji's case, cited supra, this Court proceeds to record the finding that, merely because it is mentioned in printed proforma that, statement is read over to deponent, it cannot be presumed that actual exercise of reading over same and getting it endorsed to be correct was actually followed. In the said reported case, in printed proforma, there was clause that the statement was read over to the deponent. In case at hand, even in that printed proforma noting that statement was read over to the patient, is absent.

30. To rule out any remote infirmity, it is necessary that there has to be an endorsement on the dying declaration that the contents were read over and admitted to be correct and as per the say of the deponent. The said cannot be treated as an empty formality, since the deponent is not available for cross-examination. This endorsement according to us is most vital piece in as much as the declarant is not available for cross examination. The contemporaneous document Exh.No. 38, on which the endorsement to the effect that it was read

over to Kavita and after that she admitted the contents thereof as true, is absent. Since the present case is solely depends on the dying declaration, such endorsement or certification by the scribe is almost importance. In absence of that, it is really difficult to visualize as to really, after the completion of dying declaration the contents were read over to Kavita, as claimed by P.W. No.11 Vilas Jogdand for the first time in the Court.

31. In another case of Tukaram, cited supra, dying declaration Exh. No.78 was recorded by P.W. No.4 Anant Alone, Naib Tahasildar. Said Exh. No. 78 was also recorded on cyclostyled proforma and said cyclostyled proforma does not contents any statement that dying declaration was read over to the patient and the patient had admitted correctness of the dying declaration. Same is the case in the case in hand. This Court was pleased to reject the said dying declaration Exh.No. 78.

32. Once suspicious circumstances are found in the evidence, the Court should be extremely slow in placing implicit reliance on the dying declaration as dying declaration alone if the Court finds the dying declaration to be wholly reliable, person can be convicted. In the present case, since we are at a loss to visualize as to really the statement was read over to the declarant (Kavita), it will be very unsafe on our part to record conviction on dying declaration Exh.No. 38.

33. It will be very useful here to mention the reported decision of Hon'ble Apex Court, reported in **(2007) 11, Supreme Court Cases, 269 Shaikh Bakshu and Ors V/s. The State of Maharashtra**. It will be very useful to extract relevant portion of the aforesaid authority of the Hon'ble Apex Court which reads thus, æthere was no mention in the dying declaration that it was read over and explained to the deceased. The trial court and the High Court concluded that the even though it is not so stated, it has to be presumed that it was read over and explained. View is completely unacceptable.?

34. The another circumstance which was pressed into service against the appellant by both the trial Court and learned A.P.P. before this Court is the Chemical Analysis report. Said report is at Exh.No.50. Exhibit 4 and 6 are sky-blue coloured 'T' Shirt and blackish full pant. According to the result of the analysis, Exhibit 4 and 5 are positive for the detection of kerosene residues. According to

the learned Addl.Public Prosecutor, report of Asstt.Chemical Analyser dated 30th September, 2010 is one of the corroborative piece of evidence by which there is an assurance to the dying declaration. At the first blush, it appears so. However, on the close scrutiny that argument will have to be rejected.

35. In Exh.No. 23 the spot panchnama after seizure of stove and match box, the investigating officer has recorded the following, in presence of panchas:-

œHINDI?

The appellant (ori.accused) was arrested on 11th May, 2010. His arrest panchnama is at Exh.No. 20. From arrest panchnama, it is clear that, he was arrested at Gandhi Chowk Police Station, Latur at 20.15 hrs. Exh.No. 48 is the seizure memo of seizure of 'T' shirt and full pant on the person of the accused at the time of his arrest. The relevant portion of seizure panchnama reads as under :-

œHINDI?

In Exh.No. 48, there is no mention that the bundle of clothes were 'sealed'. Even the investigating officer, P.W.No.13 Dnyaneshwar Dongare is silent in his evidence about sealing of the clothes. However, Exh.No.50 C.A. Report shows that, œ one partly sealed stove, one partly sealed parcel, one sealed packet and two sealed parcels, seals intact.

36. The prosecution has not explained when the clothes were sealed in presence of panchas. Then how the sealed bundle of clothes reached to the Regional Forensic Science Laboratory, Aurangabad. Further the prosecution has not examined any witness to lead the link evidence. In that behalf, the learned defence counsel relied upon the reported case of **Asraf Hussain Shah V/s. The Stae of Maharashtra, reported in 1996 Cri.L.J., 3147**. Paragraph No.8 of said judgment, which is reproduced herein-under, will be useful in that behalf. Paragraph No.8 reads thus:-

First of all we would like to observe that the learned trial judge was perfectly justified in rejecting the evidence of recovery of blood stained clothes and knife at the pointing out of the appellant, primarily on the ground that there was no

evidence that after seizure these articles were sealed. A Division Bench of this Court to which one of us (Vishnu Sahai, J.) was a party in the case of Deoraj Deju Suvema etc. V/s. State of Maharashtra, after considering a large number of authorities has held that not only should the prosecution adduce evidence that after seizure the articles were sealed but should also lead link evidence to the effect that till being sent to the Chemical Analyst they were kept through out in a sealed condition. This is done to eliminate the suspicion that human blood might not have been put on the articles subsequent to the recovery and prior to being sent to the Chemical Analyst.

37. In that view of the matter in absence of assertion on behalf of the investigating officer that after clothes were seized, they were 'sealed' and the said fact is also not mentioned in the contemporaneous document namely Exh.No.48 the seizure panchnama, this Court has no option but to reach to the conclusion that the clothes were not sealed. In that view of the matter, the so called kerosene residues on Exhibit 4 and 5 though found to be positive, as per the report of C.A., are of no help and assistance to the prosecution. Apart from that, it is very difficult to digest that a person will allow himself to put the clothes to be on his person from 10th May, 2010 till 11th May, 2010 at 20.15 hrs., which are stained with kerosene, the time when the accused was arrested. That is also one of the circumstances which creates doubt.

38. Therefore, according to us, this is a fit case, wherein benefit of doubt should be given in favour of the appellant / accused and accordingly, we allow this Criminal Appeal by setting aside the Judgment and Order passed by the learned Ad Hoc Additional Sessions Judge, Latur dated 25th July, 2011 in Sessions Case No.92 Of 2010. Accordingly, the appellant (original accused) is acquitted. Fine, if any, paid by the appellant be returned to him. Since the appellant is in jail, he be released forthwith, if not required in any other case. Criminal Appeal allowed.

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