Tarachand Damu Sutar vs The State Of Maharashtra on 4 May, 1961

Equivalent citations: 1962 AIR 130, 1962 SCR (2) 775, AIR 1962 SUPREME COURT 130, 1963 2 SCJ 17, 1962 2 SCR 775, 1963 MADLJ(CRI) 307, 1962 ALLCRIR 103, 1964 BOM LR 74

Author: J.L. Kapur

Bench: J.L. Kapur, M. Hidayatullah, J.C. Shah, Raghubar Dayal

PETITIONER:
TARACHAND DAMU SUTAR

Vs.

RESPONDENT:
THE STATE OF MAHARASHTRA

DATE OF JUDGMENT:
04/05/1961

BENCH:
KAPUR, J.L.
BENCH:
KAPUR, J.L.
SUBBARAO, K.
HIDAYATULLAH, M.
SHAH, J.C.
DAYAL, RAGHUBAR

CITATION:
1962 AIR 130 1962 SCR (2) 775
CITATOR INFO :
F 1980 SC 559 (11)
R 1983 SC 274 (8)
RF 1992 SC 891 (8)

ACT:
Appeal-Charge of murder-Conviction by Sessions Judge for culpable homicide not amounting to murder-High Court on appeal convicting for murder and passing sentence of death-Right of appeal-Acquittal, Meaning of-Practice in appeal-Constitution of India Art. 134 (1) (a),

HEADNOTE:

The appellant was tried for an offence under s. 302 Indian Penal Code for the murder of his wife. The evidence consisted mainly of the uncorroborated dying declaration of the wife. The Sessions judge accepted the evidence but convicted the appellant under s. 304 Part 1 Indian Penal Code. On appeal by the State the High Court convicted the appellant of an offence under s. 302 Indian Penal Code and sentenced him to death. The appellant contended that he had a right of appeal to the Supreme Court under Art. 134 (1) (a) of the Constitution and that his conviction was bad.

Held, that the appellant had a right of appeal to the Supreme Court under Art. 134 (1) (a) of the Constitution. The conviction of the appellant under S. 304 Part 1 of the Indian Penal Code by the Sessions judge amounted to an acquittal of the offence under s. 302 and the High Court had reversed this order of acquittal and sentenced the appellant to death. The word "acquittal" in Art. 134 (1) (a) did not mean that the trial must have ended in a complete acquittal of the charge, but acquittal of the offence charged and conviction for a minor offence was included in the word "acquittal".

Kishan Singh v. The King Emperor, (1928) L. R. 55, I.A. 390 relied on.

Per Kapur, Subba Rao and Shah, JJ. The appellant was rightly convicted and sentenced by the High Court. it was legal to found a conviction on the uncorroborated dying declaration. The dying declarations had been accepted both by the Sessions judge and by the High Court and there was nothing in the evidence on the record which detracted from the findings of-those courts in regard to the correctness or the propriety of this dying declaration.

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Khushal Rao v. The State of Bombay, (1958) S.C.R. 552, referred to.

Per Hidayatullah and Dayal, JJ. In an appeal under Art. 134 (1) (a) of' the Constitution the Supreme Court assessed afresh the evidence on record and did not follow the practice in appeals by special Leave under Art. 136 that concurrent findings of the Courts below could be interfered with. only when special circumstances existed. In the circumstances of the present case it was not safe to rely on the dying declaration and the appellant was entitled to be acquitted.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 341 of 1960.

Appeal by special leave from the judgment and order dated July 20, 1960, of the Bombay High Court in Criminal Appeals Nos. 488, 426 of 1960 with Review Application. Nos. 555 and 641 of 1960.

G. C. Mathur, for the appellant.

B.R.L. Iyengar and D. Gupta, for the respondent. 1961. May 4. The Judgment of Kapur, Subba Rao and Shah, JJ. was delivered by Kapur, J., and the judgment of Hidayatullah and Dayal JJ., was delivered by Dayal, J.

KAPUR, J. This is an appeal against the judgment and order of the High Court of Bombay imposing the sentence of death in appeal by the State against the order passed by the Sessions Judge, Dhulia. The facts of the appeal are these:

> The appellant, in about 1950, married Sindhubai the daughter of Chandrabhagabai. Sindhubai who is the deceased had read up to the 7th Standard. The appellant and Sindhubai were residing in a one room tenement in a house belonging to one Tavar pleader in which there 'are in all 12 to 15 tenements. The tenement of the appellant was not very far from' that of the appellant's cousin Shantabai who was residing with her husband Pandu Genda and the house of Cliandrabhagabai was about a furlong away from that of the appellant. The relations between the appellant and the deceased were normal for sometime but about two years before the occurrence differences had arisen and there were frequent quarrels between them. A child of the marriage was born about 1-1/2 years before the occurrence. The deceased was a frequent visitor to her mother's house to which the appellant took objection. The appellant bad stopped giving her the necessities of life including foodgrains etc. About a week before Diwali the appellant gave her a beating. The deceased used to have her meals with her mother and the appellant with his cousin Shantabai and the daughter of the marriage Urmila stayed with the mother of the deceased during the day time. The occurrence was on the Bhaubij day i.e. November 2, 1959 between 1.30 and 3.30 in the afternoon. After having her meals at her mother's house the deceased returned to her husband's house and went to sleep in the afternoon. It is stated that while she was sleeping the appellant gave her a beating and after sprinkling Kerosene oil on her clothes, set fire to them. The deceased with her clothes burning went in the direction of the house of Shantabai but fell down in front of it and was almost naked when some body covered her body with a dhoti. Chandrabhagabai received information, it is stated, from her nice Suman about this fact and Chandrabhagabai ran to the spot, and found her body burnt. The cousin, Shantabai and her husband Pandu Genda also arrived and on enquiry by Chandrabhagabai the deceased told her that her husband had set fire to her clothes after sprinkling kerosene oil on her. By this time a police constable informed the Police Station which was nearby and an ambulance car was sent and the deceased was taken to the Civil Hospital, Dhulia at about 4-15 P.m. She was examined by Dr. Javeri who treated her and on his enquiry the deceased told him that her husband had set fire to her clothes after sprinkling kerosene oil on her clothes. Dr. Javeri then informed the police and advised that a dying declaration be recorded. At about 5-30 P.m. a Magistrate Mr. Mhatre recorded the statement of the deceased but she died at 8-15 P. M. on the same day in the hospital.

The defence of the appellant was that of alibi, in that he was at work on the house of Mulchand Rajmal at Nehru Nagar which was being built and that he was entirely innocent of the offence. The trial court found that it was the appellant who had set fire to the clothes of the deceased after sprinkling kerosene oil; that the appellant had the intention of causing such bodily injury to the deceased as was likely to cause death and it therefore convicted the appellant of an offence under s. 304 Part 1 and sentenced him to three years' rigorous imprisonment and a fine of Rs. 100/-. The learned judge accepted the testimony of the mother Chandrabhagabai as to the dying declaration and also that of Dr. Javeri and finally he accepted the dying declaration recorded by the Magistrate which was in the form of questions and answers. In all her dying declarations the deceased had accused the appellant of setting fire to her clothes and thus causing her severe bums. The State took an appeal to the High Court which convicted the appellant of an offence under s. 302, Indian Penal Code and sentenced him to death. Against that judgment and order the appellant applied for certificate to appeal to this Court under Art. 134 (1) (a) but the certificate was refused and this Court gave special leave under Art. 136 of the Constitution.

The first question for decision is whether the appellant had a right of appeal to this Court under Art. 134 (1) (a) and the decision of that must depend upon the construction to be put on the language used in that Article the relevant portion of which is as follows:

134 (1) ""An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court.-

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death."

If the High Court reverses an order of acquittal of an accused person and sentences him to death an appeal shall lie as of right to this Court under the Article. The argument raised on behalf of the appellant was that as the appellant was acquitted of the offence of s. 302 and was convicted under s. 304 Part 1 it was a case of reversing an order of acquittal. The argument on behalf of the State was that the word acquittal meant complete acquittal. The decision of this must depend upon the construction of the word "acquittal". If a person is acquitted of the offence charged and is convicted of a lesser offence, as in the present case, can it be said that he was acquitted and the High Court had on appeal reversed the order of acquittal." In our opinion the word "acquittal ? does not mean that the trial must have ended in a complete acquittal of the charge but acquittal of the offence charged and conviction for a minor offence (than that for which the accused was tried) is included in the word ",'acquittal". This view has the support of a judgment of the judicial Committee of the Privy Council- in Kishan Singh v. The King Bmperor (1). In that case an accused person was tried by the Sessions Judge under s. 302 of the Indian Penal Code on a charge of murder but was convicted under s. 304 for culpable homicide not amounting to murder, the Court having power to do that under s. 238 (2) of the Criminal Procedure Code. He was sentenced to (1) (1928) L.R. 55 I.A. 390.

five years' rigorous imprisonment. No acquittal of the charge under s. 302 was recorded. There was no appeal to the High Court by the then local Government but, it applied for revision under s. 439 on the grounds that the appellant should have been convicted of murder and the sentence was inadequate. The High Court convicted the appellant of murder and sentenced him to death. On appeal to the Privy Council it was held that the finding of the trial court was to be regarded as an acquittal on the charge of murder and that under s. 439 (4) Criminal Procedure Code the word "acquittal" did not mean complete acquittal. At page 397 Sir Lancelot Sanderson observed:

> "Their Lordships, however, do think it necessary to shy that if the learned Judges of the High Court of Madras intended to hold that the prohibition in s. 439 sub-s. 4 refers' only to a case where the trial has ended in a complete acquittal of the accused in respect of all charges or offences, and not to case such as the present, where the accused has been acquitted of the charge of murder, but convicted of the minor offence of culpable homicide not amounting to murder,' their Lordships are unable to agree with that part of their decision. The words of the sub-sec- tion are clear and there can be no doubt as to their meaning. There is no justification for the qualification which the learned Judges in the cited case attached. to the sub-section."

We are in respectful agreement with the interpretation put on the-word "acquittal" by the Judicial Committee of the Privy Council and the word "acquittal" therefore does not mean that the trial must have ended in a complete acquittal but would also include the case where an accused has been acquitted of the charge of murder and has been convicted of a lesser offence. In that view of the matter the appellant was entitled, to a certificate under Art. 134 (1) (a) as a matter of right and this appeal must be treated as if it is under that provision of the Constitution.

The facts of this appeal have been set out above. In support of the prosecution the evidence mainly, if not solely, consists of the dying declarations. The first dying declaration was made to the mother Chandrabhagabai as soon as she came to the place where the deceased was- lying and in answer to her question "as to who had done it," the reply was that "it was done by her husband., also that the husband had set fire to her clothes." In cross-examination she stated that at the time when this statement was made by the deceased Shantabai and her husband Pandu Gonda were present. A suggestion was made to her that the deceased implicated the appellant at the instance of Chandrabhagabai but she repudiated this suggestion and both the trial court and the. High Court have accepted the correctness of this dying declaration and also that it was not prompted by the mother Cbandrabhagabai. Beyond a mere suggestion in the cross- examination there is no material to support the contention of prompting by the mother.

A similar statement accusing the appellant of setting fire to her was made by the deceased to the Doctor (Dr. Javeri) who asked the deceased as to how she got the burns and her reply was that her husband had sprinkled kerosene oil on her and bad applied a match stick to her clothes. This statement was also accepted by the High Court and we find no reason to differ from that conclusion. The third dying declaration was made in the presence of and was recorded by Mr. Mhatre, a Magistrate at about 5-30 P.M. in the presence of Dr. Javeri who certified that the deceased was in a fit state of mind to make the statement. The Magistrate asked her certain questions which are set

out in detail and he took down the answers and his evidence is that the deceased understood the questions and replied to them. He made a record of the questions and answers but that record was not signed by her nor her thumb impression taken on it because her hands were badly burnt. This examination took about an hour. This dying declaration was held by the trial Court to have been made without the help or prompting 'of anybody and according to Chandrabhagabai she was not present at the time. The learned Trial Judge held that the dying declaration was "freely given without the influence of anybody. It was not made under influence of any personal feelings." The High Court Also accepted the correctness of this dying declaration and there is no evidence on the record which would in any way detract from the finding of the trial Court or of the High Court,.in regard to the correctness or the propriety of this dying declaration. The argument raised before us was two fold: (1) that the appellant was not present at the place of occurrence at all and (2) that it was a case of suicide. There are no cogent grounds which would lead to the, conclusion that the deceased wanted to commit suicide nor have any circumstances been shower to us which would lead to any such conclusion. Even though it may be true that the relations between the husband and the wife, were strained so much so that the husband had almost refused to maintain the deceased and was not prepared to give her even food there is no indication that the deceased was so worked up as to have lost her self- control so as to commit suicide. Certain other circumstances as to the absence of any kerosene oil on the clothes of the appellant or the absence of kerosene oil on the bedding have been pointed out but in the circumstances of this case those circumstances are of no significance. Both the trial court and the High Court have found that the deceased had died as a result, of burns 'caused by the fire set to her clothes by the appellant who had sprinkled kerosene oil on her, This is supported by the dying declarations against the correctness of which no cogent reasons have been given or suggested and a conviction based on such evidence has been held to be sustainable by this Court in khushal Rao v. The State of Bombay (2).

The plea of alibi was sought to be supported by the evidence of Gangaram Sitaram a co-worker of the appellant but his testimony was rejected by both the trial Court and the High Court and having gone through it we find no reason to differ from that opinion.

In the result this appeal fails and is dismissed. RAGHUBAR DAYAL, J. We agree that the appellant had a right of appeal under Art. 134 (1) (a) of the Constitution, but regret our inability to agree with the view that the conviction of the appellant under s.302, I. P. C., be maintained.

In appeals preferred under Art. 134 (1) (a) of the Constitution-, we are to assess afresh the value of the evidence of record, and do not follow the practice of this Court in appeals, by special leave, under Art. 136 of the Constitution, that the concurrent findings of the Courts below be not interfered with, ordinarily, but be interfered with only when special circumstances exist. We are of opinion that it is not safe in this case to base the conviction of the appellant solely on the dying declarations made by the deceased, even though in law a conviction can lawfully be based on dying declaration alone if the Court feels fully satisfied about its giving a true version of the incident.

The first dying declaration was made to her mother, by the deceased. It was certainly natural for the mother to question her daughter as to how she got burnt. But that does not really mean that (2) (1958) S. C. R. 552.

the daughter did state all what the mother deposes. Two points arise there, and they are : (a) Did the mother speak the truth ? and (b) Did the daughter ,speak the truth ? The mother, P.W. 1, admittedly, has not good relations with her son-in-law. She made discrepant statements. The Sessions Judge has remarked, in paragraph 12 of his judgment, that there were lot of discrepancies in the statements of this witness. Reference may be made to her stating at one place that when she used to request the accused not to beat the daughter, the result was adverse and denying the correctness of this statement when questioned in cross-examination. According to her, only she was sent away from the room when the Magistrate recorded the dying declaration of the deceased in the hospitals indicating that the accused and some others continued to remain in the room. This statement is not borne out by Dr. Javeri or by the Magistrate. She expressed ignorance about the deceased making a statement. to the police. The Sub-Inspector and Dr. Javeri deposed about her making such a statement. She could not have been ignorant about it.

She deposes that the accused came to the spot where Sindhubai, the deceased, lay injured, about five minutes after her arrival, She knew that he had set fire to Sindhubai's clothes after pouring kerosene oil on her. She did not question him about it. She did not reprimand him. She did not abuse him. She did nothing which could have, been normally expected of a mother knowing that the, accused bad burnt her daughter The explanation that she was sorrow- strike, lacks the ring of truth. Grief striken she must be, but that would not have made her mute.

According to her Sindbubai made this dying declaration when Shantabai, cousin of the accused, and her husband Pandu Genda were present. These witnesses have not been examined by the prosecution to corroborate her statement.

The other dying declaration relied on by the Courts below was made by the deceased to Dr. Javeri, on his casually questioning the deceased as to how she got injured. It may be natural, but we have our doubts, for the Doctor to put such questions to the patient in agony, which had no real connection with his duties as a medical man, and such questioning cannot be said to have any comforting effect on the patient. Such questioning can be nothing but idle curiosity which a Doctor in that position should not evince. Any way, it would not be a good precedent to rely on such a statement to the Doctor in such circumstances, when the Doctor makes no record about it, even if it be not required to be noted in the medico-legal register. We would consider it safe not to rely upon such a statement made to a casual question by the Doctor, the details of which statement are not clear.

The dying declaration made to the police has been ignored, the Sessions Judge considering that it was not made at all, or not made at the time the Sub-Inspector deposed to have got the dying declaration from the deceased. No significance attaches to this dying declaration in any case when it was recorded after the deceased had made a formal dying declaration to the Magistrate.

The dying declaration to the Magistrate has certainly been recorded with care. The relevant statements made in this dying declaration are the following "I am suffering injuries of burning. My husband is my enemy. My husband has burnt me. Kerosene was poured over my body and a match stick was lighted. I was sleeping in the house. He, i.e., my husband, beat me and then burnt me. I

shouted, but nobody came. He was ill treating me. He was harassing me and was causing me starvation for the last 8 days. I had complained about it to Pandu Genda and Shanta Pandu. I did not send any information to my parents about the starvation.

The High Court has stated several times in its judgment that Sindhubai was sleeping when the accused set fire to her clothes. The panchnama Exhibit No. 14. prepared about the room, does not show that the bedding had any oil sprinkled over it or that it got burnt. Quite a number of other clothes were burnt, which need not have caught fire. Absence of oil on the bedding is not consistent with her statement that she was sleeping in the house when the thing happened. This statement is also not consistent with the next statement made by her that her husband beat her and then burnt her. Her statement that nobody came on her shouts because the door of the house was shut, does not fit in with her statement to the police in Exhibit 19 that the accused ran away on his work after he had set fire. The probability too is that if the accused had set fire to her clothes he would run away just after setting fire as he could expect that the victim would shout and that her shouts would attract neighbours and persons passing by. Even if the door was latched for some time while the accused remained there because he did go subsequently, that does not explain the non-arrival of any person.

The persons could have come and could have knocked at the door. It is really remarkable that in this case not a single witness of the neighbourbood has come to depose anything in support of the prosecution case. There is no evidence at all from an outside source. The investigation seemed to have revealed nothing whatever., There is nothing inthe case to lend assurance to any circumstance. Surely, this cannot be the result of the accused'sinfluence on the witnesses or the result of a general inclination not to speak the truth in the interests of justice, even when the accused committed the dastardly act of setting fire to his own wife. Their absence from the witness box may be due to their not standing what they knew to be untrue or did not consider to be true.

It is always a difficult question to speculate why deceased accused a certain person of committing the crime, or why a witness deposes against a person with whom he has no ostensible cause of enmity or why the police. in the discharge of its public duty should influence persons to make inaccurate statements, when Courts come to the conclusion that the accusation or the evidence does not appear to be true and that there are reasons to suppose that the. police had influenced the testimony of witnesses. Anyway, the same difficulty occurs in the present case. But it is clear that the relations between the wife and the husband were strained to such an extent that, according to the prosecution, the accused not only starved her, but also set fire to her clothes with the intention to cause her death. Such a conduct of the husband cannot be on account of ordinary domestic unpleasantness, but must be the result of a very acute feeling of desperation and a desire not to live any more with his wife. If such were the relations which one is inclined to infer from what the prosecution wants the Court to believe, it should not be difficult to imagine that the wife's motives in charging the husband falsely may be equally strong. She too must have been fed up with the misery of her life and might have committed suicide and put an end to her life, but when, as often happens, she was questioned, she accused her husband of setting fire to her clothes, not with a view to save herself from a conviction for attempting to commit suicide, but either on account of her feeling that her husband was responsible for all her troubles and that her disparate action was also due to the

same cause or out of malice. Any way, a dying declaration is not to be believed merely because no possible reason can- be given for accusing the accused falsely. It, can only be believed if there are no grounds for doubting it at all. Apart from the above considerations indicating that implicit reliance cannot be placed on the dying declaration, there are other circumstances which add to the feeling of uncertainty about the truth of the accusation made in the dying declaration. The panchnama of the room shows that a few shirts and old trousers and pieces of two sarees lay near the southern wall of the room in a wet and half burnt condition There is no explanation why such clothes should have been burnt. There was no point in the accused pouring kerosene oil on these clothes even if they just lay huddled near the wall. If Sindhubai fell on the clothes lying there, that may burn some of them, but will not explain their getting wet. There is no suggestion that anybody had poured water over the 'burnt clothes in order to extinguish the fire, because none came there at all. In fact, Ranganath Sitaram, P.W. 6, one of the Panchs, states that the burnt clothes were also giving smell of rock oil. The panchnama further notes :

> "On the eastern wall, two feet height from the ground there is a black spot caused due to the burning of the clothes and the same is recent one."

There is no explanation why such a mark should be there. Sindhubai could not have stood opposite the wall and, even if she did, there should have been marks of burning along the length of her body beside the wall and not at a certain spot only. These two observations can be consistent only with somebody deliberately setting fire to the clothes and keeping some burning clothes beside the wall-for a, little time, The appellant, or whoever set fire to her clothes, would not have done this as he would have made a very quick exit after drenching Sindhubai with kerosene oil and setting fire to her clothes. Sindhubai does not make any statement about such a conductor the accused in her dying declaration. The only inference then possible is that she herself (lid all this, in accordance with her own inclinations. Why she did this, one cannot say.

Sindhubai returned to her house with her daughter after taking her mid-day meal at her mother's house and sent back the daughter with Usha. This is according to the statement of her mother. She brought the child, when, according to her mother's statement, she expected her husband to come to the house after taking his meal at his cousin's place. The conduct is unusual, as, ordinarily, the child used to remain with her maternal grand-mother during the day time, as for some reason the accused probably felt aversion to her. The conduct can 'be consistent with her intention to commit suicide. She brought the child to her place to fondle with her for the last time and then sent her back to her mother. Sindhubai's running towards the house of Shantabai, her husband's cousin, and not running towards her mother's place, also appears to be unnatural. It may be that in such troubles moments one need not be absolutely logical, but it is expected to be instinctive that when in trouble one thinks of one's relations who are expected to be sympathetic, and helpful, on the occasion. It is in the statement of her mother that the route to her house is different from the passage to the house of Shantabai. It may be that the accused did not go to the house as expected, and went away to his job from his cousin's place. It was a day of festival. Sindhubai might have felt this conduct badly set fire to her clothes, and then run towards Shantabai's house where she might have expected her husband to be present.

The time of the incident though said to be between 1-30 and 3-30 P.m., appears to have been near about 3 O' clock. The mother states to have got information about that time. Tile police got information at about 3-45 P.m., and the ambulance took Sindhubai to the hospital at 4-15 P.M. The accused was not expected to be at his house at 3 P.m. The learned Judges of the High Court did not believe the defence evidence about the accused working at the house of Mulchand Rajmal from about 2 P.m. and to have gone to his house on receiving information from one Daga because Daga was. not examined, the Munim of the house-owner was not examined and the register of workers was not produced. It is however the case for the prosecution that the accused used to go to work at 7 A.M., to return at 12 O'clock and again go for work at 2 P.m., and then return at 6 P.m. Chandrabhaga, the mother of the deceased, deposes so. There is therefore no good reason 'to think that the accused did not go to his duty at 2 P.M., that day as deposed to by D.W. I. Sindhubai herself stated in her statement to the police that the accused, after setting her on fire, ran away to his work. If the time of the incident be calculated from the time the police was informed, i. e., from 3-45 P.m., the incident would have taken place some time between 3 and 3-30 P.m., and the accused would not have been at his house at that time. In fact, it appears to us that it is to avoid this difficulty that at Rome stage an attempt was made to time the incident at about 1-30 P.m. The incident could not have taken place before 2 P.m., as, in that case, information to the police would be very belated and in the normal course of events, it is not expected that Sindhubai would have tarried in the room for long or that the persons who must have collected after her running towards Shantabai's place and falling down there, Would not have taken steps to inform the police without any undue delay.

The mother's statement that Sindhubai used to tell her that if the ill-treatment continued, she would sever her connection with the accused and would earn her own living would support the view that she had really got tried of her living with the accused and that this could have prompted her to attempt suicide.

If Sindhubai was not actually asleep when the kerosene oil was poured on her, it does not stand to reason that she would not have made any attempt to run away and the possibility of the accused successfully setting fire to her clothes in the course of the struggle, would be remote, and even if he succeeded, it is a moot point whether he too would not have been singed, if not burnt.

Those are the various considerations which make us feel doubtful about the truth of the dying declaration and take the view that the appellant's conviction on the basis of the dying declaration should not be maintained. It appears from the High Court judgment that the case put before it was "sometime after 1.30 P.m., the accused latched the room from inside and while Sindhubai was sleeping he poured a large quantity of kerosene oil on her person. Her clothes became wet with that kerosene oil and before she could struggle and get up he searched for a match stick, lighted it and set Sindhu's clothes on fire'. Such a case could not be made out from the dying declaration recorded by the Magistrate. Sindhubai had said at first she was sleeping when it happened, but, in answer to the very next question, she said that her husband beat her and then burnt her. If the burning followed the beating, there could be no question of throwing kerosene oil on her while asleep. No reason for this conduct was stated. The, Magistrate who cleared the doubt full points failed to elicit why this deed was perpetrated.

Further, the searching for a match box is very improbable thing. If the accused had decided to set fire to his wife, he would have got, a match box handy and if he did forget about it and had to search for it, that would give sufficient time to Sindhubai to make good her escape. The aversion of Sindhubai to tell the name of her husband could not have been on account of any tender feeling for her husband, but was the natural act of a Hindu married woman not to tell her husband's name. This aversion to tell the name of her husband is no guarantee of the truth of her subsequent statement accusing her husband of the crime. We do not find any justification for the following observation of the High Court, when considering the defence evidence :

> "The accused has led evidence and his case is that he was not responsible for this murder at all. But in fact he was in the house when the incident took place."

The High Court had made the latter statement as a statement of fact, though there was no evidence to support it. Of course, on the basis of a dying declaration, the High Court had already held before discussing the defence evidence, that the accused was responsible for the murder of his wife. If the defence evidence is to be adjudged on the basis of the final finding of the Court, there is no use for defence evidence. It has to be taken into consideration before arriving at a final finding.

The conduct of the accused in travelling in the same ambulance car and in remaining in the hospital is in-his favour and is against the prosecution. The accused stated in his examination that he paid the charges for the ambulance car.

We would like to remark that the learned Judges who heard the appeal should not have heard it when they, at the, time of admitting it, felt so strongly about the accused being wrongly acquitted 'of the offence of murder that they asked the Government Pleader to look into the papers to find out whether it was a case where the Government would like to file an appeal against the acquittal, under s. 302, I.P.C. Government did file an appeal against that acquittal. We do not know whether it was at the suggestion of the Government Pleader or not. But, in these circumstances, it would have beep better exercise of discretion if this appeal against the acquittal had not been heard by the same Bench which, in a way, suggested the filing of the Government appeal. In fact, to make such a suggestion, appears to be very abnormal.

We are therefore of opinion that it is not satisfactorily proved that the appellant committed the murder of his wife by setting fire to her clothes. We would therefore allow-- the appeal., set aside the order of the Court below and acquit the appellant of this offence.

By COURT. In accordance with the opinion of the majority, this appeal fails and is dismissed.