

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.75 OF 2017

Sk. Imran s/o Sk. Iqbal,
Age 23 years, Occu: Labour,
r/o Kabadi Mohalla, Behind
Alankar Talkies, Jalna
District Jalna.

...Appellant

Versus

The State of Maharashtra
Copy to be served on the
Public Prosecutor, High Court
Of Judicature of Bombay
Bench at Aurangabad.

...Respondent

...

Ms. Mansi N. Ghanekar a/w Mr. K.S. Kahalekar h/f Mr. Nilesh
S. Ghanekar, Advocate for Appellant.
Mr. S.J. Salgare, APP for Respondent/State.

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**CORAM : P.R. BORA, J.
DATED : 16th SEPTEMBER, 2019.**

ORAL JUDGMENT:-

. The judgment and order passed in Sessions Case No.220 of 2014 decided by the Additional Sessions Judge, Jalna on 07.10.2016 is challenged in the present appeal. The appellant was prosecuted in the aforesaid sessions case for the offence punishable under Section 302 of Indian Penal Code. The learned Sessions Judge, however, has held the appellant guilty for the offence punishable under Section 304 Part-I of Indian Penal Code and has sentenced him to suffer R.I. for 10 years and to pay a fine of Rs.10,000/-.

2. It is the case of the prosecution that on 07.07.2014, a quarrel had taken place between the appellant and his wife namely Rizwana. As is revealing from the contents of the FIR and other material on record, on 07.07.2014, the appellant had returned to his home late at night and his wife thereafter served dinner to him and while he was taking dinner, he noticed that there was some injury caused to his son Tauhid below his right ear. He thereupon asked wife Rizwana, as to what had happened to said Tauhid. It was informed by wife Rizwana that some injury was caused to him and she had treated the said injury by applying turmeric powder etc. at home itself. The appellant got angry on Rizwana for not taking Tauhid to any doctor for treatment. There was a serious quarrel between appellant and Rizwana on the said issue which eventually took an ugly mode and in the fit of anger deceased Rizwana picked up kerosene can in the house and when she was about to pour kerosene on her person, it is alleged by the prosecution that appellant snatched the kerosene can from her hands and poured the kerosene on person of Rizwana and then set her on fire.

3. It is the further case of the prosecution that the appellant then tried to extinguish the fire and at that time,

the maternal uncle of deceased Rizwana namely Shaikh Aslam also reached at the spot and they both tried to extinguish the fire. Deceased Rizwana was then taken to the hospital by the appellant and her maternal uncle Shaikh Aslam. Deceased Rizwana was extensively burnt. The percentage of the burn is stated to be 90%.

4. At the time of her admission in the hospital and for quite a long period thereafter, deceased Rizwana did not make any complaint or made any allegation against the appellant. However, after the parents of deceased Rizwana reached to the hospital, it is said that Rizwana disclosed to them about the occurrence of the alleged incident and thereafter, her dying declaration was recorded on 08.07.2014. The Special Executive Magistrate was also requisitioned and he also recorded the statement of deceased Rizwana on the same day. In both dying declarations, deceased Rizwana made specific allegation against the appellant that he poured kerosene on her person and set her on fire.

5. On the facts as aforementioned, the appellant was prosecuted for the offence punishable under Section 302 of the Indian Penal Code. In order to prove the charge

against the accused, the prosecution examined as many as 9 witnesses. The defence of the accused was of denial. The learned Trial Court relied upon the dying declarations recorded of deceased Rizwana and has recorded a finding that it was accused who poured kerosene on person of deceased Rizwana and set her on fire. The learned Sessions Judge, however, has further held that considering the subsequent conduct of the accused and other circumstances which have come on record, no case was made out so as to convict the accused for an offence under Section 302 of Indian Penal Code and ultimately, held the accused guilty for an offence punishable under Section 304 Part-I of Indian Penal Code and sentenced him to suffer R.I. for 10 years, as noted herein-above. Aggrieved by, the present appeal has been filed.

6. Shri N.S. Ghanekar, the learned counsel appearing for the appellant has assailed the impugned judgment on several grounds. The learned counsel submitted that the learned Additional Sessions Judge has failed in appreciating that there was apparent suppression of the very first dying declaration recorded of deceased Rizwana by the Investigating Officer Manish Patil, on 07.07.2014, immediately after deceased Rizwana was

admitted in the hospital, wherein she had not blamed or attributed any overt act on part of the accused. The learned counsel further submitted that the Trial Court has also failed in appreciating that second dying declaration wherein deceased Rizwana seems to have implicated the name of the appellant-accused to be responsible for her death came to be recorded after long lapse of 33 hours. The learned counsel further submitted that the learned Sessions Judge has also failed in appreciating that the son of deceased Rizwana and the present appellant namely Shaikh Taufiq (PW-3), who has been posed as an eye witness of the alleged incident, cannot be accepted to be an eye witness of the said incident. The learned counsel taking me through the dying declarations recorded of deceased Rizwana submitted that in the dying declaration recorded by the police person, which is the only dying declaration wherein some particulars are provided by deceased Rizwana, she has clearly stated that Taufiq woke up after she was set on fire and was crying for help and her husband was attempting to douse the fire around her. The learned counsel submitted that in premise of the facts which are stated in the dying declaration, if testimony of PW-3 Taufiq is read, he has deposed a contrary story that he had eye witnessed the

accused pouring kerosene on person of his mother Rizwana and setting her on fire. The learned counsel submitted that the aforesaid evidence has been held to be a corroborative piece of evidence by the learned learned Additional Sessions Judge while recording a conclusion that it was accused who poured kerosene on person of deceased Rizwana and set her on fire. The learned counsel submitted that the fact which was not stated by deceased Rizwana was not requiring any corroboration and cannot be said to have been corroborated by evidence of PW-3 Taufiq.

7. The learned counsel further submitted that in her dying declaration recorded by the police person, deceased Rizwana, has provided somewhat detail account of the alleged incident which is lacking in her subsequent dying declaration recorded by the Special Executive Magistrate. The learned counsel submitted that there was a gap of hardly 10 minutes in recording of these two dying declarations.

8. The learned counsel further submitted that the learned Additional Sessions Judge has failed in appreciating that, had there been any intention of the present appellant to cause death of his wife Rizwana, he would not have made

any attempt to save her by dousing the fire and would not have subjected himself to the burn injuries upto the extent of 18%. The learned counsel submitted that such conduct of the accused which is revealing from the prosecution material also has been not properly appreciated by the learned Additional Sessions Judge. The learned counsel further submitted that the very reason for a quarrel between deceased Rizwana and the accused on the date of incident was that Rizwana did not take the child Tauhid to a doctor for treatment. The accused had become furious for the said reason. The learned counsel submitted that the conduct of the accused leads to an inference that the appellant is a most caring father who was intending and expecting that instead of giving treatment at home, deceased Rizwana must have taken Tauhid immediately to any doctor. The learned counsel submitted that considering the loving and caring nature of the accused, it appears improbable that he would go to an extent of pouring kerosene on person of his wife and set her on fire.

9. The learned counsel further submitted that when two dying declarations of deceased Rizwana are not consistent with each other, when very first disclosure by deceased Rizwana is not revealing any case of homicidal

death and when the possibility of deceased Rizwana being tutored in the meanwhile period by her parents after they reached to the hospital is difficult to be ruled out, reasonable doubts are created about the prosecution case. The learned counsel submitted that in absence of any clinching evidence and in absence of corroboration to the fact stated by deceased Rizwana in her dying declaration, the appellant could not have been held guilty for an offence under Section 304 Part-I of Indian Penal Code also. The learned counsel relied upon the following judgments to support his contentions:

1. ***Vishnu S/o Asaram Kanade Vs. The State of Maharashtra, 2017 ALL MR (Cri) 274.***
2. ***Vithal Kondiba Padghane Vs. The State of Maharashtra, 2016 ALL MR (Cri) 2072.***
3. ***State of Maharashtra Vs. Sk. Jabbar Sk. Sattar and Ors***, decided on 05.10.2018 in Criminal Appeal No.257 of 2011.
4. ***Paparambaka Rosamma and Ors Vs. State of Andhra Pradesh***, decided on 13.09.1999 in Criminal Appeal No.1175 of 1998.
5. ***Pandharinath and Ors Vs. The State of Maharashtra***, decided on 12.09.2013 in Criminal Appeal No.419 of 2011.

6. ***Manik Vanaji Gawali Vs. State of Maharashtra, 2013 ALL MR (Cri) 1766.***

7. ***Suresh S/o Arjun Dodorkar Vs. State of Maharashtra, 2005 ALL MR (Cri) 1599.***

The learned counsel eventually, prayed for setting aside the order of conviction and to acquit the accused of the charges leveled against him.

10. Shri Salgare, the learned APP resisted the contentions raised on behalf of the appellant. The learned APP supported the impugned judgment. The learned APP was however fair in submitting that considering the evidence on record, it is difficult to hold that the appellant was intending to cause death of deceased Rizwana. The learned APP, but, was firm in saying that the evidence on record however sufficiently reveals that it was the accused who poured kerosene on person of deceased Rizwana and set her on fire inspite of being aware that his said acts were likely to result in causing her death. The learned APP, in the circumstances submitted that considering the evidence on record, the accused can certainly be held guilty though, not for the offence under Section 304 Part-I of the Indian Penal Code, but definitely under Part-II of the said section and deserves to be adequately punished. The learned APP

submitted that the theory canvassed of suicidal attempt by deceased Rizwana is difficult to be accepted considering the fact that she was having three small children and when there was no history of any ill-treatment of any grievous nature, it appears improbable that on such a trifle issue she would have committed suicide. The learned APP further submitted that on the contrary, the possibility of the accused getting angry to such an extent that though the issue was trifle he poured kerosene on person of deceased Rizwana and set her on fire, is on much higher side. The learned APP in the circumstances prayed for rejecting the appeal.

11. I have given due consideration to the submissions made by the learned counsel appearing for the appellant and the learned APP representing the respondent-State. I have perused the impugned judgment and the entire evidence on record. Perusal of the impugned judgment reveals that the conviction of the accused is based mainly on the evidence in the form of dying declarations of deceased Rizwana. The learned Additional Sessions Judge has also held the evidence of PW-3 Shaikh Taufiq to be reliable and corroborative of the facts allegedly disclosed by deceased Rizwana in her dying declarations.

12. There can be no dispute that dying declaration can be the sole basis for conviction, however, such a dying declaration has to be proved to be wholly reliable, voluntary and truthful. It has to be further proved that maker thereof was in a fit medical condition to make it. In the instant case, there are two dying declarations of deceased Rizwana on record. Besides two written dying declarations, the prosecution has also relied upon the oral dying declarations made by deceased Rizwana to her parents as well as her brother. Thus, present is the case of multiple dying declarations of the deceased. In a case where there are multiple dying declarations, the truth should be judged with reference to all dying declarations made by the person. It is settled principle of law that in cases resting on multiple written dying declarations, the Court cannot pick and choose any one dying declaration but all the dying declarations have to be consistent in respect of material aspects of the incident. The dying declaration has to pass all the tests of reliability as the declarant is not available for the cross-examination.

13. The learned Additional Sessions Judge on the basis of the evidence in the form of dying declarations has recorded the finding that it was the accused who poured

kerosene on person of the deceased and set her on fire. The Trial Court has thus held that deceased Rizwana suffered the homicidal death and has also held the culpability of the accused to have been proved in causing death of Rizwana with a further finding that the said culpable homicide does not amount to murder and has therefore, held the accused guilty for the offence punishable under Section 304 Part-I of Indian Penal Code.

14. According to the appellant, there was one more dying declaration recorded by API Manish Patil, but the same has been suppressed by the prosecution and has not been made part of the prosecution papers filed along with the charge sheet. As has been argued by the learned counsel Shri Ghanekar, in the said dying declaration deceased Rizwana has not attributed any blame on part of the accused. It is also the case of the appellant that the said dying declaration recorded of deceased Rizwana by API Manish Patil is the first dying declaration in the point of time and hence, is more reliable and trustworthy since, the facts were fresh in the mind of deceased Rizwana and the said disclosure has to be held to be natural.

15. The defence has also alleged that subsequent two

dying declarations recorded of deceased Rizwana wherein she has allegedly impleaded the name of the accused as an offender are given by deceased Rizwana under the influence of her parents. It is also the case of the defence that the said declarations are also not consistent with each other. It has also been argued on behalf of the appellant that the written dying declarations of deceased Rizwana on record and the dying declarations allegedly given by her to her parents and her brother also vary from each other and not consistent with each other. In nutshell, it is the contention raised on behalf of the appellant that the evidence in the form of dying declarations is thus rendered doubtful and hence could not have been relied upon.

16. As against it, as has been argued by the learned APP Shri Salgare, the dying declarations of deceased Rizwana are quite trustworthy and the learned Additional Sessions Judge has rightly relied upon them and has rightly held that it was the accused who poured kerosene on person of deceased Rizwana and set her on fire, which resulted in causing her death. As I have noted herein-above, the learned APP was fair enough in submitting that considering the conduct of the accused and the other material on record, the acts of the accused would fall under Section 304

Part-II of Indian Penal Code and not under Part-I of the said section.

17. In light of the arguments as are advanced on behalf of the appellant and on behalf of the State and in view of the fact that there are several dying declarations recorded of the deceased, the said evidence in the form of dying declarations has to be closely scrutinized. From the evidence on record, it is not in dispute that deceased Rizwana died because of burn injuries caused to her. The evidence on record shows that Rizwana was burnt to the extent of 90%. On clothes of deceased Rizwana which were seized and sent to the forensic lab, kerosene residues were noticed. It is thus evident that clothes on person of deceased Rizwana were drenched with kerosene and the said clothes caught fire which resulted in causing death of Rizwana. According to the prosecution, it is the accused who poured kerosene on person of deceased Rizwana and set her on fire whereas the accused has denied the said allegations.

18. The crucial question which falls for consideration in the present appeal is whether on the basis of evidence on record and more particularly the evidence in the form of

written and oral dying declarations of deceased Rizwana, whether the prosecution can be held to have undoubtedly proved that it was the accused who poured kerosene on person of deceased Rizwana and set her on fire.

19. The dying declaration recorded by PW-9 Manish Patil, the then API is at Exhibit-54. In the said dying declaration, deceased Rizwana has elaborately stated as to how the alleged incident occurred. As stated in the said dying declaration, on 07.07.2014, the appellant returned to his home in midnight at about 12.30-01.00 a.m. Deceased Rizwana then served food to him and while he was dining, he noticed that injury was caused to his son Tauhid below his right ear. The accused then asked deceased Rizwana as to what had happened to Tauhid, Rizwana informed to the accused that while playing outside the house Tauhid fell down and incurred the said injury. She further informed that she has applied some homely medicine to the injury. The accused thereupon asked Rizwana as to why she did not take Tauhid to any dispensary and started beating Rizwana on that count. It is further disclosed by deceased Rizwana in her said statement that after she was brutally beaten by the accused, in the fit of anger she picked up the kerosene can in the house and was about to get it emptied on her

person that accused snatched the kerosene can from her hands and poured kerosene therein on her person, ignited the matchstick and then set her on fire. She has further stated that when she started yelling, her sons and the neighbours woke up. It is further stated that accused and her maternal uncle Aslam then put a bed-sheet on her person and extinguished the fire around her. It is further stated that accused then took her to Ghati Hospital through one auto rickshaw.

20. In the dying declaration at Exhibit-39 recorded by Special Executive Magistrate on 08.07.2014, it is stated by deceased Rizwana that her husband poured kerosene on her person and set her on fire. As per the oral dying declaration allegedly given by deceased Rizwana to her father PW-1 Md. Chand Md. Hussain, accused Imran took the can and poured kerosene on her person and set her on fire. As deposed by PW-2 Zubedabee wife of PW-1, the mother of deceased Rizwana, it was disclosed by deceased Rizwana to her that accused Imran first dashed her head with a wall and then poured kerosene on her person and set her on fire. In his evidence, PW-4 Shaikh Asif Shaikh Chand, the brother of the deceased, has stated that deceased Rizwana disclosed to him that accused caught her hair and dashed her on wall

and thereafter poured kerosene on her person and set her on fire. PW-4 has further deposed that deceased Rizwana also disclosed to him that Aslam Mamu brought her to hospital.

21. It has been contended by the learned APP that in written dying declarations as well as the oral dying declarations given by deceased Rizwana, the core fact stated by her is that it is the accused who poured kerosene on her person and set her on fire. It is therefore the contention of the learned APP that it has to be held that it was the accused and accused alone who poured kerosene on person of deceased Rizwana and set her on fire.

22. In her dying declaration recorded by Special Executive Magistrate which is at Exhibit-47, when narration of deceased Rizwana is only to the effect that her husband poured kerosene on her person and set her on fire, in the dying declaration recorded by API Manish Patil which is at Exhibit-54, deceased Rizwana seems to have provided some more particulars. As per her version in the said dying declaration, after she was beaten by her husband Imran, she in the fit of anger picked up the kerosene can in the house and was about to pour kerosene on her person that

the accused snatched the said kerosene can from her and poured kerosene on her person and set her on fire. As argued by the learned APP, though it apparently appears that the core fact that accused poured kerosene on her person and set her on fire, appears to have been stated in both the dying declarations by the deceased, earlier information provided by deceased Rizwana in her dying declaration at Exhibit-54 that in the fit of anger she picked up the kerosene can and was about to get it poured on her person, cannot be lost sight of. It is also significant to note that when in her written dying declaration at Exhibit-54, deceased Rizwana has categorically stated in the fit of anger she picked up the kerosene can in the house, in his evidence PW-1 Chand has deposed that it was disclosed to him by deceased Rizwana that one kerosene can was lying in the house and accused Imran picked up the said kerosene can and poured kerosene therein on her person and set her on fire. In her testimony before the Court, PW-2 Zubedabee the mother of deceased Rizwana has stated a bit different story. As has been deposed by PW-2 Zubedabee, deceased Rizwana told her that accused dashed her head with a wall and thereafter poured kerosene on her person and set her on fire. In the evidence of PW-4 Shaikh Asif, the brother of

deceased Rizwana a fourth version has come on record. As deposed by PW-4 deceased Rizwana disclosed to him that accused Imran caught her hair and dashed her on wall and then poured kerosene on her person and set her on fire.

23. Considering the two written dying declarations on record and three oral dying declarations made by deceased Rizwana to PW-1, PW-2 and PW-4, it is difficult to accept that they are fully consistent with each other. In the dying declaration at Exhibit-47, when the only information provided by deceased Rizwana is to the effect that her husband set her on fire, in the dying declaration at Exhibit-54 details are provided by deceased Rizwana and more particularly it is stated by her that in the fit of anger, she had picked up the kerosene can in her house and was about to pour kerosene therein on her person. Thus, according to the narration given by deceased Rizwana in her dying declaration at Exhibit-54, kerosene can was picked up by her in the fit of anger. Contrary to this, in the oral dying declaration allegedly given by deceased Rizwana to PW-1, she is stated to have disclosed that the kerosene can was lying in the house and accused Imran picked up the said can and poured kerosene on her person. In the oral dying declarations allegedly given by deceased Rizwana to her

mother and brother also the disclosure is to the effect that the accused picked up the kerosene can.

24. As has been held by the learned Trial Court in all the dying declarations of deceased Rizwana written as well as oral, the core fact stated by her is the same that the accused poured kerosene on her person and set her on fire. The learned Trial Court, however, has failed in appreciating that in respect of prelude to the incident there is notable variance in the dying declarations recorded of deceased Rizwana. In the dying declaration at Exhibit-54, deceased Rizwana has stated that after she was brutally beaten by the accused, in the fit of anger she picked up the kerosene can in the house and was about to pour kerosene on her person that the accused snatched can from her and poured kerosene therein on her person and then ignited her. In her subsequent dying declaration at Exhibit-47 recorded by the Magistrate, the only fact stated by her is that her husband poured kerosene on her and set her on fire. Similar is the case with oral dying declarations allegedly given by the deceased to her parents and her brother. The father (PW-1), the mother (PW-2) and the brother (PW-4) of deceased Rizwana in their respective testimonies before the Court have deposed that deceased Rizwana disclosed to them that

her husband i.e. the present appellant poured kerosene on her person and set her on fire. It is thus evident that the fact narrated by deceased Rizwana in her dying declaration at Exhibit-54 that in the fit of anger she had picked up the kerosene can in her house and was about to get pour the kerosene therein on her person, which can be said to be prelude to the core incident, is not revealing from other dying declarations, written as well as oral.

25. Somewhat similar facts as are in the present matter were existing in the case of **"Suresh S/o Arjun Dodorkar (Sonar) Vs. State of Maharashtra, 2005 ALL M.R. (Cri) 1599"**, decided by this Court. In the said matter, two dying declarations were there on record and there was a common thread in both the dying declarations that it was the appellant in the said matter who had set deceased ablaze. The Hon'ble Division Bench of this Court rejected both the dying declarations for the reason that there was a variance in two dying declarations recorded of the deceased in respect of the prelude to the core incident. I deem it appropriate to reproduce herein-below Para-9 of the said judgment which contains the observations made and finding recorded by the Hon'ble Division Bench in that regard:

"9. A perusal of both the dying declarations reveal

that there are inter se variance. In the dying declaration at Exh. 24 Vimal had stated that the appellant, under the influence of liquor, used to beat her as he was of suspicious nature. She states that when she had asked him to take his dinner, the appellant had quarrelled with her and, therefore, in anger she had gone to sleep. While she was asleep, the appellant had poured kerosene on her-and had set her ablaze. In the dying declaration at Exh. 27 Vimal had stated that in the evening she had sent the daughter of her neighbour for purchasing wheat, but as the said girl had not gone, she had herself gone and purchased wheat. According to her, the appellant, on his return, asked her as to why she had gone for purchasing wheat and what was the relationship between Vimal and the shopkeeper. The appellant then went out of the house and returned back at about 7.00p.m. or 7.30 p.m. carrying a small plastic Can of kerosene. Vimal had asked her husband to take his dinner but her husband had said that he would not eat anything prepared by her as she was of loose character. On so saying her husband poured kerosene on her and set her ablaze. It would thus be seen that in respect of the incident there is a major variance though there is a common thread in both the dying declarations that it was the appellant who had set her ablaze. In cases resting on multiple written dying declarations, the Courts cannot pick and choose any one dying declaration. All the dying declarations have to be consistent in respect of material aspects of the incident. According to us, consistency is expected in multiple dying declarations in respect of the names and the number

of accused, the prelude to the incident and the incident itself. In these two dying declarations, there is consistency in respect of the name and the number of accused. However, in respect of the prelude to the incident, there is variance. There is also variance in respect of the incident itself. The variance is apparent on perusal of the dying declarations and can be discerned from the perusal of the same. Therefore, according to us, no reliance can be placed on the two written dying declarations at Exhs. 24 and 27, as acceptance of any one dying declaration necessarily renders the other as false. If in the dying declaration the truthfulness of the narration itself is rendered doubtful, no reliance whatsoever can be placed on the dying declaration. Merely because the overt act attributed to the accused is consistent in both the dying declarations would not make the dying declarations a reliable piece of evidence. The dying declaration has to pass all the tests of reliability as the declarant is not available for cross-examination. In cases where there are multiple dying declarations and acceptance of one dying declaration falsifies the other, the dying declarations have to be necessarily rejected. In our opinion, therefore, no reliance can be placed on the dying declarations at Exhs. 24 and 27."

26. In the instant matter also, though there is a common thread in all the dying declarations that it is the appellant-accused who poured kerosene on person of deceased Rizwana and set her on fire, the prelude to the

core incident which is there in the dying declaration at Exhibit-54 is not there in the other written as well as oral dying declarations recorded of deceased Rizwana and varied facts have come on record in the said dying declarations. As has been observed by the Hon'ble Division Bench in the case of "**Suresh S/o Arjun Dodorkar (Sonar)** (cited supra), considering the variance in the dying declarations of the deceased, acceptance of any one dying declaration would necessarily render the other as false. As further observed by the Hon'ble Division Bench, if the truthfulness of the narration even in anyone dying declaration is rendered doubtful, no reliance whatsoever can be placed on the evidence in the form of dying declaration. The dying declaration has to pass all the tests of reliability as the declarant is not available for cross-examination. In premise of the view taken by the Hon'ble Division Bench, the evidence of dying declaration in the instant matter cannot be a base for conviction of the accused.

27. It was sought to be contended by the learned APP Shri Salgare that the core fact narrated by deceased Rizwana in all of her dying declaration that the accused poured kerosene on her person and set her ablaze, cannot be simply brushed aside and is sufficient to hold the accused

guilty of causing death of deceased Rizwana. I am, however, not convinced with the submission so made. As discussed herein-above, the facts narrated by deceased Rizwana in her dying declaration at Exhibit-54 which I have held to be prelude, to the effect that "in the fit of anger I picked up the kerosene can in my house and was about to pour kerosene therein on my person," has created reasonable doubts about the further fact alleged to be narrated by her that the accused snatched the kerosene can from her and poured kerosene on her person and set her ablaze. Deceased Rizwana in her dying declaration recorded at Exhibit-54, though seems to have provided account of the alleged incident in detail has not narrated or disclosed any such fact that when the accused snatched kerosene can from her hands and poured it on her person and then ignited her, any attempt was made by her to resist the said atrocity. It is difficult to accept that when the accused poured kerosene on her person and ignited her, deceased was standing still and suffered it quietly and not at all resisted the atrocity being committed by the accused.

28. The reliance has been placed by the appellant on the judgment delivered by the Division Bench of this Court in the case of "***Vishnu s/o. Asaram Kanade Vs. The State of***

Maharashtra, 2017 ALL MR (Cri) 274". Wherein the Division Bench has made certain observations which according to the learned counsel for the appellant would apply to the facts of the present case. I deem it appropriate to reproduce herein-below Para-32 of the said judgment which contains the said observations :

"32. Even otherwise going by their depositions, we found their depositions not trustworthy. They stated that their father poured kerosene on their mother's clothes and then their father ignited match-stick. Should we assume that when this atrocity was taking place, victim Vaishali was standing still and suffering it quietly? Should we assume that Vaishali did not resist at the time of incident? According to the children, the incident took place between Vaishali on one hand and accused Vishnu on the other. Both of them were grown-up persons. Assuming Vishnu was physically more powerful, yet Vaishali could have certainly resisted Vishnu's assault and the attempt of pouring kerosene on her person. Assuming that Vishnu somehow poured kerosene on her person, she would have certainly avoided his further assault which included striking of match-stick and setting her on fire. "Striking a match-stick" is a one physical act. It is generally not connected to "igniting something using the burning match-stick". We are aware that a match-stick is thin piece of wood. Even after a match-stick is ignited successfully, the user would take a few moments to get the flame settled and then within short time

he has to ignite an object with it. Before the flame of match-stick is settled, if the user tries to use it, there is possibility of extinguishing of the flame, before it could reach the target. Even after the match-stick is ignited and the flame is settled, due to small size of the stick, the user is required to ignite the target as soon as possible. If the target is not ready and close by, the burning match-stick would get extinguished. Thereafter the user is required to strike another match-stick."

On perusal of the observations made and the finding recorded by the Hon'ble Division Bench as above, there appears substance in the submission made by the learned counsel for the respondent. Considering the evidence, in the present matter also, it is difficult to rule out the possibility as has been expressed by the Division Bench in the above judgment ultimately leading to the acquittal of the accused in the said case.

29. It is not in dispute that after recording of the first dying declaration by API Manish Patil which has not been brought on record by the prosecution, second dying declaration at Exhibit-54 came to be recorded after the lapse of about 33 hours and within ten minutes thereafter, third dying declaration was recorded by the Executive Magistrate. It is not in dispute that the subsequent dying

declarations came to be recorded on insistence of the parents of deceased Rizwana after they reached to the hospital and met deceased Rizwana. In the circumstances, possibility of tutoring is difficult to be ruled out more particularly when in her first dying declaration deceased Rizwana did not attribute any blame on part of her husband. Thus, these are the additional two reasons which create reasonable doubts about truthfulness in the dying declarations recorded of deceased Rizwana. It would be therefore unsafe to base the conviction of the accused on the strength of such evidence.

30. Further the learned Trial Court has committed an error in holding that PW-3 Taufiq was an eye witness to the alleged incident. The learned Trial Court has failed in appreciating that in her dying declaration at Exhibit-54, which has been fully relied upon by it, deceased Rizwana has stated that her children awoke when she started shouting after she was set on fire by the accused. If the narration of deceased Rizwana in the dying declaration at Exhibit-54 is to be accepted, PW-3 Taufiq cannot be said to have witnessed the accused pouring kerosene on person of deceased Rizwana and set her on fire. If the dying declaration at Exhibit-47 is concerned, a specific question

was put to deceased Rizwana, as to who were present on the spot of occurrence when the alleged incident happened. In reply to the said question, deceased Rizwana has given an answer that her husband was present on the spot of occurrence. Deceased Rizwana has not stated that PW-3 Taufiq was also present at the spot of occurrence. It is further significant to note that PW-3 Taufiq himself has admitted in his cross-examination that he woke up when his mother was in flames and his father was trying to extinguish the fire, meaning thereby that he did not eye witnessed the alleged previous acts of the accused that of pouring kerosene on person of deceased Rizwana and setting her ablaze. If the testimonies of PW-1, PW-2 and PW-4 are perused, to whom deceased Rizwana is said to have given her oral dying declaration, none of the aforesaid witnesses have deposed that deceased Rizwana disclosed to them that PW-3 Taufiq had eye witnessed the alleged incident. The reasonable doubts are created about the truthfulness in the version of PW-3 Taufiq for one more reason that though the said witness has deposed in his testimony before the Court that his father caught hold of the hairs of his mother and dashed her head on the wall, neither in the inquest panchnama nor in the post-mortem examination, on the

dead body of deceased Rizwana any such injury was noticed on her head. In written dying declarations at Exhibit-47 and Exhibit-54, deceased Rizwana also has not stated that the accused had held her hairs and dashed her head to the wall. In the circumstances, I have no hesitation in holding that the learned Trial Court has wrongly held PW-3 Taufiq to be an eye witness of the alleged incident.

31. It was also sought to be contended by learned APP Shri Salgare that the accused has raised a false defence that deceased Rizwana suffered a accidental death. The learned APP submitted that raising a false defence by the accused can be a circumstance against him indicating his guilty mind. It was also contended by the learned APP that there was no possibility of commission of suicide by deceased Rizwana having regard to the fact that she was blessed with three children and as such, was not likely to take such a drastic step of ending her life leaving her three small kids behind. It has also been argued by the learned APP that when there is no case of any ill-treatment to the deceased from the accused, there was no reason for deceased Rizwana to commit suicide. According to the learned APP, when the possibility of deceased Rizwana suffering an accidental or suicidal death is ruled out, the

only possibility remains that is of homicidal death. The learned APP had also submitted that the accused has not denied his presence on the spot of occurrence. In the circumstances, according to him the accusing finger has to be stretched only towards the accused and the Trial Court has therefore rightly held the accused guilty for causing death of deceased Rizwana. There is substance in the submission advanced by the learned APP. In normal course, no woman having three small kids would commit suicide by leaving her kids at the mercy of her offender husband. However, it is equally true that it is really difficult to fathom the human mind and sometimes it becomes difficult to understand the reasons behind act. Moreover, in the fit of anger the persons may go to any extent. In the circumstances, it is difficult to record any such definite conclusion in the present matter that deceased Rizwana could never have indulged in ending her life by committing suicide.

32. On the other hand, as was submitted by learned counsel Shri Ghanekar, considering the conduct of the accused as is revealing from the prosecution case itself that the cause for his anger on deceased was that she did not take son Tauhid to any doctor for his treatment and treated

his injury at the home, which leads to an inference that he was a most loving and caring father, it appears equally difficult to accept that he would go to an extent of pouring kerosene on person of his wife and would set her on fire. Moreover, the immediate subsequent conduct of the accused also cannot be lost sight of. It has come on record that the accused tried to extinguish the fire around deceased Rizwana and in that attempt received burn injuries to the extent of 18%. It has also come on record that it was the accused who took Rizwana to the hospital. It is thus evident that two possibilities are appearing in the present matter, one that deceased Rizwana suffered a suicidal death and other that it is a case of homicidal death.

33. As elaborately discussed herein-above, the evidence relied upon by the prosecution in support of its contention that deceased Rizwana suffered homicidal death, in the form of her dying declarations is not a dependable evidence and it would be unsafe to base the conviction of the accused on the basis of such evidence. Moreover, when two possibilities of equal force and substance exist, it becomes a case of benefit of doubt and it would always go in favour of the accused.

34. After having considered the entire evidence in the matter, it is difficult to record any definite conclusion that the evidence brought on record by the prosecution leads to an irresistible conclusion that it was the accused and accused alone who poured kerosene on person of deceased Rizwana and set her on fire. In the circumstances, it would be unsafe to hold the accused guilty for any such act. The impugned judgment therefore cannot be sustained and deserves to be set aside. In the result, the following order is passed:

ORDER

- I) The order dated 07.10.2016 in Sessions Case No.220 of 2014 is set aside.
- II) The accused is acquitted of the charges leveled against him.
- III) He be released forthwith if not required in any other case or crime.
- IV) Fine amount deposited by the appellant be refunded to him.
- V) The appeal stands allowed in the aforesaid terms.

(P.R. BORA, J.)