

A.F.R.
HIGH COURT OF MADHYA PRADESH, JABALPUR

Criminal Appeal No.	71 of 1998
Parties Name	State of M.P. Through Police Station Kotwali, District Khandwa (M.P.) Vs. 1. Natwar S/o Rukhad Caste Haswi, aged 38 years. 2. Hosilal S/o Rubad, aged 30 years, caste Hasbi. 3. Sewanti Bai W/o Rukhad aged 60 years, caste Hasbi. 4. Klabai W/o Natwar, caste Hasbi aged 35 years. 5. Gora Bai W/o Prakash, caste Hasbi, aged 21 years. All resident of Gram Hediav : Police Station Kotwali, District Khandwa (M.P.)
Bench Constituted	Hon'ble Shri Justice S.K.Gangele & Hon'ble Shri Justice Anurag Shrivastava
Judgment delivered by	Hon'ble Shri Justice Anurag Shrivastava
Whether approved for reporting	Yes
Name of counsels for parties	For appellant: Shri Bramhadatt, G.A. for the appellant/State For respondent/State: Shri Siddharth Datt, Advocate, for

	the respondents.
Law laid down	
Significant paragraph numbers	

J U D G M E N T
(21.12. 2017)

This appeal under Section 378(1) of Cr.P.C., has been preferred by the appellant/State against the judgment dated 09.12.1996 passed by First Additional Sessions Judge, Khandwa in S.T. No.190/1996, whereby the respondents\accused persons have been acquitted of the charge of offence punishable under Sections 147, 302 of IPC.

2. The case of prosecution in brief is that the respondents and deceased are resident of village Bediyaw. The house of mother of Durga Das is situated near the house of respondents. Deceased Nanda Bai was wife of Durga Das who was living separately from his mother in the village in another house. Durga Das has three young daughters namely Ku. Jyoti, Bharti and Sandhiya. Respondents Natwar Lal and Hosilal are brothers and Sewanti Bai is their mother. Smt. Kala Bai is wife of Natwar Lal and Smt. Gora Bai is their daughter. Since six-seven months prior to incident Gora Bai was living in her parental house with other respondents at village Bediyaw. Durga Das used to meet Gora Bai whenever he visits his mother's house. Deceased Kamla Bai suspects illicit relationship between Durga Das and Gora Bai. A month prior to incident Kamla Bai had a quarrel with Gora Bai and her parents, on account of

relationship of Gora Bai and Durga Das. She openly blames Gora Bai having illicit relationship with her husband. On 31.07.1996 around 7:30 p.m. in the evening the respondents Natwar, his wife Kala Bai, brother Hosilal, mother Sewanti Bai and daughter Gora Bai came in front of the house of Nanda Bai and blamed her by stating that she was defaming Gora Bai by imputing false allegation of her illicit relationship with Durga Das. Than respondents started abusing and threatening to kill Nanda Bai. A quarrel took place there. Hosilal threatened Nanda Bai to kill and set her family ablaze. Seeing the quarrel, Tara Bai *Jethani* (sister-in-law) of Nanda Bai arrived there and tried to pacify the quarrel and told the respondents that Durga Das is not at home, after his arrival respondents may talk to him and settle the dispute, then Tara Bai returned home. Thereafter, all the respondents entered in the house of Nanda Bai, they caught hold of her, sprinkled kerosene oil on her and her daughters namely Ku. Jyoti, Bharti and Sandhiya and set them ablaze. After committing crime, the respondents ran away from the house. Hearing the cry of Nanda Bai and seeing the flame coming out from the house, Tara Bai, neighbors and other witnesses arrived on the spot, they found Nanda Bai and her three daughters in seriously burnt condition. Meanwhile, Sarpach Babu Lal has been informed about the incident, he intimated the police by telephone and arrived on the spot. Nanda Bai was conscious and she had informed the Sarpanch and witnesses about the incident. Nanda Bai and her daughters were brought to District Hospital Khandwa for treatment. Police arrived at hospital and dying declaration of Nanda Bai was recorded. Nanda Bai

and her daughters succumbed to injuries in the night at hospital during treatment. An intimation of their death were sent from hospital to Police Station Kotwali Khandwa. Police initiated the inquest, the Panchnamas of dead-bodies of Nanda Bai and her daughters were prepared and bodies were sent for postmortem. Police registered FIR Ex.P-16 on 01.08.1996 and investigated the crime. The spot map was prepared, container of kerosene oil, match-box, kerosene lamp and burnt clothes were seized from the spot. The statements of witnesses were recorded and after usual investigation the charge-sheet had been filed against the respondents before Court.

3. The trial Court has framed the charges of offences punishable under Sections 147 and 302 (four counts) of IPC. The respondents abjured guilt and pleaded innocence. The prosecution has examined 17 witnesses whereas the respondents have given no evidence in their defence.

4. The trial Court on appreciation of evidence disbelieved the dying declaration of deceased and testimonies of other prosecution witnesses and found the alleged offence not proved beyond reasonable doubt and consequently acquitted the respondents of the charges of alleged offences.

5. It is submitted by learned counsel for the State that in the present case from the evidence adduced by the prosecution, it is duly proved that the respondents were having enmity with the deceased. They blamed her for

defaming Gora Bai by making false imputations against her character. It is also proved that at the time of incident all the respondents came in the house of deceased Nanda Bai, they had quarrel with her and set her and her daughters ablaze. Nanda Bai informed about the incident to the witnesses and also given a dying declaration at the hospital. The trial Court on erroneous appreciation of evidence taking minor discrepancies into consideration disbelieved the statements of witnesses and dying declaration of deceased. The findings recorded by the trial Court are not sustainable. The prosecution has proved the guilt of respondents beyond reasonable doubt, therefore, appeal be allowed and respondents be convicted for commission of alleged offence.

6. Learned counsel for the respondents has supported the findings recorded by the trial Court. It is contended by learned counsel that the case of prosecution rests upon circumstantial evidence. There is no eye-witness to the incident. There are material discrepancies found in the testimonies of prosecution witnesses. The dying declaration of the deceased does not inspire confidence. It is recorded by police officer. It is not proved that at the time of recording of dying declaration, deceased was fully conscious and fit to make statement. There are discrepancies in the oral and written dying declarations made by the deceased. No independent witness has supported the prosecution case. Due to enmity, all the family members of the respondents have been implicated in the offence. The view taken by the trial Court is just and based upon sound appreciation of evidence. When

two views are possible, then the view taken by the trial Court must be accepted.

7. Heard arguments and perused the record.

8. It is not disputed that on 31.07.1996 in the evening at village Bediyaw Nanda Bai and her daughters Ku. Jyoti, aged about 6 years, Sandhiya, aged about 3 years and Bharti, aged about 6 months sustained burn injuries, they were brought to District Hospital Khandawa for treatment where they expired in the night. Police initiated the inquest, prepared panchanama (Ex.P/4, P/5, P/6 and P/7) of dead bodies and sent the bodies for postmortem. Dr. Shashi Kant (PW-7) deposed that on 01.08.1996 at main hospital, Khandwa he had conducted the postmortem of dead body of Ku. Sandhiya, aged about 3 years and found superficial to deep burn on body approximately covering whole body, 95% burn present all over the body. Cause of death is shock due to extensive burn injuries, which are antimortem. The statement of doctor is duly corroborated by pm report (Ex.P/12) given by the doctor. Similarly Dr. A.K. Shukla (PW-10) has performed the postmortem of Ku. Bharti, aged about 6 months. Dr. Avtar Singh (PW-11) performed postmortem of Smt. Nanda Bai, aged about 32 years and Dr. Sanjay Shrivastava (PW-12) performed the postmortem of Ku. Jyoti, aged about 6 years at main hospital Khandwa on 01.08.1996, found multiple burn injuries all over the body about 90 to 100% and opined that the death was caused due to shock as a result of extensive burn injuries. The statements of doctors (PW-7, PW-10, PW-11 and PW-12) were duly

corroborated by pm reports (Ex.P/12, P/18, P/20 and P/22) respectively given by the doctors. In cross-examination the statements of doctors remained unchallenged. The trial Court has rightly relied upon the statements of doctors and postmortem reports and held the deceased Smt. Nanda Bai and her daughters Ku. Sandhiya, Bharti and Jyoti have been died due to burn injuries. Their deaths are homicidal.

9. Now the question arises whether the respondents have formed an unlawful assembly and being members of assembly in furtherance of common object caused the murder of deceased Smt. Nanda Bai and her daughters by setting them ablaze ? This is an appeal against the acquittal recorded by the trial Court. It is settled law that while exercising the appellate jurisdiction against the judgment of acquittal the appellate Court has full power to re appreciate and review the evidence upon which an order of acquittal is based. When it is found that the decision of trial Court is based on evidence and the view taken is not a reasonable and plausible then the appellate Court can interfere and set-aside the judgment by marshaling the entire evidence on record. Hon'ble Apex Court in case law ***Jodhan Vs. State of M.P. (2015) 11 SCC 52*** in para 17 reiterates the principle applicable in the cases of appeal against acquittal as under:-

“In Ganpat v. State of Haryana, (2010) 12 SCC 59, after referring to earlier authorities certain principles have been culled out. They read as follows:-

15. The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly, against an order of acquittal:

(i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.

(ii) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(iii) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.

(iv) An order of acquittal is to be interfered with only when there are 'compelling and substantial reasons' for doing so. If the order is 'clearly unreasonable', it is a compelling reason for interference.

(v) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed."

10. Keeping in view of the principle laid down by Hon'ble Apex Court we have to scrutinize whether the appreciation of the evidence by the learned trial Judge was so unacceptable having not properly marshaled and hence, High Court is obliged to re-appreciate evidence and record a conviction. There is no witness to incident. The case of prosecution rests upon the circumstantial evidence. The prosecution has suggested mainly five circumstances against the respondents.

i. There was enmity between the deceased Nanda Bai and the respondents on account of imputations made by Nanda Bai on the character of Gora Bai, blaming her to have illicit relations with her husband Durga Das.

ii. The respondents had a quarrel with the deceased Nanda Bai soon before the incident on account of aforesaid imputation. The respondents were blaming Nanda Bai for defaming Gora Bai.

iii. Soon after the incident the respondents were seen running away from the scene of occurrence.

iv. The deceased Nanda Bai had made oral dying declaration to the witnesses who arrived on the spot soon after the incident.

v. Deceased had given dying declaration to Police Officer, Ravi Shanker at the hospital.

11. It is settled law that the circumstance from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature to connect the accused with the crime. All the links in the chain of events must be established beyond a reasonable doubt and the established circumstances should be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with this innocence.

12. It is not disputed that respondents Gora Bai is daughter of Natwar and Kala Bai. Hosilal is brother of Natwar and Sewanti Bai is mother of Natwar and Hosilal. Thus, all the respondents are close relatives. Durga Das (PW-6) deposed that Nanda Bai was his wife. The house of respondents is situated near the house of mother of Durga Das. Durga Das was living separately with his wife. At the time of incident Gora Bai was living in her parental house with respondents. Nanda Bai was suspecting of illicit relationship between Durga Das and

Gora Bai. She blamed Durga Das for keeping illicit relationship with Gora Bai and used to make quarrel on account of their relationship. Three months prior to the incident when Durga Das was returning home from the field respondent Natwar met him and told that your wife is defaming my daughter, tell her if she would not stop this, she would face dire consequences. In cross-examination of this witness it is suggested by the respondents that on account of keeping relations with Gora Bai, Nanda Bai quarrels with Durga Das every day. Thus, the defence is not controverting above facts. The statement of Durga Das is also corroborated by witnesses Tara Bai (PW-1) and Tara Chand (PW-16). Tara Chand deposed that a month prior to the incident there was a quarrel between Nanda Bai and respondents Sewanti Bai and Gora Bai, on account of making imputation by Nanda Bai against bad character of Gora Bai. In cross-examination the above statements of witnesses Durga Das, Tara Bai and Tara Chand remained unchallenged by the respondents, therefore, we can rely upon their testimonies and believe that there were inimical terms between the deceased and the respondents on account of relationship of Durga Das and Gora Bai. Respondents alleges that Nanda Bai was making false allegation on the character of Gora Bai and defaming her.

13. Tara Bai is the wife of elder brother of Durga Das. Tara Bai (PW-1) deposed that on the date of incident she was at home, respondents Sewanti Bai and Hosilal came there. Sewanti Bai told her that Nanda Bai is defaming Gora Bai by making false allegations of her illicit

relationship with Durga Das. Therefore, they are going to talk to Nanda Bai about this act and you do also come with us. On asking of Sewanti Bai, Tara Bai went with them to the house of Nanda Bai, other respondents also joined them on the way. When they reached near the house of Nanda Bai, she saw Nanda Bai was standing in front of her house. Seeing her Sewanti Bai started abusing Nanda Bai and other respondents also joined her in abusing. A verbal exchange of words and quarrel started there. Tara Bai tried to intervene and pacify the respondents and after some time she returned home. Respondents were still indulged in abusing Nanda Bai. The above statement of Tara Bai remained uncontroverted in cross-examination. In her police statement (Ex.D/1) she had stated presence of all the respondents who joined her on the way when she went to the house of Nanda Bai. She had also stated in Ex.D/1 that Hosilal was threatening to kill Nanda Bai. Therefore, we do not find any material omission of facts narrated by her in her statement from her police diary statement.

14. Manohar (PW-2) deposed that he is neighbor of Durga Das. On the date of incident at around 06:30 pm in the evening when he returned from field he saw the respondents Sewanti Bai, Kala Bai and Gora Bai were present on the square near his house and abusing Nanda Bai. After sometime he went to the village of her sister. Although, this witness has been declared hostile but, he verifies the fact that at the time of incident, respondents No.3, 4 and 5 were present in front of the house of deceased Nanda Bai and abusing her. House of Manohar is adjacent to house of Nanda Bai.

15. Kailash (PW-5) deposed that at the time of incident he was standing near the house of Manohar, he saw the respondents Hosilal, Natwar, Sewanti Bai, Gora Bai and Kala Bai were present in front of house of Nanda Bai. They were abusing Nanda Bai and Hosilal was threatening her to assault by sword and ruin the whole family. Thereafter he came back to his house. Although, in his police statement (Ex.D/2) he has not specifically stated that Hosilal was threatening to assault the deceased by sword and ruin the family but, it is mentioned in police statement that all the respondents were threatening Nanda Bai to beat by sword and kill the whole family. Therefore, we do not find any material discrepancies in the statement of Kailash in this regard.

16. Thus, the statement of Tara Bai is corroborated by witnesses Kailash and Manohar. Although, Manohar has been declared hostile by the prosecution but only on this ground his entire testimony cannot be rejected. Hon'ble Apex Court in case law ***Ramesh Vs. State of Haryana (2017) 1 SCC 529 in para 43*** observed as under:-

"In State v. Sanjeev Nanda, (2012) 8 SCC 450, the Court felt constrained in reiterating the growing disturbing trend:

"99. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law thereby, eroding people's faith in the system.

100. This court in State of U.P. v. Ramesh Prasad Mishra and Anr. [AIR 1996 SC 2766] held that it is equally settled law that the evidence of hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. In K. Anbazhagan v. Superintendent of Police and Anr., (AIR 2004 SC 524), this Court held that if a court finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court and they found the accused guilty.”

17. Thus, relying upon the testimony of the witnesses Tara Bai, Manohar and Kailash it is proved that at the time of incident the respondents went in front of house of deceased Nanda Bai. They were abusing her and a quarrel took place between them.

18. Tara Bai (PW-1) further deposed that when respondents were abusing the deceased, she returned home and after sometime she again went towards the house of Nanda Bai, she saw two persons running away from the house of Nanda Bai. She went in the house and found Nanda Bai and her daughters in burnt condition. Nanda Bai told her that Sewanti Bai and Kala Bai set her and her daughters ablaze by pouring kerosene oil on her and her daughters. In cross-examination Tara Bai deposed that after the incident, the neighbours and other people of locality arrived at the scene of occurrence, then Sarpach was called and till his arrival nobody was

allowed to go inside the house where Nanda Bai was lying. Later on, Sarpanch came and he alongwith 3 – 4 persons went inside the house. Nanda Bai was unconscious and she did not tell anything to Sarpanch. Durga Das the husband of Nanda Bai also arrived there by that time. Thus, this witness tries to say that when Sarpanch came and went near the deceased Nanda Bai she was unconscious and did not make any statement to Sarpanch or any other persons regarding the incident. We cannot rely upon above statement of the witness because she has further stated in her cross-examination that when Sarpanch and 3 – 4 persons went inside the house, to see Nanda Bai, she did not accompany them. She has clearly stated that after going of Sarpanch inside the house what happened there she does not know because she remained outside. This clearly shows that this witness was not present at the time when Sarpanch and 3 – 4 persons had asked the deceased about the incident. Than how could she say that the deceased had not made any statement to Sarpanch and other persons. This statement of witness appears to be false and unreliable. Leaving apart above statement the remaining part of statement of Tara Bai regarding quarrel between respondents and deceased Nanda Bai soon before the incident and making of statement by deceased to Tara Bai after the incident inspires confidence.

19. The maxim "falsus in uno falsus in omnibus" has no application in India. In the case law ***Gangadhar Behera Vs. State of Orissa (2002) 8 SCC 381*** Hon'ble Apex Court observed as under:-

“15. To the same effect is the decision in State of Punjab v. Jagir Singh, (AIR 1973 SC 2407) and Lehna v. State of Haryana, (2002 (3) SCC 76). Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of "falsus in uno falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'. (See Nisar Alli v. The State of Uttar Pradesh (AIR 1957 SC 366)).

20. Munnalal alias Devi Das (PW-3) deposed that at the time of incident he was present in his Tea shop. Durga Ram told him that Nanda Bai and her daughters have been burnt. He went to the house of Nanda Bai and saw them in burnt condition. Than immediately he went to inform Sarpanch Babu Lal. Tara Chand met him on the way and he also accompanied him to the house of Babu

Lal. Babu Lal was present in his house. He informed Babu Lal that Nanda Bai and her daughters have been burnt. Babu Lal intimated police and hospital by telephone and called the ambulance. Then Munna Lal, Sarpanch Babu Lal and Tara Chand reached at the house of Nanda Bai and went inside the room and found Nanda Bai and her daughters in burnt condition. He and Babu Lal Sarpanch asked Nanda Bai about the incident and she told that respondents have set her and her daughters on fire by sprinkling kerosene on them. After sometime police and ambulance came there and took Nanda Bai and her daughters to hospital.

21. In cross-examination this witness Munna Lal has stated that after getting information of the incident he went to the house of Nanda Bai and found her unconscious, than he rushed to the house of Sarpanch Babu Lal and returned with him. At that time Nanda Bai became conscious and told them about the incident. He has denied the suggestion of defence that Nanda Bai was unconscious and did not make any statement to him. This witness has categorically deposed that till proceeding to hospital, Nanda Bai was conscious and was talking. In view of aforesaid we do not find any material discrepancy in his statement.

22. The statement of Munna Lal is corroborated by Tara Chand (PW-16). He is elder brother of Durga Das. He deposed that at the time of incident at around 8 O' clock in the night he was returning home from the field, the witness Radha Kishan and Munna Lal met him on the way. They informed him that Nanda Bai and her 3

daughters have been burnt and they are going to inform Sarpanch. It is further deposed by Tara Chand that he also accompanied Munna Lal and went to the house of Sarpanch Babu Lal and informed him about the incident. Babu Lal intimated police at Khandwa by telephone then he came with Sarpanch and Munna Lal and other witnesses to the house of Nanda Bai. He found Nanda Bai and her daughters in burnt condition. Nanda Bai told them that the respondents entered into her house and told her that she was defaming Gora Bai by making false imputation in respect of her character and thereafter Sewanti Bai poured kerosene oil on her and set her on fire. In cross-examination this witness has categorically stated that when Nanda Bai had made statement to Sarpanch, he was also present there. He has denied the suggestion of defence that the deceased was burnt by her husband Durga Das.

23. Another witness Kailash (PW-5) deposed that at the time of incident when respondents were abusing Nanda Bai in front of her house, he remained there for some time and then came back to his house. After taking meal, he again went towards house of Nanda Bai, he saw the respondents running away, near the house of Chhogalal. He asked respondents why they are running but they did not reply. He went further and saw the light of flame coming out from the house of Durga Das. He went there and saw Nanda Bai and her daughters were burnt and Tara Bai and Manohar were dousing the fire. A tin of kerosene oil was lying there. Meanwhile, Sarpanch Babulal came there. Sarpanch asked Nanda Bai as to how she caught fire, she told that respondents had

surrounded her and Savanti Bai set her ablaze by pouring kerosene oil on her. The daughters of Nanda Bai had also sustained burn injuries. After some time ambulance came and Nanda Bai and her daughters were taken to District Hospital Khandwa. He came to hospital with the deceased Nanda Bai in ambulance. Nanda Bai was admitted in the hospital where police had recorded her statement. Nanda Bai and her daughters all have been died in the night. This witness has remained firm in cross examination and we do not find any material discrepancy in his version.

24. Durga Das (PW-6) is the husband of the deceased. He deposed that on the date of incident in the evening he was returning home from the field, respondent Natwar met him, he told him that your wife is defaming my daughter. Other respondents were also standing there. Then, Durga Das went to his mother's house to keep the bullock cart there and returned home. In his house, he found his wife Nanda Bai and daughters were in burnt condition. Nanda Bai told him that the respondents surrounded her and Sevanti Bai sprinkled kerosene oil and set her ablaze by a lamp. Her daughters were also burnt in the fire. In cross-examination he has further stated that when he arrived at home, Sarpanch Babulal and other witnesses were present there. Police did not come till 2-3 hours, then Sarpanch went to Police Station by motorcycle. Police came at about 10 O'clock in the night and thereafter, Nanda Bai and her daughters were taken to Hospital by ambulance. He also came to hospital in the ambulance. He has denied the

suggestions of defence that the deceased herself set her on fire by pouring kerosene oil on her and her daughters.

25. Sarpanch Babulal (PW-4) deposed that on the date of incident Narayan and Tara Chand came to his house and told him that the wife of Durga Das and his daughters have been died due to burn injuries. They told him to inform police, then he informed police by telephone, thereafter, he went to the house of Durga Das and found his wife and daughters were burnt. He had no talk with wife of Durga Das or his daughters. They seem to be unconscious, then he came to police station Khandwa. Prosecution has declared this witness hostile. Babulal denied that Nanda Bai had informed him against the respondents and told that respondents had set her ablaze. As he has been declared hostile therefore we can not rely upon his testimony.

26. Ravishankar (PW-15) deposed that on the date of incident 31.07.1996, he was posted as City Superintendent of Police (CSP) at Khandwa. After getting information of incident he reached to Government Hospital Khandwa where Nanda Bai was admitted. He had recorded the dying declaration of Nanda Bai Ex.P-23 wherein she had stated that the respondents Natwar, his mother, Hosilal, Gora Bai and Kala Bai had set her ablaze by pouring kerosene oil on her. The recording of dying declaration was completed at 11:35 p.m. At the time of recording of dying declaration, Nanda Bai was fully conscious and gave her statement after understanding the questions. The statement was recorded before witnesses Balram and Jagan, and Dr. S.S. Chouhan

verified it. Deceased Nanda Bai and witnesses had marked their thumb impressions on dying declaration. In cross-examination, it is further deposed by the witness that he had received information of incident from control room at 8:50 p.m. He visited to village Bediyaw and found Nanda Bai and her daughters in burnt condition. Nanda Bai and her two daughters were alive and one daughter has been died. He called the ambulance and brought Nanda Bai and her daughters to hospital at Khandwa and got them admitted for treatment. The statement of this witness is corroborated by Jagat (PW-15) who deposed that Nanda Bai had given dying declaration before police wherein he had stated against the respondents for setting her ablaze. Jagat is the witness of dying declaration Ex.P-23. Other witness of dying declaration Balram (PW-14) has not supported it and has been declared hostile by prosecution. This witness Balram has admitted his signature on Ex.P-23, he has not assigned any reason why he has signed this document when it was not recorded before him. This shows that he is hiding the fact and not stating the truth.

27. In the present case we find oral dying declaration made by the deceased before witnesses Tara Bai, Durga Das, Kailash, Munna Lal and Tara Chand, who arrived on the scene of occurrence soon after the incident and one written dying declaration made by deceased to Police CSP Ravi Shankar (PW-15). In disputably conviction can be recorded on the basis of dying declaration alone but therefore, the same must be wholly reliable. The admissibility of dying declaration is explained by Hon'ble

Supreme Court in case law ***Ramesh v state of Haryana AIR 2016 SC 5554*** as under:-

“Law on the admissibility of the dying declarations is well-settled. In *Jai Karan v. State of N.C.T., Delhi*, this Court explained that a dying declaration is admissible in evidence on the principle of necessity and can form the basis of conviction if it is found to be reliable. In order that a dying declaration may form the sole basis for conviction without the need for independent corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable and free from blemish. If, in the facts and circumstances of the case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the court on strict scrutiny finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence, neither extra strong or weak, and can be acted upon without corroboration if it is found to be otherwise true and reliable.”

28. According to version of Ravi Shanker (PW-13) who is C.S.P. it appears that after receiving information of incident he rushed to the house of Nanda Bai and taken her and her daughters for treatment to District Hospital Khandwa by ambulance. He deposed that Nanda Bai was in serious condition, therefore, he himself had recorded her dying declaration (Ex.P/23). The dying declaration was recorded at 11:35 pm and Nanda Bai expired at

around 01.30 am in the night. It is explained by this witness that although, the Magistrates were available in the city but he did not call them for recording of dying declaration looking to the condition of Nanda Bai. He has categorically deposed that at the time of recording of dying declaration, Nanda Bai was fully conscious and capable of making statement. Nothing elicited from his cross-examination to show that he is an interested witness and the dying declaration is fabricated one. Simply because he is a Police Officer, we cannot disbelieve his testimony. Dying declaration can be made before Police Officer. Hon'ble Apex Court in **Ramesh v. State of Haryana (2017)1 SCC 529** in para 32 observed as under:-

“It is immaterial to whom the declaration is made. The declaration may be made to a magistrate, to a police officer, a public servant or a private person. It may be made before a doctor; indeed, he would be the best person to opine about fitness of dying man to make the statement, and to record the statement, where he found the life was fast ebbing out of dying man and there was no time to call police or the Magistrate.” Hon'ble Supreme Court in the matter of **Paras Yadav v. State of Bihar reported in (1999) 2 SCC 126** held that “a statement of the deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can also be treated as dying declaration after the death of the injured and relied upon if the evidence of the prosecution witnesses clearly establishes that the deceased was conscious and was in a fit state of health to make the statement”. In the case law **Gulzari Lal Vs. State of Haryana AIR 2016 SC 795** Hon'ble Apex

Court has relied upon the dying declaration recorded by Police Head Constable without having the certification of the doctor regarding fitness of the deceased.

29. In the present case witness Jagat (PW-15) has stated that in the hospital during treatment Nanda Bai was conscious. Other prosecution witnesses Munna Lal (PW-3), Kailash (PW-5) and Durga Das (PW-6) have categorically deposed that when Nanda Bai was taken to hospital she was conscious. Thus, we can rely on testimony of C.S.P. Ravi Shanker (PW-13) that at the time of recording of dying declaration Nanda Bai was fully conscious. Thus, the dying declaration (Ex.P/23) recorded by Police Officer Ravi Shanker is fully corroborated by the oral dying declaration given by Nanda Bai to witnesses Munna Lal (PW-3), Kailash (PW-5), Durga Das (PW-6), Tara Chand (PW-16) and Tara Bai (PW-1).

30. On perusal of impugned judgment it appears that, the trial Court has disbelieved the case of prosecution mainly on the ground that the prosecution has not examined the witnesses Rama Khiyali and Gulab who reached on the spot soon after the incident and douse the fire. This view is erroneous. In case law **Jodhan Vs. State of M.P. (2015) 11 SCC 52** it is submitted by counsel for the appellant that the prosecution has deliberately not examined other independent material witnesses who were present at the spot and, therefore, whole case of prosecution becomes unacceptable. Hon'ble Apex Court observed that "Court is required to first consider and assess credibility of evidence available

on record and if Court finds that evidence adduced is worthy of credence, testimony has to be accepted and acted upon, though there may be other witnesses available who could also have been examined but not examined." In the present case also the witnesses who reached on the spot soon after the incident has been examined by the prosecution. Therefore, merely non-examination of other witnesses who douse the fire is immaterial and we cannot doubt the veracity of witnesses examined.

31. The trial Court has doubted on the oral dying declaration made by Nanda Bai, firstly on the ground that the witness Tara Bai (PW-1) deposed that when Sarpanch and other witnesses arrived at the scene of occurrence, Nanda Bai was unconscious and she did not make any statement, secondly witness Munna Lal (PW-3) deposed that when he reached at scene of occurrence, he found Nanda Bai was unconscious. We do not agree with the view of trial Court. Earlier in para 16 of judgment, we have already considered the statement of Tara Bai and found that she was not present when Sarpanch and other witnesses went near Nanda Bai and asked her about the incident. Therefore, we cannot believe the statement of Tara Bai that Nanda Bai did not make any dying declaration to other witnesses. As far as statement of Munna Lal (PW-3) is concerned, it appears that first time when he reached at the scene of occurrence, he saw Nanda Bai was unconscious, then he hastily rushed to call Sarpanch and returned with Sarpanch and Tara Chand. At that time, he found Nanda Bai fully conscious, this fact is described by the witness

in his cross-examination paras 7 and 8. Thus, we cannot doubt the oral dying declaration of Nanda Bai made before the witnesses.

32. The trial Court has given undue weightage to minor discrepancies occurred in the statements of Tara Bai (PW-1), Kailash (PW-5) and Manohar (PW-2) in judgment paras 32 and 33. In this regard we find that Tara Bai (PW-1) has categorically deposed that Sevanti Bai and Hosilal called her from her house and went to the house of Nanda Bai. All the respondents who were standing outside had joined them. Tara Bai has stated that all the respondents were indulge in abusing and quarreling with Nanda Bai. Thus, the presence of all the respondents in front of house of Nanda Bai has been established from the testimony of Tara Bai. This fact is also corroborated by Kailash (PW-5). When all the respondents were present and abusing the deceased then it may be possible that Kailash had noticed Hosilal and Natwar abusing Nanda Bai and other witnesses Manohar (PW-2) noticed, Sewanti Bai, Kala Bai and Gora Bai abusing Nanda Bai. This is not possible that all the respondents were abusing the deceased simultaneously. There was heated exchange of words and quarrel. Due to lapse of time and weakness of memories, witnesses are not able to state the exact role of each respondents during quarrel.

33. The trial Court has given undue weightage to the statement of Tara Bai wherein she had stated that when she again went towards the house of Nanda Bai, she saw Sewanti Bai and Kala Bai running away from the spot.

Tara Bai is not certain about this fact. She had admitted that she could not identify the persons who were running away because there was dark and she could not see them. In this regard, statement of Kailash (PW-5) is important who had seen all the respondents running away. There is minor discrepancies in the statement of witnesses as to who had sprinkled kerosene oil on the deceased and lit the fire, which are not important. This is settled law that much weight cannot be given to minor discrepancies which are bound to occur on account of difference in perceptions, loss of memory and other invariable factors. The scene of murder is rural, witnesses to the case are rustic and so their behavioural pattern and perceptive habits have to be judged as such.

34. Hon'ble Apex Court in case law **Appabhai v. State of Gujarat, 1988 Supp. SCC 241** observed as under

"13 The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.

35. In the present case it is established that there was enmity between the respondents and Nanda Bai on account of imputations made by Nanda Bai on character of Gora Bai. At the time of incident, all the respondents went to the house of Nanda Bai and started abusing and quarreling with her. Respondents Hosilal was threatening to kill Nanda Bai and her entire family. This indicates about common object of assembly. It can be formed on the spot also. After the incident, the respondents were seen running away from the scene of occurrence. The deceased had made oral dying declaration to witnesses PW-1, PW-3, PW-5, PW-6 and PW-16 who arrived on the spot soon after the incident. Thereafter, she had made dying declaration Ex.P-23 to CSP Ravi Shankar (PW-15). All the dying declarations are consistent wherein the deceased had stated the involvement of all the respondents in commission of crime. It is not acceptable that Durga Das has ablazed his wife and three daughters. He was not present at the time of incident. Thus, it is proved that respondents had formed unlawful assembly at the time of incident. The prosecution has been able to establish not only respondents presence but also active participation as a member of unlawful assembly. They all entered in the house of deceased. It may be possible that some of the members of unlawful assembly might not have set the deceased ablaze but thereby they did not cease to be a member of unlawful assembly. They shall be vicariously liable for act of any member of the assembly which had been committed in furtherance of common object of assembly.

36. Thus, in the present case we find that laying emphasis on the minor discrepancies and omissions in the evidence of prosecution witnesses, who are natural witnesses to the occurrence, the learned trial Court has doubted the dying declarations made by the deceased. The dying declaration Ex.P-23 and other oral dying declarations of the deceased are consistent with the circumstances on record. The trial Court on erroneous appreciation of evidence has disbelieved the dying declarations and recorded the acquittal in favour of the respondents. In appeal against the acquittal, if a possible view has been taken, no interference is required, but if the view taken is not legally sustainable, the Court has ample powers to interfere with the order of acquittal.

37. According, we hold that the case against the respondents stands fully established. The view taken by the trial Court for acquittal is not a possible view. The appeal is allowed. The impugned judgment and order of acquittal passed by the trial Court is set aside. It is held that the respondents being member of the unlawful assembly, in furtherance of common object of assembly set the deceased Nanda Bai and her daughters Ku. Jyoti, Sandhya, Bharti ablaze by pouring kerosene oil on them and committed their murder. The respondents Sewanti Bai and Kala Bai poured kerosene oil on deceased and her daughters and set them ablaze. The other respondents also participated in commission of crime being member of unlawful assembly. Therefore, respondents Sewanti Bai and Kala Bai are held guilty for commission of offence punishable under Sections 147 and 302 of IPC (four counts) and other respondents

Natwar, Hosilal and Gora Bai are held guilty for commission of offence punishable under Section 147 and 302 read with Section 149 of IPC (four-counts) and sentenced to undergo RI for six months and RI for life and fine of Rs.1000/- respectively. In default of payment of fine, they be served six months of imprisonment.

38. The bail-bonds of respondents are cancelled and they are directed to surrender before the trial Court to serve out the sentence imposed by this Court.

(S.K.Gangele)
Judge

(Anurag Shrivastava)
Judge

haider/Vin**