

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

CRIMINAL APPEAL NO. 44 OF 2014

Dattu s/o Yewhan Sathe,
Age : 36 years, Occu : Labour,
R/o. Datta Nagar, Ranjangaon
(Shenpunji) Tq. Gangapur,
Dist. Aurangabad

... Appellant

Vs.

The State of Maharashtra

... Respondent

...

Advocate for Appellant : Shri S. P. Koli (Appointed)

APP for Respondent – State : Shri R. D. Sanap

...

CORAM : RAVINDRA V. GHUGE

AND

B. U. DEBADWAR, JJ.

**RESERVED ON : 16th SEPTEMBER, 2020
PRONOUNCED ON : 30th SEPTEMBER, 2020**

JUDGMENT [PER: B. U. DEBADWAR, J.]:

1. This appeal u/s 374 of the Code of Criminal Procedure, 1973 has been directed against the Judgment & Order dated 21-12-2013 passed by learned Additional Sessions Judge, Vaijapur, Dist. Aurangabad in Sessions Case No. 264 of 2012, whereby convicted appellant – accused for the offences punishable under Sections 302 and 307 of the Indian Penal Code, 1860 (hereinafter referred to as “IPC”) and has been sentenced, to suffer imprisonment for life and to pay a fine of Rs. 2000/-, in default of

payment of fine, to suffer further rigorous imprisonment for six months for the offence under Section 302 of the IPC and to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 2,000/-, in default of payment of fine, to suffer further rigorous imprisonment for six months for the offence punishable u/s 307 of the IPC and both the sentences to run concurrently.

2. Facts giving rise to the prosecution case, in nutshell, are as under : -

Alkabai was the daughter of Shri Ramesh Bhaurao Khotkar, resident of village Vadadhagaon, Tq. & Dist. Aurangabad. She was given in marriage to the appellant-accused, resident of Datta Nagar, Ranjangaon, (Shenpunji) Tq. Gangapur, Dist. Aurangabad. Their marriage was solemnized in the year 2002. Appellant-accused was a drunkard. He used to harass and ill-treat Alkabai frequently, for trivial reasons. Alkabai used to inform about the conduct of the appellant-accused to her parents and her parents used to give him understanding/reprimand every time. Alkabai bore three daughters namely; Soni, Sanika and Sakshi and a son namely, Aniket @ Pintu begotten by the appellant - accused. Two elder daughters Soni & Sanika used to reside with their maternal grand-parents at Vadadhagaon, Tq. & Dist. Aurangabad, whereas, Sakshi & Aniket @ Pintu used to reside with their parents viz. appellant-accused and deceased – Alkabai.

3. On 28-07-2011, at evening time, Alkabai telephoned her father Shri Ramesh Bhaurao Khotkar and told him that, appellant-accused came home in drunken condition, picked up quarrel with her for petty reasons and beat her. Upon which, father Shri Ramesh Bhaurao Khotkar told her that, we would come soon, to which, Alkabai said him not to come and told that she would come to Vadadhagaon tomorrow.

4. Smt. Parighabai Bhausahab Salve is the cousin sister of Ramesh Bhaurao Khotkar. She used to reside in neighbouring house of Alkabai and appellant-accused. On fateful day i.e. 29-07-2011, at about 06:00 a.m., Parighabai made a phone call to Ramesh Bhaurao Khotkar and told him to come to Datta Nagar, Ranjangaon (Shenpunji) soon. On receiving the said phone call, Ramesh Bhaurao Khotkar along with relatives left Vadadhagaon and rushed to Datta Nagar, Ranjangaon (Shenpunji), Tq. Gangapur, Dist. Aurangabad. On reaching to the house of appellant-accused, he found Alkabai, Kum. Sakshi, Master Aniket @ Pintu and appellant-accused in burnt condition. He immediately carried them to Ghati Hospital, Aurangabad, in auto-rickshaw. On the way to Ghati Hospital, when he asked as to how incident took place, Alkabai told him that at about 06:00 a.m., appellant-accused picked up quarrel for petty household reason and assaulted her with fist

and kick blows. When she attempted to shout and cry, appellant-accused picked up can filled with kerosene oil and poured the same on her person and set her ablaze by igniting match stick. Therefore, her clothes caught fire. Sakshi and Aniket who were sleeping, also caught fire since some kerosene oil was spilled on their person. Besides, appellant-accused also caught fire while setting her ablaze. Soon after admitting Alkabai in the hospital, she succumbed to the burns. After getting Sakshi and Aniket admitted in the hospital, the treatment was started. On seeing the incident, Ramesh Bhaurao Khotkar underwent a shock. After funeral and getting released from shock, at about 03:00 p.m., he lodged the complaint narrating the aforesaid incident.

5. On the basis of the complaint lodged by Ramesh Bhaurao Khotkar, Crime bearing no. I-167/2011 for the offences punishable under Section 302 and 307 of the IPC came to be registered against appellant-accused at MIDC Waluj Police Station, Aurangabad City. The investigation of the said crime was carried by Jaysingh Narayan Rajput, PSI, attached to the said Police Station. During the course of investigation, initially he had gone through the complaint, collected the papers of A.D. case bearing no. 55/2011 viz. Inquest Panchanamas of Alkabai and Sakshi, Spot Panchanama, then recorded statements of material witnesses including Ramesh

Bhaurao Khotkar (PW1), Smt. Yamunabai Khotkar (PW2), Nagnath Gangadhar Bansod, Head Constable (PW3), Smt. Parighabai Bhausahab Salve (PW4), Ravindra Tanaji Tribhuvan (PW5), forwarded muddemal articles viz. can of kerosene oil and partly burnt pieces of saree and petticoat seized from the spot, at the time of drawing spot panchanama and also the clothes of the appellant-accused to the Forensic Lab at Aurangabad for examination and report, thereafter collected Injury Certificate of Aniket @ Pintu and postmortem reports of both the deceased and after completion of investigation, charge-sheeted the accused before Judicial Magistrate First Class, Gangapur, on 09-01-2012, for the offences punishable u/s 302 and 307 of the IPC. In turn, learned Judicial Magistrate, First Class, Gangapur vide order dt. 20-01-2012 committed the case to the Sessions Court at Aurangabad as the offences under Sections 302 and 307 of I.P.C. are exclusively triable by Court of Sessions.

6. After hearing prosecution and defence, on 02-02-2012, learned Addl. Sessions Judge-6, Aurangabad, framed charge under Section 302 and 307 of the IPC, vide Exh. 5. When so framed charge was read over and explained to the appellant - accused in vernacular, he pleaded not guilty and claimed to be tried. His defence as disclosed from trend of cross-examination was that,

Alkabai, Sakshi and Aniket sustained burns accidentally. None was examined in defence.

7. Meanwhile, Additional Sessions Court came to be established at Vaijapur. Therefore, case was transferred to Additional Sessions Court, Vaijapur from Sessions Court, Aurangabad.

8. To prove the charge, prosecution has examined in all nine witnesses including the aforesaid material five witnesses. Rest of the four witnesses examined by the prosecution are, Dr. Ranjit Madhukar Tandale (PW6), Autopsy Surgeon, who conducted the autopsy on the dead body of Alkabai, Dr. Navinkumar Mankichand Verma (PW7), Autopsy Surgeon, who conducted autopsy on the dead body of Sakshi, Sanjay Abhimanyu Kamble (PW8) – panch witness of the panchanama under which full pant and full shirt of appellant-accused was seized and lastly Jaysingh Narayan Rajput, PSI, attached to the MIDC Waluj Police Station who carried the investigation and charge-sheeted the appellant-accused.

9. In addition to ocular evidence of aforesaid nine witnesses, prosecution has placed its reliance on Spot Panchanama (Exh.28), Inquest Panchanama of Alkabai (Exh.25), Inquest panchanama of Sakshi (Exh.24), PM report of Alkabai (Exh.43), PM

report of Sakshi (Exh.45), Requisition to C.A. (Exh.56), C.A. Report (Exh.59), Muddemal receipt of seized articles and clothes (Exh.29).

10. After considering the evidence on record adduced by the prosecution and hearing both the sides, learned Addl. Sessions Judge, Vaijapur, vide impugned Judgment & Order held the appellant-accused guilty on both the counts inter alia observing that the prosecution has proved beyond doubt that accused had ablazed wife Alkabai after pouring kerosene oil on her person and igniting matchstick and also burnt Sakshi and attempted to burn Aniket @ Pintu and accordingly sentenced him as referred to above.

11. Being aggrieved by the judgment and order impugned, the appellant-accused has approached before this Court by preferring the present appeal.

12. Heard Mr. S. P. Koli, learned Advocate appointed to represent the appellant-accused from the panel of High Court Legal Aid Services Sub-Committee, Aurangabad and Mr. R. D. Sanap, learned APP.

13. The facts which are not in dispute, are as under : -

(a) Deceased – Alkabai was the wedded wife of appellant-accused and daughter of Ramesh Bhaurao Khotkar (PW1) and Smt. Yamunabai Ramesh Khotkar (PW2).

(b) Marriage of Alkabai was solemnized with appellant-accused in the year 2002.

(c) From the wedlock with appellant-accused, Alkabai bore three daughters and a son namely, Aniket @ Pintu.

(d) First two daughters namely, Soni and Sanika used to reside with their maternal grand-parents namely; Ramesh Bhaurao Khotkar (PW1) and Smt. Yamunabai Ramesh Khotkar (PW2) whereas, third daughter and a son Aniket @ Pintu used to reside with the appellant-accused and deceased Alkabai at their house situated at Datta Nagar, Ranjangaon (Shenpunji), Tq. Gangapur, Dist. Aurangabad.

(e) PW4 - Parighabai Bhausahab Salve was the cousin sister of Ramesh Bhaurao Khotkar (PW1) and cousin parental aunt of Alkabai.

(f) Alkabai and Ku. Sakshi died due to 98% and 56% burns respectively and Aniket @ Pintu had suffered 19% burns in the same incident.

14. Mr. S. P. Koli, learned advocate while taking us through the ocular and documentary evidence referred to above vehemently argued that, the evidence adduced by the prosecution is not at all cogent and sufficient to prove the guilt of the appellant-accused beyond reasonable doubt. Appellant-accused has come with a specific defence that, unfortunate incident of suffering burn injuries by Alkabai, Sakshi and Aniket @ Pintu took place accidentally due

to explosion of stove when Alkabai was engaged in preparing tea in wee hours. Appellant-accused also sustained 25% burns in the same incident. This clearly speaks about his intention and demonstrates as to how the appellant-accused implicated. The case of the prosecution is based on multiple oral dying declarations. All the persons viz. witnesses before whom Alkabai alleged to have made an oral dying declaration are interested witnesses. There is no consistency in their evidence regarding oral dying declaration of Alkabai. Initially, considering the over all situation, accidental death (A.D.) case was rightly registered. There is a delay of about seven hours in lodging the FIR. Complaint came to be lodged after arranging false story only with an object to implicate the accused/appellant. PM report (Exh.43) also makes it clear that, due to 98% superficial and deep burns, Alkabai was not able to speak, and as such, serious doubt creates about genuineness of alleged oral dying declarations made by Alkabai before the interested witnesses. It is true that, stove was not found at the spot (the house of the appellant-accused), when the spot panchanama was drawn. Considering the time gap between the incident and the spot panchanama, possibility of removing the stove from the spot prior to drawing of the spot panchanama cannot be ruled out. As such, merely for the reason that the stove was not found on the spot, defence of the appellant-accused cannot be discarded. Once the

oral dying declarations heavily relied upon by the prosecution to base the conviction are discarded for the aforesaid reasons, there would be no case to hold the appellant-accused guilty. Learned Addl. Sessions Judge, Vaijapur, failed to appreciate the evidence in proper perspective and merely relying on alleged oral dying declarations held the appellant-accused guilty on both the counts. Therefore, the conviction and sentence deserves to be set aside by allowing the appeal. In support of his submissions, Mr. Koli has placed reliance on the following citations.

- i) ***Poonam Bai V. The State of Chhattisgarh*** in Criminal Appeal No. 903 of 2018 in the Supreme Court of India, wherein law regarding dying declaration is discussed.
- ii) ***State of U. P. V. Madan Mohan and Ors. [(1989) 3 Supreme Court Cases 390]***, wherein effect of failure of prosecution to explain injury on the person of accused is explained.
- iii) ***State of Gujarat V. Jayrajbhai Punjabhai Varu [AIR 2016 Supreme Court 3218]***, wherein it is explained as to when oral dying declaration of victim can be made basis for conviction of the accused.
- iv) ***Heikrujam Chaoba Singh V. State of Manipur [(1999) 8 Supreme Court Cases 458]***, wherein law pertaining to dying declaration and appreciation of evidence on dying declaration is discussed.
- v) ***Lallu Manjhi V. State of Jharkhand [2003 DGLS(SC) 4]***, wherein it is held that oral testimony may be classified into three

categories namely wholly reliable, wholly unreliable and neither wholly reliable nor wholly unreliable.

vi) *Laxman Vs. State of Maharashtra [2002 DGLS(SC) 750]*, wherein theory regarding acceptability of dying declaration is discussed.

vii) *Dayal Singh and Ors. V. State of Uttaranchal [AIR 2012 Supreme Court 3046]*, wherein the term fair trial is discussed.

15. Per contra Mr. R. D. Sanap, learned APP vehemently argued that incident took place early in the morning, on fateful day at the house where the appellant-accused along with victims used to reside. From the substantive evidence of Smt. Parighabai Bhausahab Salve (PW4) and Shri. Ravindra Tanaji Tribhuvan (PW5), it has come on record that at the time of incident, except appellant-accused and victims, nobody was present in the house and nothing is brought on record by the appellant-accused on the basis of which the inference regarding presence of third person in the house, when the incident took place, can be drawn. The defence of the accused that victims sustained burns accidentally is baseless defence. As the appellant-accused alone was in the company of victims when the incident took place, his aforesaid defence holds no water.

16. Since, the evidence of Shri Ramesh Bhaurao Khotkar (PW1), Smt. Yamunabai Ramesh Khotkar (PW2), Shri Nagnath Gangadhar Bansod (PW3), Smt. Parighabai Bhausahab Salve (PW4)

and Shri Ravindra Tanaji Tribhuvan (PW5) about oral dying declaration, connecting appellant-accused to the incident, is clear, cogent and consistent, burden lies on the appellant-accused to explain how the incident took place. Evidence on record completely rules out the possibility of sustaining burn injuries by the victims accidentally. C.A. report at Exhibit 59 establishes that residues of kerosene oil detected on burnt pieces of cloths of Alkabai and empty jar seized from the spot at the time of spot panchanama. Thus, according to Mr. R. D. Sanap, learned APP, there are cogent and strong circumstances to connect the appellant-accused with the incident. Evidence adduced by the prosecution being clear, cogent and consistent, the impugned judgment convicting appellant-accused under Sections 302 and 307 of the Indian Penal Code passed by the learned Additional Sessions Judge, Vaijapur deserves to be confirmed. Lastly, Mr. R. D. Sanap, submitted that rulings cited by Mr. S. P. Koli, learned Advocate for the appellant-accused, are not applicable as they are distinguishable on facts.

17. In view of the facts and circumstances of case on record, it is abundantly clear that the case is based on multiple oral dying declarations and circumstantial evidence. Therefore, it is required to see whether oral dying declarations made by the deceased Alkabai before five witnesses referred above and

circumstances came on record through oral and documentary evidence, are sufficient to connect the appellant-accused with the incident.

18. It is the case of prosecution that Alkabai and Sakshi died of homicidal death whereas according to the appellant-accused they both died of accidental death and Aniket alias Pintu also sustained burn injuries accidentally.

19. Inquest Panchanam of Alkabai is at Exhibit 25 and Inquest panchanama of Sakshi is at Exhibit 24. Whereas, the postmortem report of Alkabai is at Exhibit 43 and the postmortem of Sakshi is at Exhibit 45.

20. Appellant-accused has not disputed genuineness of inquest panchanamas of Alkabai and Sakshi. He has admitted the same before commencement of trial in writing. However, their postmortem reports have been proved by examining the autopsy surgeons who have conducted the same.

21. Dr. Ranjit Madhukar Tandale (PW6) had conducted postmortem on the dead body of Alkabai and Dr. Navinkumar Manikchand Varma (PW7) had conducted postmortem on the dead body of Sakshi.

22. Postmortem on the dead body of Alkabai was conducted on 29-07-2011 between 11.25 a.m. to 12.25 p.m. Surface wounds and injuries mentioned in column No. 17 of postmortem report are as under :

"1. Superficial to deep burns present over body surface area. Deep burns at Chest, Perineum, Margins inflamed, floor reddened. Reddening, blackening of skin present. Singeing of scalp hairs present. The distribution of burns is as follows :-

	Part	%	Area Spared
1.	Head, neck, face	7	Posterior of scalp
2.	Chest, abdomen	18	Nil
3.	Back	18	
4.	Upper limb - Right Left	9 9	
5.	Lower Limb Right Left	18 18	
6.	Perineum	01	
	Total =	98%	

2. Heat rupture present over upper third of left thigh near inguinal region, nose pale, no e/o infiltration of blood, no e/o any vital reaction."

23. According to postmortem report at Exhibit 43 and evidence of Dr. Ranjit Madhukar Tandale (PW6), Alkabai had sustained 98% superficial and deep burns all over the body as referred above and they were ante-mortem in nature. Dr. Ranjit Madhukar Tandale (PW6), while expressing his opinion as to cause of death clearly deposed that probable cause of death of Alkabai

was shock due to burn injuries and the same is also mentioned in the postmortem report at Exhibit 43. Burn injuries mentioned in the inquest panchanama at Exhibit 25 lends corroboration to the aforesaid injuries mentioned in the postmortem report.

24. In the cross examination, Dr. Ranjit Madhukar Tandale (PW6) has stated that death can be caused due to suffocation, respiratory system and tongue help in speaking, extensive burn injuries may cause instant death. If the death has occurred due to suffocation, due to black soot particles present adherent to mucosa, nasotharynx, trachea and bronchial may contain sooty particles. However, he has very clearly denied that the suffocation was the cause of death of Alkabai.

25. Postmortem on the dead body of Sakshi was conducted on 30-07-2011 during 11.00 a.m. to 12.00 p.m. Surface wounds and injuries suffered by Sakshi mentioned in column No.17 of the postmortem report are as under :

“1. Superficial to deep burns seen as follows :-

	Part	%
1.	Head, neck, face	6
2.	Right upper limb	5
3.	Left upper limb	8
4.	Chest and abdomen	8
5.	Back	13
6.	Right lower limb	8

7.	Left lower limb	6
8.	External Genital	0
	Total	54%

26. According to Dr. Navinkumar Manikchand Varma (PW7), Sakshi had suffered 54% superficial to deep burn injuries mentioned as above. All the said burn injuries were ante-mortem in nature. While deposing about the cause of death, Dr. Navinkumar Manikchand Varma (PW7) clearly deposed that shock due to burns was the probable cause of death of Kum. Sakshi. The appellant-accused has not seriously challenged the evidence of Dr. Navinkumar Manikchand Varma (PW7). Except the suggestion that cause of death shown in postmortem reports is false, which he denied, no other suggestion was given to him.

27. From the aforesaid evidence, it is clear enough that Smt. Alkabai and Kum. Sakshi both died due to 98% and 54% superficial to deep burns respectively. The appellant-accused has also not disputed the same seriously. However, the dispute raised by the appellant-accused is pertaining to nature of death.

28. To prove its case, prosecution has heavily relied on multiple oral dying declarations made by Smt. Alkabai and circumstances came on record through oral and documentary evidence adduced by it.

29. Spot panchanama at Exhibit 28, which is admitted by the appellant-accused, demonstrates that the incident took place in the house of appellant-accused which was consisting of only one room, ad-measuring 8 ft. X 10 ft. One empty plastic kerosene oil jar and partly burned pieces of saree and petticoat were lying on the spot and during the course of spot panchanama they were seized.

30. It is evident from the record that initially on the basis of MLC report received from Mr. C. K. Sathe, ASI attached to Medical Chowki at Ghati Hospital, Aurangabad, A.D. No.55 of 2011 under Section 174 of Code of Criminal Procedure, 1973, was registered on 29-07-2011 at about 09.55 a.m. Aforesaid inquest panchanamas of dead bodies of Smt. Alkabai and Kum. Sakshi and spot panchanama were drawn during the course of enquiry of said A.D. and not during the course of investigation. Investigation started after lodging FIR on 29-11-2011 at about 03.00 p.m. by Shri Ramesh Bhaurao Khotkar (PW1) who happens to be the father of deceased Alkabai.

31. Shri Ramesh Bhaurao Khotkar (PW1), vide his deposition at Exhibit 21 deposed that since beginning the appellant-accused was addicted to liquor. He used to abuse and beat Smt.

Alkabai frequently after consuming liquor. Smt. Alkabai used to inform him about the same by making phone call and every time he used to give understanding to the appellant-accused. On 28-07-2011 at about 07.00 p.m. Smt. Alkabai telephoned and told him that the appellant-accused beat her. When he told Smt. Alkabai that he would come to her house, in reply Smt. Alkabai said him not to come. On the next day, Smt. Parighabai Bhausahab Salve (PW4), his cousin sister, made a phone call and told him to come at Datta Nagar, Ranjangaon (Shenpunji), Tq. Gangapur, Dist. Aurangabad, immediately. In pursuance of the phone call received from Smt. Parighabai Bhausahab Salve (PW4), he rushed to the house of appellant-accused at Datta Nagar, Ranjangaon (Shenpunji), along with relatives. After reaching there, he saw daughter Smt. Alkabai, in burnt condition, as such he arranged auto rickshaw and carried Smt. Alkabai to Ghati Hospital, Aurangabad. While on the way to the hospital in auto rickshaw, he inquired with Smt. Alkabai as to how the incident occurred, in reply Smt. Alkabai told him that

“in the morning accused beat him then poured kerosene on her person and set her on fire by igniting matchstick. Her son Aniket and daughter Sakshi were also burnt.”

He admitted Smt. Alkabai to the Ghati Hospital, Aurangabad. Soon

after on reaching there, Smt. Alkabai died. He received dead body of Smt. Alkabai after conducting postmortem. After receiving dead body he performed last rituals, cremated the same and then lodged the complaint (Exhibit 22) by proceeding to MIDC, Waluj Police Station.

32. During cross examination he has stated that the distance between his village Vadadhagaon, Tal. & Dist. Aurangabad and Datta Nagar, Ranjangaon (Shenpunji) Tq. Gangapur, Dist. Aurangabad, where house of the appellant-accused is situated, is five to six kilometers. The appellant-accused was working as a labour in one private company situated at MIDC, Waluj and his duty hours were 08.00 a.m. to 05.00 p.m. The funeral of Smt. Alkabai was completed at about 01.30 p.m. Smt. Alkabai used to cook the food on stove. During further cross examination he has denied that when he saw Smt. Alkabai first time, she was unconscious and immediately after admitting her to the hospital she died. He has also denied that Shri Popatrao and Smt. Sonali had admitted his daughter Smt. Alkabai in the hospital. In further cross examination he has very clearly denied that his daughter Smt. Alkabai was burnt due to accident and appellant-accused tried to extinguish the fire. However, he has admitted that accused has also suffered burn injuries.

33. Thus, from the aforesaid evidence of Shri Ramesh Bhaurao Khotkar (PW1), which is corroborated by the complaint at Exhibit 22 lodged by him, it is clear enough that the appellant-accused was drunkard, he used to harass and ill treat his wife Smt. Alkabai after coming home in drunken state, in spite of understanding given by the father of Smt. Alkabai time and again, no change took place in his attitude and conduct, and on fateful day on his coming to the house of appellant-accused (spot of incident) in pursuance of the information received from his cousin sister, Smt. Alkabai made aforesaid dying declaration before him. There was no reason for Shri. Ramesh Bhaurao Khotkar (PW1) to implicate the appellant-accused with the incident.

34. Evidence of Smt. Yamunabai Ramesh Khotkar (PW2), who happens to be the mother of deceased Smt. Alkabai is similar to the evidence of Shri. Ramesh Bhaurao Khotkar (PW1), her husband. She too has deposed about the conduct of the appellant-accused prior to the incident and also about her coming to the spot of the incident along with husband on the day of incident in pursuance of the phone call received from Smt. Parighabai Bhausahab Salve (PW4), and her noticing victims in burnt condition. According to Smt. Yamunabai Ramesh Khotkar (PW2), on making enquiry with Alkabai, she told her that,

“The appellant-accused beat her and poured kerosene on her person and set her on fire by igniting matchstick”.

Her husband admitted Smt. Alkabai to hospital. Smt. Alkabai died at the hospital during treatment. Sakshi and Aniket were also burnt.

35. During cross examination Smt. Yamunabai Ramesh Khotkar (PW2) has stated that they reached the spot at about 06.00 a.m. This statement came on record through cross examination, makes sure that Shri Ramesh Bhaurao Khotkar (PW1) received telephone call made by Smt. Parighabai Bhausahab Salve (PW4) at about 05.30 a.m. Soon after receiving the phone call, he along with wife i.e. Smt. Yamunabai Ramesh Khotkar (PW2) and others left Vadadhagaon, Aurangabad and reached to the house of appellant-accused where the incident took place at about 06.00 a.m. after traveling distance of about five to six kilometers. Therefore, the arguments advanced by Shri. Koli, Advocate for the appellant, that Shri Ramesh Bhaurao Khotkar (PW1) and Smt. Yamunabai Ramesh Khotkar (PW2) directly went to the hospital and by that time Alkabai had passed away, bears no force and substance. In further cross examination Smt. Yamunabai Ramesh Khotkar (PW2) clearly stated that there was no stove, Alkabai used to cook food on earthen furnace and not on stove. This substantive

evidence came on record through cross examination of Smt. Yamunabai Ramesh Khotkar (PW2) negatives the submissions made by Shri Koli, Advocate for the appellant-accused, that before drawing spot panchanama stove was removed from the spot and victims burnt accidentally. In last part of the cross examination, Smt. Yamunabai Ramesh Khotkar (PW2) has denied the suggestion put to her that her daughter Alkabai died due to accident and appellant-accused while saving her received burn injuries. Thus, in short, nothing could be brought on record from the cross examination of Smt. Yamunabai Ramesh Khotkar (PW2) on the basis of which her evidence can be discarded. Thus, evidence of Shri. Ramesh Bhaurao Khotkar (PW1) on the aspect of oral dying declaration made by Smt. Alkabai gets corroboration from the evidence of Smt. Yamunabai Ramesh Khotkar (PW2).

36. Shri Nagnath Gangadhar Bansod (PW3), in relevant period was attached to Begampura Police Station, Aurangabad, as Head Constable. On fateful day, he was on duty at Ghati Hospital Police Chowky, Aurangabad. Vide his deposition at Exhibit 32, he deposed that on 29-07-2011 at about 07.00 a.m. victims were brought to Ghati Hospital in auto rickshaw bearing No. MH-20-AA-2437 in burnt condition. While admitting to the hospital, in his presence, Alkabai informed to medical officer that,

"Her husband poured kerosene on her person and set her ablaze and in the said incident her children also burnt."

Smt. Alkabai had also informed the same to him when he enquired her about the incident. The portion in his aforesaid evidence to the effect that, Alkabai informed to the medical officer in his presence, is omission and he has admitted the same during his cross examination. Besides, during further cross examination he has stated that CMO declared Alkabai dead after examining her. During further cross examination, he has admitted that, in his statement under Section 161 of Code of Criminal Procedure, 1973, he has stated that the victims were brought to the hospital at 07.30 a.m. However, from his further cross examination it has come on record that victims were brought to the Ghati Hospital at 07.12 a.m. Medical papers (Bedhead tickets) states that victims had reached to the hospital at about 07.15 a.m. Thus, merely for the reason that in his statement under Section 161 of Code of Criminal Procedure, 1973, Shri Nagnath Gangadhar Bansod (PW3) has stated that victims were brought to the hospital at about 07.30 a.m., his evidence as to Alkabai's making oral dying declaration about the incident before him cannot be discarded. While recording the statement under Section 161 of Code of Criminal Procedure, 1973, he appears to have stated time of victim's reaching to the Ghati

Hospital, Aurangabad, tentatively. Thus, much capital of this aspect cannot be made when bedhead tickets placed before us clearly state that victims including Alkabai were brought to the Ghati Hospital, Aurangabad, at about 07.15 a.m. At that time, she was conscious and shortly thereafter she lost conscious and at about 07.35 a.m. she died. Thus, like the evidence of Shri Ramesh Bhaurao Khotkar (PW1) and Smt. Yamunabai Ramesh Khotkar (PW2), evidence of Shri Nagnath Gangadhar Bansod (PW3), Police Head Constable, also inspires confidence about oral dying declarations made by Alkabai connecting appellant-accused with incident.

37. Smt. Parighabai Bhausahab Salve (PW4) is the cousin sister of Shri Ramesh Bhaurao Khotkar (PW1). Her house was situated adjacent to the house of the appellant-accused. Vide her deposition at Exhibit 37 she deposed that appellant-accused was addicted to liquor. After consuming liquor, he used to quarrel with his wife and beat her. Every time she used to intervene in the quarrel and give understanding to the appellant-accused. On earlier day of incident appellant-accused came home at 10.00 p.m. and after coming home quarrel took place between him and his wife Alkabai. At about 12.00 a.m. Alkabai called her by knocking the door of her house. Accordingly, she opened the door and came out.

On her coming out, Alkabai told her that the appellant-accused is beating her, upon which she gave understanding to both of them and then they returned back to their house. On the next day (on fateful day) at about 05.00 to 05.30 a.m. somebody knocked the door, therefore she came outside the house by opening the door. On her coming outside, Shri Ravindra Tanaji Tribhuvan (PW5) informed her that smoke is coming out from the house of appellant-accused. Therefore, she rushed to the house of appellant-accused, knocked the door, upon which appellant-accused came outside the house. At that time his one hand and one leg had burnt. Then she went inside the house. On her entering into the house Alkabai told her that,

“The appellant-accused poured kerosene on her person and on the person of her children and set them on fire.”

Thereafter, she informed the same to the father of Alkabai i.e. Shri Ramesh Bhaurao Khotkar (PW1) on phone. Accordingly, parents of Alkabai came and admitted Alkabai to the hospital. During cross examination, she has denied the suggestion that Alkabai was lying in unconscious state. Thus, nothing is brought on record through her cross examination on the basis of which doubt can be raised about her version.

38. Aforesaid substantive evidence of Smt. Parighabai Bhausahab Salve (PW4) speaks volumes that at the time of incident, except appellant-accused and three victims, nobody was present and Alkabai disclosed her about the appellant-accused's setting her on fire by pouring kerosene on her person. Merely for the reason that Smt. Parighabai Bhausahab Salve (PW4) is the cousin sister of Shri Ramesh Bhaurao Khotkar (PW1) her clear, cogent, consistent and natural evidence as to the incident cannot be discarded. It is pertinent to note that, shortly after the incident, she reached to the spot and saw the victims while burning. Her evidence also throws light on the conduct of the appellant-accused and corroborates to the evidence of Shri Ramesh Bhaurao Khotkar (PW1) and Smt. Yamunabai Ramesh Khotkar (PW2) on the said aspect. Since her evidence confirms that Alkabai was conscious when she entered in his house, her further evidence about Alkabai's making oral dying declaration before her regarding the incident cannot be doubted.

39. Like Smt. Parighabai Bhausahab Salve (PW4), Shri Ravindra Tanaji Tribhuvan (PW5), being neighbour, is important independent witness. His evidence lends full support to the evidence of Parighabai. Vide his deposition at Exhibit 38, he deposed that on 19-07-2011 at about 05.30 a.m. he was

proceeding for answering nature's call. He had seen the smoke coming out from the house of appellant-accused while on the way to latrine. Thus, he gave call to Smt. Parighabai Bhausahab Salve (PW4), in pursuance of the call given by him, Parighabai came out from her house and started giving calls to Alkabai for opening the door. The appellant-accused opened the door and came out of his house. At that time the appellant-accused who opened the door found suffering burns, and on looking inside the house, Alkabai, her daughter Sakshi and son Aniket were also seen burning. They extinguished the fire. At the time of extinguishing the fire, Alkabai told her that,

“accused poured kerosene on them and set them ablaze”.

Parighabai informed the same to the parents of Alkabai on phone. Then Alkabai and children were taken to the Ghati Hospital.

40. Nothing could be brought on record through his cross examination which creates doubt about his aforesaid version. No doubt, in cross examination he has stated that his statement under Section 161 of Code of Criminal Procedure, 1973, was recorded by police on 30-07-2011 but, in fact, record shows that it was recorded on 29-07-2011 itself. Therefore, merely for the reason that during cross examination, he has wrongly stated date on which his police statement came to be recorded i.e. 30-07-2011, his evidence

cannot be discarded branding it as after thought. It is pertinent to note that, being neighbor he had no reason to depose falsely when nothing is there showing that he was at inimical terms with the appellant-accused.

41. Testimony of Smt. Parighabai Bhausahab Salve (PW4) and Shri Ravindra Tanaji Tribhuvan (PW5) inspires full confidence as to the truthfulness of oral dying declarations made by Alkabai and at the time of making the same she was conscious and oriented. Since, Alkabai succumbed to the extensive burns shortly after reaching to the Ghati Hospital, Aurangabad, case cannot be thrown away for the reason of not recording her dying declaration either by police officer or medical officer or magistrate.

42. Shri Sanjay Abhimanyu Kamble (PW8) is the panch witnesses of cloths seizure panchanama Exhibit 48 under which cloths of the appellant-accused were seized from the Ward No.22/23 of Ghati Hospital, Aurangabad where he was admitted on 30-07-2011 at about 10.00 a.m. The appellant-accused has not seriously challenged his evidence. Panchanama at Exhibit 48 lends corroboration to his evidence and proves that in the course of investigation, cloths worn by the appellant-accused at the time of incident were seized from him.

43. Shri Jaysingh Narayan Rajput (PW9), PSI, was the investigation officer. During his cross examination suggestion was put to him that Alkabai and her children received burns due to explosion of stove and somebody removed the exploded stove from the spot of incident i.e. house of the appellant-accused before drawing spot panchanama. However, he has denied the said suggestion specifically.

44. When Smt. Yamunabai Ramesh Khotkar (PW2) who happens to be the mother of victim Alkabai made it clear that Alkabai used to cook the food on earthen furnace and not on stove, since she had no stove and that is made clear by her during the course of cross examination, merely relying on vague statement of Shri Ramesh Bhaurao Khotkar (PW1) about Alkabai's cooking food on stove, the defence of the accused that Alkabai and her children burnt due to explosion of stove while preparing tea, cannot be accepted, when nothing is on record about the existence and explosion of stove at spot. It is pertinent to note that even in the statement recorded under Section 313 of the Code of Criminal Procedure, 1973, he has not stated the same.

45. When, abundantly, it is clear from the evidence of Smt. Parigahbai Bhausahab Salve (PW4) and Shri Ravindra Tanaji Tribhuvan (PW5) that at the time of incident except appellant-

accused and victims nobody was present in the house, and oral dying declarations of Alkabai made before Shri Ramesh Bhaurao Khotkar (PW1), Smt. Yamunabai Ramesh Khotkar (PW2), Shri Nagnath Gangadhar Bansod (PW3), Smt. Parighabai Bhausahab Salve (PW4) and Shri Ravindra Tanaji Tribhuvan (PW5) inspires full confidence, under Section 106 of the Evidence Act, burden lies on the appellant-accused to explain as to how Alkabai and her children sustained burns. His explanation in the form of defence is not at all worthy of credence and acceptable. Parents of Alkabai were at hospital, therefore, question of their removing the stove as alleged by the appellant-accused from the spot does not arise and Smt. Parighabai Bhausahab Salve (PW4) and Shri Ravindra Tanaji Tribhuvan (PW5) had no reason to remove the stove from the spot. It seems that considering the time gap between incident and drawing of panchanama, appellant-accused took the false defence of sustaining burns accidentally due to explosion of stove and removal of the said stove subsequently before drawing panchanama.

46. It is pertinent to note that suggestion of victim's sustaining burns due to explosion of stove was only given to the investigation officer Shri Jaysingh Narayan Rajput (PW9) and he denied the same. No such suggestion was given to Shri Ramesh

Bhaurao Khotkar (PW1), Smt. Yamunabai Ramesh Khotkar (PW2) and Shri Ravindra Tanaji Tribhuvan (PW5) during their cross-examination. They all i.e. Shri Ramesh Bhaurao Khotkar (PW1), Smt. Yamunabai Ramesh Khotkar (PW2) and Shri Ravindra Tanaji Tribhuvan (PW5) were suggested only to the effect that Alkabai burnt accidentally. However, no such suggestion was given to Shri Nagnath Gangadhar Bansod (PW3). Since at the time of incident except appellant-accused and victims nobody was present in the house where the incident took place and victim Aniket @ Pinto who survived was only two and half year old child, it was incumbent on the part of the appellant-accused to explain how victims sustained burns. Whatever explanation coming forth from his side is not only vague and inconsistent but also not at all supported by prima facie evidence. On the contrary, spot panchanama which is not disputed by the appellant-accused negatives his contention. When there is no evidence about existence of stove at the spot of incident, the vague contention of the appellant-accused that victims burnt due to explosion of stove not at all can be accepted. Thus, in any angle, defence is not probable.

47. Record shows that there is a delay of few hours in lodging the FIR. Shri Ramesh Bhaurao Khotkar (PW1) has explained the said delay in FIR. Considering the fact that Shri

Ramesh Bhaurao Khotkar (PW1) sustained shock seeing the daughter and grand children burnt extensively and the daughter Alkabai died soon after shifting to the hospital, it was not expected on his part to lodge the FIR by proceeding to the police station, leaving victims unattended and without making arrangement of funeral of Alkabai. He lodged FIR immediately after completion of funeral. Therefore, case of the prosecution, based on multiple dying declarations made by Alkabai, cannot be rejected solely on the ground of short delay in lodging FIR, when there is clear evidence to rope the appellant-accused with the incident.

48. Shri Ramesh Bhaurao Khotkar (PW1), Smt. Yamunabai Ramesh Khotkar (PW2), Shri Nagnath Gangadhar Bansod (PW3) consistently deposed about conduct of the appellant-accused. It is clear from their evidence that appellant-accused was drunkard. He used to harass and ill treat wife Alkabai after coming home in drunken state. Even on earlier day of fateful incident during night he had beaten Alkabai after coming home in drunken state. This conduct of the appellant-accused which is a relevant fact, cannot be lost sight of, as it has close nexus with the fact in issue i.e. death of two victims and sustaining burns by third victim.

49. From the evidence of Shri Jaysingh Narayan Rajput (PW9), it has come on record that he had sent article seized from

the spot viz. empty plastic kerosene oil can / jar, partly burnt pieces of saree and petticoat seized from the spot under the spot panchanama, Exhibit 28 and cloths of the accused attached under panchanama Exhibit 48, proved in the evidence of Shri Sanjay Abhimanyu Kamble (PW8), to the Forensic Lab, Aurangabad for examination and issuance of report under requisition Exhibit 56. Appellant-accused has not disputed the same seriously. Neither suggestion denying, sending of muddemal articles to Forensic Lab nor suggestion that the aforesaid articles were planted was given to the I.O. Jaysingh Rajput during his cross examination. In such circumstances there is no reason to discard C.A. report (Exhibit 59) which speaks volumes that kerosene residues were detected on aforesaid muddemal articles and all the four muddemal articles viz. empty plastic kerosene oil can, partly burnt cloth pieces and ash (seized from the spot) under panchanama Exhibit 28, partly burnt full pant, partly burnt full shirt (seized from the appellant-accused) under Panchanama Exhibit 48. In this way, C.A. report Exhibit 59 also lends full corroboration to the ocular evidence of Shri Ramesh Bhaurao Khotkar (PW1), Smt. Yamunabai Ramesh Khotkar (PW2), Shri Nagnath Gangadhar Bansod (PW3), Smt. Parighabai Bhausahab Salve (PW4), Shri Ravindra Tanaji Tribhuvan (PW5) about oral dying declaration made by Alkabai before them.

50. In case of *Vishram and Others Vs. State of M.P* [AIR 1993 Supreme Court 250], the Hon'ble Supreme Court while dealing with the aspect of oral dying declaration given to the interested witnesses, it is stated in paragraph Nos. 4 and 5 of the judgment as under :

"4. The prosecution relied on the evidence of the two eye-witnesses P.W. 2 Thanuram and his wife P.W. 3. But they turned hostile. P.W. 1 particularly deposed about the oral dying declaration made by Kamal Kishore to him. Likewise P.W. 5 the wife of Kamal Kishore deposed that she went to the place where Kamal Kishore was lying and on being questioned he told her that the appellants had beaten him and Chandra Shekhar. The trial court relying on the two dying declarations spoken to by P.Ws 1 and 5 convicted the appellants. Incidentally it also referred to some of the important admissions made by the two hostile witnesses. In the appeal, the High Court having considered the evidence of P.Ws 1 and 5 and also the admissions made by P.Ws 2 and 3 in the cross examination reached the conclusion that the prosecution established the guilt of the appellants and accordingly dismissed the appeal. In the instant appeal the learned Counsel urged that P.Ws 1 and 5 are interested witnesses and on the basis of the oral dying declarations said to have been made to them by Kamal Kishore the deceased, the appellants can not be convicted and that at any rate it is highly unsafe to convict them without strong corroboration which is not there. Learned Counsel also submitted that Kamal Kishore with multiple injuries could not have been in a position to make such dying declarations to P.Ws 1 and 5.

5. It is a simple case not arising out of any faction.

Because the cattle belonging to the appellants trespassed into the field of the deceased and damaged the crops, a quarrel arose and that ultimately led to the present occurrence. P.W. 1 who is the father of the deceased and P.W. 5 who is no other than the wife of Kamal Kishore, one of the deceased persons, would be the last persons, in such a situation, to implicate the appellants falsely leaving out the real culprits. Both the courts below have discussed the evidence of P.Ws 1 and 5. We have also perused the same. P.W. 1 in the first information report itself has mentioned about the earlier dying declaration and has also given the necessary details. Nothing significant has been elicited in his cross-examination. Likewise, P.W. 5 deposed that she also reached the place of occurrence and found Chandra Shekhar lying unconscious and that her husband Kamal Kishore was conscious and on being asked, he told her that the six appellants attacked him and beat him. Thereafter Kamal Kishore was taken to the hospital. In the cross-examination she has affirmed the same and her evidence does not suffer from any infirmities. The Doctor who examined Kamal Kishore, on being cross-examined, no doubt stated that ordinarily injuries found on the head of Kamal Kishore could cause unconsciousness but it could not positively be said that they would have caused immediate unconsciousness. Relying on this admission, the learned Counsel submitted that it is not safe to rely on the oral dying declarations. It must be noted that the Doctor did not categorically state that Kamal Kishore would have been unconscious immediately after receipt of the injuries and could not have been in a position even to speak that much. We have carefully examined the evidence of P.Ws 1 and 5 and also the reasons given by both the courts below and we are satisfied that no interference is called for. The

appeal is accordingly dismissed.”

51. Facts of the case in hand are quiet identical. The material witnesses to whom Alkabai made oral dying declaration immediately after the incident are the father, mother, parental ant and neighbour. Since, their evidence as to the oral dying declaration made by Alkabai before them is clear, cogent and consistent and defence of the appellant-accused is not at all supported by any circumstance, in view of aforesaid ratio laid down by the Hon’ble Supreme Court, their evidence cannot be discarded merely for the reason that they are interested witnesses.

52. In the case of ***Poonam Bai V. The State of Chhattisgarh*** in Criminal Appeal No. 903 of 2018 (supra), in paragraphs No. 4, 10 and 11 of the judgment, the Hon’ble Supreme Court held as under:-

“4. Mr. Siddhartha Dave, learned senior counsel appearing on behalf of the appellant, has taken us through the entire material on record. He submitted that the prosecution has not proved its case beyond reasonable doubt, there are no eye witnesses to the incident in question and the case of the prosecution mainly rests on two dying declarations. According to the learned senior counsel, the motive for the offence has not been proved, and the High Court was not justified in reversing the judgment of acquittal passed by the trial court, particularly when the judgment of the trial court cannot be said to be perverse. According to him, the trial court was fully justified in acquitting the accused since the sole

circumstance of the dying declarations relied upon by the prosecution has not been proved.

10. There cannot be any dispute that a dying declaration can be the sole basis for convicting the accused. However, such a dying declaration should be trustworthy, voluntary, blemishless and reliable. In case the person recording the dying declaration is satisfied that the declarant is in a fit medical condition to make the statement and if there are no suspicious circumstances, the dying declaration may not be invalid solely on the ground that it was not certified by the doctor. Insistence for certification by the doctor is only a rule of prudence, to be applied based on the facts and circumstances of the case. The real test is as to whether the dying declaration is truthful and voluntary. It is often said that man will not meet his maker with a lie in his mouth. However, since the declarant who makes a dying declaration cannot be subjected to cross-examination, in order for the dying declaration to be the sole basis for conviction, it should be of such a nature that it inspires the full confidence of the court. In the matter on hand, since Exh. P2, the dying declaration is the only circumstance relied upon by the prosecution, in order to satisfy our conscience, we have considered the material on record keeping in mind the well established principles regarding the acceptability of dying declarations.

11. The Naib Tehsildar-cum-Executive Magistrate (P.W.1) has deposed that the police had sent a requisition to the Tehsildar (as per Exh. P-3), who in turn requested P.W.1 to go to the spot and record the statement of the injured. P.W.1 has also deposed that he received such requisition at 12.15 p.m. on the date of the incident, and immediately thereafter, he went to the hospital and

recorded the statement of the victim (Exh.P-1). He has also deposed that he drew the panchnama regarding the recording of the dying declaration in the presence of three persons. It is to be noted that the dying declaration (Exh.P-2) as produced before the Trial Court is only a photocopy, which is not admissible in evidence. The original copy of the dying declaration has not been produced before the Trial Court. Also, though it has been stated by the Naib Tehsildar-cum-Executive Magistrate (P.W.1) that he had taken the signature of three witnesses, the photocopy of the dying declaration does not contain the signature of any witness.

It is the case of the prosecution that P.W. 1 recorded the dying declaration in the hospital. But he has admitted in his cross-examination that none of the doctors were present on that day, and that the hospital was closed since it was a Sunday. He has also admitted in his cross-examination that he did not put any question to the victim to find out whether she was in a position to make a statement or not. He also did not try to verify whether the victim had the power to recollect the incident in question. Hence, it is clear that P.W. 1 did not satisfy himself about the fitness of the victim to make a statement. No verification or certification of the doctor regarding the fitness of the victim to make a statement can be found on the dying declaration either. In addition, absolutely no reasons are forthcoming either from the Investigating Officer (P.W. 12) or from the Naib Tehsildar-cum-Executive Magistrate (P.W. 1) as to why the original dying declaration was not produced before the Trial Court."

In case at hand, the ocular evidence of PW1 to PW5 as to the dying declaration made by Alkabai is clear, cogent and supported by

circumstantial evidence and conduct of the appellant-accused (motive). Therefore, it is worthy of acceptance.

53. In the case of ***State of U. P. V. Madan Mohan and Ors.*** (supra), the Hon'ble Supreme Court had disbelieved the case of prosecution based on eye witnesses and dying declaration of deceased since the eye witnesses failed to explain injury suffered by the accused.

54. In Madan Mohan's case accused had reached police station with bleeding injury promptly after the incident and lodged complaint giving his own version of the incident and eye witnesses had failed to explain the injury suffered by the accused whereas case at hand is based on multiple oral dying declarations made by the deceased Alkabai which not only speaks as to how appellant-accused set the victims on fire but also as to how he also suffered burns and appellant-accused failed to probablize his defence of accidental death. Therefore, in our view aforesaid ration laid down by Hon'ble Supreme Court is not applicable to the case at hand.

55. In case of ***Heikrujam Chaoba Singh V. State of Manipur*** (supra), the Hon'ble Supreme Court has held as under:-

"An oral dying declaration no doubt can form the basis of conviction, though the courts seek for corroboration as a rule of prudence. But before the said

declaration can be acted upon, the court must be satisfied about the truthfulness of the same and that the said declaration was made by the deceased while he was in a fit condition to make the statement. The dying declaration has to be taken as a whole and the witness who deposes about such oral declaration to him must pass the scrutiny of reliability. So far as the statement made to PW2, the brother of the deceased, in the ambulance is concerned, PW2 stated in his evidence that *K* had told him that he had been given blows by the appellant which a dao, *P* with a hockey stick and another person with a lathi. In his cross-examination, he candidly admitted that there were three or four persons inside the ambulance when his brother told him the names of his assailants but none of those disinterested persons have been examined by the prosecution to corroborate the said PW2. The prosecution has offered no explanation for not examining them. While according to the evidence of PW2 the deceased told him that the appellant gave him a dao-blow but according to PW5 to whom the deceased made a declaration in the hospital, the deceased told him that the appellant held a thang and *P* had a hockeystick. Intrinsically, therefore, the so-called dying declaration made by the deceased to PW2 is different from the declaration made by the deceased to PW5. PW2 happens to be the elder brother of the deceased. In the aforesaid premise, it is not safe to hold the evidence of PW2 to be reliable and, therefore, the oral dying declaration as deposed to him by him cannot be pressed into service for bringing home the charges levelled against the accused appellant.

Though PW5 lodged the FIR after learning from his brother in the hospital, he categorically stated therein that the injured was not in a position to speak. The FIR

also did not reveal about the injured making a declaration to the said PW5. PW5 was examined by the police after several days of the occurrence. Even according to him when the deceased in the hospital made a declaration to him, there were several other persons present, yet it is not known as to why none of those people had been examined who could have been relied upon to corroborate the testimony of PW5. PW5 also is the brother of the deceased. The prosecution, therefore, had not examined several other disinterested persons though present when the deceased was making a declaration and chose only to examine the two interested persons. In the aforesaid premises, the conclusion is inescapable that no reliance can be placed on the testimony of PW5. After excluding the two dying declarations from consideration there is no evidence on which the prosecution can be said to have established the charge beyond reasonable doubt as against the appellant. Therefore, the conviction and sentence passed against the appellant has to be set aside and the appellant has to be acquitted by the charges levelled against him."

The aforesaid ratio laid down by the Hon'ble Supreme Court is distinguishable on facts. Therefore, it is not at all helpful to the appellant-accused in the present case for claiming acquittal.

56. In the case of ***Lallu Manjhi V. State of Jharkhand*** (supra) the Hon'ble Supreme Court in paragraph 10 of the judgment ruled as under:-

"10. The Law of Evidence does not require any particular number of witnesses to be examined in proof of

a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness. {See - Vadivelu Thevan etc. v. State of Madras, AIR 1957 SC 614}."

57. In case at hand, testimonies of PW1 to PW5 as to the oral dying declarations made by the deceased Alkabai roping the appellant-accused in the incident of extensive burns suffered by victims are worthy of acceptance. Therefore, their evidence falls in the category of wholly reliable.

58. In the case of *Laxman V. State of Maharashtra*, the Hon'ble Supreme Court in paragraph 3 of the judgment held as under:-

"3. The justice theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this

species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no

requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

59. The case at hand is based on multiple oral dying declarations and circumstantial evidence. Evidence of PW1 to PW5 as to the oral dying declarations made by the deceased Alkabai is worthy of credence. From their evidence, it is clear that at the time of making oral dying declaration, deceased Alkabai was conscious and oriented. During the course of their cross-examination, no suggestion denying the same was given to them. Medical record shows that Alkabai succumbed to the burns at about 07.35 a.m. i.e. after more than one and half hours of incident. Therefore, consistent multiply dying declarations made by Alkabai at earliest cannot be discarded raising doubt about her capacity of

making the same, specially when the appellant-accused failed to probablize his defence.

60. Considering the view of the Hon'ble Apex Court in the case of ***Laxman V. State of Maharashtra*** (supra) that,

“Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion.”

That, we have considered the medical opinion as well as the testimony of the witnesses. As recorded above, the victim had first given her oral dying declaration to Smt. Parighabai Bhausahab Salve (PW4) and Shri Ramesh Bhaurao Khotkar (PW1), Smt. Yamunabai Ramesh Khotkar (PW2), Shri Nagnath Gangadhar Bansod (PW3) and Shri Ravindra Tanaji Tribhuvan (PW5) have adduced corroborative evidence about the said oral dying declaration. The bedhead card produced before us indicates that the victim Alkabai was conscious till 07.20 a.m. She became unconscious at 07.20 a.m. and passed away at 07.35 a.m. Her head, neck and face were partly burnt upto 7%. Her mouth and her tongue were unaffected. Though there were some sooty particles in her throat, however, there was no congestion. We, therefore, in the absence of any material, cannot accept the oral arguments made before us on behalf of the appellant that the

victim was not in a fit mental condition or was not conscious to make any oral dying declaration.

61. From the aforesaid evidence on record, it is crystal clear that appellant-accused is responsible for death of wife Alkabai and daughter Sakshi. He intentionally set Alkabai on fire after pouring kerosene oil on her person and while pouring kerosene on wife Alkabai some kerosene oil spilled on the persons of daughter Sakshi, son Aniket @ Pintu and they too caught fire. Record also speaks volumes that while setting the wife on fire after pouring kerosene on her person, appellant-accused also sustained some burn injuries to his upper and lower limbs. The conduct of the appellant-accused of not opening the door of the house till Smt. Parighabai Bhausahab Salve (PW4) and Shri Ravindra Tanaji Tribhuvan (PW5), seeing the smoke coming out of the house, came and knocked the same, confirms about his intention to finish the wife and children. Though injury certificate of Aniket @ Pintu brought on record but not proved, appellant-accused cannot be relieved from the criminal liability pertaining to the burn injuries suffered by Aniket @ Pintu, a very tender aged child, as ocular evidence proves that along with Alkabai and Sakshi, Aniket has also sustained burns and the appellant-accused has not disputed the same.

62. Having regard to the totality of evidence discussed above, we have come to the conclusion that the impugned order convicting the appellant-accused passed by the learned Additional Sessions Judge, Vaijapur in Sessions Case No. 264 of 2012 passed on 21-12-2012 is correct, proper and legal. Therefore, no interference in it is called for.

63. Accordingly, the criminal appeal is dismissed.

64. Since this Court has appointed Shri S. P. Koli to represent the appellant-accused, his fees are quantified at Rs.10,000/-(Rupees Ten Thousand Only) which is to be paid to him through the High Court Legal Services Sub-Committee, Aurangabad.

(B. U. DEBADWAR, J.)

(RAVINDRA V. GHUGE, J.)

SVH