

(2009) 02 GUJ CK 0102
In the Gujarat High Court
Case No : Criminal A. No. 2442 of 2005

Rahematibanu Nazirmohammad Qureshi	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 20-02-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 32, 60
Penal Code, 1860 (IPC) — Section 302, 323, 34, 452

Citation : (2009) CriLJ 2018 : (2010) 6 RCR(Criminal) 711

Hon'ble Judges : Rajesh H. Shukla, J; Jayant Patel, J

Bench : Division Bench

Advocate : K.J. Shethna and Adil Mehta, for the Appellant; K.P. Rawal, Additional Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh H. Shukla, J.—The present Appeal is directed against the judgment and order dated 27.10.2005 in Sessions Case No. 226 of 1994 passed by the learned Additional Sessions Judge, Fast Track Court No. 2, Ahmedabad City, recording the conviction of Accused No. 1 for the offence under Sections 302, 452, 323 of Indian Penal Code, imposing sentence of life imprisonment for offence u/s 302 IPC. Further, also recording the acquittal of Accused No. 2 for the alleged offence under Sections 302, 452, 323 read with Section 34 of IPC. The Accused No. 3 had been absconding, and therefore, the trial had proceeded qua Accused Nos. 1 and 2 only and the conviction has been recorded for Accused No. 1 and acquittal has been recorded for Accused No. 2.

2. The facts of the case briefly summarized are as follows:

2.1 It is the case of the prosecution that when Sahnazbanu (deceased Sahnazbanu) was at her house, Accused No. 1 (A1) is said to have a quarrel that why she was having an affair with her son, and Accused No. 2 (A2) and Accused No. 3 (A3) also joined. A1. Thereafter, she was beaten with the fist and kick

blows and thereafter, when she went inside the house, the accused persons are said to have trespassed in the house of deceased Sahnazbanu. A1 is said to have poured dupatta of deceased Sahnazbanu in kerosene and set her on fire, whereas A2 and A3 are said to have abetted and assisted in the offence. Thereafter, the accused persons are said to have ran away and deceased Sahnazbanu also came out shouting for help and rushed to Shardaben Hospital, wherein her complaint/FIR has been recorded on the basis of the vardi given by the police at the hospital, and the offence is registered against the accused persons under Sections 302, 452 and 323 read with Section 34 of IPC.

2.2 On the basis of the complaint/FIR, the investigation was carried out. After the investigation was over, the charge-sheet was submitted. As the offence u/s 302 IPC is triable by the Court of Sessions, after ascertaining as regards the papers made available to the accused persons, the learned Additional Sessions Judge, Fast Track Court No. 2, Ahmedabad City, framed charges for the offence punishable under Sections 302, 452, 323 read with Section 34 of IPC and proceeded with the trial.

2.3 In order to bring home the charge levelled against the accused persons, the prosecution has examined the following witnesses:

PW Name and Status Exh. No. 1 Ahematibanu Mohammadshafi, Mother of the deceased. 8 2 Mohammadshafi Fazalkhan, Father of the deceased. 9 3 Kalimbbhai Habibbbhai, Relative of the deceased. 10 4 Irfan Mohammadshafi, Brother of the deceased. 11 5 Mumtazbanu Mohammadshafi, Sister of the deceased. 12 6 Ishak Mohammad Sheikh, Panch 16 7 Baldevbhai Rambhai, Executive Magistrate 17 8 Dr. Virendra Kanhiyalal Shah, Medical Officer, who has submitted the case-papers. 22 9 Dr. Vinayakrao Patil, Medical Officer 25 10 Chandansinh Natsinh Rathod, I.O. 27 11 Akshat Vinodkumar Nair, court witness 44

2.4 The prosecution has also produced documentary evidence with list at Exh.23.

2.5 After recording of the evidence was over, the learned Additional Sessions Judge recorded the further statement of the accused persons u/s 313 of Criminal Procedure Code. In their further statement, the accused persons have denied the charges levelled against them.

2.6 After hearing the learned Public Prosecutor as well as the learned advocate for the defence, the learned Additional Sessions Judge has recorded conviction for the offence under Sections 302, 452 and 323 for A1 and recorded acquittal for A2. However, as A2 was absconding, the trial proceeded against the two accused persons only.

It is this judgment and order, which has been challenged before this Court mainly on the ground inter alia that the complaint/FIR given by deceased Sahnazbanu, which has also been construed as Dying Declaration (DD), is not reliable, as deceased Sahnazbanu, with such an extensive burn injuries would not have been

in a fit state of condition to give such a complaint/FIR and, therefore, the sole evidence, which has been relied upon by the prosecution as well as the Court below for recording the conviction, is erroneous. Further, it has also been contended that in the absence of this FIR/complaint, which has been construed as DD, there is no other evidence and the name of the accused persons is also not referred to initially, and therefore, it could be a case of suicide or homicidal death and the accused persons are implicated falsely.

3. Learned Senior Counsel Mr. K.J. Shethna with Mr. Adil Mehta, referred to the material and evidence on record and also submitted that, as it would reveal, A2 has been acquitted and A1 is convicted. It was strenuously submitted that, as deceased Sahnazbanu was burnt to the extent of 90-95%, she would not be in a fit condition to narrate about the incident. For that purpose, learned Senior Counsel Mr. Shethna referred to Yadi at Exh. 19 and pointedly referred to the last paragraph as regards the condition of deceased Sahnazbanu. Learned Senior Counsel Mr. Shethna submitted that this note clearly show that deceased Sahnazbanu was not responding and was not conscious. Learned Senior Counsel Mr. Shethna also submitted that the Executive Magistrate has therefore made an endorsement that he may be called afterwards when the patient (deceased Sahnazbanu) regains consciousness. Therefore, it was strenuously urged that the complaint/FIR, which has been construed as DD before the police, is the sole evidence, on the basis of which A1 has been convicted, and that evidence in the absence of further corroboration, could not be relied upon. Learned Senior Counsel Mr. Shethna referred to the complaint/FIR given by deceased Sahnazbanu at Exh.20 and submitted that deceased Sahnazbanu herself has narrated about the incident and also stated her version.

4. Learned Senior Counsel Mr. Shethna also referred to the deposition of the prosecution witnesses, who are relatives, like mother, father, brother and sister, and submitted that all of them have not supported the prosecution case at all. On the contrary, they have stated about the cordial relations. Therefore, learned Senior Counsel Mr. Shethna referred to the evidence of prosecution witnesses in detail, particularly the deposition of PW-1 Ahematibanu Mohammadshafi, who is the mother of deceased Sahnazbanu. It was submitted that she has specifically stated that deceased Sahnazbanu was unconscious. She has also stated that she had gone for buying vegetables when deceased Sahnazbanu was in the house and thereafter, when she returned home, she saw, deceased Sahnazbanu in burnt condition in the veranda of the house. Thereupon, Kabirbhai, a friend of her husband had taken deceased Sahnazbanu to the hospital. Kabirbhai is said to have informed the husband by telephone. Learned Senior Counsel Mr. Shethna also submitted that she has been declared as a hostile witness and, in the cross-examination by the Public Prosecutor, she has denied that any such statement about the version recorded in the statement before the Police was given by her. She has also stated that because of extensive burn injuries, deceased Sahnazbanu was unconscious and she had not regained the consciousness. Learned Senior Counsel Mr. Shethna also emphasized and submitted that she has

specifically stated that, from the time, when deceased Sahnazbanu was taken to the hospital and died in the hospital, the witness was there with deceased Sahnazbanu and she had never regained consciousness. Similarly, learned Senior Counsel Mr. Shethna referred to deposition of PW-2 Mohammad-shaft Fazalkhan at Exh.9 and submitted that he has also corroborated the deposition of PW-1 - mother of deceased Sahnazbanu. He is father of deceased Sahnazbanu and has also stated in his testimony that deceased Sahnazbanu was not able to say anything as to how she got burnt. Therefore, he has also been declared hostile. He has also, in his testimony, stated that deceased Sahnazbanu was like a daughter to the neighbours and there was no quarrel. Learned Senior Counsel Mr. Shethna also referred to the deposition of PW-3 Kalimbhai Habibbhai at Exh. 10 and submitted that he is the person, who was the first and who carried deceased Sahnazbanu to the hospital. He has also, in his deposition stated that one boy had come to call him and when he reached there, he found deceased Sahnazbanu in burnt condition, and therefore, removed her in rickshaw and deceased Sahnazbanu was, urging for water. He has also stated that deceased Sahnazbanu has not stated anything in presence of her father as to what had transpired. Similarly, learned Senior Counsel Mr. Shethna referred to the deposition of PW-4 Irfan Mohammad-shafi at Exh. 11 and submitted that he has also corroborated the evidence of the aforesaid witness. He is the brother of deceased Sahnazbanu and he has also stated that when he came to know that deceased Sahnazbanu is removed to hospital, he had gone to the hospital and he could not talk, as deceased Sahnazbanu was unconscious. He had also stated that deceased Sahnazbanu had died of burn injuries, but how deceased Sahnazbanu has been burnt, he cannot say. Learned Senior Counsel Mr. Shethna also referred to the deposition of PW-5 Mumtazbanu Mohammadshafi at Exh.12, who is the sister of deceased Sahnazbanu, and submitted that she is said to have been present in the house at the time of incident. However, in her deposition, she has stated that she was not in the house and she does not know as to what has transpired and therefore, she has been declared hostile.

5. Learned Senior Counsel Mr. Shethna submitted that all the near and dear relatives of deceased Sahnazbanu, like- father, mother, sister and brother, have not supported the prosecution case, and who are the persons who would have the first occasion to talk to deceased Sahnazbanu as regards the incident, have not uttered a word about the incident regarding quarrel, implicating the accused persons and the version, and the theory put forward by the prosecution, is not at all supported by these witnesses. Learned Senior Counsel Mr. Shethna, therefore submitted that, it clearly raises doubt as regards the complaint/the FIR, which has been construed as DD. Learned Senior Counsel Mr. Shethna submitted that the Court may examine and appreciate that with such an extensive burn injuries, and when there is no supporting evidence as regards the incident by the near and dear relatives, who have been examined and with whom deceased Sahnazbanu could have first stated about the incident, and therefore, merely relying on the complaint/FIR, which is construed as DD, the conviction has been

recorded, which is not justified, and it requires further scrutiny and appreciation of evidence afresh by this Court.

6. Learned Senior Counsel Mr. Shethna again emphasized that the complaint/FIR, which is construed as a DD, is the sole evidence for recording the conviction, which raises doubt as to whether deceased Sahnazbanu, having such a extensive burn Injuries, would have narrated the incident and whether she would have been in a fit condition to give such a declaration. Learned Senior Counsel Mr. Shethna also emphasized that, at the cost of repetition, the Court may consider that all other relatives, including near and dear relatives of deceased Sahnazbanu, like mother, father, brother and sister, who could have been the persons with her and to whom she could have stated about the incident first in point of time, have not at all supported and given a go by to the theory suggested by the prosecution, and therefore, the conviction recorded, solely on the basis of this statement/DD, is erroneous. For that purpose, learned Senior Counsel Mr. Shethna submitted that whether deceased Sahnazbanu was in a fit state of condition to give such a statement before the police as FIR/DD, which may also be appreciated. For that purpose, learned Senior Counsel Mr. Shethna again referred to the yadi at Exh. 19 and submitted that it requires close scrutiny in light of the endorsement made at the bottom with regard to the time and the condition of the deceased patient and also the fact that the Executive Magistrate in his deposition at Exh.17 has clearly stated that when he reached to the hospital, deceased Sahnazbanu was not conscious, and therefore, he had made an endorsement, which is found at the bottom of Exh. 19 Learned Senior Counsel Mr. Shethna referred to the testimony of PW-7 Executive Magistrate at Exh. 17 and strenuously submitted that though in his testimony, he has stated that when he reached the burns ward, where deceased Sahnazbanu was admitted, when he asked repeatedly, deceased Sahnazbanu could not respond and the Doctor had also certified that she was not conscious. He has stated that he has reached hospital around 22:22-22:30 hours. Therefore, learned Senior Counsel Mr. Shethna submitted that with such an extensive burn injuries, and admittedly, when deceased Sahnazbanu was conscious when the Executive Magistrate reached to the hospital, whether deceased Sahnazbanu would have been able to give the statement/complaint, which is also construed as DD, is required to be appreciated with the medical evidence, which do not also support the prosecution case. For that purpose, learned Senior Counsel Mr. Shethna also referred to the case-papers produced at exh. 24 and submitted that it refers to the alleged history, but does not referred to names of the present accused persons. It also clearly states that the total burn injuries is 90%. He has also referred to the testimony of Dr. Akshat Vinodkumar Nair, who was examined at Exh.44 as a court witness. It was submitted that this witness had made an endorsement on the Yadi with regard to the condition of the patient and, therefore, he has been examined as a court witness. Learned Senior Counsel Mr. Shethna submitted that the trial Court was aware about this aspect, and therefore, at the fag-end, the Court had examined this witness as court witness, to verify with regard to the

condition of deceased Sahnazbanu. He referred to the testimony of the witness Dr. Akshat Vinodkumar Nair, at Exh.44 and submitted that though he has also stated that he has made an endorsement at Exh.28 though deceased Sahnazbanu was conscious. He has also admitted that he has not made any endorsement on the complaint/FIR, which is construed as DD, as regards the condition of deceased Sahnazbanu. Similarly, he has not remained throughout there as, it has been admitted that after recording of the complaint/DD started, he had gone to other wards to examine other patients. Learned Senior Counsel Mr. Shethna, therefore, submitted that this testimony of the Doctor cannot be relied upon and, considering the entire evidence and more particularly the testimony of the Executive Magistrate, who had stated that when he reached the hospital, deceased Sahnazbanu was not conscious coupled with the fact that other witnesses, who had carried deceased Sahnazbanu to the hospital and who are near relatives of deceased Sahnazbanu having also stated that she was not conscious, whether such an FIR/complaint, which has been construed as DD, could be the sole basis for conviction. Learned Senior Counsel Mr. Shethna, therefore, submitted referring to the case papers, which have been produced at Exh.24 (page Nos. 135 to 165) and submitted that deceased Sahnazbanu had sustained burn injuries of 90%. Referring to page No. 141, he pointedly drawn the attention to the endorsement made by the mother that the condition of her daughter is serious. The treatment-sheet, which is also produced on record, also referred to this aspect. Learned Senior Counsel Mr. Shethna referred to the deposition of PW-8 Dr. Virendra Kanahiyalal Shah at Exh.22 and submitted that he has produced the case papers of deceased Sahnazbanu at Exh.24 He has stated that during the time when deceased Sahnazbanu was brought to the hospital and during treatment Sahnazbanu succumbed to the same and she was treated by one Dr. Harshad Nayak and not by Dr. Nair. Learned Senior Counsel Mr. Shethna submitted that when Dr. Virendra Kanahiyalal Shah in his testimony has referred to the name of other Dr. Nair, who is said to have treated, whereas deceased Sahnazbanu had been treated by Dr. Nair and had made an endorsement as regards the condition of deceased Sahnazbanu, and who has been examined as court witness. Learned Senior Counsel Mr. Shethna, therefore, submitted that it raises doubt as regards the condition of deceased Sahnazbanu and the prosecution case, when there is some discrepancy with regard to the name of the Doctor who could have examined and made an endorsement. He further submitted referring to the case-papers which are produced at Exh.24 (page 130, 151, 153, etc.), though the person who is examined as a court witness at Exh.44 is Dr. Akshat Vinodkumar Nair and not Harshad Nayak, and when this Doctor, who is examined and is said to have made an endorsement, admittedly, has not made the endorsement on the statement/FIR, which is construed as DD at Exh. 28 and therefore, it could not be relied upon and it cannot be a sole basis for conviction. Therefore, learned Senior Counsel Mr. Shethna again submitted that when there is no corroborative evidence, this statement before the police being FIR/complaint, which is construed as DD, cannot form sole basis for conviction. He also referred to and relied upon the

judgment of the Hon''ble Apex Court reported in Darshan Singh alias Bhasuri and Others Vs. State of Punjab, and submitted that the Hon''ble Apex Court has considered, when the DD should be relied upon and, he pointedly referred to the observations made in paragraph 7, which he tried to emphasize that merely because the endorsement is made, by itself would not be sufficient. Learned Senior Counsel Mr. Shethna submitted that in the case before the Hon''ble Apex Court, there were such a severe injuries to the deceased and in spite of that, the medical opinion and the endorsement was there, on the basis of which, the trial Court and the High Court accepted the DD. However, the Hon''ble Apex Court had made the observation that if there were such an injury on vital organs, it is impossible to believe that the deceased would have been in a fit state of mind and body to make any kind of credible statement, relating to the circumstances, resulting into his death. Emphasizing on this aspect, learned Senior Counsel Mr. Shethna submitted that in the facts of the present case also it would also be applicable that even if the endorsement is made by the Doctor as regards the condition of the patient that she was conscious, he has admitted that he has not remained present when the complaint/FIR was recorded and that he has made an endorsement as regards the condition of deceased Sahnazbanu on the statement/FIR, which is treated as DD itself coupled with the fact that other witnesses, who are relatives of deceased Sahnazbanu, have not at all supported the prosecution case, and therefore, considering the incident of injuries and the evidence led by the prosecution, cannot be believed and the complaint/FIR, which is construed as DD, cannot form sole basis for recording conviction, as it has been done by the Court below, which is erroneous. Learned Senior Counsel Mr. Shethna referred to the deposition of PW 10 Chandansinh Natsinh Rathod, I.O. at Exh. 27 and submitted that he has recorded the complaint of deceased Sahnazbanu. However, referring to the said testimony and the FIR at Exh. 28 learned Senior Counsel Mr. Shethna submitted that no overt act is attributed to Al, and therefore also, the case of the prosecution cannot be believed.

7. Learned Senior Counsel Mr. Shethna also referred to the evidence and submitted that it was the duty of the prosecution to establish the genesis of the case of the prosecution and if the genesis of the prosecution case was a mystery, then it is not fault of the accused, and the benefit of doubt at least should go to the accused, as the prosecution has failed to establish the case against the accused persons beyond reasonable doubt.

8. Learned Senior Counsel Mr. Shethna again referred to the complaint at Exh.28 and also Exh.31 and the inquest panchnama at Exh.31 and submitted that how the name could have been mentioned in the inquest panchnama, as it would have been premature and therefore, it raises doubt about the recording of the FIR/complaint itself. Learned Senior Counsel Mr. Shethna also referred to the testimony of PW 11 Dr. Akshat Vinodkumar Nair at Exh,44 and submitted that he has also admitted that in such cases, normally the version or the narration about the incident is stated by the relatives, and when the relatives have not supported the prosecution case, this document in the form of inquest panchnama

mentioning the name of the accused, also raises doubt. Learned Senior Counsel Mr. Shethna also submitted that the court may also consider as to why the FIR/complaint of other relatives like -father and mother, who are present, has not been recorded and it is recorded from the mouth of deceased Sahnazbanu when she had such an extensive burn injuries.

Learned Senior Counsel Mr. Shethna, therefore submitted that it is only with a view that such a statement from deceased Shahnazbanu, recorded in the form of FIR/complaint, which is also construed as DD, would be relevant, and therefore, instead of recording such a complaint from the relatives, it has been recorded as of deceased Sahnazbanu, which is doubtful, as she was having such an extensive burn injuries.

9. Again, summing-up, learned Senior Counsel Mr. Shethna much emphasized that the recording of conviction of AI on the sole basis of the complaint/FIR before the police, which is construed as DD, is erroneous and particularly when it has not been corroborated by any other evidence of the deposition of the relatives, who had brought deceased Sahnazbanu to the hospital and who could have the opportunity to ascertain as to what had transpired.

10. Learned APP Mr. K.P. Rawal for the State submitted that the main thrust of the argument of the defence is as regards the condition of deceased Sahnazbanu. However, learned APP submitted that deceased Sahnazbanu was in a fit state of condition to make such a complaint/FIR before the police, which has also been considered as DD. For that purpose he has also referred to the evidence and pointedly referred to the case-papers at Exh.24 and submitted that it is recorded while recording history about the burn condition at about 6:00 p.m. by pouring kerosene. It was submitted that though it does not refer the name. It is also evident that the Yadi at exh. 30 is given from the hospital itself on the basis of the instructions given by the RMO and the report has been made to the control room on the basis of this Yadi, and the FIR/complaint was recorded in the hospital and the said report for registering the offence is at Exh. 31 which also clearly referred the names of the accused persons. Learned APP also submitted that Dr. Akshat Vinodkumar Nair has been examined as a court witness at Exh. 44 who had made an endorsement as regards the condition of deceased Sahnazbanu. He has specifically stated that he had made an endorsement about the condition of deceased Sahnazbanu, and she was conscious when her statement was recorded, and he was present. Learned APP submitted that he may not have remained present throughout as he would have been required to attend to other patients also, but that would not make any difference when he had made a specific endorsement at Exh. 19 as regards the condition of deceased Sahnazbanu. Learned APP Mr. Raval submitted that as the endorsement regarding deceased Sahnazbanu has been made by the Doctor at Exh. 19 it is not necessary that he would also have made the endorsement on the FIR/complaint, which has been construed as DD at Exh.. 28 itself. Learned APP referred to the deposition of PW-11 Dr. Akshat Vinodkumar Nair at Exh.44

and pointedly referred to the specific say of the Doctor that he had made the endorsement and deceased Sahnazbanu was conscious. Learned APP submitted that this endorsement made by the Doctor is further corroborated by the case-papers, which are produced at Exh. 24 to which he referred to and submitted that even though it refers to the extensive burn injuries to the extent of 95%, it is stated that it is superficial to the deep burn injuries, and therefore, even if such burn injuries are there, it depends on the capacity of the patient, and no presumption can be made that with such a burn injuries person would not be able to speak or say anything. Moreover, learned APP Mr. Raval strenuously submitted that when there is a specific evidence in the form of the testimony of the Doctor, who had made the endorsement about the condition of deceased Sahnazbanu at Exh.44 coupled with the case-papers, the said medical evidence cannot be brushed aside to raise such a presumption. Learned APP Mr. Raval further submitted that once the statement/FIR before the police, which is construed as DD Exh.28 has been found to be reliable and is accepted that deceased Sahnazbanu was in a fit state of condition to make such a statement, it could form the sole basis for the conviction. In support of this contention, learned APP Mr. Raval referred to relied upon the judgment of the Hon''ble Apex Court, reported in Laxman Vs. State of Maharashtra, and pointedly drawn the attention of the court to the observations made therein.

11. He has also referred to and relied upon the judgment of the Hon''ble Apex Court reported in Babu Lal and Others Vs. State of Madhya Pradesh, . He pointedly referred to the observations made in paragraph 7 and submitted that Section 32 of the Evidence Act deals with Dying Declaration and, as observed in this judgment, the general principles are discussed as regards the admissibility. He submitted that, as observed in this judgment, condition of the declarant, who had made the Dying Declaration, is established by the evidence, then it could be relied upon. Learned APP Mr. Raval also referred to the judgment of the Hon''ble Apex Court reported in State of Karnataka Vs. Shariff, and submitted that, as observed in this judgment, the complaint/FIR before the police could also be construed as DD and it is not necessary that Dying Declaration has to be recorded by the Magistrate. The statement of the deceased recorded by the police personnel in the hospital though the Magistrate has been called, the same could be recorded by the police. The learned APP submitted that in the facts of the present case, when the Magistrate was called and before he could arrive for the purpose of recording the DD, police personnel had recorded the statement of deceased Sahnazbanu in the form of complaint/FIR, which is now to be construed as DD, as subsequently, due to the deterioration in the condition of deceased Sahnazbanu, Executive Magistrate could not record the DD, which is evident from Exh. 19. Learned APP, therefore, submitted that this part of the evidence and particularly Exh. 19 which has been relied upon by the learned Senior Counsel for the accused, on the contrary supports the prosecution case and when the statement recorded by the police, which is to be construed as DD at Exh. 29 is reliable and particularly when the Doctor has also certified about

the condition of deceased Sahnazbanu in the Yadi itself at Exh. 19 and also, as stated in his testimony before the court at Exh.44. Learned APP Mr. Raval also emphasized that this witness has been examined as a court witness to ascertain about this aspect, and after having considered on the aspect of fit condition of deceased Sahnazbanu, the conclusion has been arrived at by the court below, which is just and proper, and does not call for any interference. Learned APP Mr. Raval also referred to the judgment of the Hon''ble Apex Court reported in Dashrath @ Champa and Others Vs. State of Madhya Pradesh, and submitted that, as observed in this judgment, the Hon''ble Apex Court has reiterated in paragraph 12 that the DD can form the sole basis of conviction and the corroboration is merely rule of prudence, which cannot be insisted upon, and therefore, referring to this discussion, learned APP Mr. Raval submitted that the impugned judgment and order recording conviction of AI is just and proper and the same may be confirmed.

12. In view of the rival submissions and, on appreciation and scrutiny of material and evidence on record, it is required to be considered, whether the impugned judgment and order dated 27.10.2005 passed by the learned Additional Sessions Judge, Fast Track Court, No. 2, Ahmedabad City in Sessions Case No. 226 of 1994, recording conviction, calls for any interference or not.

13. The moot question, which is required to be considered and appreciated, is whether the appreciation of evidence by the court below, as regards the condition of deceased Shahnazbanu, that she was in a fit state of condition to make a declaration, which has been recorded in the form of complaint/FIR and also construed as a DD, is required to be appreciated.

14. This aspect has been much emphasized by the learned Senior Counsel Mr. Shethna referring to the evidence on record and particularly Yadi Exh. 19 which suggests that deceased Shahnazbanu was having extensive burn injuries to the extent of 90-95%. This submission, which has been emphasized, require a close scrutiny and re-appreciation of the entire evidence inasmuch as it is a very relevant aspect which would have a much bearing on other related issues as to whether such a declaration before the police in the form of FIR/complaint, which is also construed as a DD, can form a sole basis of conviction or not.

15. In order to appreciate the submissions, which have been much emphasized by learned Senior Counsel Mr. Shethna, that the testimony of the prosecution witnesses, who are the near and dear relatives of deceased Shahnazbanu, and who would have the opportunity, first in point of time, about knowing from deceased Shahnazbanu as to the occurrence of the incident, have not supported the prosecution case and have given a total go-by to the, prosecution case for the alleged offence against the accused. It is in context of this testimony of the prosecution witnesses, who have been examined, like, father, mother, brother and sister of deceased Shahnazbanu on one hand having not supported the prosecution case at all coupled with the fact about the submission with regard to the fit condition of deceased Shahnazbanu to make such a declaration, assumes

the importance and also require a close scrutiny of the evidence. There is no doubt that the prosecution witnesses examined, who are the near and dear relatives of deceased Shahnazbanu like father, mother, brother and sister, have not at all supported the prosecution case. It is also a valid submission that such close relatives who were with deceased Shahnazbanu, would have the opportunity of knowing as to what had transpired, since they were with deceased Shahnazbanu from the beginning.

16. However, at the same time, the other evidence also required to be appreciated, particularly the Yadi at Exh. 19 which has been referred to and relied upon by learned Senior Counsel Mr. Shethna. The Yadi Exh.19 with an endorsement of the Executive Magistrate as regards the condition of deceased Shahnazbanu, is required to be examined and scrutinized closely. The said Yadi at Exh. 19 refers to this endorsement, but it is evident that the endorsement has been made by the Executive Magistrate that, when he asked deceased Shahnazbanu, she had not responded as she was not conscious. He has taken the opinion of the Doctor and had returned as she was not in fit condition to give any statement. At the same time, the time mentioned is 22.15 to 22.30 hours on 30.3.1994. The Executive Magistrate, who has been examined by the prosecution as PW-7, in his deposition at Exh. 17 clearly stated that he reached the hospital between 22.15 to 22.30 hours and he had received the Yadi at his residence at about 21.25 hours. He has also stated that on Yadi Exh. 19 the Doctor had made an endorsement on 7.50 when deceased Shahnazbanu was conscious. He has also admitted that he had not seen the Doctor first in point of time when he reached the hospital. Again the Yadi Exh.19 clearly records the endorsement of the Doctor as, "patient is conscious 7.50 pm 30.3.1994" and just below that, another endorsement is that, "patient is unconscious at present - 10:30 pm". There is also a note that the Executive Magistrate received the Yadi at 2 -25 hours at his residence. Therefore, it implies that when the Yadi Exh.19 was sent at 7.50 with an endorsement of the Doctor, deceased Shahnazbanu was conscious and in a fit state of condition, and when the Executive Magistrate reached admittedly at about 22.15 to 22.30 hours, deceased Shahnazbanu was unconscious. Therefore, what has transpired during this period, will have to be examined and scrutinized while scanning through the evidence. For that purpose the deposition of Dr. Akshat Vinodkumar Nair, who made the endorsement, would be very relevant and who has been examined as a court witness at Exh.44, is required to be appreciated. Dr. Akshat Vinodkumar Nair has stated in his testimony that when deceased Shahnazbanu was brought to the hospital, he had recorded the history on the case-papers at Exh.24. Further, he has stated that deceased Sahnazbanu was conscious on 30.3.1994 at 7.50 hours, for which he had made an endorsement for sending Yadi for recording of DD. He has also stated that when the com-plaint/FIR Exh.28 was recorded, deceased Shahnazbanu was in fit state of condition and was conscious, which he had verified. He has further stated that deceased Shahnazbanu had made the statement, which has been recorded as FIR/complaint (and it is to be construed

as a DD) in his presence and he had also made an endorsement on the same, and the thumb impression of deceased Shahnazbanu was also made on the said complaint/FIR at Exh.28. In the cross-examination, he has also admitted that in such cases of extensive burn injuries to the extent of 96%, with the passage of time, the pain would increase. However, he has denied the suggestion that deceased Shahnazbanu was not conscious when the complaint/FIR at Exh.28 was recorded. He has further admitted that in the documents/case papers Exh.24, he has not made any note that he has also endorsed the document Exh.28 or that it was recorded in his presence. Therefore, this testimony of this witness lends credibility, as he has candidly stated what has transpired and candidly stated about the presence of the relatives, and also the fact that in such cases the condition of the patient would deteriorate. Moreover, a close look at the case papers, which are produced at Exh.24, would reveal that the endorsement has been made about the history of alleged burns at home by pouring kerosene. Moreover, though it is 97% burns, it is also stated that superficial to deep burns and the endorsement is made that, "patient is conscious". The treatment-sheet, which is produced at page No. 165 (Exh.24) also clearly reveals that the endorsement has been made as regards the condition from time to time. On left hand side which referred to Notes;

On 31.3.1994 - 6.40 hours - General Condition - Poor,

On 31.3.1994 - 0.50 hours - General Condition - Poor, and

On 31.3.1994 - patient has died.

It is also required to be appreciated that the Doctor is a independent witness who has no personal grudge or any reason to give a false testimony, and in fact whatever he has stated, is corroborated by the case papers produced at Exh.24 with regard to the condition of deceased Shahnazbanu. Further, the vardi at Exh.30, which is the extract of vardi, records that, as per the instructions of the RMO at Shardaben Hospital, the Police Constable at the police table of the hospital has recorded about the incident, which refers to the name of the accused persons and also that deceased Shahnazbanu was set ablaze and is admitted in the burns ward. However, the vardi is dated 30.3.1994 -19.00 hours. It is on the basis of this vardi the FIR/complaint Exh.28 has been recorded, and on the basis thereof, the report for registering the offence at Exh.31 has been made to the control room, which also referred to the manner in which the incident occurred and also the names of the accused persons. It also referred the time of the incident and also the place and the time of registration of the offence. It is, on the basis of this document and evidence, when the Executive Magistrate has reached at about 22.15 to 22.30 hours, deceased Shahnazbanu was not conscious. This would clearly suggest that, at the time, when her complaint/FIR, which is construed as a DD at Exh.28, was recorded, deceased Shahnazbanu was conscious and in fit state of condition to make such declaration. This aspect has been corroborated by the medical evidence in the form of testimony of Dr. Akshat Vinodkumar Nair, who has been examined as a court witness at Exh.44, as

discussed above. and the case papers produced at Exh.24. Further, It is also corroborated by the testimony of PW-10 Chandansinh Natsinh Rathod at Exh. 26 who had recorded the FIR/complaint of deceased Shahnazbanu. This witness has stated in his testimony that on inquiry the Doctor had confirmed that deceased Shahnazbanu was in a fit state of condition to give the declaration, and thereafter, in the presence of Doctor, he had recorded the complaint/FIR of deceased Shahnazbanu, wherein, she has stated as to what had transpired referring to the names of the accused persons. A close scrutiny of the testimony of this witness also reveals that he has also specifically stated that when he recorded the FIR/complaint at Exh.28, deceased Shahnazbanu was conscious and, before and during the time when her complaint/FIR was recorded, which he had confirmed and, thereafter he had sent the report for registration of the offence at Exh.31. This witness is also an independent witness, who has no grudge or any motive to implicate the accused persons. It is only on the basis of the declaration made, this witness could have recorded the version about the incident. It is also required to be mentioned that Dr. Akshat Vinodkumar Nair, who is an independent witness and as a Doctor, who had made the endorsement about the condition of deceased Shahnazbanu, was competent to make such an endorsement and he would be the best person to opine about the condition of deceased Shahnazbanu and, he has in his testimony before the Court also stated, which is further corroborated in the form of case papers produced at Exh.24.

17. Therefore, merely because the near and dear relatives or the close relatives of deceased Shahnazbanu have turned hostile, the declaration made by the deceased before the police, which has been recorded as a complaint/FIR and also construed as DD, corroborated by the medical evidence as discussed above, cannot be brushed aside. The Court also cannot draw any inference or presumption, when the prosecution witnesses, who are the relatives of deceased Shahnazbanu, have turned hostile disregarding the medical evidence in the form of testimony of the Doctor, who has made the endorsement as to the condition of deceased Shahnazbanu, supported by other documents like the case papers.

18. Therefore, the submissions made by the learned Senior Counsel Mr. Shethna that deceased Shahnazbanu was having extensive burn injuries and when the near and dear relatives of deceased Shahnazbanu, who had the occasion to know as to what had transpired, have not supported the prosecution case, would raise the doubt about the complaint or the declaration before the police at Exh.28, is without any merit.

19. Another facet of the argument is whether such a declaration form the sole basis of conviction. As discussed above, once it is accepted that the complaint/FIR Exh. 28, which is to be construed as DD, has been made by deceased Shahnazbanu in a fit state of condition and is therefore reliable, the same could be relied upon. The law on this aspect is well-settled and as it has been observed in catena of decision that to look for corroboration is merely a rule of prudence

rather than a rule of law. In any event, the complaint/FIR Exh.28 has been sufficiently corroborated by the medical evidence as regards the condition of deceased Shahnazbanu in the form of testimony of Doctor, who has been examined as a court witness at Exh.44 and the case papers at Exh.24. Therefore, when it is evident that such a declaration was made by deceased Sahnazbanu in a fit state of condition, the reliance could be made, for which a useful reference can be made to the judgment of the Hon''ble Apex Court (Constitution Bench), which has laid down the guideline, reported in Laxman Vs. State of Maharashtra, The Hon''ble Apex Court in this judgment, referring to Section 32 of the Evidence Act, has focused as to the aspects about the appreciation of the evidence and such declaration in background of Section 32 of the Evidence Act. Though, normally, such statements are hearsay, but as by way of exception such a declaration of dying person is admissible in the evidence and therefore, the Hon''ble Apex Court (Constitution Bench) has referred to this aspect and has observed:

The situation in which a man is on the deathbed is very solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eye-witnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case.

A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

It is indeed a hypertechnical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the Magistrate categorically stated in

his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind.

20. In the facts of the present case also, on the contrary there is a specific certification by the competent Doctor, who had recorded the history when deceased Shahnazbanu was brought to the hospital and has also in his testimony before the Court, as a court witness at Exh.44, clearly stated that he had remained present when such a statement was recorded. However, he has also stated and supported the endorsement made by him in his testimony that deceased Shahnazbanu was in a fit state of mind to give such declaration, for which he has made endorsement and even on the complaint/FIR Exh. 28, which is construed as a DD, he has also signed it. This would answer the submissions made by the learned Senior Counsel and, in light of this settled position of law, if the DD is found to be truthful, reliable and without suffering from any basic infirmity, can be the sole basis for the conviction. In the facts of the present case also, once, such a declaration before the police, which has to be construed as DD is found to be truthful and reliable, it can also form the basis for conviction.

21. Further, a useful reference can be made to the judgment of the Hon''ble Apex Court reported in State of Karnataka Vs. Shariff, wherein the Hon''ble Apex Court has also observed referring to the earlier judgments that such a declaration need not necessarily be recorded by the Magistrates. The statement of deceased recorded by the police personnel in hospital, would be reliable, as the Magistrate could have been called to record the same. Therefore, referring to the earlier judgments on this aspect, the Hon''ble Apex Court in this judgment has clearly observed that such a declaration could be made before the police personnel in the hospital and the fact that it has been recorded by the police personnel, by itself, is not sufficient to discard, if it is found to be otherwise trustworthy and reliable. Moreover, it is required to be appreciated that it is not merely the complaint/FIR which is construed as a DD at Exh.28, which has been relied upon inasmuch as in order to ascertain about the condition of deceased Shahnazbanu, there is sufficient corroboration in the form of medical evidence. Further, to lend more credibility to this declaration, there is other corroborative evidence in the form of the FSL report at Exh.36, relied upon by the prosecution, which referred to the marks of carbon having been found (kerosene) on the, clothes of AI.

22. A useful reference can also be made to the judgment of the Hon''ble Apex Court reported in Dashrath @ Champa and Others Vs. State of Madhya Pradesh, wherein, again, the Hon''ble Apex Court has re-emphasized the guidelines with regard to the DD as well as the admissibility and the logic or the principles behind the admissibility of the DD in context of Section 32 of the Evidence Act. The Hon''ble Apex Court has also observed in paragraph 9 as under:

9. At this juncture, it is relevant to take note of Section 32 of the Evidence Act, which deals with cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant. The general rule is that all oral evidence must be direct viz., if it refers to a fact which could be seen it must be the

evidence of the witness who says he saw it, if it refers to a fact which could be heard, it must be the evidence of the witness who says he heard it, if it refers to a fact which could be perceived by any other sense, it must be the evidence of the witness who says he perceived it by that sense. Similar is the case with opinion. These aspects are elaborated in Section 60. The eight clauses of Section 32 are exceptions to the general rule against hearsay just stated. Clause (1) of Section 32 makes relevant what is generally described as dying declaration, though such an expression has not been used in any Statute. It essentially means statements made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are: firstly, necessity for the victim being generally the only principal eye-witness to the crime, the exclusion of the statement might deflect the ends of justice; and secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice. These aspects have been eloquently stated by Lyre LCR in *R v. Wood Cock* (1789) 1 Lea 500. Shakespeare makes the wounded Melun, finding himself disbelieved while announcing the intended treachery of the Dauphin Lewis explain:

Have I met hideous death within my view;

Retaining but a quantity of life.

Which bleeds away even as a form of wax.

Resolveth from his figure gainst the fire?

What is the world should make me now deceive,

Since I must lose the use of all deceit?

Why should I then be false since it is true.

That I must die here and live hence by truth?

It has also been further observed:

The Rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in *Smt. Paniben Vs. State of Gujarat*, . There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. *Munnu Raja and Another Vs. The State of Madhya Pradesh*,

23. The Hon''ble Apex Court has also observed and discussed possible caution

which are required to be observed, and has further observed, referring to the earlier judgment reported in Nanhau Ram and Another Vs. State of Madhya Pradesh,

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

In light of the above principles, the acceptability of alleged dying declaration in the instant case has to be considered. The dying declaration is only a piece of untested evidence and must like any other evidence, satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration.

Therefore, this observations reiterating the settled position of law clearly answers this submission advanced by learned Senior Counsel Mr. Shethna that it cannot be the sole basis for conviction.

24. The another aspect, which has been emphasized by learned Senior Counsel Mr. Shethna is that, if the genesis of the case of the prosecution is not accepted or corroborated and if it was a mystery, it is no fault of the accused, is required to be appreciated. The premises on which this submission is made, would be justified if the submission is supported by the factual matrix and the evidence on record. There is no quarrel with the proposition advanced by learned Senior Counsel Mr. Shethna, but in the facts of the present case, the genesis of the prosecution case is not in a mystery nor it can be said to be slacking in any reliable evidence. It is in background of the evidence and material on record and the appreciation thereof, the Court has to reach the conclusion. While reaching this conclusion, the Court is required to appreciate and weigh the evidence, and therefore, this submission that the case of the prosecution is a mystery inasmuch as though the death has occurred by burning, who has done it, or whether the accused could be involved, is a mystery, cannot be readily accepted. Further, the statement made by learned Senior Counsel Mr. Shethna that how the names have been referred to in the inquest panchnama Exh. 13 in which he has referred to the Yadi Exh. 19 and also the report for registering the offence at Exh.29 that the names of the accused are falsely recorded and they are roped in when there is no evidence as to the involvement of the accused, is also misconceived.

25. It is well settled that the name of the accused may not be there in the FIR/complaint in the first instance but, subsequently, during the investigation, the offence could be registered. In the facts of the present case, the vardi at Exh.30, which is the first in point of time, where, from the police table at the Shardaben Hospital it has been stated by the Constable on duty referring to the name of the accused persons and, on the basis thereof, the complaint/FIR, which is to be construed as DD at Exh.28, has been recorded and thereafter the report has

been made at Exh.29 for registering the offence also referred to the name of the accused. It cannot be said that the names of the persons who were involved were not there and the accused persons have been falsely roped in or implicated. On the contrary, as a matter of fact, from the very beginning, right from the vardi at Exh.30, the names are specific and in any event, when the complaint/FIR, which is to be construed as DD at Exh.28, is accepted as truthful and reliable. There is a clinching evidence with regard to the involvement of the accused and, on appreciation of evidence when the Court below has recorded the conviction of A1 and has acquitted A2, we are of the opinion that it does not call for any interference.

The impugned judgment and order dated 27.10.2005 in Sessions Case No. 226 of 1994 passed by the learned Additional Sessions Judge, Fast Track Court No. 2, Ahmedabad City, recording the conviction of Accused No. 1 for the offence under Sections 302, 452, 323 of Indian Penal Code and imposing sentence of life imprisonment for offence u/s 302 IPC, is hereby confirmed. Accordingly, the present appeal is hereby stands dismissed.