

The State of Maharashtra. Vs. Sampat Babso Kale, and anr.

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Court : Mumbai

Decided On : Oct-13-2010

Judge : D.B.Bhosale; R.G.Ketkar, Jj.

Appeal No. : CRIMINAL APPEAL NO.473 OF 1991

Appellant : The State of Maharashtra.

Respondent : Sampat Babso Kale, and anr.

Advocate for Def. : Ms.Revati MohiteDere, Adv.

Advocate for Pet/Ap. : Mr.Rajeev Patil; Mr.Dilip Bodake, Adv.

Judgement :

1. This appeal is preferred by the State of Maharashtra challenging the judgment and order dated 20 March, 1991 passed by the learned Sessions Judge, Pune in Sessions Case No.33 of 1990. By that judgment, learned Sessions Judge, Pune acquitted the respondents accused of the Charge under Sections 302 and 409A Indian Penal Code, 1860 (for short 'IPC') individually and also under Sections 302 and 498A read with Section 34 IPC. Respondents no.1 and 2 shall hereinafter be referred as accused no.1 and 2, respectively. The facts and circumstances, giving rise to the filing of this appeal preferred by the State, are as under.

2] The accused were prosecuted on the allegations that they subjected deceased Sharada to cruelty and on or about 9 July, 1989 at about 1:30 am. in Room No.6 situate at M.I.D.C. Colony, Chinchwad, they intentionally poured kerosene on her

body and set her on fire. Deceased Sharada was daughter of PW 4 Sarjerao Bajirao Dhaigude who is resident of Nira. Marriage between the deceased Sharada and accused no.1 Sampat took place on 25 April, 1987 at Lonand. After the marriage, accused no.1 Sampat and deceased Sharada cohabited at Thergaon, near Chinchwad, Taluka Pune for about one year. Thereafter, they shifted to the quarter in M.I.D.C. Colony, Chinchwad. Accused No.1 Sampat and Sharada used to visit PW 4 Sarjerao at Nira at the interval of 3 to 4 months. The used to stay over night at his residence. It is the case of prosecution that for a period of one and half year after the marriage accused no.1 Sampat treated deceased Sharada well. However, thereafter, he started illtreating her. Deceased Sharada told her father PW 4 Sarjerao that accused no.1 used to express that he would desert her because she could not conceive. He threatened her that on that ground he would discard her. Even accused no.2 Tarabai used to express displeasure as deceased Sharada was not in a position to conceive. She used to instigate accused no.1 Sampat for discarding Sharada. PW 4 Sarjerao called accused no.1 Sampat and told him to bear with time as only one and half year had passed since the marriage. However, there was no change in the attitude of accused no.1 and he continued to illtreat deceased Sharada. It is the case of prosecution that accused no.1 started looking for other alliance which was told to PW 4 Sarjerao by his relative PW 6 Narayan Laxman Kare.

3] It is the case of prosecution that at about 1:30 hours on 9 July, 1989 both the accused either individually or in furtherance of their common intention poured kerosene on the clothes and body of deceased Sharada and set her on fire. Accused no.1 Sampat and the persons residing in the vicinity took Sharada to Sassoon Hospital at about 2:30 am. PW 5 Dr.Chibbar admitted Sharada in ward no.27 which is otherwise known as Burn Ward in Sassoon Hospital, Pune. He examined her and found that Sharada sustained 98% burn injuries. Requisite arrangements were made for calling PW 2 Kamlakar Adhav, Special Judicial Magistrate, Pune. At about 3:30 am or 3:45 am PW 2 Kamlakar Adhav recorded dying declaration of Sharada at exhibit 16. It is the further case of prosecution that on 9 July, 1989 accused no.1 gave phone messages to neighbour of PW 4 Sarjerao that he (PW 4) and brother of accused no.1 were immediately called to Pune. Accordingly, PW 4 Sarjerao went to Lonand and contacted brother of

accused no.1. Thereafter, they left for Pune and came to the residence of accused no.1 at Chinchwad. However, the said place was locked and on making inquiry from neighbours, PW 4 Sarjerao came to know that Sharada sustained burn injuries and that she was shifted to Sassoon Hospital, Pune. He went to Sassoon Hospital and on making inquiry came to know that Sharada was no more and her dead body was kept in morgue. After conducting post mortem, on dead body of Sharada, it was handed over to PW 4 Sarjerao who took it to Nira for funeral. Since accused nos.1 and 2 were arrested by police, neither of them or any member of their family remained present for the funeral.

4] At 6 pm. on 9 July, 1969 PW 3 P.H.C. Pathare attached to Police Station, Chinchwad, received information from the Police Station Officer about the incident in question and about recording dying declaration of Sharada by the Special Judicial Magistrate at Sassoon Hospital, Pune. He immediately went to Band Garden Police Station to collect her dying declaration and report of P.H.C. R.A.Aziz, Police Head Constable. He went to Sassoon Hospital, Pune and noticed that Sharada sustained 100% burn injuries. He returned to Police Station, Chinchwad and lodged FIR exhibit 19 on behalf of State and registered offence at C.R. No.364 of 1989 under Section 307 read with Section 34 IPC and handed over the investigation to PW 7 PSI Bhat. PSI Bhat visited the place of incident on 9 July, 1989 and prepared spot panchnama exhibit 13. He attached articles 1 to 3. At that time, he was informed that Sharada expired in Sassoon Hospital. He arrested both the accused at 12.30 hours on the same day and forwarded the report to police station. He converted the offence under Section 302 read with 34 IPC. He also made inquiry with the persons residing in the vicinity and recorded their statements. He prepared inquest exhibit 8 as also recorded statement of PW 4 and others in Sassoon Hospital. On 11 July, 1989 PW 7 Bhat recorded statements of mother of deceased Sharada and others.

5] On 28 July, 1989 both the accused were sent for medical examination for ascertaining whether they had sustained any injuries. Medical certificate exhibit 9 was issued by the Casualty Medical Officer, Sassoon Hospital, Pune in respect of accused no.2 Tarabai certifying that, on her examination, no burn injuries were seen. Likewise, in respect of accused no.1 Sampat, certificate exhibit 10 was

issued certifying that, on examination, no burn injuries were seen. On 17 August, 1989, PW 7 PSI Bhat went to Nira and recorded statements of Ms. Jayshree Kare and others. After completing investigation, he filed charge sheet at exhibit 30 in the court of learned Judicial Magistrate First Class on 16 October, 1989 who, in turn, committed the case to the court of Sessions on 4 January, 1990. Charge exhibit 2 was read over and explained to accused. They denied guilt and claimed to be tried. The defence of the accused was of total denial. They admitted about the marriage of accused no.1 Sampat and Sharada and about their residence initially at Thergaon and subsequently, at M.I.D.C. Colony, Chinchwad. Accused no.1 also admitted that he and deceased used to visit the residence of PW 4 Sarjerao once in three to four months' interval and used to stay there over night. They, however, denied that deceased Sharada was subjected to any cruelty. They further denied that they expressed displeasure as Sharada could not conceive and, on that count, she would be driven out of the house. Accused no.1 Sampat further denied that they approached PW 6 Narayan Laxman Kare for alliance. Accused no.1 further admitted that after Sharada sustained injuries, he along with his neighbours took her to Sassoon Hospital. He was informed by the concerned Medical Officer that condition of deceased Sharada was serious. Both accused denied that PW 5 Dr. Chibbar asked Sharada about the history of sustaining burn injuries, whereupon she told him that both accused poured kerosene on her body and set on fire herself and her clothes. According to them, since Sharada sustained 100% burn injuries she was unable to speak. They have denied the contents of dying declaration of Sharada. Accused no.1 Sampat filed his written statement at exhibit 32 and also produced letters which were marked exhibits 34 to 39. Accused no.2 adopted said statement by filing purshis exhibit 40.

6] In the written statement exhibit 32, accused no.1 contended that in the quarter in M.I.D.C. Colony, Chinchwad, deceased Sharada and her brother Manoj started residing together. Madhav who is son of accused no.2 Tarabai was also residing with him. He used to love deceased Sharada like anything. She never left him at any time. He brought T.V., Taperecorder and other household articles according to her wish. He has further contended that his parents are illiterate and are from poor class. There were no facilities at Lonand where his parents were living. Deceased Sharada never liked to stay with his parents at Lonand. However, to fulfill wishes

of his parents, Sharada stayed at Lonand. She, however, told him that in future she would not go to Lonand and stay with his parents. Because of old age of his parents, they were keeping illhealth. There was nobody to look after them and accused felt that Sharada should look after them. On 8 July 1989 accused no.2 Tarabai came to their residence. While they were taking dinner, accused no.2 told accused no.1 that since their parents are ill, it was difficult for them to do any household work. Accused no.2 suggested that accused no.1 should send his wife Sharada to their residence at Lonand where she would stay for one year. At that time, both of them desired that Sharada should go and stay with their parents at Lonand. Sharada did not like this idea and she kept mum. Sharada was disappointed on that count. He thought that he should console her on the next day. As usual, he and Sharada went to sleep on the cot. On the mattress in the same room, accused no.2 and her son Madhav slept.

7] At about 1:30 hours, when he was in sleep, he heard noise from the kitchen. Both the accused went towards the kitchen and found that door was closed. Accused no.1 pushed the door forcibly and found that Sharada was in flames. He raised shouts and took a bucket of water from bath room and poured on her body. Accused no.2 also shouted and the people from building gathered there. Accused no.1 was carrying deceased Sharada and he asked her as to what he had done. He requested his neighbour Shri Shiralkar to contact on telephone and call ambulance. Said Shiralkar, however, could not contact on phone. Immediately accused no.1 Sampat and said Shiralkar went on scooter to Jijamata Hospital and brought ambulance. Accused no.1 and neighbours brought Sharada to Sassoon Hospital. On the way, he found that the general condition of Sharada was deteriorating and she was speaking incoherently. When he returned with ambulance, he heard from the persons who had gathered that Sharada poured kerosene on her clothes and body and set fire. In the defence, it was further submitted that Sharada was rather adamant and strong minded.

8] The prosecution filed four documents along with list exhibit 6 and with the application exhibit 5 under Section 294 of the Code of Criminal Procedure. The defence admitted that the inquest exhibit 8, injury certificates exhibits 9 and 10 as also post mortem notes exhibit 28. In order to bring home the guilt of accused, the

prosecution examined in all seven witnesses. PW 1 Narayan Namdeo Bhosure, panch to spot panchnama, has proved the spot panchnama exhibit 13. PW 2 Kamlakar Baburao Adhav, Special Judicial Magistrate, at exhibit 14, who produced Yadi (Exh.15) whereby he was called in Sassoon Hospital, Pune for recording the dying declaration. He also proved dying declaration exhibit 16. PW 3 is Baliram Shivram Pathare, Police Head Constable, at exhibit 17, who produced the report given to him by R.A.Aziz, Police Head Constable and lodged FIR exhibit 19 on behalf of the State. PW 4 Sarjerao Bajirao Dhaigude at exhibit 22, who is father of deceased Sharada. He produced marriage invitation card exhibit 22 showing that accused No.1 married one Kishori alias Asha on 8 December, 1990. PW 4 Sarjerao deposed about illtreatment and cruelty inflicted by accused to Sharada. PW 5 is Dr.Sanjiv Chibbar who produced case papers. He proved his endorsement on the dying declaration that Sharada was conscious and she was in a position to give dying declaration. He deposed that he recorded history of the case as narrated by Sharada in his own handwriting, where she had stated that both accused poured kerosene on her clothes and set fire to them. Prosecution also examined PW 6 Narayan, relative of Sarjerao (PW 4) to substantiate that accused no.1 sought alliance and proposed to marry his daughter which was declined by PW 6 Narayan. PW 7 is PSI Bapurao Vithoba Bhat who carried out the investigation.

9] On the basis of the evidence on record, learned Sessions Judge acquitted the accused by the impugned judgment and order dated 20 March, 1991. It is against this judgment and order, the State has preferred this appeal. Since there was delay of 48 days in filing the appeal, Criminal Application No.3031 of 1991 was filed for condonation of delay. Rule was issued on the said application. In so far as appeal is concerned, on 13 January, 1992 it was admitted subject to condonation of delay.

10] We have heard Mr.H.J.Dedhia, learned APP for appellant State, Mr.Rajiv Patil, learned counsel for respondent no.1/accused no.1 and Ms.Revati MohiteDere, learned counsel for respondent no.2/accused no.2, at length.

11] Learned counsel for respondents opposed the application for condonation of delay contending that application does not make out any sufficient cause for condoning the delay. They submitted that the incident in question took place in July 1989 and after considering the material on record, learned Sessions Judge acquitted both the accused on 20 March, 1991. Now the appeal has come up for final hearing in September, 2010. Accused no.1 is a married person having children. In so far as accused no.2 is concerned, her son Madhav who was at the relevant time taking education and was residing with accused no.1, committed suicide. It was therefore submitted by them that this is not a fit case for condoning delay after almost 21 years from the date of incident. They, therefore, prayed for dismissal of the application for condonation of delay.

12] Mr.Dedhia, learned APP submitted that after the impugned judgment and order was passed on 20 March, 1991, application for certified copy was made. After obtaining the certified copy and after perusing the judgment, proposal was moved in time to the Law and Judiciary Department for filing appeal. The said proposal was received by the Law and Judiciary Department on 19 June, 1991 and sanction for filing appeal was granted on 24 June, 1991. The papers were received in the office of Public Prosecutor, High Court, Bombay on 26 June, 1991. It was, however, noticed that the certified copy of the impugned judgment was not with the sanction order. Inquiries were made by the office of the Public Prosecutor with the Law and Judiciary Department about the certified copy. However, it was not traceable. The office of the Public Prosecutor made second application on 6 July, 1991. The certified copy was sent to the office of Public Prosecutor on 9 August, 1991 and appeal was filed on that day which was beyond time by 48 days. He, therefore, submitted that the delay in the instant case is neither deliberate nor intentional and, hence, deserves to be condoned.

13] We have considered rival submissions made by learned counsel for the parties. As noted earlier, on the application for condonation of delay, Rule was issued on 13 January, 1992. It was made returnable on 10 February, 1992. It is not in dispute and even otherwise from the record it is evident that accused were duly served with this application on 9 February, 1992. However, no reply opposing the application was filed. Considering the grounds set out in paragraph III of the

application, we are satisfied that the State has made out sufficient cause for condoning the delay. We, accordingly, condone the delay.

14] Mr.Dedhia submitted that in the instant case the prosecution has established that initially for a period of one and half year from 13 [B]crappeal473-91

the marriage, accused no.1 treated Sharada properly. He however started illtreating her and inflicted cruelty as she could not conceive. Evidence of PW 4 Sarjerao establishes that Sharada was illtreated by the accused. He further submitted that the evidence of PW 2 Kamlakar and PW 5 Dr.Chibbar proves beyond reasonable doubt the dying declaration. The dying declaration clearly sets out that accused poured kerosene and set her on fire. He submitted that when the dying declaration of Sharada was recorded there was no possibility of tutoring as when PW 4 Sarjerao came to hospital, Sharada had already expired. He therefore submitted that the dying declaration recorded by PW 2 does not suffer from any infirmity. The dying declaration was not a result of tutoring, prompting or imagination. Considering the testimony of PW 2 Kamlakar and PW 5 Dr.Chibbar as also the dying declaration exhibit 16, it cannot be said that the dying declaration was suspicious. He further submitted that considering the testimony of these witnesses, it was evident that the deceased Sharada was in a position to make the dying declaration. He submitted that learned Sessions Judge solely relied upon the testimony of PW 5 Dr.Sanjeev Chibbar and came to the conclusion that the deceased was not in mental condition and conscious to give statement. In support of these submissions, he relied upon the following decisions:

(i) Varikuppal Srinivas v. State of A.P., 2009 AIR SC 975.

(ii) Satish Ambanna Bonsode v. State of Maharashtra, (2009) 11 SCC 217.

(iii) Sher Singh and another v. State of Punjab, (2008) 4 SCC 265.

15] On the other hand, Mr.Rajiv Patil and Ms.Revati MohiteDere supported the impugned judgment and order. They submitted that the prosecution has not established the guilt of the accused beyond reasonable doubt. It has come in the evidence of PW 7 PSI Bhat that he did not mention the names of witnesses in the

charge sheet who were residing in the vicinity as nobody supported the incident in question and they were not knowing about it. It has come on record that accused no.1 shifted deceased Sharada with the help of neighbours to Sassoon Hospital. If at all the accused had set the deceased Sharada on fire, she would have definitely disclosed the said fact to the persons while going to the hospital. It has also come in the evidence of PW 7 PSI Bhat that he recorded statements of 21 persons residing in the vicinity, but none of them was examined as witness.

16] In so far as dying declaration recorded by PW 2 Kamlakar is concerned, learned counsel for the accused submitted that the dying declaration is not free from suspicion. Deceased Sharada sustained 100% burn injuries and considering the evidence of PW 5 Dr.Chibbar, deceased Sharada was not in mental fit condition to make dying declaration. They submitted that on 8 July, 1989 while they were taking dinner, they suggested Sharada for going to Lonand to look after their ailing parents and stay there for one year. Sharada did not like that idea and in order to bring pressure on accused for not sending her to Lonand, she poured kerosene and set herself on fire at 1:30 am. as a pressurizing tactic. In that, however, she sustained 100% burn injuries. They further contended that the view taken by the Sessions Court is reasonably a possible view. It cannot be termed as unreasonable and perverse view. This is more so when the court is dealing with appeal against acquittal almost 19 years after. They, therefore, prayed for dismissal of appeal.

17] In support of these submissions, learned counsel for the accused relied upon the following judgments: i) Mahindra Pratap Singh v. State of U.P., 2009 (3) JT 120.

ii) Darshan Singh v. State of Punjab & anr., 2010 All.MR. (Cri.) 622 (S.C.)

iii) Hate Singh Bhagat Singh Vs.State of Madhya Bharat, AIR 1953 SC 468.

iv) Shantabai v. State, Crimes VII1990 (2) 574.

v) Darshan Singh and others Vs.State of Punjab and Joga Singh and others v. State of Punjab, AIR 1983 SC 554.

- vi) State of Rajasthan v. Prithvi Raj, Crimes VII 1995(3) 260.
- vii) Laxman v. State of Maharashtra, 2002 AIR SCW 3479.
- viii) Gopalsingh and anr. v. State of Madhya Pradesh and anr., AIR 1972 SC 1557.
- ix) State of Rajasthan v. Yusuf, AIR 2009 SC 2674.

18] The prosecution has examined PW 1 Narayan Namdeo Bhosure at exhibit 12. He is a panch witness to spot panchnama. PW 2 Kamlakar Adhav, Special Judicial Magistrate was examined at exhibit 14. He deposed that at about 3:30 am on 9 July, 1989 he received intimation from Bund Garden Police Station and he was directed to go to Sassoon Hospital for recording dying declaration of Sharada. He acknowledged receipt of Yadi exhibit 15. He went to Ward No.27 in Sassoon Hospital where he met PW 5 Dr.Chibbar and told him that he wanted to record dying declaration of Sharada. PW 5 took him towards bed of Sharada. PW 5 Dr.Chibbar examined her and told him that Sharada was fully conscious and well oriented to give dying declaration. PW 2 Kamlakar asked deceased her name and she gave her name as Sharada Sampat Kale, age 25 years and that she was doing house hold work. She also gave her address as M.I.D.C. Colony, A3. He further asked her if she was fully conscious and she answered the same in the affirmative. He disclosed to her his identity and asked her as to how she sustained burn injuries. Sharada told him that on the night of 8 July, 1989 at 1:30 hours, her husband Sampat and his sister Tarabai poured kerosene on her clothes at her residence and thereafter set fire to her. She further told him that as she would not conceive and give birth to a child, there was quarrel between her and her husband. He used to taunt her and illtreat her. She further told him that because of the said reason, accused poured kerosene on her person and set her on fire and, accordingly, sustained burn injuries. He further deposed that he recorded her dying declaration as narrated by her and the same was read over to her. She admitted the same as true and correct. He took impression of her left great toe and attested the same. He also countersigned the same. While he was recording dying declaration of Sharada, PW 5 Dr.Chibbar and one staff nurse were present with him. On the said dying declaration, PW 5 Dr.Chibbar made endorsement to the following effect:

" .the statement issued to me by this patient is in the total presence of her mental faculties and in presence of staff nurses. I certify her fit to issue this statement."

PW 5 Dr.Chibbar had signed below said endorsement in the presence of PW 2 Kamlakar.

19] In the crossexamination, PW 2 Kamlakar deposed that he did not examine case papers of Sharada before recording her dying declaration. Sharada had sustained 100% burn injuries and that she was in agonies and pains. She was speaking with difficulty. She was also moaning. When he saw Sharada, he noticed Saline I/V was already in progress. He only asked questions to her which are mentioned in the dying declaration. Before recording her dying declaration he did not put her any other question to ascertain if she was in fit mental condition to give dying declaration. He did not make separate endorsement to the effect that he recorded the same in the presence of PW 5 Dr.Chibbar. There was also no endorsement of PW 5 Dr.Chibbar that he examined female patient before recording her dying declaration and that he found her fit to give dying declaration. He denied that female patient was not in a position to utter single word because of extensive burn injuries and he recorded the contents of dying declaration as narrated by police. He denied that PW 5 Dr.Chibbar did not examine Sharada before recording her dying declaration. He further denied that he obtained endorsement of PW 5 Dr.Chibbar below dying declaration subsequently. He also denied that PW 5 Dr.Chibbar was not present while recording the dying declaration. He further denied that he did not read over the contents of the dying declaration and that Sharada admitted that as true and correct. He further denied that he did not record dying declaration of Sharada as narrated by her and simply obtained impression of her great toe on it. 20] In the dying declaration exhibit 16 when the question No.3 was asked by PW 2 Kamlakar to deceased Sharada about the burn injuries sustained by her, she replied to the following effect: "Q3.How you sustained burns?

Today on 8.7.89 at night at about 130 hrs. at my residence my husband Sampat Babasaheb Kale and my sister in law Tarabai Dhanaji Dhaigude poured kerosene on my person and set me on fire and I sustained burn injuries. Quarrels used to

take place between we both husband and wife and he also used to quarrel with me that I could not give birth to child and used to illtreat me. Yesterday at night due to above reason both of them poured kerosene on me and set me on fire and I sustained burns."

21] The prosecution has examined PW 4 Sarjerao, father of deceased Sharada at exhibit 21. He deposed that for the period of first one and half year accused treated Sharada well. Thereafter, he started illtreating her. Sharada told him that accused no.1 expressed to her that he would discard her because she could not conceive. Even accused no.2 used to express her displeasure as to why Sharada was not in a position to conceive. Accused no.2 used to instigate accused no.1 that he should discard Sharada and drive her out of house. Therefore, PW 4 Sarjerao called accused no.1 and told him to bear with time because only one and half years passed since their marriage. However, accused no.1 Sampat continued to illtreat Sharada and inflicted cruelty on her. Accused no.1 started of another bride. He further deposed that on 9 July, 1989 a phone message was received from accused no.1 by his neighbour that he (PW 4 Sarjerao) and brother of accused no.1 were called to Pune immediately. He went to Lonand and contacted brother of accused no.1. Then, PW 4 Sarjerao along with brother of accused went to residence of accused no.1 at Chinchwad. However, his house was found locked. On making inquiries with the neighbours, he came to know that Sharada sustained burn injuries and that she was admitted in Sassoon Hospital. He went to Sassoon Hospital and came to know that Sharada was no more and her dead body was kept in morgue. He took the dead body of deceased at Nira and performed her last rites. At about 4:00 pm the police recorded his statement. Brother of accused did not accompany him to Nira. Subsequently, in the month of December, 1990 accused no.1 performed marriage. PW 4 Sarjerao produced invitation card of said marriage at exhibit 22. 22] In the crossexamination, PW 4 Sarjerao admitted that parents of accused no.1 and their unmarried daughter by name Gangu reside at Lonand. Parents of accused and their other relatives were illtreated and they used to work as labourer. They did not own any landed property. The residence of parents of accused at Lonand comprises of one room admeasuring 10ft x 10 ft. It was constructed by mud and bricks with a roof on it. There is no facility of water and electricity, bath room, W.C. etc. He shown letters

dated 26 July, 1988 and 25 April, 1989 allegedly written by accused no.1 to him. He felt ignorance as to who produced these letters dated 26 July, 1988. He admitted content of letter dated 25 April, 1989 exhibit 23. He admitted that before the incident in question, his son Manoj was residing with accuse no.1 and Sharada for some months. He was serving there. His elder daughter Kusum was given in marriage at Wadegaon Farm, Taluka Satara. However, he committed suicide by taking poison. He denied that deceased Sharada was sentimental. He further deposed that when he arrived at hospital, he came to know that Sharada in her dying declaration disclosed that accused poured kerosene on her clothes and set her on fire because she could not conceive child. He further admitted that accused no.2 was residing at Lonand with her husband and children. He never complained to police about the illtreatment received by Sharada at the hands of accused no.1. He denied that in the statement recorded by police on 9 July, 1989 he did not state that Sharada told that accused no.1 expressed to drive her out of the house as she could not conceive. He admitted that in the statement recorded by police he did not state that one Kare (PW 6) told him that accused no.1 was searching for a bride and was thinking of remarriage. He denied that he deposed falsely that Sharada told him about illtreatment at the hands of accused. 23] Prosecution examined PW 3 Baliram Shivram Pathare, Police Head Constable at exhibit 17 who obtained the dying declaration from Band Garden Police Station and also report of R.A.Aziz, P.H.C. (exhibit 18). On receipt of information, he lodged FIR at Pimpri Police Station who bore his signature (exhibit 19).

24] Prosecution also examined PW 5 Dr.Rajiv Chibbar at exhibit

29. He deposed that Sharada was brought to Sassoon at 2:50 am in Ward No.27. he personally examined her and found that she had sustained 98% burn injuries as under :

- i) 36% burn injuries on thorax,
- ii) 18% burn injuries on upper limbs,
- iii) 35% burn injuries on lower limbs,

iv) 1% burn injury on perineum,

v) 8% on the face. He asked Shrada about history of burn injuries sustained by her and she told him "of being doused by her husband Sampat Baba Kale and his sister with kerosene and set her on fire at 1230 am approximately". He wrote the history accordingly in his handwriting in the case papers exhibit 25. About 10 to 15 minutes thereafter, PW 2 Kamlakar came to Ward No.27 and told him that he came for recording dying declaration of deceased Sharada. He further deposed that he examined Sharada before recording dying declaration and found that even at that time she was lucid. It was his observation by experience that even in case if a patient sustains burn injuries upto 100%, still such a patient is having a clear brain and he can talk with understanding. He found that Sharada was fit and conscious to give her dying declaration. In his presence, PW 2 Kamlakar asked questions and recorded answers given by her. He saw that both palms of Sharada together with fingers had sustained burn injuries and hence the impression of left great toe was taken by the PW 2 Kamlakar on dying declaration. Thereafter, he made endorsement to the following effect :

"the statement issued to me (PW 5) by the patient is in the total presence of her mental faculties and in presence of the staff nurses. I certify her fit to issue this statement."

In the presence of PW 5 Dr.Chibbar, PW 2 Kamlakar read over the contents of the dying declaration and she admitted the same as true and correct. Enforcement was made on the case papers that PW 2 Kamlakar recorded the dying declaration on 9 July, 1989 at 4 am. PW 2 Kamlakar also signed below the said endorsement. Sharada expired in the morning at about 9:00 am. According to him, the burn injuries on all over the body which were to the extent of 98% were sufficient in the ordinary course of nature to cause death. He gave sufficient warning to accused no.1 at the time of admission of deceased in Ward No.27 that her condition was very serious and his signature was obtained below the endorsement of case papers.

25] In the crossexamination, PW 5 Dr.Chibbar deposed that he worked in Ward No.27 and treated the patient suffering from burn injuries for w months and 5 days

only. He observed that generally ward No.27 of Sassoon is full of patients. At that time, he was also attached to male ward as emergency. At that time, he roughly treated about 200 patients who had sustained burn injuries. He admitted that Sharada was in a very serious condition when she was brought to Sassoon hospital in ward No.27. There were extensive burn injuries over her face and neck because of which she was in great pains and agonies. He further deposed that when there is higher percentage of burn injuries, there is every possibility that such a patient goes in shock, mental process of the patient is hampered and patient may go in delirium. In that case also a patient may go in comma. Because of 100% of burn injuries, there is dehydration in the body of the patient. He further admitted that because of dehydration, the tongue would go dry and it would cause difficulty to the patient while talking. He also agreed that burn injuries caused by kerosene are more dangerous as compared to burn injuries sustained by other things. He further admitted that because of burning carbon dioxide and carbon monoxide are created and because of inhaling of them same, it becomes dangerous to the life. Carbon monoxide is dangerous to the health. An inhaling of the same to the extent of 0.1 per cent is dangerous to the health. Similarly, carbon monoxide is rapidly absorbed in the blood. Because of the same the brain of the person will be affected. Even at times and because of all these things which he has narrated hereinabove, there is every possibility that the mental faculty of such a patient will be affected and it will result in cerebral anoxia, causing total damage to the brain. Findings of carbon particles in traches may show as to what amount of quantity the patient had inhaled the smoke.

26] He further deposed that injections like pethidine, morphine and fortwin are given to such a type of patients to relieve them from pain and agony. He stated that such injections are given to the patient only after dying declaration. These medicines are pain killers and sedatives. The attention of this witness was drawn to temperative chart where were endorsement to the following effect : " Injections fortwin 1 ampule given at 330 a.m." According to this witness, one ampule of fortwin contains 2 ml. of Fortwin. It comes approximately to 2 cc. In this case, he can not even rule out the possibility that injection Fortwin might have been given to the patient even before recording of dying declaration. He admitted that when he asked the deceased about history of burn injuries sustained by her, she narrated

the same in Marathi. To a pointed question as to whether he asked the deceased some questions in order to ascertain that she was in a fit mental condition to give history of case, he answered that he asked the deceased and thereafter recorded the history of the case.

27] He further deposed that normal pulse rate of a person between age group 18 to 40 is between 66 to 80 per minute and in this case, the pulse rate was 120 per minute. To a pointed question as to whether he took a note in case papers that he examined the patient before recording her dying declaration and questions put to her by him, he answered that he did not do so as according to him it was not necessary also. He admitted that he did not make any endorsement on case papers that before recording her dying declaration, he put to deceased some questions and she answered to his satisfaction and, thus, according to him, she was in fit condition to give dying declaration. He denied that deceased did not narrate the history of the case as written by him on case papers. He further denied that PW 2 Kamlakar did not record Sharada's dying declaration in his presence. He denied that Sharada was not in fit mental condition when she narrated the history of the case.

28] The prosecution also examined PW 6 Narayan Laxman Kare at exhibit 26 to substantiate that accused no.1 Sampat approached him with a proposal of his daughter's marriage with the accused. He deposed that in the month of April, 1989 accused no.1 came to his residence along with his mother and gave proposal to perform marriage with his daughter Usha. At that time his daughterinlaw Jayashree was at the residence. At the time of his evidence, the age of his daughter Usha was 18 years. When this witness returned to his home, his daughterinlaw Jayashree told him about the same. Learned counsel for the accused contended that evidence of PW 6 Narayan is totally unbelievable for more than one reason. In the first place, the said evidence is totally hearsay evidence. Secondly, at the time of deposition, the age of his daughter Usha was 18 years. His evidence was recorded on March, 1991. His daughterinlaw Jayashree was not examined. In order to get over this, PW 6 Narayan came with the explanation that since Jayashree delivered a female child and the date on which he deposed, was 11 day of delivery of child, she therefore was not in a position to go out of house

for a period of at least two months. Considering the evidence of PW 6 Narayan, we find merit in the submissions advanced on behalf of the learned counsel for the accused. We, accordingly, discard the entire testimony of PW 6 Narayan from our consideration.

29] The prosecution examined PW 7 Bapurao Vithoba Bhat, PSI who carried out the investigation and prepared spot panchnama exhibit 13 as also attached articles Nos.1 to 3 under the panchnama. He arrested the accused at about 12:20 hours on 9 July, 1989. He made inquiries with the persons residing in the vicinity and also recorded statements of some of them. He went to Sassoon hospital and prepared inquest exhibit 8. He did not mention names of witnesses residing in the vicinity in the charge sheet because nobody supported the incident in question and they were not knowing about it.

30] In the crossexamination, PW 7 admitted that letter dated 25th April, 1989 exhibit 23 and one more letter dated 26 July, 1988 were produced before him by PW 4 Sarjerao. As far as post card dated 19 May, 1988, it might have been produced by PW 4 Sarjerao. He deposed that he wanted to record the statement of persons residing in the adjoining premises to ascertain if any of them heard shouts of deceased Sharada soon after the incident or anyone of them extinguished fire of her clothes. He admitted that he recorded statements of 21 persons residing in the same building and same vicinity. He denied that he did not mention names of six persons in the charge sheet because their version was contrary to the case of prosecution.

31] Before we appreciate the evidence on record and deal with the rival submissions made by learned counsel for the parties, bearing in mind that we are dealing with appeal against acquittal, let us consider the principles governing the power of the appellate Court while dealing with the appeal against acquittal. In the case of M.G.Agarwal V/s.State of Maharashtra, AIR 1963 SC 200 the Constitution Bench of the Apex Court held in Paragraph Nos.16 & 17 of the Judgment as under:

16. Section 423 (1) prescribes the powers of the appellate Court in disposing of appeals preferred before it and clauses (a) and (b) deal with appeals against

acquittals and appeals against convictions respectively. There is no doubt that the power conferred by clause (a) which deals with an appeal against an order of acquittal is as wide as the power conferred by clause (b) which deals with an appeal against an order of conviction , and so, it is obvious that the High Court's powers in dealing with criminal appeals are equally wide whether the appeal in question is one against acquittal or against conviction. That is one aspect of the question. The other aspect of the question centres round the approach which the High Court adopts in dealing with appeals against orders of acquittal. In dealing with such appeals, the High Court naturally bears in mind the presumption of innocence in favour of an accused person and cannot lose sight of the fact that the said presumption is strengthened by the order of acquittal passed in his favour by the trial Court and so, the fact that the accused person is entitled to the benefit of a reasonable doubt will always be present in the mind of the High Court when it deals with the merits of the case. As an appellate Court the High Court is generally slow in disturbing the finding of fact recorded by the trial Court, particularly when the said finding is based on an appreciation of oral evidence because the trial Court has the advantage of watching the demeanor of the witnesses who have given evidence. Thus, though the powers of the High Court in dealing with an appeal against acquittal are as wide as those which it has in dealing with an appeal against conviction, in dealing with the former class of appeals, its approach is governed by the overriding consideration flowing from the presumption of innocence. Sometimes the width of the power is emphasized, while on other occasions, the necessity to adopt a cautious approach in dealing with appeals against acquittals is emphasized and the emphasis is expressed in different words or phrases used from time to time. But the true legal position is that however circumspect and cautious the approach of the High Court may be in dealing with appeals against acquittals, it is undoubtedly entitled to reach its own conclusions upon the evidence adduced by the prosecution in respect of the guilt or innocence of the accused. This position has been clarified by the Privy Council in *Sheo Swarup v.Emperor*, 61 Ind App 398 : (AIR 1934 PC 227 (2) and *Nur Mohammad v.Emperor*, AIR 1945 PC 151.

17. In some of the earlier decisions of this Court, however, in emphasizing the importance of adopting a cautious approach in dealing with appeals against

acquittals, it was observed that the presumption of innocence is reinforced by the order of acquittal and so "the findings of the trial Court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons" : Surajpal Singh v.The State, 19523 SCR 193 at p.201 : (AIR 1952 SC 52 at p.54). Similarly in Ajmer Singh v.State of Punjab, 1953 SCR 418: (AIR 1953 SC 76), it was observed that the interference of the High Court in an appeal against the order of acquittal would be justified only if there are "very substantial and compelling reasons to do so." In some other decisions, it has been stated that an order of acquittal can be reversed only for "good and sufficiently cogent reasons" or for "strong reasons". In appreciating the effect of these observations, it must be remembered that these observations were not intended to lay down a rigid or inflexible rule which should govern the decision of the High Court in appeals against acquittals. They were not intended, and should not be read to have intended to introduce an additional condition in clause (a) of section 423 (1) of the Code. All that the said observations are intended to emphasize is that the approach of the High Court in dealing with an appeal against acquittal ought to be cautious because as Lord Russell observed in the case of Sheo Swarup, 61 Ind App 398: (AIR 1934 PC 227 (2), the presumption of innocence in favour of the accused " is not certainly weakened by the fact that he has been acquitted at his trial". Therefore the test suggested by the expressing "substantial and compelling reasons" should not be construed as a formula which has to be rigidly applied in every case. That is the effect of the recent decisions of this Court, for instance, in Sanwat Singh v.State of Rajasthan, AIR 1961 Sc 714, and Harbans Singh v.State of Punjab AIR 1962 SC 439 and so, it is not necessary that before reversing a judgment of acquittal, the High Court must necessarily characterize the findings recorded therein as perverse. Therefore, the question which we have to ask ourselves in the present appeals is whether on the material produced by the prosecution, the High Court was justified in reaching the conclusion that the prosecution case against the appellants had been proved beyond a reasonable doubt and that the contrary view taken by the trial Court was erroneous. In answering this question, we would, no doubt, consider the salient and broad features of the evidence in order to appreciate the grievance made by the appellants against the conclusions of the High Court. But under Art.136 we

would ordinarily be reluctant to interfere with the findings of fact recorded by the High Court particularly where the said findings are based on appreciation of oral evidence.

32] In the case of State of Maharashtra V/s.Haribhau Deshmukh, 2003 Bom.C.R (Cri.) 1233, the Division Bench of this Court reviewed the entire case law on this subject, to which one of us (D.B.Bhosale, J.) was a party. The Division Bench considered judgment in the case of Caetano Piedade Fernandes V./s. Union of Territory of Goa, Daman & Diu), AIR 1977 SC 135, wherein the Supreme Court observed thus:

"It is now well settled that though the Appellate Court has the same powers as the trial Court of appreciating evidence and coming to its own conclusion on questions of fact, it should not interfere with an acquittal, unless it finds that the view taken by the trial Court is unreasonable or perverse. If the view taken by the trial Court is a reasonably possible view, the Appellate Court should not disturb an acquittal merely because it thinks that another view is better or more preferable."

33] In State of Maharashtra v/s.Haribhau Deshmukh (supra) the Division Bench also considered the case of Dhanna V/s.State of M.P., AIR 1996 SC 2478. In case of Dhanna V/s.State of M.P. (supra) the Apex Court reiterated the fact that the presumption of innocence of the person is only strengthened by the order of acquittal and the High Court should be very cautious in interfering. It may be so interfered only if there is absolute assurance of the guilt of the accused upon the appreciation of evidence on record. The Supreme Court observed thus:

"Though the code does not make any distinction between an appeal from acquittal and an appeal from conviction so far as powers of the Appellate Court are concerned, certain unwritten rules of adjudication have consistently been followed by Judges while dealing with appeals against acquittal. No doubt, the High Court has full power to review the evidence and to arrive at its own independent conclusions whether the appeal is against conviction or acquittal. But while dealing with an appeal against acquittal the Appellate Court has to bear in mind, first, that there is a general presumption in favour of the innocence of the person accused in criminal cases and that presumption is only strengthened by the acquittal. The

second is, every accused is entitled to the benefit of reasonable doubt regarding his guilt and when the trial Court acquitted him he would retain that benefit in the Appellate Court also. Thus Appellate Court in appeals against acquittals has to proceed more cautiously and only if there is absolute assurance of the guilt of the accused, upon the evidence on record, that the order of acquittal is liable to be interfered with or disturbed."

After considering the entire case law on the subject the Division Bench ultimately observed in Paragraph No.22 as under: "22. In our opinion, the scope and extent of powers of the High Court under section 379 of the 1978 Code is well defined and has been disclosed by the above referred judgment of the Supreme Court of India. In our opinion, the consistent and well settled law on the point is that the High Court can interfere with the order of acquittal only when:

- 1] The appreciation of evidence by the trial Court is perverse or the conclusion drawn by it cannot be drawn on any view of the evidence,
- 2] Where the application of law is improperly done,
- 3] Where there is substantial omission to consider the evidence existing on record,
- 4] The view taken by the acquitting Court is impermissible on the evidence on record,
- 5] If the order of acquittal is allowed to stand it will result the miscarriage of justice".

34] In the present case the prosecution has heavily relied upon the dying declaration. The Constitution Bench of the Apex Court in the case of Laxman v. State of Maharashtra (supra) dealt with the juristic theory regarding the acceptability of dying declaration. It was observed in paragraph No.3 as under :

"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 death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross examination are dispensed with. Since the accused has no power of cross examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the Court in its truthfulness and correctness. The Court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The Court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted

upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

(emphasis supplied)

35] In the case of Satish (supra) the Apex Court summarised the principles governing the dying declaration. They are as under :

i. There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See: Munnu Raja v.State of M.P., 1976 (3) SCC 104].

ii. If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [see: State of U.P.v.Ram Sagar Yadav, 1985 (1) SCC 552, and Ramavati Devi v.State of Bihar, 1983 (1) SCC 211].

iii. The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See: K.Ramachandra Reddy v. Public Prosecutor, 1976 (3) SCC 618].

iv. Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence.[See: Rasheed Beg v.State of M.P., 1974 (4) SCC 264]. v. Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See: Kake Singh v. State of M.P., 1981 Supp.SCC 25].

vi. A dying declaration which suffers from infirmity cannot form the basis of conviction. [See : Ram Manorath v. State of U.P., 1981 (2) SCC 654].

vii. Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. [State of Maharashtra v. Krishnamurti Laxmipati Naidu, 1980 Supp.SCC 455].

viii. Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. [See: Surajdeo Ojha v. State of Bihar, 1980 Supp.SCC 769] .

ix. Normally, 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 eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See: Nanhau Ram v. State of M.P., 1988 Supp. SCC 152].

x. Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See: State of U.P. v. Madan Mohan, 1989 (3) SCC 390].

xi. Whether there are more than one statements in the nature of dying declaration, the one first in point of time must be preferred. Of course, if the plurality of the dying declaration could be held to be trustworthy and reliable, it has to be accepted. [See: Mohanlal Gangaram Gehani v. State of Maharashtra, 1982 (1) SCC 700].

36] Bearing in mind the principles governing power of the Appellate Court in dealing with an appeal against acquittal as also the principles governing dying declaration laid down by the Apex Court, let us consider the evidence on record. As noted earlier, the prosecution had examined PW 2 Kamlakar Adhav, Special Judicial Magistrate at exhibit 14. He had recorded the dying declaration of Sharada. He deposed that when he went to Ward No.27 in Sassoon Hospital, he met PW 5 Dr.Chibbar. He told PW 5 Dr.Chibbar that he wanted to record the dying declaration of deceased Sharada. PW 5 Dr.Chibbar examined deceased and told him that Sharada was fully conscious and well oriented to give dying declaration. PW 2 Kamlakar asked deceased Sharada her name and she gave her name as Sharada Sampat Kale, age 25 years and that he was doing house hold work. She also gave her address as M.I.D.C. Colony, A3. He further asked her if she was fully conscious and she answered the same in the affirmative. She disclosed to her his identify and asked her as to how she sustained \burn injuries. Sharada told him that on 8 July, 1989 at 1:30 hours, her husband Sampat and his sister Tarabai

poured kerosene on her clothes at her residence and thereafter set fire to her. She further told him that as she could not conceive and give birth to a child, there used to be quarrel between her and her husband. He used to taunt her and illtreat her. She further told him that because of the said reason, the accused poured kerosene on her person and set her on fire and resultantly, she sustained burn injuries. He further deposed that he recorded the dying declaration as narrated by her. The same was read over to her and she admitted the same as true and correct. While he was recording dying declaration of Sharada, PW 5 Dr.Chibbar and one staff nurse were present with him and on the said dying declaration PW 5 Dr.Chibbar made endorsement to the following effect : " .the statement issued to me by this patient is in the total presence of her mental faculties and in presence of staff nurses. I certify her fit to issue this statement."

PW 5 Dr.Chibbar had signed below said endorsement in the presence of PW 2 Kamlakar.

37] In the crossexamination, he deposed that Sharada had sustained 100% burn injuries and she was in agonies and pains. She was speaking with difficulty. She was also moaning. He denied that female patient (Sharada) was not in a fit condition to utter a single word because of extensive burn injuries and further denied that he recorded contents of the dying declaration as narrated by the police. He denied that PW 5 Dr.Chibbar did not examine Sharada before recording her dying declaration. He also denied that he obtained endorsement of PW 5 Dr.Chibbar below dying declaration subsequently. He further denied that PW 5 Dr.Chibbar was not present while recording the dying declaration. He also denied that he did not read over the contents of the dying declaration to Sharada and that she did not admit the same as true and correct. He also denied that he did not record the dying declaration of Sharada as narrated by her and simply obtained impression of her great toe on it. In the earlier part of our judgment we have already extracted in verbatim the Question No.3 put by PW 2 Kamlakar and the answer given by deceased Sharada.

38] The prosecution has also examined PW 5 Dr.Chibbar. He examined Sharada at 2:50 am when she was brought in Ward No. 27 of Sassoon. He asked her about

the history of burn injuries and she told him of being doused by her husband and his sister with kerosene and set her on fire at 12:30 hours. He wrote history of accused in his hand writing in the case papers exhibit 25. He further deposed that he examined Sharada before recording dying declaration and found that at that time she was lucid. In other words, she was in a position to understand and was showing an ability to think clearly. It was his observation by experience that even in case if a patient sustains burn injuries upto 100%, still such a patient is having a clear brain and he can talk with understanding. He found that Sharada was fit and conscious to give her dying declaration. In his presence, PW 2 Kamlakar asked question and recorded answers given by her. After PW 2 Kamlakar recorded dying declaration, he made endorsement to the effect that "the statement issued to me (PW 5) by the patient is in the total presence of her mental faculties and in presence of the staff nurses. I certify her fit to issue this statement." He further deposed that the contents of dying declaration were read over to Sharada by PW 2 Kamlakar and she admitted the same as true and correct.

39] In so far as the evidence of PW 2 Kamlakar and PW 5 Dr.Chibbar is concerned, they are totally independent persons. It can not be said that their version is interested one. They had no animosity or grudge against the accused. PW 2 Kamlakar, Special Judicial Magistrate was satisfied that Sharada was in a fit mental condition to give dying declaration. Even PW 5 Dr.Chibbar told him that Sharada was fully conscious and was well oriented to give dying declaration.

40] Learned counsel for the accused submitted that PW 2 Kamlakar admitted in crossexamination that Sharada sustained 100% burn injuries and that she was in agonies and pains. She was speaking with difficulty. She was also moaning. According to learned counsel for accused, PW 2 Kamlakar further admitted that before recording her dying declaration he did not put any other question to ascertain if she was in a fit mental condition to give dying declaration and that he has not made separate endorsement on the dying declaration that he recorded the same in the presence of Dr.Chibbar. He further admitted that Dr.Chibbar who examined Sharada did not make endorsement that he examined her before recording dying declaration and that he found her to be fit to give statement. Relying upon this part of testimony, learned counsel for the accused submitted

that the testimony of PW 2 Kamkalar does not inspire confidence. They submitted that deceased Sharada was not in a fit mental condition to give dying declaration. 41] Learned counsel for the accused also criticized the evidence of PW 5 Dr.Chibbar and submitted that he had admitted that when Sharada was admitted in hospital she was in a very serious condition. Because of extensive burn injuries over her face and neck, she was in great pains and agonies. He further deposed that when there is higher percentage of burn injuries, there is every possibility that such patient goes in shock, mental process of the patient is hampered and the patient may go in delirium. In that case also, a patient may go in comma. Because of 100% of burn injuries, there is dehydration in the body of the patient. He further admitted that because of dehydration, the tongue would go dry and it would cause difficulty to the patient while talking. He has also agreed that burn injuries caused by kerosene are more dangerous as compared to burn injuries sustained by other things. Relying upon this part of the testimony, learned counsel for the accused submitted that the admissions given by PW 5 Dr.Chibbar in cross examination showed that Sharada was not in a fit mental condition to give dying declaration.

42] We are unable to appreciate these submissions. The so called admissions given by PW 5 Dr.Chibbar are mere possibilities in a given case. However, PW 5 Dr.Chibbar was not pointedly asked a question as to whether the possibilities in a given case, in fact, turned out in realities in the case of Sharada. As observed in paragraph no.12 in the case of Satish (Supra), PW 5 Dr.Chibbar had given hypothetical answers to the questions regarding the effect of person who suffered burns of a very high percentage. PW 5 Dr.Chibbar had categorically deposed that deceased Sharada who given dying declaration was in a position to do so. Even otherwise, the accused have not pointed out any animosity. PW 5 Dr.Chbbar is totally independent and disinterested witness. The testimony of PW 2 Kamlakar and PW 5 Dr.Chibbar clearly show that deceased Sharada had given dying declaration which implicated accused. From the testimony of PW 2 Kamlakar and PW 5 Dr.Chibbar, we are satisfied that the said testimony inspires confidence as also they have duly proved the dying declaration made by deceased Sharada.

43] From the evidence of PW 2 Kamalakar Adhav, Special Judicial Magistrate and Dr.Chibbar (P.W.5) we are satisfied that the dying declaration recorded by P.W.2

Kamalakar Adhav is free from any infirmity worth taking note of and to discard the dying declaration. Both these witnesses have clearly stated that the deceased was in a fit and conscious state to make the declaration. The question, therefore, arises as to what evidential value or weight has to be attached to such statement necessarily depends upon the facts and circumstances of each particular case and while doing so one has to see whether the statement of the deceased was not as a result of either tutoring or prompting or produce of imagination as observed by the Supreme Court in *Laxman v. State of Maharashtra* (supra). In the present case both these witnesses (P.W.2 and P.W.5) are absolutely independent and they had no reason whatsoever to either fabricate dying declaration or to reduce it in writing by imagination. Admittedly, none of the relatives of the deceased were with her right from the date and time of incident till her oral dying declaration was recorded by P.W.2 Kamalakar Adhav. Therefore, the question in present case of either tutoring or prompting does not arise at all. 44] The next question, therefore, would arise as to whether the dying declaration is product of imagination of the deceased. In our opinion, it is not. It is because at the time of her admission in the hospital while giving history to the doctor, she told as to how she sustained burn injuries and it is consistent with dying declaration recorded subsequently by Kamalakar Adhav. As a matter of fact, when she was admitted in the hospital her husband and his relatives were in the hospital. Despite this, the deceased dared to tell the doctor as who were responsible for the injuries sustained by her. Thereafter, P.W.2 Kamalakar Adhav also recorded her statement in question and answer form after obtaining certification of the doctor as to fitness of mind of the deceased. In defence, the husband has stated that his relations with wife and her all relatives were extremely good and he had no reason to commit her murder. If that was so there was also no reason for the deceased to commit suicide and falsely implicate the accused as persons responsible for sustaining burn injuries. When we examined this from another angle i.e. the defence disclosed in the written statement, we were satisfied that the defence is not consistent with dying declaration as product of imagination.

45] In defence, it is brought on record by way of written statement that both accused wanted the deceased to go and stay with their parents at Lonand and, therefore, she committed suicide. This defence is not at all acceptable for more

than one reason. Firstly, nobody had forced the deceased to go and stay with her in laws at Lonand in a small house of 10 X 10 sq. ft. Secondly, the unmarried sister of accused was at Lonand staying with their parents, apart from the fact that one more brother of accused was also residing at Lonand. Accused No.2 was also residing at Lonand along with her husband. This defence, therefore, appears to be an after thought. If relations between the two were cordial and if they were leading happy married life, as is claimed by accused no.1, she had no reason to go to extent of committing suicide. We have no doubt in our mind that the accused are suppressing as to how burn injuries were sustained by the deceased and why in a small house they waited till she sustained almost 100% injuries and did not make any effort to extinguish the fire. As noted earlier, the defence admitted the injury certificates of the accused at exhibits 9 and 10. No burn injuries were sustained by the accused which falsifies their defence. This all clearly points to the guilt of accused. We are satisfied that the dying is true and voluntary and is sufficient to base conviction of the accused. The dying declaration is not the result of tutoring, prompting or imagination. She was in fit state of mind to make declaration. It is not suspicious. The opinion of the doctor expressed in response to the questions of general nature would not come in our way for accepting the evidence of P.W.2 and P.W.5 which clearly show that the statement was made by the deceased. Apart from the fact that the contents of statement also support that it was made by the deceased. The trial Court has wrongly discarded the dying declaration only on the basis of the opinion expressed by the doctor in response to hypothetical questions put to him in the cross examination. The dying declaration is consistent with the prosecution case and, therefore, it is trustworthy and reliable and deserves to be accepted.

46] Learned Sessions Judge has merely discussed the evidence of PW 2 Kamlakar in paragraph 19 of the impugned judgment by observing that taking into consideration the admissions given by Dr.Chibbar, it is difficult to agree that the deceased Sharada was in a fit mental condition and was fully conscious to give dying declaration. The learned Sessions Judge has not at all given any reasons for discarding the evidence of PW 2 Kamlakar. There is substantial omission on the part of learned Sessions Judge to consider the testimony of PW 2 Kamlakar.

47] As noted earlier, PW 4 Sarjerao had deposed the illtreatment as also cruelty meted out to deceased Sharada on the ground that she was not in a position to conceive and give birth to child. Merely because PW 7 PSI Bhat, Investigating Officer did not examine any persons from the vicinity where accused was residing, cannot be a ground to disbelieve the dying declaration made by deceased Sharada which is duly proved by PW 2 Kamlakar and PW 5 Dr.Chibbar. The appreciation of evidence by learned Sessions Judge is perverse as also the conclusions drawn by him could not have been drawn in view of the evidence. The view taken by learned Sessions Judge while acquitting accused is impermissible on the evidence on record. Having regard to the evidence on record, there is absolute assurance of guilt of the accused which necessitates interference with the order of acquittal. If the order of acquittal is allowed to stand, it will result in miscarriage of justice. 48] Learned counsel for the accused relied upon the judgment of the Apex Court in the case of Mahendra Pratap to contend that unless the conclusion of the trial court drawn on the basis of evidence are found to be unreasonable or perverse, the order of acquittal should not be disturbed. The present appeal remained pending before this court almost for 19 years. It was, therefore, submitted that this is not a fit case for interfering with the order of acquittal. To that effect, learned counsel for the respondents also relied upon the judgment of the Apex Court in the case of Darshan Singh (supra) and State of Rajasthan v. Prithvi Raj (supra). We do not find any merit in this submission as we have already come to the conclusion that the conclusions drawn by the learned Sessions Judge on the evidence are unreasonable, perverse and unsustainable. The impugned order has led to failure of justice. As observed by the Apex Court in the case of State of Karnataka v. Moin Patel and ors, AIR 1996 SC 3041 we are unable to accept the contentions raised on behalf of the accused that having regard to the long interval between the acquittal and hearing of this appeal, this Court may not interfere with the judgment. 49] Learned counsel for the respondents also relied upon the judgment of the Apex Court in the case of Shantabai (supra) as also the judgment of the Apex Court in the case of Darshan Singh (supra), State of Rajasthan Vs.Prithvi Raj (supra) and State of Rajasthan v. Yusuf (supra) to contend that the conviction cannot be based on the dying declaration as the accused have been falsely implicated on the basis of the

evidence on record. It cannot be said that the dying declaration can be regarded as truthful. We do not find any substance in this submission for the reasons 52 [B]crappeal473-91 already noted earlier. We came to the conclusion that the in the instant case the dying declaration is truthful. 50] Learned counsel for the respondents also relied upon the written submission filed by the accused no.1 at exhibit 32 as also letters at exhibits 34 to 39. It was submitted that deceased Sharada was highly emotional and sentimental. The parents of accused were keeping illhealth and therefore they desired that their daughterinlaw Sharada should look after them at Lonand. Accused discussed this issue in the night of 8 July, 1989 and expressed their desire that the deceased Sharada should reside at Lonand for a period of one year to look after their ailing parents. Having regard to the facilities available at the residence of the parents of the accused, Sharada was not willing to reside at Lonand. Since there was no one to look after the parents of accused, they merely expressed desire that Sharada should reside at Lonand for one year. Deceased Sharada did not like this and in order to pressurise the accused, in the night of 8 July, 1989 she poured kerosene on herself and set her on fire. However, the said attempt of Sharada setting her on fire blew out of proportion with the result she sustained 100% burn injuries. This submission was made for the first time during the course of argument of this appeal and no such case was made out even in the written statement.

51] It has come in the crossexamination of PW 4 Sarjerao that the unmarried sister of accused namely Gangu was residing at Lonand. Even accused no.2 is residing at Lonand with her husband and children. In the examinationinchief, PW 4 Sarjerao deposed that on 9 July, 1989 a message was received from accused no.1 by his neighbour that PW 4 Sarjerao and brother of accused no.1 were called to Pune immediately. PW 4 Sarjerao went to Lonand and contacted the brother of accused no.1 and they both went to the house of accused no.1. This also suggests that one brother of accused was also residing at Lonand. Therefore, the story put by the defence that since nobody was at Lonand to look after the parents of accused, in our opinion, is not a worth believing. The reliance placed by accused on various letters addressed by accused no.1 and, in particular, on letter dated 25 April, 1989 exhibit 23, is misconceived.

52] Learned counsel for the accused submitted that in view of passage of time as also in view of the fact that appeal was pending in this court for about 19 years, we should not interfere with the order of acquittal. The Division Bench of this Court in the case of State of Maharashtra v. Haribhau Krishnaji Deshmukh and ors, 2003 Bom.C.R. (Cri).1233 had noted that in most of the appeals preferred by the State against an order of acquittal, they are given a back seat as the accused are enlarged on bail. This necessitates that the matter right from the year 1987-88 were pending. We are also not oblivious of the fact that this appeal has come up for final hearing in 2010. Precisely, for that reason we were slow and cautious in dealing with this matter. Having regard to the evidence on record, we are satisfied about the guilt of the accused. We have, therefore, no alternative but to interfere with the order of acquittal.

53] In the result, Appeal is allowed. The impugned judgment and order dated 20 March, 1991 passed by the learned Sessions Judge, Pune in Sessions Case No.33 of 1990, is set aside. Accused are held guilty of the offences punishable under Sections 302 and 409A read with 34 IPC and are sentenced to undergo imprisonment for life. We grant eight weeks time to the accused to surrender.

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