

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.808 OF 2017
ALONGWITH
INTERIM APPLICATION NO. 1839 OF 2024
ALONGWITH
INTERIM APPLICATION NO. 4457 OF 2025
ALONGWITH
INTERIM APPLICATION NO. 4516 OF 2024**

Prasad Sudhakar Kulkarni,
(Presently in Central Jail, Nashik)
Age : 30 Years, Residing at : Poornima
Apartment, Flat No.4, Chetna Nagar,
Indira Nagar, Nashik.

...Appellant

Versus

1. **The State of Maharashtra,**
Through Indira Nagar Police Station,
District : Nashik, (CR No.I-78/201).

**...Respondent No.1
(Ori.Complainant)**

2. **Balkrushna Jaggannath Mulay,**
Age : 66 Years, Occupation : Nil,
Residing at : Balaji Angan, Near S.G.
Vidyalaya, Ram Mandir Road,
Kopargaon, Ahmednagar.

...Respondent No.2

Ms. Pushpa Ganediwala a/w Ms. Anima Mishra, Mr. Anuj Singh, Mr. Vinod Patil, Ms. Priyanka P., Mr. Pradyumna Agrawal, Ms. Anshu Agrawal and Mr. Bhushan Shinde i/b. Dhaara Legal, Advocates for Appellant.

Mr. S. V. Gavand, APP, for Respondent No.1 – State.

Mr. S. G. Deshmukh a/w Mr. Gautam T. Kanchanpurkar, Advocates for Respondent No.2.

CORAM : M. S. KARNIK AND
S. M. MODAK, JJ.

DATE : 5th MAY 2026

JUDGMENT : (PER : S. M. MODAK, J.)

1. The Appellant is convicted by the Court of Additional Sessions Judge, Nashik on 22nd August 2017 for the offence punishable under Section 302 of Indian Penal Code in a trial conducted in Sessions Case No.240/2011. The sentence is life imprisonment and fine of Rs. 5,000/- and there is imprisonment in default to pay fine for period of six months. The amount of fine is to be paid to the father of the victim-Kirti. The correctness of the said judgment is challenged on behalf of the Appellant.

2. The contention of the Appellant is there are two sets of dying declarations (Exh. 120 and Exh. 93). One set suggest that Kirti succumbed to accidental burn injuries whereas another set suggest that it was a homicidal death due to pouring of kerosene and setting her on fire by her own husband i.e. the present Appellant. The Appellant contend that the trial Court has not considered both sets of dying declarations as per the set norms. According to him, he has offered a

proper explanation as to how deceased-Kirti succumbed to burn injuries. Whereas according to prosecution the second set of dying declaration clearly suggest that it is the Appellant who is responsible for the death due to burning and in fact it is the case of the homicidal death i.e. to say 'Kirti' and Appellant both were staying in the same house and when the deceased- Kirti was burnt, the Appellant was very much present there and the explanation which is offered by him is not a plausible explanation. Father of the deceased/respondent No.2 during pendency of trial has also raised grievance about bonafides of the investigation. Even there was criminal Writ Petition No. 3235 of 2011 filed by him in this Court. However, the Commissioner of Police, Nashik has transferred the investigation to Inspector attached to Crime Branch, Nashik. So we are required to decide as to whether the lacunae pointed in the investigation on behalf of the respondent No.2 are natural or whether they were deliberate.

3. On this background, when we have read the trial Court judgment, we find the trial Court has given importance to second set of dying declaration (Exh. 93). Trial Court found certain defects in investigation and that is how, trial Court has convicted the Appellant.

While dealing with the Appeal, we are supposed to ascertain whether the defects in the investigation are really the defects to assist the Appellant or they are the defects occurred in a natural course unintentionally. We also have to find out what are the circumstances corroborating accidental dying declaration and what are the circumstances corroborating dying declaration implicating the Appellant and then this Court has to assess which set of dying declarations is correct.

4. On this background, we have heard learned Advocate Ms. Ganediwala for the Appellant, learned APP Shri Gavand for the Respondent No. 1-State and learned Advocate Shri Deshmukh for Respondent No.2-father of the deceased.

5. The death of the deceased due to burn injuries is not disputed. The issue is, '*whether it was accidental or homicidal*'. The presence of the accused at the time of incident is also not in dispute because he himself got burn injuries and he was also hospitalized in a civil hospital. So the issues involved before us are as follows:-

- (a) Whether the prosecution has proved homicidal death of the deceased Kirti ?
- (b) Whether it is the first set of dying declaration

suggesting accidental death is reliable or whether it is the second set of dying declaration suggesting homicidal death at the hands of the Appellant is to be believed?

- (c) Whether the trial Court has rightly appreciated the evidence?

Prosecution case

6. The prosecution case as reflected from the evidence need to be restated. It is as follows:-

- (i) The deceased Kirti married to the Appellant on 20th January 2011 at Aurangabad. At the time of marriage the Appellant was residing at Aurangabad. After the marriage both of them shifted to Nashik.
- (ii) The Appellant was working in a Company at Nashik. His fellow colleague was PW No.9- Hemant Puroshottam Vispute, whereas the spot panch-PW No.1 Rajesh Dusane was also his fellow colleague.
- (iii) During lifetime, deceased Kirti has disclosed to her brother PW No.2-Dinesh about the harassment at the instance of the Appellant. The Appellant used to consume liquor and used to beat and abuse his own wife-Kirti.
- (iv) There are certain instances of demand of money

by the Appellant from his own wife Kirti during her lifetime. Those instances are quoted by Kirti to her own brother-PW No.2-Dinesh. Some of such instances took place on 23rd April 2011, 25th April 2011, 26th April 2011, 27th April 2011 and on 9th May 2011.

- (v) The Appellant used to demand Rs.1 lac for the purpose of purchase of car. The relatives of deceased Kirti has expressed inability on account of financial constraint. (It is important to note that these facts stated by Dinesh in his evidence are not part of his police statement).
- (vi) Mr. Deshmukh considers these allegations as a motive for committing murder by the Appellant. Whereas according to Mrs. Ganediwala, this portion is by way of improvement and need to be excluded while appreciating the evidence.
- (vii) Unfortunate incident took place on 12th May 2011 at about 9.30 to 10 p.m., when both the spouses were at home. It is the prosecution case that the Appellant returned home in a drunken condition and when the deceased asked him about the same, he got annoyed and poured kerosene on the person of the deceased and set her on fire.
- (viii) Whereas according to the Appellant, the gown of

the deceased was caught fire due to a burning niranjan (diya) and that is how she sustained burn injury.

- (ix) According to Mr. Deshmukh, if the gown caught fire due to a niranjan, 95% burn injuries will not be possible.
- (x) PW No. 1-Rajesh Dusane was informed about the burning incident by mother of the Appellant at 9.30 p.m. of 12th May 2011. He went to the spot immediately, called Shekhar Kulkarni (who is husband of sister of Appellant) and was instrumental in shifting the deceased and Appellant first to Life care hospital and then to the Civil hospital.
- (xi) After knowing about the incident, neighbours also visited the spot. One is PW No. 9-Hemant Vispute, who is a colleague of the Appellant. He visited the spot after being told by PW No.1 Rajesh. Another is P.W. No. 8-Chetan Bhadange, who is a Dentist by profession. He heard a shouting and went to the spot.
- (xii) PW No. 8-Chetan arranged for medical help and hence called PW6-Dr. Shripad Upasani. He came to the spot alongwith his medical team.
- (xiii) PW No.6- Dr. Shripad Upasani arranged for an

ambulance.

- (xiv) When all these witnesses visited the spot, they saw deceased Kirti was lying on a ground and she was shouting and she was burnt. All of them also saw the Appellant sustained burn injuries. He had worn an underpant and banian. All of them smelt of kerosene and they have also sensed the liquor being consumed by the Appellant.
- (xv) At Civil hospital firstly there was a dying declaration recorded on 13th May 2011 by the Police Head Constable R. H. Jadhav who is not examined (as deposed by P.W.No. 11) attached to Indira Nagar Police Station. According to the Appellant, this dying declaration was concealed by the prosecution and it was produced when insisted by the Appellant. This is the first accidental dying declaration. (Exh. 120)
- (xvi) There is spot panchnama carried out on 13th May 2011 (Exh. 25) by seizure officer (who is not examined). He has seized following articles from the spot: (i) matchbox, (ii) remaining matchstick and (iii) burnt pieces of gown and (iv) a niranjan/samai.
- (xvii) On this background the police constable thought it fit to arrange for recording of dying declaration through the resident Naib Tahsildar Nashik

Taluka. He wrote a letter on 13th May 2011. P. W. No. 5 Ajit Dhenge recorded it on 13th May 2011 (1.30 to 2 A.M. as noted by the certifying doctor).

- (xviii) Balkrushna Mule, who is a father of the deceased wrote to Senior PI of Indira Nagar Police Station on 14th May 2011 (Exh. 105) thereby expressing suspicion because his daughter is burnt 95% and therefore requested the dying declaration of Kirti be recorded again. He is not examined.
- (xix) Accordingly Inspector Kopere P. W. No.11 recorded a dying declaration by visiting Civil Hospital on 14th May 2011 at about 8.40 p.m.. (Exh. 120).
- (xx) On the basis of said dying declaration Inspector Kondiram Kopere has registered an FIR bearing C.R. No. 78/2011 under Section 307 of Indian Penal Code against the Appellant. He transferred the investigation to PSI Potkule.
- (xxi) There is also a property search and seizure form (Exh. 29) recorded on 14th May 2011 by P.S.I. Potkule. It records seizure of certain articles. Interestingly, there is a reference of a plastic bottle having a smell of kerosene. The defence has harped much upon the seizure of kerosene bottle which was not described in the spot panchnama

dated 13th May 2011. There is a report of a Chemical Analyser (Exh. 113). They have found the kerosene test positive in respect of a plastic bottle and the pieces of a gown, whereas for other two articles it was negative.

- (xxii) On this background, Indira Nagar Police Station police wrote to Special Executive Magistrate as per their letter dated 14th May 2011, thereby requesting to record the dying declaration. PW No.5 again recorded the dying declaration on 14th May 2011. PW No.12-Dr. Patil who was the Medical Officer has certified about the fitness of the deceased. The medical officer gave initial fitness endorsement at 11.10 p.m. and again certified about the fitness at 11.35 p.m.
- (xxiii) While undergoing treatment, the deceased succumbed to the injuries and she died on 16th May 2011. Inquest panchnama was prepared at Civil Hospital (Exh. 100) and PW No.4 and PW No.7 performed the inquest panchnama. Offence is converted into one under Section 302 of Indian Penal Code.
- (xxiv) PW No. 3-Madhukar Shankpal performed postmortem (Exh. 76) and opined that the death was due to burn. He assessed 100% burn injuries on the body of the deceased.

- (xxv) PSI Potkule carried out the investigation and filed charge-sheet for an offence under Section 302 of IPC (Exh. 1).
- (xxvi) Balkrushna Jagannath Mule-father of the deceased found some suspicion about the approach of the police. He wrote to the Commissioner of police on 25th July 2011. He has mentioned that the mother of the Appellant was a retired Mamledar.
- (xxvii) There was a writ petition filed in the High Court by father of the deceased and the Division Bench of the High Court as per the order dated 18th December 2012 passed in Criminal Writ Petition No.3235/2011 was pleased to record willingness shown by the Commissioner of Police to transfer the investigation to Senior PI Shri Sanap attached to Crime Branch as per the order dated 18th December 2012.
- (xxviii) Then PW No.13-PI Sanap carried out an investigation and then he filed supplementary charge-sheet (Exh. C/12A).

Conduct of trial

7. The prosecution has in all examined 13 witnesses, whereas the defence of the Appellant is of denial and he has suggested that the burn injuries were caused to the Appellant due to the gown catching fire by

a niranjan. He has also filed a separate written statement. The categories of the prosecution witnesses can be summarized as follows:-

- (A) PW No. 2 Dinesh Balkrishna Mule is the brother of the deceased.
- (B) On the point of visiting the spot after the incident, the prosecution has in all examined 3 witnesses. They are (i)PW No. 1-Rajesh Dusane, (ii) P.W. No.6 Dr. Shripad Upasani, who is the doctor by profession and (iii) PW No.8-Chetan Bhadange, who is a neighbour.
- (C) PW No.9-Hemant Vispute is the co-employee working with the Appellant, who visited Life care hospital and then shifted deceased to Civil Hospital.
- (D) On the point of panchnama, the prosecution examined PW No.1- Rajesh Dusane being the spot panch and PW No.4-Rahul Ingle and PW No.7 Manisha Lahade who are the inquest panch.
- (E) On the point of accidental dying declaration, the prosecution has examined following witnesses:-
 - (i) There is first accidental dying declaration

recorded by the Police of Nashik City Police Station on 13th May 2011 at Civil Hospital. No one is examined on behalf of the prosecution. It is this dying declaration which is not produced on behalf of the prosecution along with the charge sheet. It was produced when accused insisted. It is at Exh. 120 given during the evidence.

(ii) P.W. No.5-Ajit Dhenge, who is an Executive Magistrate and he has recorded the second accidental dying declaration Exh. 93 on 13th May 2011 (from 1.30 a.m. to 02.00 a.m. i.e. midnight of 12th May 2011 to 13th May 2011) as per the timings given by certifying doctor.

(F) Second set of dying declaration, the prosecution has examined following witnesses:-

(i) P.W. No.10-PSI Kondiram Rahu Kopere who has recorded it on 14th May 2011 (at 8.40 p.m. timing mentioned by doctor) at Exh. 106.

(ii) Executive Magistrate-PW No.5 Ajit Dhenge who has recorded a dying declaration on 14th May 2011 from 11.10 p.m. to 11.35 p.m. (timings given by certifying doctor) at Exh. 95.

(iii) Dr. Yogita Patil-PW No.12 is the Medical Officer who has endorsed the fitness (Exh. 129 and Exh. 130) of deceased – Kirti when Executive Magistrate recorded dying declaration on 14th May 2011

(G) On the point of investigation, the prosecution has examined following two officers:-

(i) PW No.11-PSI, Balu Potkule, who is the first investigation officer attached to Indira Nagar Police station.

(ii) PW No.13-PSI Sanjay Sanap who is attached to Crime Branch who has carried out the investigation after it is transferred as per order of Commissioner of Police on 17th December 2012.

(H) PW No.3 Dr. Madhukar Sankpal, who has carried out

post mortem. (Exh. 76)

8. There are also other documentary evidence which will be referred during the course of the judgment. We will first scrutinize the evidence adduced on the point of homicidal death.

About spot

9. About the place of the incident i.e. on 01st floor Poornima Apartment at Chetna Nagar, Nashik, there is ample evidence to suggest that the burning incident took place at that spot on 12th May 2011 at about 8.30 p.m.. Admittedly, there is no eyewitness to the incident. The spot panchnama at Exh. 25 is duly proved through the evidence of the spot panch-PW No. 1. The seizure of the articles on 13th May 2011 which is also duly proved. Not only that there are three witnesses who rushed to the spot. They are :- Witness No. 1-Dusane and other two witnesses; PW 8-Chetan and PW 6-Upasani.

10. They have seen the deceased lying on the ground with burn injuries and they have also noticed accused having burn injuries. ***So the spot of incident is duly proved.***

Seizure of articles

11. There is spot panchnama carried out on 13th May 2011 at 9.00

a.m. to 9.45 a.m. The police who carried it is not examined. He has seized (i) matchbox, (ii) remaining matchstick and (iii) burnt pieces of gown and (iv) a niranjan/samai. However, the issue does not rest there. There is one more property search and seizure panchnama at Exh. 29 dated 14th May 2011 prepared by PSI Potkule. There are four articles mentioned. Earlier articles already mentioned in spot panchnama were also described in it. The additional article mentioned is a plastic barni (can) having a smell of rockel (kerosene). According to Appellant, this can was not mentioned in the panchnama and even PW No.1-Rajesh Dusane spot panch has agreed that this was not found when he along with others have visited the spot of the incident. PSI Potkule has also deposed about preparing the search and seizure form having description of the bottle with the smell of rockel.

12. We find that there is no finding of the trial Court on this issue. If the kerosene bottle is not there on 13th May 2011, it is for the prosecution to explain how it is mentioned in the property search and seizure form dated 14th May 2011. This form is not a seizure panchnama but it is a form which is generally prepared after seizure is effected. This form mentions the name of Shekhar Surendra Kulkarni,

who has produced those articles (who prosecution alleges as husband of sister of the Appellant). Admittedly, he is also not examined on behalf of the prosecution.

13. PW No.2-Dinesh has tried to give some explanation about this plastic bottle. After getting knowledge of the incident, when he came to Nashik, he went to the flat on 13th May 2011 along with his father and relatives, he saw relatives of the Appellant were cleaning the tiles of the first room and they have sensed smell of kerosene. He had also noticed one empty plastic bottle of kerosene near the kitchen ota. He has further stated that he has seen mother of the Appellant was throwing the burnt pieces in the toilet. When he has asked the mother, she hurriedly told that the police will come.

14. He was cross-examined on the facts noticed by him when he visited the spot and facts deposed by him. He has denied that “*he has not stated those facts*”. However, when PSI Potkule was cross-examined, he has admitted that “*witness Dinesh in his statement has not stated about the facts witnessed by him when he visited the flat on 13th May 2011*”.

15. There is one allegation made by father of the deceased that the

investigation done by the police was faulty. The issue is why PSI Potkule will do all these things. He is supposed to record the facts stated by the witness in his statement recorded under Section 161 of the Code of Criminal Procedure. There are two aspects. First one is oversight and second is deliberate attempt to help the accused.

16. Respondent No.2 is having a grievance against PSI Potkule. But when the spot panchnama was prepared, it was not PSI Potkule who has prepared it but it was prepared by Head Constable. Question is whether it can be lacuna on the part of Police Head Constable who has performed seizure panchnama on 13th May 2011 or whether PSI Potkule has deliberately added it in property search and seizure form.

Attempt to remove ambiguity

17. At this juncture, it is relevant to consider efforts made on behalf of the prosecution when the trial was going on. There was an application at Exh. 156 filed on behalf of the prosecution to recall PSI Potkule for clearing the ambiguity in the seizure of bottle having smell of alcohol and other aspect. In fact, it can certainly be considered as a genuine effort to clear the ambiguity. It was in that sense an ambiguity. Because when spot panchnama was prepared at 9 a.m. to 9.45 am on

13/5/2011, there was no seizure of bottle having smell of alcohol and when there is reference of seizure of such a bottle in the property search and seizure form, learned A.P.P. was justified in making such request. If such a request could have been allowed by the trial Court, through PSI Potkule, prosecution could have got an opportunity to explain it.

Findings of Trial Court

18. It is important to consider the reasonings given by the trial Court. It is reflected in para no. 42 of the impugned judgment. Trial Court considered “*filing of writ petition in High Court by father of the deceased and transfer of investigation*” as the factors for observing that there is no ambiguity. In fact reasons given in the application were more appropriate to recall PSI Potkule. Hence, we do not subscribe to the said view.

19. We are conscious we are not dealing with proceedings in which there is challenge to the order passed by the trial Court. We have considered this issue for deciding whether it has got impact on overall responsibility of the prosecution to prove the case and correctness of the findings recorded by the trial Court in the impugned judgment.

20. When considered from said angle, we feel that due to the said

order, prosecution has lost an opportunity to explain the ambiguity. At the same time, even the Appellant is denied of an opportunity to challenge the prosecution case of subsequent recording of property search and seizure form having reference of bottle having smell of kerosene. Hence, we have got serious doubt about bonafides of seizure of barni having the smell of the kerosene. There is one more reason. PW No. 1-Dusane has also admitted that barni was not found when he visited the spot at the time of panchnama. So it creates serious doubt about the place at where it was found. Even Shekhar Kulkarni who has produced it (as per prosecution case) is not examined.

About dying declarations

21. Mr. Deshmukh, learned counsel for Respondent No. 2 and Mrs. Ganediwala, learned counsel for the Appellant have relied upon various judgments. They are as follows:-

Judgments relied upon on behalf of the Appellant

- (i) Makhan Singh Vs. The State of Haryana¹
- (ii) Irfan @ Naka Vs. The State of Uttar Pradesh²
- (iii) Abhishek Sharma Vs. State (Govt. Of NCT of Delhi)³

Judgments relied upon on behalf of the Respondent No. 2

1 MANU/SC/1003/2022

2 (2023) INSC 758

3 2023 INSC 924

- (i) Sudhakar Vs. State of Madhya Pradesh⁴
- (ii) Sher Singh and Anr. Vs. State of Punjab⁵
- (iii) Lakhan Vs. State of Madhya Pradesh⁶
- (iv) Raju Devade Vs. State of Maharashtra⁷

22. When we have read above judgments, the following principles emerge:

Principles for appreciating Dying Declaration

- (a) The Court has to see whether the dying declaration is true and made voluntarily by the deceased. There is no rule that dying declaration has to be corroborated by other evidence.
- (b) The Court has to ascertain himself that dying declaration is not the result of tutoring, prompting or imagination.
- (c) Court should be satisfied about the fitness of the maker of the statement.
- (d) Even though there is no fitness certificate by the Doctor, the dying declaration can be relied upon when the recorder is satisfied about fitness of the maker.
- (e) The accused cannot cross-examine the deceased, hence, the dying declaration should be of such a nature so as to inspire full confidence of the Court in its truthfulness and correctness.

4 (2012) 7 SCC 569

5 (2008) 4 SCC 265

6 (2010) 8 SCC 514

7 (2016) 11 SCC 673

- (f) Whether the statement was recorded properly and whether the dying declaration is consistent throughout.
- (g) Whether it is possible for the maker of the statement to give the statement considering the injuries caused to him.

About multiple Dying Declarations

- (h) When there are multiple dying declaration, the Court has to see whether there are consistent or not.
- (i) When there are inconsistencies, every dying declaration has to be considered independently on its own merits so as to appreciate its evidentiary value and one cannot be rejected because of contents of others.
- (j) In case of multiple dying declarations, it is duty of the Court to consider each one of them in its correct perspective and satisfy itself that one of them reflects the true state of affairs.
- (k) When there are two dying declaration giving two different versions, serious doubt is created about the truthfulness of the dying declaration and the Court should make an endeavour to see corroborative material.
- (l) Court can give due weightage to certain factors such as :--
 - (i) attendant circumstances,
 - (ii) condition of the deceased at the time of giving statement.
 - (iii) medical evidence.
 - (iv) voluntariness and genuineness
 - (v) physical and mental fitness of the deceased.

(vi) possibility of the deceased being tutored.

23. These are some of the principles to be considered while appreciating the evidence of dying declaration in general and principles to be considered when there are inconsistent dying declarations.

24. When the evidence of any dying declaration is to be appreciated, it is tested from below mentioned perspective -

- (i) Who has recorded it and what type of procedure he has followed.
- (ii) whether the maker of the declaration is in fit state of mind.
- (iii) The contents of dying declaration, corroborative material on record vis-a-vis the involvement of the accused.

25. On the basis of above principles, we will go through the evidence adduced before the trial Court. As said above, there are two sets of dying declarations. First consist of two dying declarations suggesting that death was accidental. The details are as follows:-

Accidental Dying declaration

- a) First dying declaration at Exh. 120 recorded by Police head constable Jadhav on 13th May 2011.

It is in narrative form. There is fitness endorsement by the doctor.

Admittedly, no one is examined to prove this dying declaration. This was not produced along with the charge sheet. But when the Appellant insisted, this was produced and then it was shown to PSI Potkule. Furthermore, the writer of this dying declaration is not examined. There is no reason offered before the trial Court for not examining him. At least we do not find any reason from the impugned judgment.

26. In fact from the available evidence, there is every reason to believe that the prosecution has made every attempt to conceal it from the trial Court. In fact when there are inconsistent dying declarations, the responsibility on the prosecution is to place all the materials before the trial Court and then leave to the trial Court to appreciate it and come to proper conclusion. This has not happened and in fact, we also find that the trial Court has totally overlooked this fact and appreciated the evidence without dealing with this evidence.

(b) Another dying declaration is recorded (at Exh.93) by PW No.5 – Executive Magistrate Shri Dhenge on the intervening night of 12th May 2011 and 13th May 2011.

It is in question and answer form. The doctor has mentioned the timing of 1.30 a.m. to 2.00 a.m. This doctor is not examined. This dying declaration was recorded when he received a letter from Indira

Nagar Police Station. (Para No.2 of evidence of P. W. No. 5 on Page No.103). It will be relevant to consider the contents of both these dying declarations. One which recorded by police is in detail as compared to one recorded by executive magistrate. They are as follows :--

Contents of Dying declaration

“On 12.5.2011, my gown came in contact with samai and hence I was burnt. My chest and face were also burnt”.

These are the contents from the proved dying declaration recorded by executive magistrate. We have not reproduced the contents from the one which is recorded by the police.

27. Trial Court in para No.46 of the judgment opined “it is surprising why such letter is issued by investigating officer of Indira Nagar Police Station”. We do not endorse this view. It is for the reason “recording of dying declaration by a person not connected to investigation” is always preferred. So the officer who has given a letter has committed no wrong.

28. In fact when there are two sets of dying declaration, trial Court

should assess the available evidence in respect of every set of dying declaration and should come to its own conclusion. We find trial Court has not done so.

Corroborating materials

29. We have tried to find out are there any circumstances available on record which corroborates the theory of accidental death as narrated in above said two declarations. It is no doubt true that niranjan is seized from the spot.

30. The main ground on which Mr.Deshmukh has tried to challenge this theory of accidental death is the injuries caused to the deceased and part of the body on which they were caused. Admittedly, the treatment papers maintained by Civil Hospital during the lifetime of deceased Kirti were not tendered in evidence. Deceased was admitted at late evening of 12th May 2011 and she died on 16th May 2011. In fact in a case involving inconsistent dying declarations, fitness of the maker not only at the time of recording of dying declarations is relevant but also at the time of admission and thereafter also. From medical papers, the Court can consider the treatment given and other health parameters. Unfortunately, the prosecution has overlooked this fact.

And even we find no attempt made on behalf of the Appellant to ask for its production.

Evidence about post mortem

31. When we have gone through the postmortem notes, we find the injuries were 100% and they were on different parts of the body including face to legs. Prosecution has examined the doctor who conducted post mortem, P.W. No 3 Dr. Madhumar Yashvant Shankpal. He has done postmortem on 16/5/2011. Cause of death is '*shock due to burns*'. He was asked about the contents of inquest panchnama. Said panchnama refers about falling of odhani on the niranjan. When we have read his evidence, we do not find any attempt made on behalf of the prosecution to bring on record that the injuries noticed on the dead body may be possible due to kerosene burning. Appellant tried to put questions to him regarding creation of soot due to kerosene burning. However, the doctor volunteered that if patient survives for 3 to 4 days, the particles soot may not find inside the body due to puffing of these particles. However, the Appellant has also not made an attempt to put up theory of burns which might have been caused due to burning of gown in a samai.

32. The inquest panchnama is duly proved through P.W. No.3 and P.W.No.7. Out of them, P.W. No.3 is relative of the deceased Kirti and prior to witnessing inquest, he has visited the hospital.

33. The argument on behalf of respondent No. 2 is “*whether such percentage of injuries may be possible if the gown is caught in the burning niranjan*”. What we feel is when there are two possible reasons for causing of death that is to say accidental or homicidal, the prosecution ought to have brought on record and possibly through medical officer that the percentage of injuries caused or noticed at the time of post mortem were in fact caused due to kerosene burning only and not due to other burning.

34. Unfortunately, we do not find any attempt made on behalf of the prosecution in this respect. If such an attempt could have been made, we could have certainly accepted the submission made by Mr. Deshmukh. Furthermore, case is decided on evidence and not on the basis of personal opinion of Judge and surprises. We also do not find any observations made by the trial Court in this regard. So we are at pains to observe that even though there were 100% burn injuries, for want of materials, it is not possible to form an opinion that the 100%

injuries were caused due to kerosene pouring only.

Inconsistency in defence version

35. Mr. Deshmukh has pointed out inconsistency in between the exact cloth worn by the deceased at the time of incident. In the dying declaration at Exh.93 (second accidental dying declaration), there is reference of gown whereas in the written statement, the Appellant has referred about odhani. Even in cross-examination of certain witnesses suggestions were given that dress was caught in fire. The trial Court has emphasized on this variance in para No.51 of the impugned judgment.

Trial Court observed :-

“in the dying declaration at Exh.93, she has nowhere referred about odhani”.

Even trial Court observed :-

“samai is always having number of flames. There is no contention that number of wicks were existing in it. The wick was also seized but it was not fully burned”.

36. We do not fully subscribe to the view of the trial Court. Because

answers given in Section 313 statement is not the evidence. Furthermore, weakness in a case put up by defence does not relieve the prosecution from discharging their burden.

Second set of Dying declaration

37. Now we will consider the evidence on the point of second set of dying declaration. The details are as follows:-

- (a) Dying declaration (Exh.106) recorded by PW No.10, PI Kondiram Kopere.

He recorded it on 14th May 2011 after respondent No. 2/father of the deceased has complained to Indira Nagar Police Station on 14/5/2011 (Exh. 105). It is important to note that the father is not examined as a witness on behalf of the prosecution. What is the reason it is best known to them. We cannot read what is stated by him in his complaint.

38. We do find some reference in the evidence of P.W No. 10 Kopere. Shri Kopere was not attached to Indira Nagar Police Station, but he was attached to Ambad Police Station. Shri Kopere was having charge of Indira Nagar Police Station as regular officer was on leave. He deposed *“father of the deceased has informed, his daughter was burnt and admitted in civil hospital and he requested for recording her supplementary statement”*. On the basis of this declaration, Mr. Kopere

registered an offence u/s. 307 of Indian Penal Code at Indira Nagar Police Station against the Appellant. It is important to note, the provisions of Section 498-A were not invoked. There is timing at 8.40 p.m. mentioned by the medical officer. This is the first dying declaration wherein deceased Kirti has stated that it is the Appellant who has poured kerosene on her and set her on fire. Admittedly, the doctor who has given endorsement is not examined. Deceased Kirti could not sign hence Shri Kopere has obtained her right hand thumb impression.

39. It will be relevant to consider contents of this dying declaration (Exh.106). They are as follows :--

a)	Deceased Kirti and her husband/Appellant were alone in the house. Appellant returned home by consuming liquor.
b)	She tried to convince him but Appellant quarreled with her.
c)	Appellant poured kerosene from a bottle on her and set her on fire with the help of match stick.
d)	She shouted. As a result Appellant tried to extinguish the fire by putting chaddar on her.
e)	She came out of the house and shouted for help.
f)	She was admitted in civil hospital by one Shekhar Kulkarni.

40. Shri Kopere admits he has not recorded the statement of father

of the deceased. There is only timing as 8.40 p.m. on the said dying declaration. He was asked question about “*necessity of taking the endorsement at the beginning of recording of such declaration*”. He answered doctor was present along with him. This doctor is not examined. There is no rule that there should be endorsement at the beginning and at the end. But such practice is developed due to passage of time.

41. Presence of doctor throughout recording of declaration is always advisable because he can monitor the health of the patient. And if both the timings are mentioned, it helps the Court to assess the evidence in proper way. Because these timings are mentioned at that time and if they are recorded, there is hardly any scope of filling lacunae by way of oral evidence.

b) Such kind of dying declaration (Exh.95) is also recorded by PW No.5 Shri Dhenge – Executive Magistrate.

42. On 14th May 2011, he received letter for Indira Nagar police station. At the time of evidence, he has not brought that letter however the defence has shown the said letter from the record. Accordingly, it was marked as Exh.94. He admits father of the victim has requested for

recording statement of the deceased. As said above father of the victim is not examined. There is no reason for the prosecution not to examine him.

43. It seems Exh.94 was written by some police constable attached to Indira Nagar Police station which is addressed to executive magistrate. The writer of this letter is not examined. He could have thrown some light on whose instructions he gave this letter. For this piece of evidence, the learned trial judge has not observed “*why such letter was given*”. Learned trial Judge while commenting on a letter written to Executive Magistrate (who subsequently recorded accidental dying declaration) has questioned necessity of writing letter. But when Police wrote present letter (then Executive Magistrate recorded Exh.94), the necessity is not questioned.

44. On this background, Shri Dhenge recorded it on 14th May 2011. The medical officer has mentioned the timing as 11.10 p.m. to 11.35 p.m. The doctor who has given the endorsement is examined as PW No.12 Dr. Yogita Patil.

45. It will be relevant to consider contents of dying declaration recorded by Executive Magistrate Shri Dhenge. They are as follows :-

a)	He records “ there is reference in the police letter to the effect earlier statement was given by the deceased under pressure and she has complained against husband to her father and she wishes to give statement again”. <u>Again we are stressing on the importance of examining father of the deceased. All the facts about the circumstances disclosed by deceased to her father could have been brought in evidence.</u>
b)	Again the dying declaration mentions her mental condition was not good earlier and hence I have given false statement. <u>It is important to note that earlier dying declaration was recorded by the same executive magistrate.</u> When he records such fact <u>does it mean to say that Shri Dhenge has not assessed mental condition of the deceased at the time of recording earlier dying declaration. This creates doubt about reliability of the evidence of Shri Dhenge.</u> Trial Court has not assessed his evidence from that perspective.
c)	Details of the incident as recorded in this dying declaration are more or less similar to the declaration recorded by Shri Kopere except on certain aspect.

46. It is emphasized to record the dying declaration in the words of the maker. It is the responsibility of the Court to consider minute

details. This is all the more necessary for the reason the maker of the dying declaration is not available at the time of giving of evidence but the Court can assess the evidence only on the basis of record created contemporarily.

47. The trial Court has considered the evidence of PW No.5 Shri Dhenge as trustworthy for the reason *“that statement recorded by him corroborates with the statement recorded by PSI Kopere”* (Para 54). According to Ms. Ganediwala this factual observation is not entirely correct. We agree with her. We have also minutely gone through the contents of both these dying declarations. The variation noticed in them is as follows :--

Subject	Exhibit – 95	Exhibit 106
Manner of saving the deceased	By throwing water	By throwing water and chaddar
Persons who shifted her to hospital	Neighbours and husband	Shekhar Kulkarni

The variation on above first aspect is not about important particular. While appreciating the defence of the Appellant, trial Court appreciated it with microscopic examination and observed there is variance in between gown and odhani trial Court considered it as major variance, But then trial Court ought to have applied same

yardstick prior to comparing both these Dying declarations. However, we do not consider it as major variation.

48. However on the said aspect of persons who shifted her, there is major variation. At one place she says '*neighbours and husband*'. This is understandable. At other place when she says that Shekhar Kulkarni admitted them in civil hospital. Except PW No.1 Dusane and PW No.9 Vispute, other witnesses (about visit to the spot they are) PW No. 6-Upasane and PW No.8-Bhadange have not referred about the presence of Shekhar Kulkarni.

49. Even when we have read the evidence of PW No. 1-Dusane, he has referred the name of Shekhar Kulkarni. What he has deposed is :-

“thereafter I got down and phoned to Shekhar kulkarni”.

After that he said:-

“at the hospital Shekhar Kulkarni had shown to him one mangalsutra and finger rings which were also smelling of kerosene”.

From this, we cannot irresistibly infer that Shekhar Kulkarni was present in the house when the deceased was shifted to Civil Hospital.

50. Whereas PW No.9-Vispute (who has accompanied the deceased in the ambulance) has referred about the name of Shekhar Kulkarni at

the subsequent stage. He deposed *“doctor has asked to remove his finger ring and at the relevant time his sister’s husband Shekhar Kulkarni was present. He had filled up the form”*. From this it cannot be inferred that Shekhar Kulkarni was very much present in the house when deceased was shifted. If it is so at whose instance name of Shekhar Kulkarni is referred in Exh. 106 (recorded by by Mr. Kopere). How this fact can be overlooked? However, trial Court has not considered it.

Corroborative materials

51. On the basis of above evidence, we tried to find out corroborative circumstances available on record. Mr.Gavand, learned APP has invited our attention to the report by chemical analyzer and the forwarding letter sent by PSI Potkule. These are at Exh.113 and Exh.112 respectively. It is true four articles were sent. The analysis by CA is as follows:-

- (a) Kerosene test was positive in respect of empty plastic jar and partly burnt clothes of gown.
- (b) Kerosene test was negative for samai and match box was found unsuitable.

We have already commented on prosecution evidence on the point of

'seizure of barni having the smell of kerosene recorded in search and seizure form' as not reliable. No doubt Court has to consider presence of kerosene particle on piece of cloth described as gown. But this circumstance need to be considered with other proved circumstances.

Portion in Police Statement of PW No.2

52. Mrs. Ganediwala, learned counsel for the Appellant, has invited our attention to one more circumstance. Certain portion from the statement of PW No. 2-Dinesh dated 14th May 2011 before the Police was marked at Exh.123. This was done through PSI Potkule. He has admitted that PW No.2-Dinesh has stated the said fact to him. We can certainly read that portion.

53. It talks about the condition of deceased-Kirti expressed by PW No. 2-Dinesh and this was noticed by him, when he alongwith other relatives have visited the Civil hospital. According to him, deceased-Kirti was not in a position to speak. For our better understanding the exact portion in Marathi is reproduced:

"तेव्हा माझे आई, वडील व आत्या व इतर नातेवाईक नाशिक सिव्हिल हॉस्पिटल जळीत कक्ष येथे हजर होते. त्यावेळेस माझी बहीण किर्ती हिस पाहिले असता ती बोलण्याच्या परीस्थीतीत नव्हती."

This has happened when PW No. 2-Dinesh has visited the Civil hospital. The timings are not clear, but probably it may be on 13th May 2011. This circumstance is also relevant circumstance which throw some light about the prosecution case of giving of statement by deceased Kirti on 14th May 2011.

54. He was cross-examined on this portion. The answers given by him are reproduced below for ready reference. They are:

It did not happen that “on 13th May 2011 when I had been to Burn Ward to see my sister, she was not in a position to talk”. It is not true that “on 14th May 2011 my statement was recorded and in the said statement I have stated that when I had been to burn ward on 13th May 2011 my sister was not in a position to talk”.

When asked about recording statement, he flatly denied that his statement was recorded. The question is why PSI Potkule will record a statement containing imaginary facts and will state the facts which the witness has not stated.

Filing of Writ Petition

55. It is very well true that the father of the deceased has filed a writ petition No. 3235 of 2011, before this Court making grievance about

the investigation. It is very well true that petition was disposed of on 18th December 2012. This Court has recorded *“transfer of investigation already done by the Commissioner of Police to the Crime Branch”*. At the same time it is true that there was no occasion for this Court to make any comment about the grievances against the investigating agency.

56. In criminal proceedings, filing of writ petition is one thing and giving evidence is another thing. Ultimately, the trial Court is supposed to deal with the evidence which is adduced. There was a serious issue raised by father of the respondent about the investigation. However, when the stage of appreciation of evidence arrives, the standard of enquiry is different. If the Court has to give a finding about such grievance, Court can certainly draw an inference on the basis of the available evidence. The issue before the trial Court was *“whether to trust and believe the grievances of PW No.2 and his father or whether we can trust the investigating agency”*.

57. No doubt there is a letter written by Deputy Police Commissioner Nashik addressed to Director General of Police on 7th September 2015. It is on page no. 307 of paper book. It refers to

demand of the papers by the first informant Dinesh Mule about the departmental enquiry conducted against PSI Potkule. But question is whether it is sufficient to draw an inference against Shri Potkule. We are making clear that observations herein are only for the purpose of deciding the issues involved in the appeal and not for any other purpose. Ultimately Court decides the issues on the basis of evidence.

58. We feel that the trial Court was not right in drawing an inference about the defects in the investigation. There ought to have been additional material which we find missing. For this reason we find stand taken by PW No.2-Dinesh on the point of disowning the statement given by him to PSI-Potkule as not justified.

Facts deposited by independent witnesses

59. There is one more circumstance brought to our notice by Mr. Deshmukh. It is about the fact deposited by three independent witnesses. They have visited the spot immediately on 12th May 2011. These witnesses are -

PW No. 1-Rajesh Dusane,

PW No. 6-Dr. Shripad Upasani

PW No. 8-Chetan Bhadange.

60. **PW No. 1 - Rajesh Dusane** - This witness is examined on two

aspects. One visiting the spot on 12th May 2011 on receiving telephonic information from mother of the Appellant at 9.30 p.m. And secondly again visiting the spot on 13th May 2011 for witnessing spot panchanama. He is the witness whose statement is not recorded by Inspector Sanap but his statement is recorded by PSI Potkule only. His evidence about spot panchnama is already discussed. We will focus on facts noticed by him on 12th May 2011 at the time of first visit.

From his evidence, following facts emerge:-

- a) He saw deceased in burnt condition and Appellant (on underpant and baniyan) in drunken condition. He has participated in shifting both of them to Life Care Hospital first and then to Civil Hospital.
- b) At Civil Hospital, Shekhar Kulkarni has shown him mangalsutra and finger rings having smell of kerosene.

During cross-examination, he has given following answers:

- a) At the Civil Hospital, police did not make any enquiry. He has also not given any information to the police about the condition of Prasad and his wife.
- b) At the time of spot panchnama, police have not made any enquiry with him about the incident.
- c) On his own accord, he has not stated anything about

condition of Appellant-Prasad.

- d) At that time also not stated about smell of kerosene on mangalsutra and finger ring (which were shown by Shekhar Kulkarni).
- e) Neither kerosene bottle was found nor reference of smell of kerosene in the spot panchnama.
- f) He has not disclosed to anyone about condition of Appellant, smell of kerosene and smell of kerosene to above said two articles. (till giving police statement).
- g) At work place, he has not seen Appellant in drunken condition.

61. Trial Court has not considered his evidence in minute details. His line of cross-examination is about natural conduct of the witness after the incident.

About smell of kerosene :- His statement was not recorded after delay.

One fact is clear, he has not disclosed to police even though there was an occasion in the civil hospital and at the time of spot panchnama.

This evidence is very relevant because there is dying declaration of kerosene burning.

About smell of alcohol :- This is also important piece of evidence. It is one of the piece of corroborating material and needs to be scrutinized

with proper precaution. Even though there was an occasion for the witness to state, he has chosen to keep mum. This factor was not considered by the trial Court. The test of prudent man has to be applied.

62. PW No.8 – Chetan - He is next door neighbour of the Appellant. He resides in adjoining building. He went to spot after hearing the shouts. He noticed following facts:-

- a) Appellant and his wife were shouting.
- b) Wife was burnt almost
- c) There was smell of kerosene.
- d) He called Dr. Upasani -PW No.6.
- e) He came down from first floor. When he got down and went near Appellant, there was smell of liquor.

During cross-examination, he has given following answers:

- a) After the incident, police have visited Pournima Building, police have not inquired with him and he has even not intimated to police about visiting the spot.
- b) PSI Sanap recorded his statement after 18-19 months of the incident.
- c) He could not offer any explanation why the facts “*about sensing smell of liquor from the mouth of Appellant*” are not

appearing in his police statement.

63. PW No.6 Shripad Upasani :- During chief, he has stated following facts:-

- a) He is doctor by profession. He visited the spot on the call received from PW No.8 – Chetan.
- b) He saw one lady in a burnt condition and water around her.
- c) He saw another person wearing underpant and baniyan talking on mobile.
- d) He sensed smell of kerosene and burnt clothes. He also felt smell of alcohol from person talking on mobile.
- e) He arranged for shifting of patients to Life Care Hospital.

During cross-examination, he has stated following facts:-

- a) He has not narrated about the incident to the police within 2-3 days.
- b) Even within one month, he has not disclosed about smell of alcohol and kerosene.
- c) For one and half years, he has not disclosed those facts to police.

64. So far as their visit is concerned, it is not incriminating against the Appellant. But when they deposed that they have noticed smell of

alcohol from to the mouth of the Appellant and also noticed smell of kerosene at the spot, these facts are incriminating.

65. It is really strange that if these three witnesses have visited the spot immediately after happening of the incident, why their statements are not recorded immediately. No explanation was offered before the trial Court. Unfortunately, none of the parties have brought on record why PSI Potkule has not recorded their statements. This Court can certainly draw an inference that PSI Potkule ought to have verified with the persons who were instrumental in shifting injured to Civil hospital. There may be two inferences:-

- a) These witnesses may be formal witnesses. That is to say they have just visited the spot and arranged for shifting of the deceased and Appellant to the hospital or that;
- b) PSI Potkule has deliberately not recorded their statements in order to help the Appellant.

66. The testimony of PW No.6 and PW No.8 can be viewed from different angles. It is:-

- a) Lapse of PSI Potkule to record it.
- b) Inaction on the part of above witnesses to inform police about the facts noticed by them.

c) Improvements made by them.

67. It is very well true, the prosecution case should not suffer for acts of commission and omission by the police. Conduct of these witnesses not to inform police is also having some significance. What is of paramount consideration is “*facts deposed in Court but not stated to police*”. These improvements are about important particular.

68. **About evidence of PW No.9 – Hemant Vispute** :- He is the colleague of Appellant. He received a call from PW No.1 – Dusane. He has not visited the spot. He went to Life Care Hospital. He deposed following facts:

- a) He saw Appellant with burn injuries. Appellant told him that his wife was burnt due to flame of samai.
- b) On the advice of doctor, they were shifted to Civil Hospital.
- c) In the ambulance, he sat near the driver whereas Appellant was sitting on backside alongwith his wife on stretcher.
- d) He noticed “*wife was pointing out finger towards Appellant and she wanted to speak but Appellant warned her not to speak*”.
- e) Shekhar Kulkarni pointed out finger ring of Appellant.

It has smell of kerosene.

During cross, he has narrated following facts:

- a) Statement is recorded after 23 months. On his own, he has not shown willingness to give statement.
- b) He cannot offer any explanation why the facts “*about smelling of kerosene*” is not appearing in his police statement.
- c) Witness does not recollect about “*pointing out finger by the deceased towards Appellant.*”

About improvements, it is related to important particular.

69. PSI Potkule has admitted that he has not recorded the statement of Dr.Chetan Bhadange, Hemant Vispute and Dr.Upasane. (Para No.40) whereas PI Sanap has deposed about recording statement of Mr.Dusane, Vispute and Pawar (Para 2). According to Mrs.Ganediwala, these statements were recorded after long gap and there is every possibility of embellishment. Whereas, according to Mr.Deshmukh, delay in recording their statements cannot be attributed to them but it was the fault of PSI Potkule and that is how, PI Sanap has recorded their statements. The trial Court in para No.40 has noted there is lacuna in investigation. The statement of witness

who has accompanied the deceased in ambulance ought to have been recorded. The Court has noted the investigation by PSI Potkule is defective and Court has taken note of filing of Writ Petition by father of the victim.

70. It is true in a criminal trial, immediately reporting the incident to the police is of significance. The delay in informing the police gives rise to suspicion. This can be viewed from two angles. First, when there was an occasion for these witnesses to inform the police but they have not informed and second is, police have not contacted them.

71. We are at pains to observe that even though there were witnesses available, for some reason or the other, their evidence cannot be considered as reliable material to corroborate the incriminating Dying declaration. This is because of lapse on the part of earlier Investigating Officer, keeping mum by the witnesses and improvements made while giving evidence.

Demand of Dowry

72. Mr. Deshmukh, learned counsel for Respondent No. 2 has invited our attention to the demand of dowry by the Appellant and facts stated by Mrs. Kirti during her lifetime to PW No. 2. According

to him, this is the motive for murdering Kirti. He also invited our attention to the findings given by the trial Court on this aspect. It is on page No. 388, para no. 96 and 108. Trial Court has referred to the facts deposed by PW No. 2. This is in respect of demand of Rs. 1 Lakh by the accused for the purpose of purchase of car. We have given the details of demand while explaining the prosecution case. No doubt this can be considered as a motive. But the trial Court has overlooked one fact. If the evidence has to be appreciated then the facts deposed during chief-examination and facts deposed during the cross-examination needs to be considered in its totality.

73. PW No. 2-Dinesh has stated that those material facts are not stated by him on 14th May 2011. In fact, he answered that he cannot tell whether these facts are not stated, because his statement is not recorded on 14th May 2011. However, PSI Potkule has admitted that relevant facts are not stated by Mr. Dinesh while giving statement on 14th May 2011. The trial Court has given Exhibit 121 and 122 to the contents of para no. 2 and some of the contents of para No. 3 of the evidence of PW No. 2. The manner of recording such answers is not correct. In fact the trial Court ought to have recorded in the cross-examination.

However, this is not illegality.

74. So also portion from Police statement (recorded under Section 161 of the Criminal Procedure Code) of PW No. 2 recorded by PW No.11 was marked as Exh. 123. First PW No. 2 has disowned it and then it was admitted by PW No.11-Potkule. We have already made comment about Exh. 123. It is important to consider contents of Exh. 121 and Exh. 122 and their relevance. They are as follows :-

Exh. 121

On 23rd April 2011 accused demanded Rs. One lakh for purchasing car. Accused had picked up quarrel for same with my sister. She had narrated aforesaid fact to me on phone in the said night. On 25th April 2011 she had come to my house. She had narrated the aforesaid incident to my father. On the same day night my father had phoned to accused. My father told to accused on phone that he has no money with him due to expenses of marriage and he would see afterwards about his demand. On 26th April 2011 my elder sister Dipti had come to our house at Kopargaon from Aurangabad. She talked with mother of accused on phone on 27th April 2011 at about 10.30 a.m. Thereafter my sister had told me that mother of accused told that what we had objection for giving amount to husband of deceased. We

had given understanding to my sister and sent her on 30th June 2011 to the house of accused.

Exh. 122

On 9th May 2011 in between 9.00 to 9.30 p.m. I received phone of accused. He asked me on phone that when we would pay Rs.One lakh. I told him to ask about the same to my father.

75. The facts stated by PW No. 2-Dinesh about his demand of dowry cannot be accepted. The trial Court in para No.73 has referred about the meaning of evidence as per Section 2 of the Evidence Act. There can not be any dispute about its meaning. What the trial Court has observed is whatever facts stated in chief examination has to be treated as a evidence. This also cannot be disputed. But '*what is evidence*' is one thing and '*appreciation of evidence*' is another thing. But we find trial Court has failed to appreciate that piece of evidence. Trial Court overlooked this improvement by making general comment that "investigation is defective". When any Court is making any comment about acts/omissions of any police officer or conduct of a witness, trial Court is certainly entitled to do it. But this has to be done with care and caution and only when that is the only inference which can be drawn and not otherwise. In this case for want of materials, said

inference cannot be drawn. For these reasons, the improved portion needs to be excluded.

76. It is important to note that in the charge-sheet filed, the Police have invoked only Section 302 of the Indian Penal Code. The provisions of Section 498-A of the Indian Penal Code were not invoked. It may be for the reason that prosecution witnesses have not stated about the demand of money and consequent harassment. If there are allegations of Section 498A of the Indian Penal Code, no Police officer will take risk of not applying it. Even second investigating officer Mr. Sanap has not invoked Section 498A of the Indian Penal Code.

Conduct of the Appellant

77. Last circumstance on which Mr. Gavand, learned APP and Mr. Deshmukh, have emphasized is about the conduct of the accused. According to them, when the incident took place, he was very much present at the spot and he also sustained burn injuries. According to them, it is for the accused to explain how the incident of burning has taken place. Both of them have relied upon the provisions of Section 106 of the Evidence Act.

78. Whereas according to Mrs. Ganediwala, the accused has given an explanation and according to her, there is no need to enter into witness box but this explanation can be brought on record on the basis of the available evidence. She relied upon two accidental dying declarations.

79. It will also be relevant to consider the answers given by the Appellant to the relevant questions from Section 313 statement. According to Mr. Deshmukh when the question was put to the Appellant about burning of Kirti by pouring kerosene, the Appellant has expressed ignorance. However, Mrs. Ganediwala, learned counsel for the Appellant has invited our attention to the statement given by the Appellant in writing. In that statement, he has stated that odhani of the deceased caught fire due to the niranjan and that is how she suffered burn injuries. He further stated that relatives of the deceased have pressurized the Police and then got recorded the subsequent dying declarations.

80. According to Mr. Deshmukh, even there is variance about which article was caught in fire, whether it is gown or odhani. About this variance, we have already made comment in earlier part of our judgment.

81. In para No.83, trial Court has emphasized on non-examining PW No.1–Dusane as a defence witness. It is true that the accused can also bring on record certain facts by cross examining the prosecution witness and there is no need to examine that witness by way of defence. This cannot be a factor against the accused.

82. It is true as per the provisions of Section 106 of the Evidence Act, it is for the accused to explain about the facts which are in his special knowledge. At the same time, it is true that the burden on accused to explain the facts within his knowledge is not as heavy as that of prosecution. Whether it is odhani or gown/saree which was caught in niranjan, is brought on record by way of dying declaration. It was recorded by Police and by Executive Magistrate. The lacunae in the defence does not help the prosecution evidence. It can be certainly be said that the accused has given an explanation.

83. It is very well true, the Appellant need not prove his defence by applying the test of proof beyond reasonable doubt. It is also settled that if there are certain lacunae in the defence, it does not help the prosecution to prove its case.

Injuries caused to the accused

84. There is no dispute about presence of the Appellant at the spot at the time of incident. It is also undisputed fact that he has also received burn injuries. There is dispute about percentage of burn to the Appellant. It is matter of record that to prove those injuries, prosecution has not examined any witness. His discharge certificate from Civil hospital is produced, but it was not exhibited. It is the prosecution case that the accused was drunk at the time of incident. Admittedly, no medical certificate to that effect is proved. If any witness on this aspect is examined on behalf of the prosecution, this could have given an opportunity to the Appellant to disprove these allegations. If any medical witness could have been examined, it could have considered as a material to corroborate the version of neighbours. 100 % - whether can speak.

Conclusion

85. After appreciating all the available corroborative piece of evidence, it will be relevant to consider the finding of the trial Court in respect of two sets of dying declaration. We do not subscribe to finding of the trial Court in para No.94 that the dying declaration at Exh.93

(recorded by PW No. 5 about accidental death) and 120 (recorded by Police Head Constable about accidental dying declaration) were given under pressure. They are the two dying declarations which suggest of accidental death. But we do not find on what basis the trial Court has come to conclusion that these statements were given under the pressure. Admittedly, at that time, the relatives of the deceased had not arrived and even the accused was admitted in the hospital. The trial Court has overlooked this fact.

86. The trial Court has favoured the two dying declarations (Exh. 95 and Exh. 106) which were recorded on 14th May 2011 as compared to two dying declarations recorded on 13th May 2011. However, trial Court has overlooked one fact that when such inconsistent dying declarations are there on record, the facts stated by the maker has to be tested on the basis of available proved circumstances. When we have tested both the sets of dying declarations on the basis of the proved available circumstance as narrated above, we find that there is only one circumstance which can be considered. It is presence of kerosene particles on the piece of a gown. About seizure of barni having a smell of kerosene, about 100% burn injuries in P.M. report caused only due

to kerosene burning, about the improvement made by PW No.2 Dinesh are not the reliable circumstances.

87. We have gone through the evidence of the Executive Magistrate-PW No. 5, PSI Kopere-PW No. 10 and the medical officer-PW No. 12. It is the grievance of the father of the deceased that first two dying declarations were recorded due to pressure of the Appellant, because mother of the Appellant was retired Tahsildar. Admittedly, there was no one from their side present in the hospital when these two accidental dying declarations were recorded. No one from the side of relatives of the deceased was present, but it is also a fact that the Appellant was also admitted in the hospital. Though no one is examined on behalf of the prosecution to indicate the percentage of the burn injuries on the person of Appellant, but it is undisputed fact that the Appellant was also admitted in the hospital.

88. As against this, it is a matter of record that second set of two dying declarations were recorded after the father of the Appellant arrived at Nashik and complained to Police. Both the sides argued that these two sets of dying declarations were recorded at the behest of the Appellant and at the behest of relatives of the deceased respectively. We

have gone through the cross-examination conducted on behalf of the defence about the concerned witnesses. Attempt is also made on behalf of the defence to challenge the testimony of the witnesses about proper care taken to certify the fitness of the deceased.

89. When we have gone through their cross-examination, we do not find much infirmity in their evidence except as noted in earlier part of this judgment. It is important to note that Executive Magistrate to both dying declarations is same. Now at one point of time, the deceased stated that she was caught fire as her gown was caught in burning niranjan, whereas at other point of time, she has stated that it is Appellant who poured the kerosene and burnt her on fire. It is true the law presumes that the person on a deathbed speaks the truth.

90. Dr. Patil-PW No. 12, who is certifying doctor at the time of second dying declaration recorded by Executive Magistrate has not produced medical case papers, wherein the notings about health of the deceased are recorded. These case papers help the Court to ascertain the health of the maker and the treatment given. Unfortunately, even the accused has not made any attempt to call for those papers. Though it is a fact that there were 100% burn injuries, Appellant is entitled to

raise a grievance about capability to speak.

91. It is true the prosecution has initially made an attempt to conceal the evidence about accidental dying declaration. Though one dying declaration by Executive Magistrate is produced, the certifying doctor is not examined. We find only one corroboration to this accidental dying declaration in the form of seizure of samai/niranjan. It is settled law that the lacunae in the defence put up by the Appellant does not help the prosecution case and they have to stand on their own legs.

92. About evidence relating to two dying declarations implicating the Appellant, we do find certain lacunae as expressed earlier in the prosecution evidence and even the findings recorded by the trial Court which we have already discussed in earlier part of the judgment.

93. We do find a corroborating material in the form of CA report about piece of gown having kerosene particles. Other report about burning has been discarded by us.

94. We do find that the prosecution while conducting the trial, ought to have examined certain witnesses, so to say the father of the deceased, certain Police officials who have made correspondence. The medical case papers maintained by Civil hospital till the death of

deceased-Kirti were not produced before the trial Court.

95. After taking an overview of the entire evidence, we find that the prosecution has not proved its case beyond reasonable doubt. We are conscious that Kirti died within short span of matrimonial life that is date of marriage is 20th January 2011 and death is on 16th May 2011. It is true ultimately we are bound by rules of evidence and the cases are decided on the basis of what has come in the evidence and not on the basis of suspicion. For all these reasons, we find that the findings given by the trial Court about holding the Appellant guilty being responsible for the death of his wife cannot be sustained in the eyes of law. Though there are lacune in the theory of accidental death, the prosecution has not proved the case of homicidal death at the instance of the Appellant. Hence, we have no alternative but to allow the appeal and set aside the conviction.

96. Hence, the order :-

ORDER

- (i) The Criminal Appeal is allowed.
- (ii) The order of conviction and sentence recorded by the Court of Additional Sessions Judge, Nashik on 22nd

August 2017 for the offence punishable under Section 302 of Indian Penal Code in a trial conducted in Sessions Case No.240/2011 is set aside.

(iii) The Appellant be released forthwith, if not required in any other case.

(iv) Fine, if deposited, be returned to the Appellant.

97. The Criminal Appeal is disposed of.

98. Pending Interim Application, if any, also stands disposed of.

(S. M. MODAK, J.)

(M. S. KARNIK, J.)