IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1736 of 2010

FOR APPROVAL AND SIGNATURE:
HONOURABLE Mr. JUSTICE ANANT S. DAVE
and
HONOURABLE Ms. JUSTICE SONIA GOKANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GANESH GOVINDBHAI ROHIT....Appellant(s)

Versus

STATE OF GUJARAT....Opponent(s)/Respondent(s)

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Appearance:
Mr PRATIK B BAROT, ADVOCATE for the Appellant
Ms MOXA K THAKKAR APP for the Opponent(s)/Respondent

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CORAM: HONOURABLE Mr. JUSTICE ANANT S. DAVE
and
HONOURABLE Ms. JUSTICE SONIA GOKANI
August 28, 2014.

CAV JUDGMENT *(PER : HONOURABLE Ms. JUSTICE SONIA GOKANI)*

This Appeal arises from the judgment and order of the learned Addl. Sessions Judge & Presiding Officer, Fast Track Court No. 5, Vadodara dated 17th

September 2010 rendered in Sessions Case No. 78 of 2009, holding the appellant guilty for the offences punishable under Sections 302 IPC by directing him to undergo life imprisonment and pay fine of Rs. 2,000/=; in default, to undergo two months rigorous imprisonment. Brief facts necessary for appreciation of the appeal are as follow :

The complainant is the deceased victim Mitaben, who married with appellant Ganesh Govindbhai Rohit two years prior to the said incident. The appellant was already married and had children begotten from the first marriage. However, on account of love affair between the victim and the appellant, they started residing together at Krishna Complex, Vadodara for nearly six to seven years. She continued to reside together with the first wife and children for about one and half year and thereafter, appellant's first wife-Jayaben separated and lived separately with her children at Makarpura, Vadodara. The deceased was working at Karjan in a Beauty Parlour which was run by her sister-in-law whereas, the appellant worked at GIDC in a firm known as Urmi Oxygen. He also looked after maintenance and other requirements of his first wife.

On 15th April 2009, when the victim came back from her work place at Karjan, her husband was annoyed for her returning late at home and he started abusing her. Later on, she was asked to prepare food and on completing cooking, she called appellant-Ganesh. He chose not to join for dinner, but instead, in his anger, brought a plastic bottle full with kerosene and poured the same over the victim. He burnt her ablaze by a piece of paper which was ignited from stove. She made hue and cry and though the persons in the neighbourhood

tried to save her and removed her to the hospital, however, during the course of treatment, she succumbed to burn injuries. This being a medio-legal case, the complaint was recorded at the hospital. It was the deceased herself who gave the complaint and her dying declaration also was recorded by the Executive Magistrate.

After due investigation, the chargesheet was laid against the appellant and the case was committed to the Court of Sessions at Vadodara. On providing all accompanying documents to the appellant, charges came to be framed for the offences punishable under Section 302 read with Section 325, 504 IPC on 29th September 2009 and as the appellant-original accused pleaded not guilty, the prosecution examined in all eighteen witnesses to prove the charges and also brought on record various documentary evidences to substantiate the same.

The Court after recording further statement under Section 313 CrPC appreciated the evidence and held the accused-appellant guilty of the offences he was charged with, and aggrieved by such an order and judgment, the present Appeal under Section 378 (4) CrPC has been preferred where both the sides have been heard at length.

Submissions :

Learned advocate Shri Pratik Barot appearing for the appellant vehemently and strenuously urged on the line of the grounds raised in the appeal memo. His main emphasis was around three aspects *viz*., (a) that the appellant-accused sustained injuries in both his hands, while attempting to save the deceased and the same has not been explained either by the complainant or by any of the prosecution witnesses; (b) dying declaration alone is insufficient to

hold a person guilty. It is a piece of evidence which requires independent corroboration and in absence of any endorsement by a Doctor with regard to the mental and physical fitness of the patient, the very document is not believable; and (c) serious infirmities arise in the deposition of various witnesses which create a serious doubt in the theory of the prosecution. According to the learned advocate, it was a suicidal death attempted to be converted in a homicidal act. In this respect, he sought to place reliance upon the following authorities :

[a] ***Kanti Lal v. State of Rajasthan***, 2009 (2) GLH 688;
[b] ***Somabhai Ganeshbhai Parmar v. State of Gujarat***, 2012 (3) GLH 169;
[c] ***Khant Dhanjibhai Ghusabhai Sarvaiya v. State of Gujarat***, 2014 (1) GLH 424;

As against that learned APP Ms. Moxa K. Thakkar appearing for the respondent-State has urged that the victim patient was all along conscious. The dying declaration is recorded by Executive Magistrate which fulfills all the requirements laid down not only by the Statute but by various judicial pronouncements, and therefore, no further corroboration is needed. However, in the instant case, there is ample corroboration in terms of deposition of the neighbours, Doctor and other official witnesses which would cumulatively go to suggest that the Court has rightly considered the incident as a case of homicidal death amounting to murder. It is further urged that even otherwise, if there is any discrepancy in the medical and ocular evidence, it is the ocular evidence which needs to be given primacy. In the instant case, according to the learned APP, nothing significant indicates any serious anomaly which will question the case of prosecution.

Law on Dying Declaration :

Upon thus hearing both the sides and on careful examination of the ocular as well as documentary evidence, at the outset, contentions raised in respect of dying declaration recorded of the deceased Mitaben shall need to be examined. The law on the subject requires appreciation at this stage. In case of ***Bhajju @ Karan Singh v. State of Madhya Pradesh***, reported in (2012) 4 SCC 327 Their Lordships have summarized the principles governing evaluation of a dying declaration under English and Indian Law. They have also considered the provisions of Indian Evidence Act, being Section 32 to hold and observe as to when the Court can base conviction solely on the basis of dying declaration, without requiring any further corroboration. Apt would be, to reproduce relevant observations made in paragraph nos. 22 to 27, which reads thus -

> "22. The law is very clear that if the dying declaration has been recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of the events, then the dying declaration can certainly be relied upon by the Court and could form the sole piece of evidence resulting in the conviction of the accused. This Court has clearly stated the principle that Section 32 of the Indian Evidence Act, 1872 (for short '**the Act**') is an exception to the general rule against the admissibility of hearsay evidence. Clause (1) of Section 32 makes the statement of the deceased admissible, which is generally described as a '*dying declaration*'.
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> 23. The '*dying declaration*' essentially means the statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that the conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in

extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful considerations to speak the truth.

24. Once the Court is satisfied that the declaration was true and voluntary, it undoubtedly can base its conviction on the dying declaration, without requiring any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated by other evidence.

25. There is a clear distinction between the principles governing the evaluation of a dying declaration under the English law and the Indian law. Under the English law, credence and relevancy of a dying declaration is only when the person making such a statement is in hopeless condition and expecting an imminent death. So under the English law, for its admissibility, the declaration should have been made when in the actual danger of death and that the declarant should have had a full apprehension that his death would ensue. However, under the Indian law, the dying declaration is relevant, whether the person who makes it was or was not under expectation of death at the time of such declaration. The dying declaration is admissible not only in the case of homicide but also in civil suits. The admissibility of a dying declaration rests upon the principle of *nemo meritorious praesumuntur mentiri* (a man will not meet his maker with a lie in his mouth).

26. The law is well-settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. A dying declaration, if found reliable, can form the basis of a conviction. A Court of facts is not excluded from acting upon an uncorroborated dying declaration for finding conviction. The dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence. If in a given case a particular dying declaration suffers from any infirmity, either of its own or as disclosed by

> the other evidence adduced in the case or the circumstances coming to its notice, the Court may, as a rule of prudence, look for corroboration and if the infirmities are such as would render a dying declaration so infirm that it pricks the conscience of the Court, the same may be refused to be accepted as forming basis of the conviction.
> 27. Another consideration that may weigh with the Court, of course with reference to the facts of a given case, is whether the dying declaration has been able to bring a confidence thereupon or not, is it trust-worthy or is merely an attempt to cover up the latches of investigation. It must allure the satisfaction of the Court that reliance ought to be placed thereon rather than distrust."

Dying Declaration is an admissible evidence and admissibility is based on issue of necessity. What is vital to be found out is whether the Dying Declaration can be made the basis for holding the person guilty. This being the piece of evidence having to stand on the same footing as other evidences, is to be evaluated on the basis of surrounding circumstances. Infirmed Dying Declaration can be made use of, if the infirmity of such document is curable with corroborating evidences by exercising the rule of prudence. However, if the document is so infirm that the same cannot be relied upon at all, for any purpose and depending on such document would amount to acting contrary to the conscience of the Court, the same need not be regarded at all.

The Apex Court in case of ***Krishan v. State of Haryana***, reported in (2013) 3 SCC 280 held that where the dying declaration is is true and correct, the attendant circumstances show it to be reliable and it has to be recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the Court to look for corroboration.

In case of *Kanti Lal v. State of Rajasthan* [Supra], the Apex Court was considering credibility of dying declaration where it held that for placing implicit reliance on dying declaration, the Court must be satisfied that the deceased was in a fit state of mind to narrate the correct facts of occurrence. If the capacity of the maker of the statement to narrate the facts is found to be impaired, such dying declaration should be rejected, as it is highly unsafe to place reliance on it. The dying declaration should be voluntary and should not be prompted. And, physical as well as manual fitness of the maker is to be proved by the prosecution.

This Court in case of ***Somabhai Ganeshbhai Parmar v. State of Gujarat***, reported in 2012 (3) GLH 169, where in absence of any satisfactory evidence as regard physical and mental condition of the deceased at the time of recording her dying declaration and where the Executive Magistrate also admittedly had not obtained any certificate of fitness from the concerned Doctor, had given the accused benefit of doubt, setting aside the conviction. The Court also on referring to Section 101 of the Indian Evidence Act has held that the case of the accused that he tried to save the deceased who had set herself on fire was required to be believed as it was the prosecution's obligation to explain the injuries on the person of the accused. However, before such obligation is placed on the prosecution, two conditions are necessary to be satisfied – [i] injuries must be grievous and serious; and [ii] such injuries must have been caused at the time of occurrence.

This Court in case of ***Kant Dhanjibhai Ghusanbhai Sarvaiya v. State of Gujarat***, reported in 2014 (1) GLH 424 also had not believed the case of

prosecution and granted benefit to the accused when the injuries on the person of the accused were not explained.

As could be deduced from these pronouncements, the dying declaration, independently also, is entitled to great weight provided it inspires complete confidence of the Court with regard to its truthfulness and correctness. From all the attending circumstances, if the Court gets satisfied that the declaration is voluntary and truthful, the dying declaration could be made the sole basis for conviction. This Court in case of ***Paniben v. State of Gujarat***, reported in (1992) 2 SCC 474 has summed up the law at paragraph 18, which reads thus -

> "(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See *Munnu Raja v. State of M.P.*)
> (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See *State of U.P. v. Ram Sagar Yadav and Ramawati Devi v. State of Bihar*.)
> (iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See *K. Ramachandra Reddy v. Public Prosecutor*)
> (iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See *Rasheed Beg v. State of M.P.*)
> (v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See *Kake Singh v. State of M.P.*)
> (vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See *Ram Manorath v. State of U.P.*)
> (vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (See *State*

> *of Maharashtra v. Krishnamurti Laxmipati Naidu*.)
> (viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See *Surajdeo Ojha v. State of Bihar*.)
> (ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See *Nanhau Ram v. State of M.P*.)
> (x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See *State of U.P. v. Madan Mohan*.)
> (xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See *Mohanlal Gangaram Gehani v. State of Maharashtra*.)"

Witnesses :

In the instant case, before scrutinizing dying declaration carefully to ensure that it is not a result of tutoring or prompting and the same is the result of truthful and voluntary version from the deceased and also is inspiring confidence, firstly, Dr. Asha Gupta's deposition at PW-10 deserves consideration. She is the Medical Officer at SSG Hospital, Vadodara where the patient was taken in Ambulance at around 11:40 pm [*midnight of 15th April 2009*]. The victim was admitted to the Emergency Ward. Her address given was 207, Krishna Complex, Makarpura, Opp. JP Petroleum, Vadodara and on asking the history, she stated that she was set on fire by her husband, who sprinkled kerosene and thereafter had switched on the gas and with the help of piece of paper, lit on, such was thrown over her body and thus she was set on fire. The incident occurred at 10:15 pm and on the same night she was removed to the

Hospital. She was completely conscious. Burn injuries found on her person were to the extent of 75%. She was referred to Surgery Department of the Civil Hospital. On 17th April 2009 at 01:30 hours, she succumbed to these burnt injuries. According to her, the injuries were sufficient to cause death in the ordinary course of nature. She agreed that one Lataben Somalal Soni PW-11 had accompanied the patient. The said Lataben is also a witness who was working as Supervisor at Public Health Center at Kayavarohan at the relevant time. One Shri Santosh R. Sharma was also accompanying her. She issued medical certificate after 17th April 2009 This Officer has been extensively cross examined mainly to elicit from her whether the patient was conscious and also in a position to comprehend and understand the questions She denied allegation that the history was given by PW-11 Lataben Somalal Soni. According to her, the history was given by the patient herself and none else. Certificate issued by her is also exhibited at Exh. 29, which states, thus -

> "H/o. Fire flame burn by husband, her husband pour kerosene over her body, then fire gas chulla then fire a piece of paper then thrown over her body, so fire flame burn of body today 10.15 pm at home of patient. History given by patient self."

PW-11 Lataben Soni stays in a neighbourhood and is working as a Supervisor at Public Health Cenre. Her job hours are from 8.00 am to 5.00 pm. According to her, she know all those who reside in the same residential complex. The deceased was residing at Flat No. 202 with her husband and was running a beauty parlour in Karjan. She also knew the family history that the first wife of the appellant was alive and she lived separately at Suryanagar, Makarpura, Baroda because of dispute between the deceased and the said Jayaben.

According to this witness, on 15th April 2009, when she was at her residence, she heard screaming and she came out of her home and she noticed on the upper storey of the complex flames of fire, and therefore, she ran there. She found Mitaben running here and there and was was shouting for help. This witness also had also shouted for such help and from the neighbourhood, people rushed to the place of deceased. Every one tried to extinguish the fire by pouring water. She cut open the clothes with the help of scissors and afterwards went to call an ambulance. She since is working in the medical department, she knew the first aid requirements, and therefore, victim-Mitaben was taken to bathroom and was made to sit under the shower. She inquired from the victim as to how the incident occurred and she stated that because she came late, her husband has doubted her character and had quarreled with her. After she cooked the food, he chose not to joint for dinner, instead, in the fit of his anger, poured kerosene from the gallery of the flat and after she was drenched, he had lit the fire with the help of a piece of paper. She also has further stated that the husband of victim was in the house only having a towel wrapped on his body. When people asked him as to why he so did, he replied that in a fit of anger, he committed such an act and after wearing the clothes, he left the home.

This witness has been thoroughly cross examined and she has stood to her ground. According to her, she was with the victim till 01:30 am. She had also stated to the Police that when she saw the appellant Ganesh only wearing towel with his hands burnt. She also agreed to the suggestion that accused also had tried to extinguish the fire alongwith others. She also agreed that the supper that she had cooked was lying in the said condition in the kitchen. She denied

the suggestion that deceased committed suicide. She also denied the suggestion that as the appellant was not in favour of victim keeping relations with her, she has concocted a story of homicidal death.

PW-14 Girish Kamjibhai Nisarta was working as Magistrate at Vadodara. On 16th April 2009, he received a Yadi from Makarpura Police Station. He went to SSG Hospital. He first went to the Medical Officer and on having received written opinion of the patient being in conscious state and orientation, he recorded the dying declaration. He also checked the orientation of the patient and on being satisfied, he inquired about the incident where she has stated that the husband had poured Kerosene and had lit fire with a piece of paper. She also further stated that on various parts of body because of this fire, she was burnt. Husband had burnt her with the help of kerosene. On being inquired once again as to who is responsible for the incident, she has specifically stated that her husband is responsible for the same. She did not say anything beyond this. In cross examination, the said witness has stated that when the Yadi was sent to him, he had a noting that the patient is conscious. When he reached to the bed of the patient, relatives were present. He had asked them to leave the place. Except from below the knees, bandages were found on the person of the victim. He denied the suggestion that dying declaration was concocted at the behest of the Police. This dying declaration, if is looked at, the same is recorded at 4:10 am on 16th April 2009. The victim survived till 01:05 of 17th April 2009. It also makes a mention that as there was a clear opinion of the patient being conscious and oriented, he has recorded the dying declaration. It took him about ten minutes to record the dying declaration, which started at 04:00 am and was

completed at 04:10 am.

PW-18 Laxmansinh Kodarji Katara was serving as Police Inspector. On 16th April 2009, he received a Yadi from PSO Markarpura Police Station in relation to Mitaben who was under the treatment at SSG Hospital, and therefore, he went there to record the complaint. According to her complaint, she was serving at Sakhi Beuty Parlour which was situated at Karjan. She commuted in State Transport Bus and at 08:30 pm she came to Vadodara from Karjan. Her husband was present in the house but first he chose not to open the main door. When he opened after a while, he was very angry for her getting late. She chose not to reply and completed the cooking of dinner. After that task was over, she invited her husband for dinner and he got further angry. He brought in a plastic bottle kerosene which he poured over her body and also further poured kerosene which was stored in a stove. He lit the fire from the gas stove with the help of a piece of paper. Her neighbour Lalaben called Ambulance. She stated that she was completely conscious. Her husband's second wife Jayaben lived at Suryanagar, Vadodara. She had no children of her own and she further stated that she lived separately from her in-laws. According to this witness, on account of burn injuries on both hands, thumb mark was recorded from the toe of right leg. The said thumb mark was taken in presence of the complainant's brother.

In the cross examination, he stated that the first thing which he did after reaching to the hospital was to meet victim deceased-Mitaben, and thereafter, in an about half-an-hour's time, met rest of the relatives. The complaint that he had recorded was sent to the Police Station for registration of FIR. He met the

Doctor personally. However, he did not take opinion of the doctor as to whether she was capable of answering the queries. He also had made arrangement for recording the dying declaration. He also agreed to the suggestion that the accused had worn only a towel and his both hands were burnt. He denied the suggestion that the deceased had committed suicide and yet deliberately this has been made out a case of homicidal death.

The complaint Exh. 50 when is examined, it provides all the details which have been narrated by PW-18 and on overall examination of facts, it could be noticed that the husband had doubted her character and abused her, when she returned late from her work-place. Soon after her returning home, she completed cooking and he also was in no mood to join for dinner but instead, he had other plans for her. Bringing kerosene in a bottle and also adding kerosene from the stove, she was set on fire with the help of a piece of paper, which was lit from the gas burner. Not only the complaint which is recorded on 16th April 2009 at around 12:31 am by the senior Police Inspector of the concerned area, but also, the gist of deposition of other witnesses, coupled with various documentary evidences and the dying declaration narrate consistently the fact of appellant having set ablaze his wife Mitaben by pouring kerosene on her.

In the complaint as well as in the dying declaration, deceased is consistent, which are both recorded in a gap of about 3 to 4 hours - after she was removed to the hospital for treatment. The complaint is recorded first and thereafter, the dying declaration which came to be recorded at 4:00 am [*in the wee hours of 16th April 2009*]. She did survive till the next day and succumbed to burn injuries on 17th April 2009 at around 01:30 am. In the instant case, before

the dying declaration was recorded on the basis of Yadi sent by the Police, the doctor has endorsed on such Yadi in relation to the consciousness and orientation of the victim, the Executive Magistrate has proceeded to record the same. Such endorsement was made at 02:30 am and the dying declaration was recorded at 04:00 am. It is not the dying declaration alone which is sought to be relied upon by the learned Sessions Judge, but, her complaint given before the Police Inspector which in detail gives details of the incident and also corroborates the history given to the Medical Officer who first attended her soon after her arrival at SSG Hospital; coupled with the oral dying declaration before the witnesses who had rescued her, have led the trial Court to conclude the guilt of the appellant.

It could be noticed from the record that the neighbour-Lataben being a lady, residing on the first floor was very prompt in responding to the need of the victim and being a Supervisor in Public Health Center, she was equipped with the requirement of first-aid in such circumstances. All the details she had given of her having made the victim sit under the shower after the flames were extinguished with the help of other neighbours and also of having applied the ointment, as also the manner in which she was removed to SSG Hospital, give a narration of the incident vividly. There is no reason for her to concoct the story, nor has she any enmity towards the husband of the deceased. All persons who have deposed in their official capacity had no axe to grind against the appellant.

It is true that reliance is placed on the dying declaration and the question that begs the answer is whether this document can be relied upon on the same footing as other evidence and whether its infirmity is curable with the aid of

other evidences. It is of course not the solitary piece of evidence which has been relied upon by the prosecution. Assuming that non recordance of any endorsement after completing the recordance of dying declaration would drag this document into a debate as to whether the patient was conscious and oriented till she completed her version before the Executive Magistrate. As could be noticed, a *Yadi* sent to the Executive Magistrate records her consciousness and orientation at 02:30 am. Dying Declaration was recorded between 04:00 am to 04:10 am and the patient has survived for nearly 22 hours thereafter and it is not disputed that she was conscious during the treatment. Medical Evidence notes her consciousness when she was brought to the hospital. History given to Doctors is in her words. It is worth remembering that Dying Declaration when carefully scrutinized, there appears no such infirmity in the details as to the occurrence which would lead to suspect this document. However, it had been acted upon with corroboration, and therefore, it can be said that the deceased while giving history before Dr. Ashaben was in a fit mental condition to give her version. She had given her first version before PW-11 Lataben, who is one of the key witnesses. In other words, it can be safely stated that the learned Judge committed no error while relying on the dying declaration after appreciating duly the other voluminous evidences in support of the case of prosecution.

At this stage, version of Jitendra Ishwarbhai Parekh [PW-9] – brother of the victim and that of Rekhaben Arvindbhai Parekh [PW-8] – sister-in-law of the victim if are examined, PW-9 received a phone call from sister-in-law PW-8-Rekhaben who received a phone call from Lataben [PW-11] and when they

reached SSG Hospital, victim-Mitaben was conscious and before both these witnesses, she had narrated the same facts. PW-9 Jitendra I. Parekh agreed in his cross examination that the family had objection to the relationship. He also agreed to the suggestion that since the appellant was married, no social customs were followed by the family as the entire family was unhappy about such a relationship. He denied in the exhaustive cross examination that she had committed suicide.

It is quite understandable that if any girl chooses to marry a married-man, when the personal law prescribes monogamy, the family members would have objection as not only on social front, but essentially also on legal aspects. Here also, deceased had lived with the first wife of the appellant and his children for quite sometime. Only after serious disputes with the first wife, they both had separated. However, no complaint at any point of time had been given against the appellant by the family members of the deceased and this incident when had occurred, which according to this witness was described by his sister, rightly, the Court has drawn appropriate facts for the purpose of appreciation from the evidence of this witness. He in no manner has exaggerated nor acted out of enmosity or grudge to involve this appellant. Family's annoyance was towards the deceased because of her decision and insistence to join this appellant as second wife while first marriage subsisted.

Deceased-Mitaben's sister-in-law also gave details of the relationship with the deceased and her husband. According to her, she had given details of her husband having set her on fire. Initially, she was working with the sister-in-law and later she started her own business. When the Police came to record

complaint, they were present. She also denied the suggestion that Ganesh was not happy about Mitaben keeping relation with Lataben {PW-11}.

These witnesses further add to the corroboration in whose presence the deceased had repeated her version. They are close relatives who are expected to be in the Hospital. Their presence is very natural as they were serving the deceased while she was under the treatment. Resistance of family in deceased carrying or keeping any live-in relationship with the appellant is in a ordinary course quite understandable. However, that cannot be a ground as suggested in the cross examination for these witnesses to falsely involve the appellant.

Injuries to the Appellant and Special Knowledge of the Accused :

This brings the Court to another vital aspect of the prosecution not having explained the injuries on the hands of the accused and the emphasis on the part of the defence to give benefit of doubt to the accused on this count. Both the decisions of this Court rendered in case of *Somabhai Ganeshbhai Parmar* [Supra] and *Khant Dhanjibhai Ghusabhai Sarvaiya* [Supra] are heavily relied upon. It is the say of the appellant that burden of proof with regard to the injury on the person of the accused would be there if the injury is grievous or severe and the injuries if are caused at the time of occurrence. As could be noted from the decisions referred to hereinabove, burnt injuries on the person of the appellant were not at all grave or serious and such injuries of course were caused during the time of occurrence.

In the defence, two witnesses are examined *viz.*, Anandbhai Chhotabhai Patel {DW-1} and Darshan Vinodbhai Dave {DW-2} by the appellant who are

residents of the same complex. According to DW-1, on the fateful night, he alongwith other four – five persons was sitting down-stairs and when he heard noise, he rushed upstairs and there he found that some neighbours were pouring water and the appellant was also helping. According to him, after this incident was over, Lataben came and she also when inquired Mitaben as to how the said incident had occurred, she had not stated anything. It is also stated that he was the one who had taken her to the hospital and she was unconscious at the time of incident. Ganesh was taking bath. He also stated that they had cordial relation with the family. He could not know how she died.

This witness has been cross examined at length. According to him, many people had gathered by the time he had reached the place of incident. He maintained that Mitaben was outside her flat. Nor has he any clue as to how the deceased was set on flames. First aid was given to deceased and her clothes also were cut open by PW-11 Lataben. No summons was served to this witness. He was being brought by the accused in defence. DW-2 Darshan Vinodbhai Dave, who resides at a flat no. 11 on the Ground Floor also stated on the same lines that the victim was unable to speak anything while she was removed to the Hospital. He had not seen the appellant extinguishing fire. However, he could know from others that he was trying to do so. He has also stated that he halted there for about one and half hour, but, she had not regained consciousness.

Necessary to refer to at this stage, the visit of FLS Investigation team which visited the scene of offence. It had in its preliminary report at Exh. 52 found half-burnt pieces of clothes in the front lobby alongwith burnt piece of paper. It could find torn piece of the daily newspaper '*Gujarat Samachar*', a

stove and its lid separately. One transparent bottle, which contained small quantity of left-over kerosene and cooked food which was lying on the kitchen platform as it is; near bathroom-toilet, on the left hand side of the bed room, half burnt paper pieces of '*Gujarat Samachar*' were found. Stove, plastic bottle, half burnt clothes lying in the lobby, etc., were collected.

Scene of offence panchnama was drawn by the FSL team where also all these articles are noticed clearly indicating of manner and modus of execution of crime. Things would speak for themselves quite much.. The half burnt clothes contained *odor* of kerosene. The stove cap was missing. Plastic bottle found with a lid also contained little quantity of kerosene. Pieces of half burnt papers were found and also one old newspaper in a torn condition. Half burnt pieces of paper were also found near the washbasin and next to such washbasin, a toilet and bathroom is situated. Nothing of course was found in the bathroom. The report of FSL reveal that in all the samples/specimens collected and sent for examination had shown presence of hydrocarbon of kerosene and from both – plastic bottle and stove, kerosene was found. And in all, from all the three samples - burnt clothes, plastic bottle and stove, hydrocarbons of kerosene and kerosene respectively were found.

These details of the panchnama corroborate versions of prosecution witness, cooked food was found on the platform. Use of kerosene and piece of paper having been used for setting ablaze the victim are clearly noticed. Container of kerosene also further vindicates the story of witnesses.

In light of this discussion, deposition of both the defence witnesses have rightly not been given any undue weightage by the trial Court. The Court

observed that though the defence witnesses are also entitled to similar treatment as is being given to the prosecution witnesses, deposition of those two persons cannot throw away the otherwise voluminous evidence pointing to the guilt of the accused. Moreover, their answers in the cross examination unfailingly can lead to conclude that their only object is to help the appellant being away from the clutches of the law.

While throwing kerosene and setting the deceased at fire, possibility cannot be ruled out of the appellant sustaining injuries. We must appreciate at this juncture that the injuries to the person of the accused are not so severe, even if it is held to have been sustained during the occurrence. Only the deceased victim and the appellant were residing in the house. Incident had taken place at around 10:30 at night. Since both of them were alone, it would be the special knowledge of the accused under Section 106 of the Indian Evidence Act to state as to how the incident has taken place.

The Apex Court in ***Babu alias Balasubramaniam & Anr. v. State of Tamil Nadu***, reported in (2013) 8 SCC 60 was dealing with a case where the appellant had married to deceased and the couple was residing in a house owned by the appellant. There were allegations of cruelty and dowry and on the allegation that the husband has administered poison which reached upto stomach and intestine while deceased remained unconscious. In this context, Their Lordships held that the death occurred around 6.00 am in the house where the deceased resided with appellant-accused. The presence of appellant-accused in the house is natural. Besides, it is not contended by the appellant that he was not present in the house when the incident occurred. To this fact

situation, Section 106 of the Evidence Act is attracted. The Bench, on the same line, has emphasized and reiterated that when in a given fact-situation how the person died is in the exclusive personal knowledge of the accused, it is for him to explain how the death occurred. It would be relevant to reproduce some of the observations made in this regard, which reads thus -

> *"...To this fact situation, Section 106 of the Evidence Act is attracted. As to how the deceased received injuries to her head and how she died must be within the exclusive personal knowledge of A-1 Babu. It was for him to explain how the death occurred. He has not given any plausible explanation for the death of the deceased in such suspicious circumstances in the house in which he resided with her and when he was admittedly present in the house at the material time. This circumstance must be kept in mind while dealing with this case. We are mindful of the fact that this would not relieve the prosecution of its burden of proving its case. But, it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, has offered an explanation which might drive the court to draw a different inference. In this case, in our opinion, the prosecution has succeeded in proving facts from which reasonable inference can be drawn that the death of the deceased was homicidal and A-1 Babu was responsible for it. A-1 Babu could have by virtue of his special knowledge regarding the said facts offered an explanation from which a different inference could have been drawn. Since he has not done so, this circumstance adds up to other circumstances which substantiate the prosecution case*."

In case of ***Babubhai Bhimabhai Bokhiria & Anr. v. State of Gujarat &***

Ors., reported in (2014) 5 SCC 568, the Apex Court considered the decision of Privy Council rendered in case of *Pakala Naraynana Swami v. King Emperor*, reported in AIR 1939 PC 47 wherein, while appreciating the meaning of expression "*circumstances of transaction*" used in Section 32 of the Evidence Act to hold that this statement may be made before the cause of death has arisen or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction : general expressions indicating fear or suspicion whether a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. This was also reiterated in case of ***Shiv Kumar v. State of Uttar Pradesh***, rendered in a decision in Criminal Appeal No. 55 of 1966, where again, the Court has stated that general expression indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of death will not be admissible. A necessary condition of admissibility under the section is that the circumstance must have some proximate relation to the actual occurrence, and therefore, the Court concluded as under :-

> "19. All these decisions support the view which was taken that the note written by the deceased does not relate to the cause of his death or to any of the circumstances of the transaction which resulted in his death and therefore, is inadmissible in law.
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> 20. Now we revert to the authority of this Court in ***Rattan Singh v. State of H.P***., reported in (1997) 4 SCC 161 relied on by Dr. Singhvi. In the said case, the deceased immediately before she was fired at, spoke out that the accused was standing nearby with a gun. In a split second the sound of

firearm shot was heard and in a trice her life snuffed off. In the said background, this Court held that the words spoken by the deceased have connection with the circumstance of transaction which resulted into death. In the case in hand, excepting apprehension, there is nothing in the note. No circumstance of any transaction resulting in the death of the deceased is found in the note. Hence, this decision in no way supports the contention of Dr. Singhvi.

In ***Sri Bhagwan v. State of Uttar Pradesh***, reported in (2013) 12 SCC 137, the Investigating Officer had recorded statement of the deceased under Section 161 CrPC. The Court was considering whether such a statement made by the deceased could be accepted as dying declaration. Apt it would be, to reproduce relevant observations made by the Bench in its judgment at paragraph nos. 23 to 25, which reads thus -

> "21. As far as the implication of 162 (2) of Cr.P.C. Is concerned, as a proposition of law, unlike the excepted circumstances under which 161 statement could be relied upon, as rightly contended by learned senior counsel for the respondent, once the said statement though recorded under Section 161 Cr.P.C. assumes the character of dying declaration falling within the four corners of Section 32(1) of Evidence Act, then whatever credence that would apply to a declaration governed by Section 32 (1) should automatically deemed to apply in all force to such a statement though was once recorded under Section 161 Cr.P.C. The above statement of law would result in a position that a purported recorded statement under Section 161 of a victim having regard to the subsequent event of the death of the person making the statement who was a victim would enable the prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Evidence Act and thereby commend all the credence that would be applicable to a dying declaration recorded and claimed as such. 22. Keeping the above principle in mind, it can be stated without any scope for

> contradiction that when we examine the claim made on the statement recorded by PW-4 of the deceased by applying Section 162 (2), we have no hesitation in holding that the said statement as relied upon by the trial Court as Criminal Appeal No.1709 of 2009 an acceptable dying declaration in all force was perfectly justified. We say so because no other conflicting circumstance was either pointed out or demonstrated before the trial Court or the High Court or before us in order to exclude the said document from being relied upon as a dying declaration of the deceased. We reiterate that having regard to the manner in which the said statement was recorded at the time when the crime was registered originally under Section 326 IPC within the shortest time possible within which it could be recorded by PW-4 in order to provide proper medical treatment to the deceased by sending him to the hospital, with no other intention pointed out at the instance of the appellant to discredit contents of the said statement, we hold that the reliance placed upon the said statement as the dying declaration of the deceased was perfectly justified. Having regard to our above conclusion, the said submission of the learned counsel for the appellant also stands rejected.
>
> 23. The other submission of learned counsel for the appellant was that the absence of the acid marks on the body of the accused belies the case of the prosecution. At the very outset, it will be relevant to note that the recovery memo Exhibit Ka-1 disclose recovery of gloves which were marked as exhibit 4 before the trial Court. The chemical report marked as Ka-18 discloses the rubber gloves apparently used by the appellant while carrying out the offence of pouring acid on the deceased. Exhibit Ka-18 discloses that the burnt pieces of rubber gloves had the content of acid on it. Therefore, when the appellant had taken every precaution to ensure that while throwing acid on the deceased, he was not injured in any manner, the absence of any such injury on him can have no effect in the case of the prosecution."

In the instant case, there is no dispute with regard to the fact that both, the deceased and appellant stayed together as husband and wife in a flat no. 202 at Krishna Complex, Vadodara. The appellant by his insistence that he sustained burn injuries in the same occurrence has not disputed his presence. With none else present in the house, when the wife sustained burn injuries who

would know better than the husband as to how she sustained the same. Assuming without admission that he also helped others in extinguishing the fire, there is nothing to indicate his presence while removing the wife to the SSG Hospital nor thereafter at any point of time, till she died. He would surely not know as to what was going to be the version of wife before the Police or the Magistrate then. Again, there is eloquent evidence that he was wearing a towel and when was questioned about the incident, he admitted of having acted in the fit of anger and after wearing clothes had left the home. Even if the incriminating version is omitted, his conduct soon after the incident needs to be appreciated under the Indian Evidence Act and the principles of *res gesta* would lead to conclude that this is another strong circumstance pointing at his guilt as well. It is for the accused to explain the facts which are within his special knowledge. It is beyond comprehension for person of any reasonable conduct that when the wife is burning and has sustained serious injuries, the husband would not like to call even an ambulance nor would be available by her side all-throughout till she succumbed to such injuries. This is a glaring circumstance which has not been explained by the appellant even in his further statement recorded under Section 313 CrPC when the trial Court in detail inquired of incriminating circumstances.

In the further statement, he simply repeated that all stated is untrue. He, of course, in one of the answers had said that while saving her, he received injuries. Deposition of Dr. Rajiv Dahyabhai Makwana, who examined the appellant on 16th April 2009 at the behest of the police personnels of Makarpura Police Station, records history given by the appellant that while saving the wife,

he had sustained the injuries. It was superficial burn injuries. According to Doctor, either while saving a person or while extinguishing the fire, such injuries can be caused to the body of the appellant. It is not a sheer co-incidence that half burnt papers were also noticed during panchnama near the washbasin and bathroom. According to the deceased, the main door was locked and her husband was inside the bathroom and according to Lataben after people residing in the neighbourhood entered the house, accused was found coming out from the bathroom.

Even the defence witness have stated that when they reached the place, appellant was taking bath. He came out wearing a towel. It is not likely that a person taking bath hears shout of his wife after others having reached there. The only possibility could be while setting her at fire, because of some kerosene on his hand, he might have sustained burn injuries and also to pretend that he was in the bathroom while the victim was burning that he put up a towel and pretended to others of his coming out of the bathroom and thereafter joined others to extinguish the fire. Even without making any guess on as to what might have weighed with the accused in behaving in such a manner as he has behaved, it is very clear from all the attending circumstances and the clear deposition of all the witnesses, which have been discussed hereinabove, that the entire version leads to only single most conclusion of this being a homicidal act amounting to murder.

Lastly, the corroborating medical evidence in terms of nature of injuries on the person of the deceased also is quite apparent. The post mortem is carried out by a panel of three doctors, and one of whom *ie.*, Dr. A.K Mahajan has

detailed out in her deposition as to how external injuries found on the person of the victim can cause death. In column no. 17 of the PM report, following injuries are reflected :

> "External Injuries
>
> Dermo epidermal burns with blackening and pilling of skin expanding deep in following area :
>
> Face : Both chin, cheeks burnt
> Neck : } Burnt
> Chest : } all
> Abdomen : } around
> UL (both) : Burnt all around except fingers.
> LL (Both) : Both thighs burnt upto L/3 anteriorly, both buttocks and right thigh patchy burnt with left knee back burnt.
> External genitals : Unburnt
> – Eye brows : Eyelashes singed
> – Ink mark present on both great toe
> – Right ankle venesection present."
>
> The cause of death is burnt injuries and its effects.

According to this expert, her genitals were not burnt and front portion below the knees was not burnt and the injuries were *ante mortem* in nature and were sufficient to cause death. The burn injuries were to the tune of 70 to 75%. This injury pattern also is indicative that kerosene was poured while she was waiting for the husband to join her. Parts burnt of her person further vindicate the story of prosecution.

Cumulatively, when entire evidence is appreciated, we are of the firm opinion that the conviction based on the strength of Dying Declaration recorded by the Executive Magistrate and on getting corroboration from the details made in the complaint and other evidences ocular and documentary is justified, warranting no interference. Versions of the deceased before all the authorities [Executive Magistrate and Police] were made before the cause of death had

arisen or at the time when she anticipated death with 75% burnt injuries and thus, the words spoken by her have connection with the circumstances of transactions which resulted into death. Whatever little infirmity trial Court found in recording Dying declaration by exercising rule of prudence, corroboration was sought from other voluminous evidence of the neighbour and close relatives and medical persons and thereby, was justified on relying on the same eventually.

Injuries on the person of the appellant being superficial and not serious coupled with his non explaining the circumstances of his special knowledge as only husband – wife were at home at around 10.00 pm at night further coupled with his conduct in post crime period, justly led the trial court not to believe the version of defence of act being suicidal in nature.

From the overall consideration, we are of the opinion that Court below has rightly appreciated entire evidence and none of the contentions raised for and on behalf of the accused would lead this Court to intervene in the impugned judgment and order passed by the learned Judge. Resultantly, this Criminal Appeal fails and the same is dismissed. Rule *nisi* stands discharged with no order as to costs.

{Anant S. Dave, J.}

{Ms. Sonia Gokani, J.}

Prakash*507