cr.a9289j 30.4.97

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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 92 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes r r not? Yes r or not? Yes r or not? Yes r or not? Yes r or not? Yes r or not? Yes r or not? Yes r or not Yes r or not? Yes r or not? Yes r or not? Yes r or not? Yes r or not? Yes r or not? Yes r or not? Yes r or not? Yes r or not? Yes r or not? Yes r or not? Yes r or not? Yes r or no ? Yes r or not? Yes r or not? Yes r or not? Yes r or not? Yes r or not? Yes r or not? Ye r or not? Yes r or not? Yes r

3. Whether Their Lordships wish to see the fair copy of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge? No

DIPAKKUMAR KANTILAL THAKKAR

Versus

STATE OF GUJARAT

Appearance:

MR VIVEK BAROT for Petitioner

Mr. S.R.Divetia APP for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE S.D.PANDIT
Date of decision:9.5.97 /97

JUDGEMENT (Per: Pandit.J)

Dipakkumar Kantilal Thakkar has preferred the present appeal against the judgment delivered by the Additional Sessions Judge of City Civil and Sessions Court, Ahmedabad in Sessions Case No. 183/88 on 30.1.89 by which he has held the appellant guilty of the offence under section 302 IPC and sentenced him to suffer R.I. for life.

2. Deceased Shilpaben is the wife of the present appellant. Her marriage with the present appellant was solemnised about 9 months prior to the date of the incident which took place on 11.2.88 at about 8 pm. It is the case of the prosecution that the appellant was in the habit of drinking and when the appellant and the deceased Shilpaben were living in the joint family consisting of the appellant, appellant's brother brother's wife as well as his mother-original accused no.2 and the appellant used to torture and harass Shilpaben by making dowry demands. Thereafter there was intervention by the parents of Shiplaben and elder brother of present appellant by name Raghu and thereafter Shilpaben and appellant started living separately from the said members of the family. But even thereafter there was no improvement in the conduct of the present appellant. He continued to return every day under the influence of drink . It is further the case of the prosecution that on 11.2.88 present appellant returned at about 7.00 p.m. and at that time he was also drunk. After he returned home, Shiplaben questioned him as to why he had returned home after consuming liquor and therefore, there was some exchange of words between the two. Thereafter the accussed-appellant closed the door from inside of their room. He also closed the windows of the room and then he physically assaulted Shilpaben and took kerosene from the stove and sprinkled the same on her person and then set fire to her. The flames and light of the fire was witnessed by prosecution witness

Maheshkumar son of the landlord and he and other neighbours knocked the door. Thereafter the accused appellant opened the said door and at that time they found her in flames. They poured water on her. Some quilts were also thrown on her and the fire was extinguished. At that time accused had also joined in extinguishing the fire. Shilpaben was removed to the civil hospital, Ahmedabad and the police were informed. The police then arranged for recording the dying declaration. Accordingly p.w. 2 Yahoshwa William, executive magistrate went to the civil hospital and recorded her dying declaration. In her dying declaration she told that her husband had returned home in the evening under the influence of liquor and therefore, she questioned him and when she questioned him about the same, he became aggressive. He thereafter closed the door of the room and then assaulted her and sprinkled kerosene on her person from the stove which was lying nearby and then set fire to her.

3. Thereafter the police officer Devjibhai Kanibhai Bava went to the civil hospital and recorded her statement and that statement of her was treated as the FIR. Shilpaben had succumbed to the burn injuries sustained in the said fire and met with the death on 13.2.88.

4. On completion of the necessary investigation the police has sent a charge sheet against the present accused in the court of learned Metropolitan Magistrate,Ahmedabad and the learned Metropolitan Magistrate was pleased to commit the accused to the court of Sessions. A charge was framed against the present appellant and his mother Jyotiben for the offence punishable under section 498A and 302 IPC on 9.7.88.

5. The accused pleaded not guilty to the charge. Their defence was of total denial. On behalf of the appellant it was tried to suggest that the fire in question could be suicidal. In order to prove its case against the present appellant the prosecution had examined in all 17 witnesses and the prosecution has broadly relied upon the dying declarations made by the deceased before the executive magistrate, The dyeing declaration made before the police who recorded the same in writing and the earlier oral declaration made by her to her father p.w. 5 Arunbhai Thakkar, mother p.w. 14 Kantaben and one Kantilal Daxini p.w. 15. The learned Additional City Sessions Judge accepted the evidence led by the prosecution. He rejected the suggestion made on behalf of the accused that the fire to Shilpaben could be

suicidal. He found the present appellant guilty of the offence punishable under section 302 IPC. He came to the conclusion that the accused Jyotiben had not committed any offence. He consequently acquitted her of all the charges levelled against her. Having found the accused no.1-appellant herein guilty of the offence under section 302 IPC, he sentenced the accused for imprisonment to life.

6. Being aggrieved by the said decision the appellant has come in appeal before this court.

7. The learned advocate for the appellant has vehemently urged before us that the learned Addl. Sessions Judge has erred in holding that deceased Shilpaben had sustained homicidal burns by accepting evidence particularly regarding the dying declaration of said Shilpaben. He contended before us that in view of the material on record the learned Addl. Sessions Judge ought to have given benefit of doubt to the present appellant. It is true that the onus is on the prosecution to prove the charge against the accused beyond reasonable doubt. But the reasonable doubt could not be on account of timidity of mind. It is true that as per law, the prosecution must prove beyond reasonable doubt about the guilt of the accused, or otherwise he is entitled to benefit of doubt. But the benefit of doubt does not mean that the prosecution evidence must be strong as to exclude even a remote possibility that the accused could have committed the offence. On the contrary when the guilt of the accused is established the mere fact that there is only remote possibility in favour of the accused itself is sufficient to establish the case beyond reasonable doubt. In the case of Shivaji Sahebrao Bobade & ors. vs. State of Maharashtra AIR 1973 2622 the Apex Court has laid down the guidelines for appreciation of evidence as under.

" Even at this stage we may remind ourselves of a necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expenses of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand special in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs two; the

> web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person lightheartedly as a learned author has sapiently observed goes much beyond the simple fact punished. If unmeritted acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated 'persons' and more severe punishment to those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltiness. For all these reason is it true to say, with Viscount Simen, that " a miscarriage of justice may arise from the acquittal for the guilty no less than from the conviction of the innocent In short our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents. "

8. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of fool-proof concoction.(see Inder Singh & anor. vs. State AIR 1978 SC 1991.) In the case of K. Gopal Reddy vs. State of Andhra Pradesh AIR 1979 SC 387 the apex court has quoted with approval the following observation of Lord Denning in Miller vs. Ministry of Pensions 1947 2 ALL ER 372

> " Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of

> justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence of course it is possible but not in the least probable , the case is proved beyond reasonable doubt, but nothing short of that will suffice"

Therefore, bearing this aspect regarding proving the case of reasonable doubt we proceed to consider the evidence on record along with the submissions made by Mr. Barot.

9. Admittedly the victim Shilpaben has met with death due to severe burns sustained on 11.2.88 at about 8 p.m. It is also not in dispute that she had received burns in her house and at that time in the house there was nobody else except the present accused along with Shipla. The burns injury sustained by her could be either accidental or suicidal or homicidal. From the panchnama of the scene of offence as well as from the report of the Forensic Science Laboratory it is quite clear that kerosene was found on the clothes of Shiplaben and at the spot where she was found in a burn condition. A stove was also found at the spot where she was found in the burnt condition but the stove was in a fit and good condition. It was not exploded though it was found empty on account of taking out kerosene from the tank of the stove. It is also very pertinent to note at this stage that at the scene of offence, besides the stove no other utensils used for cooking any food or any half cooked food were found. Therefore, in the circumstances the burns in question could not be accidental. As the stove has not exploded and as kerosene was found on the half burnt clothes and inner clothes of Shilpaben and as there was also smell of kerosene found on the quilt used in extinguishing the fire of Shilpaben by putting quilt on her, the possibility of Shilpaben sustaining burns on account of accident is totally ruled out. It was fairly conceded before us by Mr. Barot that the burns in question could not be accidental.

10. Therefore, now two possibilities are remaining firstly ,as to whether the burns in question were suicidal or secondly whether they are homicidal. The prosecution has come with a case that the burns in question were homicidal. In order to prove its case that the burns in question were homicidal the prosecution has relied upon the dying declaration of Shilpaben. The dying declaration of Shilpaben consists of oral

declaration made by her to p.w. 5 Arunbhai her father, p.w. 4 Kantaben her mother and p.w. 15 Kantibhai Daxini. Besides the oral dying declaration the prosecution has also relied upon her dying declaration written down by p.w.. 2 Yohashwa William, executive magistrate and p.w 16 the police officer Devjibhai Kantibhai Bava. It is settled law that truthful and reliable dying declaration made can form the sole basis of conviction even if it is not corroborated. But the court must be satisfied that the declaration is truthful. Reliability of a dying declaration should be subject to the close scrutiny considering that it was made in the absence of the accused who had no opportunity to test its veracity on cross examination. In examining the dying declaration, it is always necessary to see whether it is 'touched up" or tutored one or inspired by feeling of enmity and ill will. It is true that while suffering with severe pain from burn injuries deceased might not be willing to make a false declaration but it is not unusual for even persons suffering from great pain and being on the verge of death gave last blow to their enemies. But once it is found by the court that the dying declaration was truthful version as to the circumstances of the death and the assaults on the victim, there is no question of further corroboration. Dying declaration cannot be ignored when crucial facts are found in it. It cannot be ignored merely on the ground that it did not include any statement as to how the accused received injury (State of Maharashtra vs. Krishnamurti AIR 1981 SC 617). Therefore, bearing this aspect in mind regarding the dying declaration, we proceed to consider the evidence of dying declaration produced by the prosecution in this case.

11. P.W. 2 Yahoshwa William the executive magistrate has deposed at exh. 17 as to how he recorded the dying declaration. Now if his evidence is considered, then it would be quite clear that he had proceeded to record the dying declaration after ascertaining from the medical officer regarding the fit mental condition of Shilpaben to make a statement. He has also deposed that when the said dying declaration was recorded he had taken all the pre cautions to see that no relation or police officer remain present near as well as in the vicinity of the deceased. The dying declaration recorded by him is in the question and answer form . In the dying declaration Shilpaben has given clear and cogent replies to his question. When she was asked to narrate about the incident she has stated as under:

"After drinking my husband came at home in the evening. There was hot exchange or words between me and my husband and my husband got aggressive and poured on me kerosene from the stove and set me ablaze. The door of the house was got closed and after 10 minutes it was opened and as I was shouting, owner of the house and other neighbours rushed there and quilts were thrown on me and thereafter Dakshini Dada brought me at the hospital."

That shows that she has given a very brief statement. Said statement is also clear and cogent. If the cross examination of the executive magistrate is seen then it is very difficult to hold that said dying declaration made by Shilpaben was not voluntary one. No doubt it was asked in the cross examination of executive magistrate in para 9 that in one case in which he was examined as a witness for the purpose of proving the dying declaration the Public Prosecutor had asked permission for his cross examination and he was cross examined. Now on the strength of the said admission given by him, Mr. Barot learned advocate for the appellant urged before us that his evidence should be discarded and the dying declaration recorded by him should not be accepted. It must be mentioned here that certified copy of his deposition in which he was cross examined was not produced on record. Merely because he was permitted to cross examined it could not be said that he was declared as hostile. It is also not clear as to whether in that case also evidence of said witness was rejected by the sessions court or not. Merely because the public prosecutor seeks permission to cross examine the prosecution witness on certain aspect and that permission is granted to the public prosecutor, the witness could not be elaborated to be false or unbelievable. Therefore, in the circumstances we are unable to accept the claim of Mr. Barot that the evidence of this witness should be discarded and that the dying declaration recorded by him should be rejected.

12. Before recording of this dying declaration at exh.18 by executive magistrate when Shilpabven was brought to the burns ward, the doctor incharge of the ward p.w. 10 Dr.Manish Patel had taken down from her history about the injuries sustained by her and the history which he has recorded in the said case paper, it is recorded as under after noting that the patient was quite conscious and well .

Therefore, that history of burns given by her when she was admitted in the award gives necessary corroboration and support to the dying declaration at exh.18. After recording the said dying declaration exh. 18 p.w. executive magistrate, the police had also recorded her dying declaration by way of recording her statement u/s 161 Cr.P.C. and in her dying declaration she has repeated the same story which was narrated by her before the executive magistrate. It is urged before us by Mr. Barot that in the said statement recorded by the police u/s 161 Cr.P.C. Shilpaben has not named her husband as one of the person who had made attempts to extinguish the fire on her by putting quilts on her though that fact has been deposed by Mashkumar son of the landlord and other persons and therefore, be contended before us that she was not making true disclosure. It is true that from the evidence of Maheshkumar, it is quite clear that present appellant also made efforts to extinguish the fire on her by putting quilts on her body but it is also an admitted fact that Maheshkumar had also made an attempt to extinguish the fire on her body by putting quilts on her body,. Therefore, in the circumstances if she has stated in the statement only the name of Maheshkumar and if she did not make any reference about her husband it could not be said that her dying declaration is not truthful. Merely because she does not give details and names of the persons made efforts to extinguish the fire on her, the dying declaration could not be said to be untruthful.

13. The three prosecution witnesses viz. p.w 5 Arunbhai, p.w. 14 Kantaben and p.w. 15 Kantilal have also deposed that when they had asked the deceased Shilpaben as to how she has sustained the burn injuries she had told each of them that kerosene from the stove was sprinkled on her by her husband and he had set fire to her. No doubt all the three witnesses are related to Shilpaben but merely because they are related to Shilpaben there evidence could not be rejected. Out of these 3 witnesses p.w.. 14 Kantaben has stated that she she had gone to the hospital near the bed of Shilpaben present accused was there and when she first asked Shilpaben as to what had happened the accused had told her that there was quarrel between him and his wife. Then Shilpaben narrated the incident as to how her husband had set fire to her. The disclosure of the incident by referring as-Jamai son-in-law of Kantaben is quite natural. Presence of kerosene on half burnt clothes of Shilpaben ,smell on the quilt which were used

for extinguishing the fire on Shilpaben, the finding of an empty stove at the place where Shilpaben was found in burnt condition and smell of kerosene in the room when the panaches had gone to prepare the panchnama of the scene of offence give necessary support and corroboration to the version of Shilpaben. The most important and crucial circumstance which is giving support to her version is that when present accused was arrested by the police on that night, the police had found kerosene spots on his shirt and pants and therefore, they were seized and were attached under a panchnama. Thereafter the shirt and pant of the accused were sent to the chemical analyser for his analysis and report and the chemical analyser has found presence of kerosene on both of them. Presence of kerosene on his shirt and pants supports the claim of Shilpaben that she was caught by her husband and he had sprinkled kerosene from the stove. The version given by the accused in his statement under section 313 is that he had gone fast asleep in the room and got up when he felt heat in the room and at that time he found his wife in flames and the room was closed and therefore, he attempted to extinguish the fire by putting quilts. But if the said version given by him was true and correct then there would not have been any kerosene on his shirt and pant. Presence of kerosene on his shirt and pant gives necessary support and corroboration to the dying declaration of Shilpaben.

14. Mr. Barot learned advocate for the appellant has further urged before us that the executive magistrate Yahoshwa William has stated in his cross examination that the police officer was interrogating the deceased Shilpaben,. That shows that the police had recorded her statement before the dying declaration was recorded by the executive magistrate. Said statement of Shilpaben is suppressed by the prosecution and therefore, the dying declaration should not be accepted. But if the cross examination of said executive magistrate is read carefully and minutely then it would be quite clear that he nowhere states that the police officer who was talking with the deceased Shilpaben was reducing in writing his interrogation or statement of Shilpaben. On the contrary in the cross examination by the learned advocate for the accused in para 10 said witness has categorically stated that PSI Vatalia had not recorded the statement of Shilpaben. Not only that but PSI Vatalia has also clearly stated that he had not recorded any statement of Shilpaben before the dying declaration was recorded by executive magistrate. Neither the executive magistrate nor any other witnesses had made any positive statement that before recording the dying declaration by executive

magistrate the police had recorded any statement in writing by the deceased Shilpaben. Not only that there is also no such positive statement by any other witness and there are no circumstances brought on record in the evidence of any of the witnesses for holding that before recording of the dying declaration, any statement of Shilpaben was recorded by the police. Therefore, in the circumstances it is not possible to accept the contention of Mr.Barot that failure of the prosecution to produce said statement should result in the rejecting of the dying declaration.

15. The next circumstance on which Mr. Barot vehemently urge before us is that Dr. Satish Pandya recorded the history regarding the burns in the case paper and as per the said history Shilpaben was cooking curry on the stove and she got up in order to take masalas to put the same in the curry, accidentally the lower end of her saree caught fire. This document of Dr. Pandya is not relied upon by the prosecution in order to prove its case against the present appellant. But if the history of burns recorded by him is considered then it would be quite clear that said history was given by a male person in view of the statement recorded by him. From the case papers on record it would be quite clear that present appellant had gone to the hospital with Shilpaben. His signature is also obtained on the case paper maintained in the burns ward after informing him that condition of his wife was very serious. It is pertinent to note that from the oral evidence of either Maheshkumar or Shilpaben's father or mother or Daxini Dada it has not come on record that Shilpaben was taken to OPD/Emergency ward and there she was questioned regarding burns by Dr. Pandya. From the version given by the accused in the statement under section 313 Cr.P.C.as well as from the circumstances on record it is quite clear that the burns in question could not be at all accidental. History recorded by Dr. Pandya is thus not only incorrect but is also false. Therefore, in the circumstances because of the said incorrect and false history it is not possible for us to reject the dying declaration. Mr. Barot urged before us that said history recorded by Dr, Pandya must have been made by deceased Shilpaben but we are unable to accept that contention of him. principally on two grounds (1) that the history recorded by him shows that the history was given by a male person and no other witness has spoken about Dr. Pandya recording said history in his/her presence. Mr. Barot has vehemently urged before ius that false history is given by Shilpaben and consequently her dying declaration implicating present accused should

not be accepted but we are unable to accept that contention of him.

16. It is vehemently argued on behalf of the appellant that p.w. 15 Kantilal Dakshini being a Police Officer and being interested in the deceased has falsely implicated the appellant in this case by false dying declaration. But we are unable to accept the submission of Mr. Barot as we are unable to find any material to support that contention. The material on record does show that the said witness had any concern as well as control over the investigation. It also does not disclose that he had taken any leading part or taking any undue interest in any aspect of investigation. It also does not disclose that he had availed of any opportunity to tutor the deceased or influence the deceased before she made dying declaration.

17. Therefore in view of the above consideration we hold that the evidence of dying declaration led by the prosecution has been rightly accepted by the learned Addl.Sessions Judge and we do not find any reason to reject the same. Therefore, in view of such dying declaration it is quite obvious that the burns in question are homicidal one.

18. After having come to the positive conclusion that the burns in question are homicidal it is but natural to reject the version given by the accused .As per the version given by the accused the burns in question could be suicidal. At the out set it must be stated that the marriage between the appellant and Shilpaben had taken place about 8 months ago. No doubt it has come in evidence that both the appellant and his mother were torturing Shilpaben for dowry. Their evidence as well as statement of the accused clearly shows that because of the said grievance made by Shilpaben, Shilpaben and the appellant started staying separately. The house taken by Shilpaben for separate residence for her and her husband was near her parental house. If cross examination of Shilpaben's parents as well as p.w. 15 Daxini Dada are considered then it would be quite clear that from their cross examination no material is brought out to indicate that Shilpaben was fed up with her life or with the accused and that she had either indicated or expresseded to put an and to her life. She was married hardly about 8 months back and when she was living separately and was trying to make improvement in the behavior and conduct of her husband it is not at all likely that she would try to end her life more particularly in view of the fact that Shilpaben was not an educated girl and is not shown to be

of assertive or dominating nature . Now apart from this that circumstance that kerosene spots were found on the pants and shirt of the present accused at the time of his arrest panchnama as well by the chemical analyser in the FSL test the version put up by the accused that he was fast asleep and did not know how there was fire to Shilpaben could not be at all believed and accepted and presence of kerosene on his pant and shirt supports clearly the claim of Shilpaben that her husband caught hold of her and took kerosene from the stove and sprinkled kerosene on her and set fire to her clothes. It is very pertinent to note that there was no burn on any part of his clothes. Therefore, in the above consideration we hold that the version put up by the accused regarding suicidal burns is not at all believable and will have to be rejected.

19. Thus we hold that the appellant has been rightly held guilty by the trial Court. We therefore hold present appeal will have to due dismissed and accordingly the appeal is dismissed. The order of conviction and sentence passed by the Trial Court is maintained and confirmed. The appellant be informed about the decision of this appeal through the jail authorities.

(N.J.Pandya.J)

(S.D.Pandit.J)