
(2012) 07 GUJ CK 0028
In the Gujarat High Court
Case No : Criminal Appeal No. 670 of 2007

Somabhai Ganeshbhai Parmar

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 13-07-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2012) 3 GLH 169 : (2012) 3 GLR 2444

Hon'ble Judges : Bhaskar Bhattacharya, Acting C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : Mrudul M. Barot 1, for the Appellant; K.P. Raval, APP for Opponent 1, for the Respondent

Final Decision : Allowed

Judgement

Mr. J.B. Pardiwala, J.—By way of this Appeal, the appellant-original accused seeks to challenge the judgment and order dated 25th January 2007 passed by the learned Sessions Judge, Vadodara in Sessions Case No. 249 of 2005 and thereby convicting the accused-appellant for the offence punishable u/s 302 of IPC and sentencing the accused-appellant to undergo rigorous imprisonment for life with a fine of Rs. 5,000=00. In default of payment of fine, to undergo simple imprisonment for a period of two years.

I. Case of the Prosecution :-

Deceased Sudhaben was married to the accused past about five years from the date of incident. After marriage, she started residing at her matrimonial home with her father-in-law and mother-in-law. A baby girl named "Divya" was born in the wedlock of the deceased and the accused. At the time of the incident baby Divya was aged about one and a half years. On 13th May 2005 sister-in-law of the deceased named "Maniben" came from Vadodara at the house of the deceased. Deceased prepared food for her sister-in-law and at that point of time her father-in-law, mother-in-law and her niece "Shital" were present in the

house. At that point of time the accused returned home from work and on seeing the deceased the deceased jokingly told her niece Shital that she has not prepared food for her uncle i.e. the accused. The accused felt bad and picked up a quarrel with the deceased and also assaulted the deceased. Deceased thereafter went off to sleep being disheartened with what had happened in the evening. The deceased was in a sleeping position but she was awake and at around 8 O'clock in the night there was power failure. At that point of time, the mother-in-law of the deceased named "Ujamben" came in the house and threw kerosene which was in a "khadiya" (a container). The deceased got drenched with kerosene and at that time the accused lit a matchstick and set the deceased on fire. The deceased started burning and shouted for help. No sooner had deceased started shouting than the accused i.e. her husband and her mother-in-law tried to extinguish the fire and in the process the accused and the mother-in-law of the deceased also sustained burn injuries.

2. It is the case of the prosecution that the motive behind the commission of crime was illicit relationship of the accused with the sister-in-law of the deceased named Dakshaben Sureshbhai. Deceased had seen the accused sleeping with Dakshaben two to three times in the past and the deceased had asked the accused not to maintain any illicit relations with Daksha but the accused did not pay heed to the say of the deceased and continued to keep illicit relationship with Dakshaben. The accused used to frequently quarrel with the deceased because of illicit relationship of the accused with Dakshaben. In spite of the deceased requesting the accused to give up illicit relations, the accused continued and as a result thereof the mother-in-law of the deceased and her husband, the accused, set her on fire by pouring kerosene. This is the sum and substance of the prosecution case.

3. Record reveals that on 13th May 2006 at around 11:30 p.m. in the night the deceased as well as the accused and the mother-in-law Ujamben were all brought to S.S.G. Hospital, Vadodara for treatment. The accused and the mother-in-law had also to be admitted at S.S.G. Hospital, Vadodara as both had received burn injuries on face, hands and abdomen to the extent of around 8 to 10 percent with 1 to 3 degree of burns.

4. It appears that the incident occurred at any time between 8:00 and 9:30 in the night and immediately thereafter all the three i.e. the deceased, the accused and the mother-in-law of the deceased were rushed to the hospital. After all the three were admitted at S.S.G. Hospital, Vadodara, the Head Constable named Shankerbhai Dabhai, Buckle No. 1652 who was on duty at the hospital received one "vardhi" from the Chief Medical Officer Dr. Smt. Meenaxiben Chauhan at around 23:30 hours stating that the deceased Sudhaben, her husband Somabhai and her mother-in-law Ujamben have been brought to the hospital for treatment of burns. In the telephone "vardhi" it was also stated how the incident occurred.

5. It appears that at around 1:20 a.m. on 14th May 2005, the Police Sub-Inspector of the concerned police station reached the hospital and gave an

application Exh.15 in writing to the Medical Officer requesting to certify as to whether it was possible to record dying declaration or not. One Dr. Ravindra put an endorsement that "patient conscious and oriented at present". As both the hands were burnt it was not possible to take the thumb impression of the hand on the complaint and, therefore, the impression of the toe of the right leg of the deceased was put on the complaint. The same story has been narrated in the complaint.

6. It appears that thereafter the first information report was lodged by the deceased herself (Exh.16). Thereafter, it appears that the Investigating Officer addressed a "vardhi" to the Executive: Magistrate, Vadodara Rural, Vadodara, requesting him to come to S.S.G. Hospital, Vadodara for the purpose of recording a dying declaration. It is pertinent to note that in the communication addressed to the Executive Magistrate (Exh.17), it has been stated that three persons, namely, (1) Sudhaben Somabhai Parmar, (2) Somabhai Ganeshbhai Parmar, and (3) Ujamben Ganeshbhai Parmar, have sustained burn injuries and have been admitted and Sudhaben has sustained burn injuries on the entire body and, therefore, her dying declaration needs to be recorded. From the endorsement on Exh.17, it appears that the "yadi" was received by the Executive Magistrate at around 2:10 in the early morning on 14th May 2005.

7. On 14th May 2005, the dying declaration of the deceased was recorded by the Executive Magistrate (Exh.27), wherein the deceased stated that her husband, on returning home, asked for the food and she served food to her husband. After her husband finished the dinner, the deceased jokingly told her niece Shital that she has not cooked food for her uncle ("mama"), that is to say, has not cooked food for her husband. This joke was not liked by the accused, as a result of which, the accused assaulted the deceased. At around 8:30 in the night her mother-in-law Ujamben hurled a "khadiya" filled with kerosene and her husband lit a matchstick and set her on fire. In the dying declaration she further stated that she got frightened and her husband and her mother-in-law also sustained burn injuries. Thereafter, she narrated about the harassment on the part of her husband due to illicit relationship with Dakshaben, the sister-in-law of the deceased, on account of which the matrimonial life of the deceased got disturbed. She has also stated in the dying declaration that in the past she had seen her husband sleeping with Dakshaben. She held her husband, the accused, and the mother-in-law responsible for the incident.

8. Record reveals that at around 4:30 in the early morning on 14th May 2005 Sudhaben passed away. Her dead body was sent for postmortem examination. The postmortem report revealed that she had sustained 98% 1st degree to 2nd degree burn injuries all over the body and the cause of death was due to shock as a result of the burn injuries.

9. So far as the accused is concerned, as per the medical certificate Exh.33 he had sustained burn injuries on face, both hands and forearms to the extent of about 10% to 20%. The burns were 1st degree to 2nd degree. On accused being

asked at the hospital as to how he sustained burn injuries, he informed that while trying to save his wife from burning he sustained injuries. So far as the mother-in-law Ujamben is concerned, her certificate at Exh.32 reveals that she had sustained 1 to 3 degree burns on face, both hands and abdomen on about 8% to 10% of the body. She was also asked as to how she sustained burn injuries, and in reply, she informed that while trying to save her daughter-in-law who was burning, she too sustained burn injuries.

10. The accused persons, namely, the accused herein and his mother Ujamben Ganeshbhai Parmar, both were arrested in connection with the said offence. Charge-sheet was filed against the accused and his mother Ujamben.

11. The Additional Sessions Judge, Fast Track Court No. 12, Vadodara, vide order dated 25th January 2006 framed charge against the accused herein and his mother Ujamben vide Exh.6, to which both pleaded not guilty and were ultimately put to trial.

12. Prosecution examined the following witnesses during the course of the trial :-

(1) PW1 - Khimjibhai Somabhai Parmar - Exh. 11, Father of the deceased Sudhaben.

(2) PW2 - Shantaben Khimjibhai Parmar- Exh. 13, Mother of the deceased Sudhaben.

(3) PW3 - Jagdishkumar Trikambhai Sonara - Exh. 14, Investigating Officer.

(4) PW4 - Kiran Vinodray Desai -Exh.26, Executive Magistrate who recorded dying declaration of the deceased at Exh.27.

(5) PW5 - Kusumben Govindrao Balpandey - Exh.30.

(6) PW6 - Dr. Minaxiben Chimanbhai Chauhan - Exh.31.

(7) PW7 - Dr. Vaishakhiben Yashvantrao Shukla - Exh.36, Doctor who conducted postmortem of the dead body of the deceased.

(8) PW8 - Lallubhai Mahijibhai Parmar - Exh.38.

(9) PW9 - Prabhatsinh Kabhaisinh Parmar - Exh.40.

(10) PW10 - Haribhadrasingh Takhsinh - Exh.44, Constable (Buckle No. 1871) who was on duty at the S.S.G. Hospital, Vadodara.

13. Prosecution also relied upon the following documentary evidence :-

(1) Exh.15, a letter written to the Medical Officer i.e. Dr. Ravindra, to know as to whether the patient was in a fit state of mind to give dying declaration.

(2) Exh.16, F.I.R.

(3) Exh.17, a letter written to the Executive Magistrate to record dying declaration of the deceased.

(4) Exh.27, dying declaration of the deceased recorded by the Executive Magistrate.

(5) Exh.37, postmortem note.

(6) Exh.39, inquest panchnama.

(7) Exh.41, panchnama of place of incident.

(8) Exh.45, telephone "vardhi".

(9) Exh.46, telephone "vardhi" given by Dr. Minaxiben first in point of time, no sooner the accused, the deceased and the mother-in-law Ujamben were admitted at the S.S.G. Hospital, Vadodara.

(10) Exh.47, F.S.L. Report.

14. Upon appreciation and evaluation of the evidence led by the prosecution, the trial Court came to the conclusion that the prosecution has been able to prove the case against the accused, appellant herein beyond reasonable doubt and was accordingly held guilty for the offence of murder of his wife, punishable u/s 302 of IPC and was sentenced to undergo rigorous imprisonment for life.

15. So far as the original accused No. 2 is concerned i.e. the mother-in-law of the deceased Ujamben, the trial Court came to the conclusion that the prosecution has failed to prove the case against the mother-in-law beyond reasonable doubt and was accordingly acquitted of all the charges by giving benefit of doubt.

16. Upon inquiring with the learned Public Prosecutor as to whether any acquittal appeal has been preferred by the State so far as the mother-in-law of the deceased is concerned, we were informed that the State has not thought fit to prefer any acquittal appeal.

II. Oral Evidence of the Witnesses :-

17. PW1 Khimjibhai Somabhai Parmar (Exh.11) :-

This witness happens to be the father of the deceased. He deposed that he has four daughters and a son. The name of the deceased was Sudhaben and Sudhaben was the second child. Sudhaben was married to the accused Somabhai Ganeshbhai Parmar of village Gosindra past about five years. It appears that when this incident occurred, during that period this witness decided to get her third daughter named "Damyanti" married. Marriage was fixed and he was on the verge of leaving for distribution of invitation cards of the marriage. At that point of time, few persons sent by the accused from village Gosindra came and informed this witness that his daughter Sudhaben is sick and has been admitted at S.S.G. Hospital, Vadodara. PW1, in Company of one Thakorbhai, came to Vadodara, and on reaching Vadodara, they learnt that Sudhaben has been admitted at Sayaji Hospital, Vadodara. Accordingly, they reached Sayaji Hospital. On reaching Sayaji Hospital, they saw the dead body of Sudha. This witness

learnt, on the strength of the dying declaration of the deceased before the Executive Magistrate that, Sudha's sister-in-law Daksha had caught hold off Sudha, the mother-in-law Ujamben poured kerosene and her husband, the accused herein lit a matchstick and set Sudha on fire. He has further deposed that the reason of her daughter's burning was because of illicit relationship of his son-in-law, the accused, with Daksha. Sudha had seen the accused and Daksha together for two to three times. He has also deposed that the in-laws of Sudha had driven her out number of times during her matrimonial life but he used to persuade Sudha to return to her matrimonial home. He has also deposed that the only reason Sudha was driven out from her matrimonial home was illicit relations of the accused with Daksha.

18. In the cross-examination of this witness, he has admitted that it is true that Sudha was brought at the hospital by his son-in-law, the accused, and the mother-in-law Ujamben. He also admitted that it is true that his son-in-law and Ujamben had also sustained burn injuries. This witness has further deposed that on reaching the hospital he inquired from Sudha as to how she sustained the burn injuries, and in reply, Sudha informed her father that while sleeping, a "khadiya" filled with kerosene fell on her and that is how she sustained the burn injuries. This witness also deposed that Sudha informed him that her husband and mother-in-law both immediately came to help her and in the process they sustained burn injuries. He has further deposed that he had no talks with Sudha as to whether the mother-in-law, sister-in-law or husband had set her on fire. He deposed that when he was inquiring with her daughter, the other relatives reached the hospital. He has also admitted that it is true that the relatives who were present at the hospital informed Sudha that she must say that it was her mother-in-law, her husband and her sister-in-law who set her on fire with a view to teach them a lesson and thereafter the matter may be compromised. He has also admitted in his evidence that it is true that Sudha agreed to say so on the instruction of the relatives. He has also deposed that it is true that when doctor inquired from Sudha as to how she sustained burn injuries, she narrated the version as per the say of the relatives. He further deposed that he remained at the hospital with her daughter and the relatives, and by early morning Sudha passed away.

19. So far as the evidence of PW1 is concerned, his first version in the examination-in-chief is that upon learning that Sudha has been admitted to Sayaji hospital he, in Company of one Thakorbbhai, reached the hospital and saw the dead body of Sudha and it is only on the strength of the dying declaration which was recorded that he learnt that the accused, mother-in-law Ujamben and sister-in-law Dakshaben, together set Sudha on fire.

20. In the cross-examination, there is a big somersault. This witness has practically destroyed the entire case of the prosecution. In the cross-examination PW1, father of the deceased, has narrated altogether a different story. PW1 has tried to project a story as if the deceased was very much alive at the time when

he reached the hospital and was able to even speak to her daughter Sudha. However, he has admitted that whatever was stated by Sudha in her dying declaration and before the police was as per the say of the relatives and the relatives did ask Sudha to involve her husband, mother-in-law and sister-in-law. In short, from the evidence of PW1, it appears that there was some tutoring at the end of the relatives to the deceased in the hospital.

21. PW2 - Shanta Khimjibhai Parmar (Exh.13) :-

This witness is the mother of the deceased Sudhaben. This witness did not support the case of the prosecution and was declared hostile.

22. PW3 - Jagdishkumar Trikambhai Sonara (Exh.14) :-

This witness is the Investigating Officer. This witness deposed that on 14th May 2005 he was serving as Police Sub-Inspector at Varnama Police Station. At that point of time, he received a "vardhi" from S.S.G. Hospital, Vadodara to the effect that Sudhaben Somabhai Parmar has been set on fire by her husband, the accused, and her mother-in-law Ujamben. He deposed that he reached the hospital and gave a "yadi" Exh. 15 to the Medical Officer, Incharge, inquiring as to whether Sudhaben is fit enough to give a statement or not. On the said "yadi", doctor put an endorsement that patient was conscious. Thereafter, he went to the special room in the burns ward and met Sudhaben. He introduced himself, and upon inquiring from Sudhaben, Sudhaben informed that on the previous day her sister-in-law ("nanand") had come to her house and she was served food. Her husband returned home after work and at that point of time she jokingly told her niece "Shital" that "I have not cooked food for your "mama"", as a result of which her husband picked up quarrel and assaulted her. Thereafter, she went off to sleep and at around 8 O'clock in the night there was power failure and at that point of time mother-in-law Ujamben came inside the room, poured kerosene and her husband lit a matchstick and set her clothes on fire. She raised shout. Her husband and mother-in-law tried to extinguish the fire but they also sustained burn injuries. Her husband had illicit relations with Dakshaben, his sister-in-law. This witness has further stated that accordingly he recorded FIR Exh.17. He deposed that thereafter he had informed the Executive Magistrate to reach the hospital and record dying declaration of Sudhaben. This communication is at Exh.17. This witness thereafter reached the place where the incident occurred and drew a scene of offence panchnama. From the scene of offence panchnama he collected a mattress, one bottle of kerosene, one burnt saree, soil stained with kerosene about 100 gms. and 100 gms. of controlled soil. He deposed that he also collected one half burnt matchstick. He recorded statements of Maniben and one another witness. He also drew an inquest panchnama and sent the body of Sudhaben for postmortem. The muddamal articles were sent to the Forensic Science Laboratory.

23. This witness, in his cross-examination, deposed that he received the information at around 12 O'clock on 13th May 2005. He deposed that he

reached the S.S.G. Hospital, Vadodara at around 1 O'clock in the night and first met Sudhaben and inquired from her as to how the incident occurred and as narrated by her, the same was taken down in writing. He deposed that he did not inquire anything with the other two injured persons. He does not remember as to whether the other two persons i.e. the accused and the mother-in-law Ujamben were there in the hospital for treatment or not. He did not inquire with the doctor as to where were the other two injured persons. He did not even inquire with the Head Constable who sent the "vardhi" from the hospital regarding the other two injured persons. He deposed that he had obtained thumb impression on the FIR. He has admitted in his cross-examination that Exh.15 ("yadi") which he had prepared and handed over to the doctor to know as to whether the injured was conscious or not contains names of three persons. He had no idea as to in which ward Ujamben and Somabhai were admitted. He had no idea as to which doctor put the endorsement on the "yadi" Exh.15. It appears that the trial Judge thought fit to note the demeanour of this witness and has noted that the witness is replying after a very long time and inspite of asking him to give prompt reply, he has been referring to his case-diary. The Investigating Officer further deposed that he had no idea as to which doctor was treating Sudhaben, that is to say, he had no idea about the name of the doctor. This witness even did not know who was the incharge of that particular ward. He deposed that before meeting Sudhaben, he met one doctor and gave him a "yadi". He admitted that in the said "yadi" names of three patients had been written. He admitted that he had not prepared an independent "yadi" to know as to whether Sudhaben was conscious or not. He has no idea as to whether the other two patients were in which particular ward. He denied the suggestion put by the defence that the FIR was concocted and that he had not recorded any such FIR. He deposed that it was true that he did not collect the first case-papers regarding the admission of Sudhaben at the dispensary. He further deposed that he did not confirm or verify before recording the FIR of Sudhaben as to whether Sudhaben had been tutored by any person or not. He deposed that the skin of the face of Sudhaben was burnt. The hair were also burnt.

24. The evidence of this witness who is the Investigating Officer assumes significance, as he recorded the FIR of the deceased which the prosecution has relied upon heavily as a first dying declaration. So far as the evidence of this witness is concerned, the "yadi" Exh.15 is important. Exh.15 contains the names of three persons (1) Sudhaben, (2) Somabhai, and (3) Ujamben. In the "yadi" Exh.15 prepared by this witness, it is stated that the three persons named are undergoing treatment and whether they are fit enough to give dying declaration or not, was inquired from the doctor.

25. It appears from the endorsement put, in Exh.15 that one Dr. Ravindra wrote "patient conscious and oriented at present". The moot question would be as to which patient Dr. Ravindra is referring to. There were three patients and it is not clear or said in so many words that so and so patient is conscious and oriented. Under such circumstances, it is difficult to reach to a conclusion that before the

FIR came to be recorded, deceased Sudhaben was conscious and was in a fit state of mind. It deserves to be noted that within three hours from the time of recording of FIR as well as the dying declaration, Sudhaben passed away. This would speak a lot as regards the condition of the deceased, more particularly, when she had sustained 98% third degree burns all over the body.

26. PW4 - Kiran Vinodray Desai (Exh.26) :-

This witness is the Executive Magistrate who recorded the dying declaration of the deceased at S.S.G. Hospital, Vadodara. In his examination-in-chief, he deposed that he received the "yadi" informing that a dying declaration of a patient admitted in the burns ward of S.S.G. Hospital, Vadodara is to be recorded. He deposed that, on the strength of the "yadi" he reached S.S.G. Hospital, Vadodara and went to room No. 13 where the lady was admitted. He admitted that he did not meet anyone except inquiring with a nurse about the room number. He further deposed that when he reached room No. 13, he asked the relatives to go out and inquired about the name of the victim. The deceased, in turn, disclosed her name as Sudhaben Somabhai Parmar and thereafter the dying declaration was recorded. This witness has deposed the entire contents of the dying declaration Exh.27 in his examination-in-chief. In his cross-examination, the Executive Magistrate deposed that he received the "yadi" at 2:10 a.m. in the night. He further deposed that he received the "yadi" at S.S.G. Hospital, Vadodara and before that he was informed on telephone and that is how he reached the S.S.G. Hospital, Vadodara. As to whose dying declaration is to be recorded, was informed to this witness on telephone. He further deposed that there were around two to five relatives near the patient when he reached for the purpose of recording the dying declaration. He did not verify before recording the dying declaration as to whether anybody had tutored the injured or not. He did not even inquire as to whether before recording the dying declaration the injured had disclosed about the incident to any other person or not. He has no idea as to who brought her to the hospital and at what time. He deposed that the maker of the dying declaration was under the treatment of Dr. Ravindra. He has admitted that before recording the dying declaration he did not inquire from Dr. Ravindra so far as the mental state of the patient's mind was concerned. He did not give any "yadi" in writing to the doctor in this respect. He, however, relied upon the endorsement obtained by the police. He admitted in his cross-examination that it is true that before recording the dying declaration, it is very much essential and advisable to know from the doctor as to whether the patient is physically and mentally fit to make any declaration or not, and it is also necessary to obtain such certificate from the doctor. He admitted that he has not obtained such a certificate of fitness from the doctor. He also deposed that the skin of the entire face was burnt, her neck and chest was also burnt. He denied to the suggestion put by the defence that he incorporated the details as contained in the dying declaration by merely asking the police in this regard.

27. From the evidence of PW4, the Executive Magistrate, it is clear that before

recording the dying declaration he did not care or bother to inquire from the doctor as regards the condition of the patient. In clear words this witness has admitted that he did not give any written "yadi" to the doctor in this regard or even inquire orally. However, he tried to salvage the situation by deposing that police had obtained an endorsement about the condition of the deceased. This would hardly save the situation because this witness himself has deposed that before recording the dying declaration he had no idea as to whether Sudhaben had made any statement about the incident before any other person. When this witness reached the hospital to record the dying declaration he had no idea that the FIR was already registered and, therefore, he could not have relied upon the endorsement put by Dr. Ravindra on Exh. 15. Even otherwise, Exh.15 is of no consequence as discussed above. Therefore, all that one could gather from the evidence of this witness is that he recorded the dying declaration Exh.27.

28. PW5 - Kusumben Govindrao Balpandey (Exh.30) :-

This witness at the relevant point of time was serving as Head Constable at "Nari Suraksha Kendra, Kothi Kacheri". When she came to depose she had retired from service. All that she had disposed is that the deceased Sudhaben was brought to "Nari Suraksha" by her father. She has deposed that one application dated 29th March 2005 was given by Sudhaben alleging harassment and cruelty at the end of her mother-in-law. Nothing much turns around so far as the evidence of this witness is concerned except the fact that there was harassment at the end of the mother-in-law.

29. PW6 - Dr. Minaxiben Chimanbhai Chauhan (Exh.31) :-

This witness is a Medical Officer and at the relevant point of time she was serving at S.S.G. Hospital, Vadodara. On 13th May 2005 at around 11 :-30 p.m. three persons were brought to the hospital (1) Sudhaben Somabhai Parmar, (2) Somabhai Ganeshbhai Parmar, and (3) Ujamben Ganeshbhai Parmar, for the purpose of treatment. She deposed that on inquiring from Ujamben, she informed that she sustained burn injuries while trying to save her daughter-in-law. On her examination, this witness found that Ujamben had sustained 1st to 3rd degree burns on her face, both hands and abdomen to the extent of 8% to 10%. She issued a certificate in this regard which is Exh.32. At the same time, she inquired from Somabhai Ganeshbhai Parmar, the accused herein, and he also in turn informed that while trying to save his wife who was on fire, he sustained burn injuries. On his examination, the witness found that Somabhai had sustained 1st to 2nd degree burns on face, both hands and both wrists to the extent of 10% to 12%. This witness issued a certificate Exh.33 in this regard. Thereafter, she inquired from Sudhaben and Sudhaben, in turn, is said to have told that her husband and mother-in-law poured kerosene and set her on fire and the reason for doing so was that she had a quarrel with her husband and at that point of time, the husband had also beaten her. On examination of Sudhaben, the witness noticed that there were 2nd to 3rd degree burns all over the body i.e. 100% burns. She deposed that when she first came to the hospital

she was alive and conscious. This witness has deposed that she immediately referred Sudhaben to the surgical head of the burns ward. In her cross-examination, this witness has deposed that she had asked the Head Constable Shankerbhai who was on duty at the hospital to sent a "vardhi" as regards the incident. This witness deposed that it was true that when Sudhaben was admitted in the hospital at that point of time the fact that her husband and mother-in-law set her on fire by throwing a bottle of kerosene was not disclosed. She deposed that it was true that before her, no such fact was revealed that her mother-in-law threw a bottle of kerosene and her husband lit a matchstick and set her on fire. This witness further deposed that it is true that in the "vardhi" which was sent from the hospital there is no reference of any role being played by the mother-in-law. She further deposed that it is true that a person with 100% burns is considered to be very serious. She further deposed that no treatment was given to Sudhaben by her.

30. From the evidence of this witness, it is very clear that three persons were brought to the hospital i.e. the deceased, the accused and the mother-in-law Ujamben. The accused and the mother-in-law informed this witness as to how they sustained burn injuries. From the evidence of this witness, it is also very clear that when Sudhaben was brought to the hospital it was not revealed that her husband and mother-in-law had set her on fire. Even in the "vardhi" which was sent from the hospital, no role to the mother-in-law Ujamben was ascribed. This is the reason why the trial Court thought fit to acquit the mother-in-law giving her benefit of doubt.

31. PW7-Dr. Vaishakhiben Yashvantrao Shukla (Exh.36) :-

This witness in the year 2005 was serving as Medical Officer, Forensic Medicines Department. According to this witness, the dead body of Sudhaben Somabhai was brought at around 11:45 for the purpose of postmortem. This witness alongwith Dr. A.K. Mahajan, performed the postmortem. This witness has deposed that there were 98% burns of 1st to 2nd degree. All the injuries were ante mortem. In her cross-examination, she deposed that a person who has sustained 98% burns is considered to be a very serious case. It is true that the deceased had sustained burns on the face as well as neck. She has further deposed that such a person would definitely be in a very critical condition.

32. PW 10 - Haribhadrasingh Takhtasingh, Head Constable (Buckle No. 1871) - Exh.44 :-

This witness is a police officer. On 15th May 2005 he was at Varnama Police Station serving as a Police Sub-Inspector. At that point of time, he received one "vardhi" from S.S.G. Hospital, Vadodara sent by Head Constable Shankerbhai, informing about burn injuries sustained by Sudhaben, Somabhai and Ujamben. This witness registered a "vardhi" in the station diary. All that this witness has done is to prove the registration of the same in the diary by producing the same at Exh.45. This witness otherwise has no role to play except by producing the

telephone "vardhi" (Exh.45). Exh.45, a telephone "vardhi" also is an important piece of evidence. In Exh.45, telephone "vardhi", no role has been ascribed to the mother-in-law Ujamben and it is stated that the husband i.e. the accused herein poured kerosene on the body of Sudhaben and set her on fire.

III. Contentions on behalf of the Accused :-

33. Mr. Mrudul M. Barot, learned Counsel appearing for the accused-appellant vehemently submitted that the trial Court in the present case committed a serious error in holding the accused-appellant guilty of the offence of murder and thereby convicting and sentencing the accused to undergo life imprisonment, more particularly, when the trial Court acquitted the co-accused Ujamben, the mother-in-law of the deceased by disbelieving the two dying declarations of the deceased in part. Mr. Barot submitted that conviction in a criminal trial could be based solely on the dying declaration provided the dying declaration is found to be wholly reliable. Mr. Barot submitted that the trial Court has not believed the dying declaration wholly reliable and in such circumstances, conviction could not have been based solely upon it.

34. Mr. Barot submitted that the trial Court ought not to have relied upon the two dying declarations as substantive piece of evidence for the simple reason that the deceased had sustained almost 98% 3rd degree burns all over the body and there is no evidence worth the name to show that at the time of recording of the FIR as well as the dying declaration the deceased was conscious and was in a fit state of mind to make such a declaration.

35. Mr. Barot submitted that so far as PW4 Kiran Desai, the Executive Magistrate Exh.26 is concerned, he has admitted in his evidence stated that he had not inquired from any of the doctors as regards the condition of the deceased at the time when he came to record the dying declaration. He has submitted that it is an admitted position that dying declaration does not carry certificate by Executive Magistrate to the effect that it was a voluntary statement made by the deceased and was read over to the deponent. Dying declaration was not even attested by the doctor. Mr. Barot submitted that immediately on admission in the hospital, ordinarily in cases of: extensive burns, injections like Fortwin and Pethidine are administered and a person would be under constant sedatives to relieve the injured from pain.

36. Mr. Barot further submitted that even so far as the FIR is concerned, which has been treated as a dying declaration by the prosecution, it could not have been relied upon by the trial Court for the simple reason that there is no satisfactory evidence that before recording of FIR the Investigating Officer obtained the opinion of the doctor as regards the state of mind of the deceased. Mr. Barot submitted that the trial Court committed an error in relying upon the endorsement of the doctor made upon Exh.15 stating that the patient is conscious and oriented at present. Mr. Barot submitted that so far as Exh.15 is concerned, there are three names: (1) of the accused, (2) the deceased, and (3)

Ujamben. It is not clear as to which particular patient Dr. Ravindra referred to while putting the endorsement that the patient is conscious and oriented. Mr. Barot submitted that in the absence of satisfactory evidence in this regard, the trial Court could not have drawn an inference that Dr. Ravindra meant to refer to Sudhaben i.e. the deceased. Such an inference would remain in the realm of conjectures and surmises.

37. Mr. Barot submitted that as a matter of fact Sudhaben, the deceased, committed suicide by pouring kerosene on her body and thereafter setting herself on fire due to the incident which occurred just couple of hours before the time of the incident. Mr. Barot submitted that a quarrel ensued between the accused and the deceased on deceased cracking a joke with her niece Shital which was not liked by the accused, as a result of which the deceased felt bad and took the extreme step of dousing herself with kerosene and set herself on fire. Mr. Barot submitted that this is the reason why the accused herein and the mother-in-law of the deceased Ujamben both sustained serious injuries on hands, palms, face, abdomen. Mr. Barot submitted that the defence version of suicide by the deceased is highly probable, whereas the prosecution version of homicidal death is highly improbable.

38. Mr. Barot submitted that the trial Court has also not touched this aspect and has very conveniently avoided to discuss as to how the accused herein and the mother-in-law Ujamben both sustained burn injuries as confirmed by PW6 Dr. Minaxiben Chauhan Exh.31.

39. Mr. Barot submitted that even PW1, father of the deceased, has altogether a different story to narrate.

40. Mr. Barot submitted that the appeal deserves to be allowed by quashing and setting aside the judgment and order of conviction passed by the trial Court.

41. On the other hand, Mr. K.P. Raval, learned APP vehemently submitted that while defending the judgment and order of conviction passed by the trial Court, the trial Court, upon appreciation and evaluation of the evidence on record, has rightly come to the conclusion that prosecution has been able to prove the guilt of the accused beyond reasonable doubt. Mr. Raval submitted that this Court may not disturb a well-reasoned judgment of the trial Court.

42. Mr. Raval heavily relying upon the two dying declarations, submitted that there is no element of doubt that the accused had illicit relations with one Dakshaben, his sister-in-law and due to which the matrimonial life of the deceased had become miserable and on that particular day the accused decided to eliminate the deceased by pouring kerosene on her and setting her on fire. Mr. Raval submitted that the two dying declarations are wholly reliable and the trial Court rightly convicted the accused based on such dying declarations. Mr. Raval submitted that even though the trial Court disbelieved the prosecution's case so far as the mother-in-law Ujamben is concerned, the evidence on record was sufficient enough to hold the accused herein guilty of the offence. Just because

the mother-in-law came to be acquitted, does not mean that the entire case of the prosecution ought to have been discarded or disbelieved by the trial Court. Mr. Raval submitted that in a criminal trial, more particularly, in this country, the maxim "falsus in uno, falsus in omnibus" (false in one thing, false in every thing) cannot be made applicable. Mr. Raval also submitted that the injuries sustained by the accused herein and the mother-in-law Ujamben are not such a circumstance which points only towards the innocence of the accused. Non explanation of burn injuries on the accused herein by itself is no ground to reject the entire prosecution case and acquit the accused of such a heinous crime.

43. He submitted that there is no merit in this Appeal and the same be dismissed confirming the judgment and order of conviction.

IV. Analysis :-

44. Having heard learned Counsel for the respective parties and upon re-appreciation and re-evaluation of the entire evidence on record, oral as well as documentary, we are of the view that conviction of the accused could not have been based on the two dying declarations as relied upon by the trial Court. There are more than one reason to reach to this conclusion. It is no doubt true that conviction can be recorded on the basis of dying declaration alone, but therefore, the same must be wholly reliable. In a case where suspicion can be raised as regards the correctness of the dying declaration, the Court, before convicting an accused on the basis thereof would look for some corroborative evidence. Suspicion is no substitute for proof. If evidence brought on record suggests that such dying declaration does not reveal the entire truth, it may be considered only as a piece of evidence, in which event, conviction may not be rested only on the basis thereof. The question as to whether a dying declaration is of impeccable character, would depend upon several factors, physical and mental condition of the deceased is one of them.

45. The Supreme Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in the case of Smt. Paniben Vs. State of Gujarat, (SCC pp. 480-81, para 18) (Emphasis supplied) :-

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See Munnu Raja and Another Vs. The State of Madhya Pradesh,

(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 Uttar Pradesh Vs. Ram Sagar Yadav and Others, and Ramawati Devi Vs. State of Bihar,

(iii) Supreme Court has to scrutinise 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 and Another Vs. The Public Prosecutor,

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See Rasheed Beg and Others Vs. State of Madhya Pradesh,

(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 Alias Surendra Singh Vs. State of Madhya Pradesh,

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [See Ram Manorath and Others Vs. State of Uttar Pradesh,

(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. Krishnamurthi Laxmipati Naidu, 1980 Supp SCC 455]

(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 and Others Vs. State of Bihar,

(ix) 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. But where the eyewitness has said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See Nanhau Ram and Another Vs. State of Madhya Pradesh,

(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. Vs. Madan Mohan and Others,

(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 Vs. State of Maharashtra,

46. In Puran Chand Vs. State of Haryana, this Court once again reiterated the above mentioned principles.

47. In Panneerselvam Vs. State of Tamil Nadu, , a Bench of three Judges of the Supreme Court reiterating various principles mentioned above, held that it cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of the conviction unless it is corroborated and the rule requiring corroboration is merely a rule of prudence.

48. In the light of the above principles, the acceptability of the alleged dying declaration in the instant case has to be considered. If, after careful scrutiny, the Court is satisfied that it is 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 a basis of conviction, even if there is no corroboration. With

these principles, let us consider the statement of Sudhaben and its acceptability.

49. In this case, the circumstances which have been brought on record clearly point satisfied that it is 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 a basis of conviction, even if there is no corroboration. With these principles, let us consider the statement of Sudhaben and its acceptability out that what might have been stated in the dying declaration may not be correct. There is evidence to the effect that the matrimonial life of the deceased was disturbed on account of the accused having illicit relationship with one Dakshaben, his sister-in-law, and due to which the deceased was being harassed and ill-treated at matrimonial home. If the deceased had been nurturing a grudge against her husband for a long time, she, while committing suicide, herself may try to implicate him so as to make his life miserable. Court cannot in all cases presume that a dying person would never make a false statement. In the present case, first we are not satisfied as regards the fact as to whether the deceased Sudhaben at the relevant point of time was fit enough to make any statement. As discussed earlier, it is difficult for us to rely upon Exh.15 because it is not clear as to which patient Dr. Ravindra was referring to while certifying that the patient is conscious and oriented. In Exh.15 there are three names, one, of the deceased, second, of the accused herein, and third, of the mother-in-law Ujamben. It is also undisputed that all the three had sustained burn injuries and, therefore, the Investigating Officer ought to have been more clear and explicit while seeking an opinion from the doctor as regards the mental condition specifically of the deceased Sudhaben. We cannot overlook the fact that the deceased had sustained almost 98% of third degree burns. She barely survived for few hours. At around 1:30 in the early morning on 14th May 2005, FIR is being registered and immediately thereafter at around 2:30 the Executive Magistrate comes and records the dying declaration and at 4:30 she breathed her last. This would also reflect on the condition of Sudhaben at that point of time. So far as the Executive Magistrate is concerned, he has been candid enough to admit in his evidence that he did not obtain any certificate of fitness from the doctor and straightway came to the hospital and recorded dying declaration of the deceased. Just because an Executive Magistrate records a statement by itself cannot be a ground to accept the statement in its entirety. We can also take judicial note of the fact that no sooner a patient with extensive burns all over the body is admitted in a hospital, the first thing the doctors would do as a part of the treatment to relieve the patient from pain is to administer injections like Fortwin and Pethidine. They would try to keep the patient under constant sedatives. Though in the present case such a pertinent question has not been put to the doctor as regards the treatment, but still, this would be the first preliminary treatment in the case of burns and, therefore, very essential for the prosecution to bring on record cogent, convincing and reliable evidence as regards the condition of the maker of the statement, more particularly, in cases like extensive burns of 98%, as in the present case.

50. The cumulative factors and surrounding circumstances make it impossible to rely upon the dying declarations that were recorded in Exh.16 and Exh.27. It is the duty of the prosecution to establish the charge against the accused beyond reasonable doubt. The benefit of doubt must always go in favour of the accused. It is true that dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state-of-mind. It is for that reason, non-examination of Dr. Ravindra who is said to have put the endorsement on Exh. 15 stating that "patient is conscious and oriented", attains some significance. It is not because it is the requirement in law that the doctor, who certified about the condition of the victim to make a dying declaration, is required to be examined in every case but, it was the obligation of the prosecution to lead corroborative evidence available in the peculiar circumstances of the case.

51. We have also examined the evidence of PW4, the Executive Magistrate, who recorded the dying declaration of the deceased. We do not find from the entire evidence of the Executive Magistrate that he himself: was satisfied with the physical and mental condition of the deceased so as to consider her fit to give a declaration. There can be no doubt that when a dying declaration is recorded, the person who records the statement must be satisfied with the person who makes the statement is consciously making the statement understanding the implications of the words he/she uses.

52. We have also tried to examine the matter keeping in mind acquittal of mother-in-law Ujamben. It is no doubt true that if one co-accused is acquitted for some reason by itself is no ground to discard the entire evidence and acquit the other accused person. It all depends upon the facts and circumstances of each case and the quality of evidence led by the prosecution. In the present case, the deceased Sudhaben remained very consistent with the genesis of the occurrence. Her case in both the dying declarations has been that at around 8 O'clock in the night when she was sleeping after the incident of quarrel with the accused herein, her mother-in-law Ujamben came in the house, poured kerosene on her body which was in a "khadiya" (container) and her husband, the accused herein lit a matchstick and set her clothes on fire. The trial Court, however, relying on the telephone "vardhi" Exh.46, thought fit to acquit the mother-in-law Ujamben because it appears that the first version at the time of admission of Sudhaben in the hospital was not the one implicating the mother-in-law in any manner. The trial Court, therefore, ultimately acquitted the mother-in-law Ujamben giving her benefit of doubt. Once the mother-in-law Ujamben is acquitted and thereafter if the accused herein is to be held guilty for the offence, would suggest that the entire version of the deceased is being changed. The question would be, then who poured kerosene. If the mother-in-law did not pour kerosene then the act of pouring kerosene on the body of the deceased is also being attributed to the accused herein, and thereby, changing the basic substratum of the prosecution case. In any criminal trial, if the facts are inextricably mixed up with each other, then the Court must make an endeavour

to separate the grain from the chaff but, in undertaking this exercise, the Court cannot change or introduce a new story than the one which has been put forward by the prosecution. We are of the view that as the trial Court has disbelieved the involvement of the mother-in-law Ujamben in the crime, would suggest that the trial Court has not believed the dying declaration in toto. If such is the case then the dying declaration which is otherwise a substantive piece of evidence, no longer remains a substantive piece of evidence but just remains a piece of evidence, and in absence of corroboration to the same, conviction cannot be based solely upon it.

53. We have no doubt in our mind that this is not a case of homicidal death but, is a case of suicide. Accused picked up quarrel with the deceased upon deceased cracking a joke with her niece Shital and which ended with accused assaulting the deceased. Feeling humiliated and insulted, she retired in her house and was lying on a cot and thereafter at around 8:00 O'clock she took the extreme step of dousing herself with kerosene and thereafter set herself on fire. It is at this stage that the accused herein and the mother-in-law Ujamben came at the place of occurrence of the incident and must have tried to extinguish the fire to save Sudhaben, and in the process, sustained burn injuries on hands, palms, face, neck and abdomen, as certified by the doctor in Exh.32 and Exh.33.

54. We find that the defence set up by the accused-appellant is more probable and true compared to the case put up by the prosecution. We cannot lose sight of the principle that while the prosecution has to prove his case beyond reasonable doubt, the defence of the accused has to be tested on the touchstone of probability. The burden of proof lies on the prosecution in all criminal trials, though the onus may shift to the accused in given circumstances, and if so provided by law. Therefore, the evidence has to be appreciated to find out whether the defence setup by the accused-appellant is probable and true. Testing the defence of the accused on the touchstone of probability, we have no hesitation in coming to the conclusion that this is a case of suicide and not of murder as alleged by the prosecution.

55. It has been the case of the accused right from day one that he sustained burn injuries while trying to save his wife deceased Sudhaben, who had set herself on fire. This was the version of the accused immediately before the doctor on he being admitted at S.S.G. Hospital, Vadodara along with his mother Ujamben and deceased Sudhaben. This was also the version of the co-accused, mother-in-law Ujamben. Prosecution has kept a conspicuous silence on this aspect. The trial Court also brushed aside this circumstance very lightly due to the two so-called weighty dying declarations. It is a settled law that where serious injuries are found on the person of the accused, as a principle of appreciation of evidence, it becomes obligatory on the prosecution to explain the injuries so as to satisfy the Court as to the circumstances under which the occurrence originated. But, before this obligation is placed on the prosecution, two conditions must be satisfied :-

(i) that the injuries on the person of the accused must be very serious and severe and not superficial, and

(ii) that it must be shown that these injuries must have been caused at the time of the occurrence in question.

56. In the present case, we are of the view that both the conditions are satisfied. Here is not a case where the deceased has been clobbered to death by an axe and one lacerated wound is sustained by the accused. Though, in the present case, the doctor has certified the burn injuries on the body of the accused herein as well as the mother-in-law to be simple and not very serious, but at the same time, the injuries were burns having a direct nexus with the cause of death of the deceased. The deceased died due to burn injuries and while extinguishing the fire the accused herein and his mother sustained burn injuries.

57. Under such circumstances, the defence put forward by the accused is more probable rather than the case of the prosecution, more particularly, when we have reached to the conclusion that the two dying declarations are not beyond the pale of doubt.

58. There is one more reason why implicit reliance could not have been placed by the trial Court on the dying declarations. Evidence of PW1, father of the deceased assumes significance in this regard. He has not been declared hostile by the prosecution in any manner but, at the same time, his evidence discloses something which could not be ignored or overlooked. In his evidence, he has deposed that in the hospital there were many relatives and those relatives tutored Sudhaben to involve her mother-in-law and her husband by alleging that they set Sudha on fire and thereafter they would settle the dispute. PW1, father of the deceased, had gone to the extent of deposing that it is true that on " the say of the relatives Sudha agreed to involve the accused and her mother-in-law. There is no re-examination at the end of the Public Prosecutor. If there was any ambiguity it could have been resolved through re-examination of PW1. If the party who called the witness, feels that explanation is required for any matter referred to in the cross-examination, he is at liberty to put any question in re-examination to get the explanation. The Public Prosecutor is expected to formulate his questions for that purpose.

59. In the aforesaid view of the matter, we are, therefore, of the opinion that it is a fit case where the appellant is entitled to the benefit of doubt.

60. The Appeal is accordingly allowed. The judgment and order of conviction passed by the Sessions Judge, Vadodara in Sessions Case No. 249 of 2005 is quashed and set-aside. The appellant is ordered to be acquitted of all the charges. The appellant is ordered to be released forthwith, if not required in any other case.