
(1996) 06 GUJ CK 0016
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Koli Chunilal Savji and Another

RESPONDENT

Date of Decision : 24-06-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 32, 32(1)

Penal Code, 1860 (IPC) — Section 302, 307, 34, 498(A), 498A

Citation : (2000) 4 GLR 3277

Hon'ble Judges : M.H. Kadri, J;J.M. Panchal, J

Bench : Division Bench

Judgement

J.M. Panchal, J.—Criminal Appeal No. 236 of 1989 is filed by the State of Gujarat questioning legality and validity of judgment and order dated February 6, 1989 rendered by the learned Addl. Sessions Judge, Jamnagar, in Sessions Case No. 74 of 1984, acquitting the respondents-original accused, of the offences punishable u/s 302 read with Section 34 of the I.P. Code. In Criminal Appeal No. 105 of 1989, the appellants, who are the original accused, have challenged the judgment and order dated February 6, 1989, delivered by the learned Addl. Sessions Judge, Jamnagar, in Sessions Case No. 74 of 1984, convicting them of the offence punishable u/s 498A of the I.P. Code, and sentencing them to R.I. for two years and fine of Rs. 250/-, in default S.I. for two months. While admitting Criminal Appeal No. 105 of 1989, the Court issued notice calling upon the appellants of Criminal Appeal No. 105 of 1989 to show cause as to why the sentence imposed for the offence punishable u/s 498A should not be enhanced. That proceeding is numbered as Misc. Criminal Application No. 564 of 1989. As the two appeals and the proceeding for enhancement of sentence arise out of the common judgment and order dated February 6, 1989, rendered by the learned Addl. Sessions Judge, Jamnagar, in Sessions Case No. 74 of 1984, we propose to dispose them of by this common judgment.

2. Briefly stated, the prosecution case is that deceased Dhanuben, wife of Chunilal Savji was residing in Room No 164, situated in Machhar Nagar area of

Jamnagar City along with her husband and three children. The incident took place on June 28, 1984 at about 4-00 a.m. It is the prosecution case that the accused shared common intention to kill Dhanuben and her minor son Ajay, and they, in furtherance of that common intention, poured kerosene over them and lit the fire. As deceased Dhanuben and Ajay received burn injuries, deceased Dhanuben raised shouts for help. Because of the shouts raised by her, neighbours collected at the place where the incident had taken place, and extinguished the fire. Injured Dhanuben as well as injured Ajay were removed to hospital. Mr. R.B. Parmar, who was then discharging duties as P.S.I., Jamnagar City "B" Division Police Station, received information that Dhanuben and Ajay were brought to Irwin Hospital in burnt condition. Thereafter, he proceeded to the hospital and contacted injured Dhanuben. After questioning her, he wrote down her complaint as stated by her. Thereafter, Mr. Parmar went to the police station and made entry in the register. After registering the complaint, P.S.I. Mr. Parmar wrote a Yadi to Executive Magistrate for recording dying declaration of injured Dhanuben. The Yadi was handed over to Executive Magistrate by Mr. Parmar. Thereupon, the Executive Magistrate proceeded to Irwin Hospital for the purpose of recording dying declaration of injured Dhanuben. At the hospital, the Executive Magistrate contacted Dr. Shukla, who was then treating injured Dhanuben and injured Ajay. The Executive Magistrate ascertained from the doctor as to whether Dhanuben was in fit state of mind to give statement. The doctor made an endorsement on the Yadi to the effect that the patient was fully conscious and signed the said endorsement. Thereafter, the Executive Magistrate asked the persons who were near the cot of injured Dhanuben to leave the room, and then questioned Dhanuben. The Executive Magistrate recorded the dying declaration as given by Dhanuben. During the course of treatment, minor Ajay expired at 8-55 p.m., whereas injured Dhanuben expired at about 9-50 a.m. on the same day.

3. Dr. Bansidhar Ganpatlal Gupta, who was discharging duties as Assistant Professor and Head of the Department, Irwin Group of Hospitals, Jamnagar, performed autopsy on the dead bodies of Dhanuben and Ajay on June 28, 1984. The doctor who performed the autopsy also prepared the post-mortem notes. Thereafter, the investigation was handed over to Mr. U.T. Brahmhatt, who was then discharging duties as the Police Inspector, Jamnagar City "B" Division Police Station. The Investigating Officer recorded the statement of several persons. At the conclusion of the investigation, the accused were charge-sheeted for the offences punishable u/s 302 read with Section 34 of the I.P. Code. As the offences were exclusively triable by the Sessions Court, case was committed to the Sessions Court for trial. The learned Addl. Sessions Judge, framed charge at Exh. 4 against the accused u/s 302 read with Section 34 of I.P. Code. The charge was read over and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution, therefore, in order to prove its case, examined following witnesses:

(1) Manjulaben Dayalji PW 1, Exh. 8 (2) Chandulal Parshottam PW 2, Exh. 9 (3)

Ramesh Amrutlal PW 3, Exh. 10 (4) Vijay Chunilal PW 4, Exh. 11 (5) Jayshreeben Ratilal PW 5, Exh. 12 (6) Razak Hasan PW 6, Exh. 13 (7) Umarbhai Ismail PW 7, Exh. 14 (8) Chandubha Varsubha Gohil PW 8, Exh. 15 (9) Dr. Bansidhar Ganpal Gupta PW 9, Exh. 17 (10) Vinod Chunilal PW 10, Exh. 22 (11) Godavariben Harjibhai PW 11, Exh. 23 (12) Rashmiben Ishwarlal (Executive Magistrate, who recorded the D.D.) PW 12, Exh. 24 (13) Kishore Savji PW 13, Exh. 25 (14) Rambhai Bhagubhai Parmar, P.S.I., who recorded F.I.R. PW 14, Exh. 44 (15) Udaykumar Tribhovandas, I.O. PW 15, Exh. 47 4. The prosecution also relied on post-mortem notes, First Information Report which was subsequently treated as Dying Declaration after the death of injured Dhanuben, Dying Declaration recorded by the Executive Magistrate, and other documents, to prove its case.

5. After recording of evidence of the prosecution witnesses was over, the learned Judge recorded statements of the accused u/s 313 of the Code of Criminal Procedure. In their statements u/s 313, the accused denied their involvement in the offence and stated the case to be a false one. They, however, produced no defence. The learned Judge appreciated the evidence led by the prosecution and recorded following conclusions:

(i) Deceased Dhanuben and deceased Ajay died because of burn injuries sustained by them, and the burn injuries sustained by them were sufficient in the ordinary course of nature to cause death;

(ii) The deceased persons did not receive burn injuries by accident;

(iii) Though Vijay Chunilal, PW 4, Ex. 11 claimed that he was present in the room at the time of incident, he was not present as he did not receive any burn injury, nor was his presence referred to by deceased Dhanuben in her F.I.R.;

(iv) Even if it was assumed that Vijay Chunilal was present in the room at the time when the incident took place, his evidence does not throw any light on the incident;

(v) The F.I.R. as narrated by deceased Dhanuben was recorded by P.S.I. Mr. Parmar before 7-30 a.m. on June 28, 1984, and it is a genuine piece of evidence;

(vi) (a) Manjulaben Dayalji. PW 1. Exh. 8, (b) Chandulal Parshottam, PW 2, Exh. 9, (c) Ramesli Amrutlal. PW 3. Exh. 10, (d) Jayshreeben Ratilal, PW 5, Exh. 12, (e) Razak Hasan. PW 6, Exh. 13, (f) Umarbhai Ismail, PW 7, Exh. 14, (g) Chandubha Varsubha Gohil, PW 8, Exh. 15, (h) Vinod Chunilal, PW 10, Exh. 22, (i) Godavariben Harjibhai, PW 11, Exh. 23 and (j) Kishore Savji, PW 13, Exh. 25, were examined by the prosecution to prove oral dying declaration made by deceased Dhanuben to them, but they have turned hostile and the oral dying declaration alleged to have been made by the deceased to them is not proved;

(vii) Ms. Rashmiben Ishwarlal, PW 12, Exh. 24 recorded the dying declaration as narrated by deceased Dhanuben, and deceased Dhanuben was in fit state of mind to make that statement. Therefore, the dying declaration recorded by the

Executive Magistrate is a reliable piece of evidence.

(viii) The defence of the accused that the room was closed from inside and they were not present at the time of the incident is not believable because the arrest panchnama and the panchnama of the persons of the accused indicate that they had received burn injuries;

(ix) The circumstances that, (a) the accused informed the brother of deceased Dhanuben and did not prevent Savjibhai who is the father of accused No. 1 from giving information to the mother of deceased Dhanuben; (b) there is possibility that deceased Dhanuben committed suicide because of anger and gave names of the accused in the dying declaration; (c) the deceased did not try to come out of the room; (d) the accused had no grudge against deceased minor Ajay; (e) non-examination of the doctor who treated deceased Dhanuben and deceased Ajay as well who made endorsement on the Yadi to the effect that the patient was fully conscious; (f) absence of endorsement on the dying declaration to the effect that the patient was fully conscious; (g) absence of evidence about the exact time at which the P.S.I. had started recording the F.I.R. of the deceased; (h) lapse on the part of Investigating Officer in not sending the petti-coat worn by accused No. 2 to Forensic Science Laboratory for analysis; (i) Non-examination of the Head Constable or the Medical Officer who informed P.S.I. Mr. Parmar about Dhanuben and Ajay having been brought to Irwin Hospital in burnt condition; (j) Non-examination of Savjibhai Manjibhai who received burn injuries; (k) Non-abscondence of the accused; and (1) absence of corroboration to the complaint and dying declaration; indicate that neither deceased Dhanuben nor deceased Ajay were killed by the accused.

(x) From the content of F.I.R. as well as the Dying Declaration, it is evident that the deceased Dhanuben was subjected to cruelty, and therefore, offence u/s 498A is made out against the accused.

6. In view of the above referred to conclusions, the learned Judge acquitted the accused of the offences punishable u/s 302 read with Section 34 of the I.P. Code, but convicted them u/s 498A of the I.P. Code and imposed the sentence which is referred to earlier, giving rise to the present three proceedings.

7. Mr. S.R. Divetia, the learned Counsel for the State Government has taken us through the entire evidence on record. It was contended on behalf of the State that after having held that the F.I.R. and the Dying Declaration are genuine pieces of evidence, the learned Judge should have convicted the accused of the offences punishable u/s 302 read with Section 34 of the I.P. Code. After referring to the evidence of P.S.I. Mr. Parmar, it was pleaded on behalf of the State Government that P.S.I. Mr. Parmar recorded the F.I.R. as narrated by injured Dhanuben, and therefore, the accused should have been convicted of the offences with which they were charged as the F.I.R. became dying declaration after the death of Dhanuben. The learned Counsel for the prosecuting agency emphasised that the endorsement made by the Doctor on the yadi to the effect

that the patient was fully conscious read with the evidence of the Executive Magistrate, clearly indicates that injured Dhanuben was fully conscious and was in fit state of mind to make statement when her Dying Declaration was recorded and in view of the contents of the Dying Declaration recorded by the Executive Magistrate, the appeal filed by the State Government should be accepted. On behalf of the State it was asserted that the contents of the F.I.R. and the Dying Declaration make it abundantly clear that the accused had subjected deceased Dhanuban to cruelty, and therefore, conviction u/s 498A of the I.P. Code, which is recorded by the learned Judge should be upheld by the Court. While addressing the Court on the question of enhancement of sentence, it was pleaded by Mr. Divetia, the learned Counsel for the State Government that the reasons given by the learned Judge for imposing sentence of R.I. for two years for the offence punishable u/s 498A, are not cogent and valid and having regard to the age of the accused, and the manner in which the incident had taken place, the sentence is grossly inadequate and deserves to be enhanced. In support of his submissions, the learned Counsel for the State Government placed reliance on (i) Smt. Paniben Vs. State of Gujarat, ; and (ii) Bolem Bhaskerrao and Anr. v. State of Andhra Pradesh 1996 SCC (Cri.) 49.

8. Mr. A.D. Shah, learned Counsel for the accused submitted that the reasons given by the learned Judge for arriving at the finding that the two dying declarations cannot be implicitly relied on for coming to the conclusion that the charge of murder is proved against the accused, are cogent and convincing, and therefore, the acquittal appeal filed by the State Government should be dismissed. The learned Counsel for the defence contended that the Executive Magistrate herself did not verify from the patient as to whether the patient was in fit state of mind to make conscious statement and except one question no other question was put to her, and therefore, the Dying Declaration recorded by the Executive Magistrate should not be relied on more particularly when the prosecution failed to examine Dr. Shukla, who made endorsement on the Yadi to the effect that the patient was fully conscious. The learned Counsel for the accused asserted that the evidence of the prosecution witnesses who have turned hostile indicates that the house was closed from inside, and the witnesses had entered the room by removing the iron sheet roof, but at that time none of the accused was found present in the room which indicates that deceased Dhanuben had committed suicide with minor Ajay. It was stressed on behalf of the accused that the say of the hostile witnesses that after removing iron sheet roof the witnesses had entered the room should be believed as the evidence of Police Inspector Mr. Brahmhatt indicates that one of the iron sheets was found by him in a lifted condition. Mr. A.D. Shah, learned Counsel for the defence argued that when the learned Judge refused to place reliance on the First Information Report and the Dying Declaration for the purpose of basing conviction u/s 302 read with Section 34 of the I.P. Code, it was not open to him to record conviction u/s 498A of the I.P. Code by relying on part of those two documents, and therefore, the appeal filed by the accused challenging validity of

conviction u/s 498A of the I.P. Code should be allowed. As far as the question of enhancement of sentence is concerned, it was submitted on behalf of the accused that the punishment imposed by the learned Judge cannot be regarded as grossly inadequate and for too lenient, and therefore, the notice for enhancement of sentence deserves to be discharged. It was emphasised that the incident took place in the year 1984, and by this time 12 years have passed by, and therefore, the discretion to enhance sentence should not be exercised by this Court more particularly when the accused have undergone agony of pendency of the present proceedings. In support of submissions made by him, the learned Counsel for the accused, has placed reliance on (1) Maniram Vs. State of M.P., , and (2) Kanchy Komu Ramma v. State of A.P. 1996 SCC (Cri. 31).

9. We are conscious of the fact that this is an appeal against acquittal and if this Court comes to the conclusion that the view taken by the trial Court is reasonably plausible, then this Court would not be justified in interfering with the order of acquittal. However, by a catena of decisions of the Supreme Court, it is now well settled that the High Court has full power to review at large, the evidence upon which the order of acquittal is founded and to reach the conclusion that upon such evidence the order of acquittal should be reversed. But, in exercising the power conferred by the Code, and before reaching conclusions upon facts, we have given proper weight and consideration to such matters as: (i) view of the learned trial Judge as to the credibility of the witnesses; (ii) the presumption of innocence in favour of accused, the presumption certainly not weakened by the fact that they have been acquitted at the trial; (iii) right of the accused to the benefit of any reasonable doubt; (iv) the slowness of appellate Court to disturb the finding of fact arrived at by the Judge, who had the advantage of seeing the witness and observing demeanour.

10. From the evidence on record, the prosecution has established that deceased Dhanuben died of burn injuries, which were sustained by her in the early morning of June 28, 1984. As per post-mortem note Exh. 19 prepared by Dr. Bansidhar Ganpatlal Gupta, P.W. 9, Exh. 17 deceased Dhanuben died due to shock on account of burns. Similarly, the prosecution has also established that deceased Ajay died of burn injuries sustained in the early morning of June 28, 1984. The post-mortem notes Exh. 18 prepared and proved by Bansidhar G. Gupta, P.W. 9, Exh. 17 indicate that deceased Ajay died because of shock received on account of the burns. The question, therefore, is whether deceased Dhanuben and deceased Ajay died of suicide or homicide? There is no evidence regarding previous mental condition of deceased Dhanuben to show any tendency to commit suicide. In view of the finding by Dr. Bansidhar G. Gupta, P.W. 9, Exh. 17 under Exhs. 18 & 19 post-mortem notes that both deceased died due to shock received on account of burn injuries, if it is proved to have been committed by anyone, indisputably it would be a murder punishable u/s 302 of the Indian Penal Code.

11. The primary question, therefore, is whether the prosecution has established

the case against the accused beyond reasonable doubt ?

12. The prosecution has examined: (a) Manjulaben Dayalji, PW 1, Exh 8, (b) Chandulal Parshottam, PW 2, Exh 9. (c) Ramesh Amrutlal, PW 3, Exh. 10, (d) Vijay Chunilal, PW 4. Exh. 11 (e) Jayshreeben Radial, PW 5, Exh. 12, (f) Razak Hasan, PW 6, Exh. 13. (g) Umarbhai Ismail, PW 7, Exh. 14, (h) Chandubha Varsubha Gohil, PW 8 Exh. 16, (i) Vinod Chunilal, PW 10, Exh. 22, (j) Godavariben Harjibhai, PW 11. Exh. 23 and (k) Kishore Savji, PW 13, Exh. 25, to prove its case that deceased Dhanuben had made oral dying declaration to the witnesses and implicated the accused. However, all these witnesses resiled from their previous statements. The learned Public Prosecutor had, therefore, sought permission of the Court to treat them as hostile witnesses. Such permission was granted by the learned Judge, and the learned Public Prosecutor was permitted to confront the witnesses with their previous statements. As the witnesses had turned hostile, we are of the opinion that their evidence cannot be relied on because their evidence is not supported by any other reliable evidence on record. What is the value of the evidence of a witness who has turned hostile has been considered by the Supreme Court in several decisions. It is well settled that where the Court gives permission to the Prosecutor to cross-examine his own witness thus characterising him as a hostile witness, that fact does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base the conviction upon his testimony if corroborated by other reliable evidence (See (1) Bhagwansingh v. State of Haryana AIR 1976 SC 292, and (2) Sat Paul Vs. Delhi Administration, . However, as noted earlier, there is no reliable independent evidence on the record of the case which can corroborate the evidence of hostile witnesses. Under the circumstances, the evidence of the above referred to witnesses is of no help to the prosecution to prove its case of oral dying declaration.

13. The prosecution has heavily relied on two dying declarations, viz. (1) First Information Report, Exh. 45 recorded by P.S.I. Mr. Rambhai Bhagabhai Parmar, PW 14, Ex. 44, which came to be treated as dying declaration after death of injured Dhanuben, and (2) dying declaration Exh. 41 recorded by Executive Magistrate Ms. Rashmiben Ishwarbhai, PW 12, Exh. 24, in order to bring home the charge against the accused u/s 302 read with Section 34 of the I.P. Code.

14. Before appreciating the evidence of the witnesses and the contents of dying declarations, it would be relevant to notice the law relating to dying declaration. Section 32(1) of the Evidence Act, 1872 is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination, it is not credit-worthy. u/s 32 when a statement is made by a person as to the cause of death or as to any of the circumstances, which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased, called the dying declaration, falls in that category provided it has

been made by the deceased while in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. A dying declaration made by a person on the verge of his death has a special sanctity, as at that solemn moment, a person is most unlikely to make any untrue statement. The sanctity attached to dying declaration is that a person on the verge of death would not commit sin of implicating somebody falsely. The shadow of impending death is by itself the guarantee of truth of the statement made by the deceased regarding cause of circumstances leading to his death. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the person is at the point of death and when every hope of this world is gone. At that point of time every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak truth, such a solemn situation 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. A dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Courts, it becomes very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration by itself can be sufficient for recording conviction even without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance then the Courts have to look for corroboration. The rule of corroboration requires that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The declaration must be accepted, unless such declaration can be shown not to have been made in expectations of death or to be otherwise unreliable. Any evidence adduced for this purpose can only detract from its value, but does not affect its admissibility. It is also well settled that it is not necessary that recording of dying declaration should be in the form of question and answer. The persons making dying declaration need not make elaborate and exhaustive statement as to cover each and every aspect of the incident, more so, where the deceased-declarant was, at that time, suffering from high degree of burns and was under severe stress and agony. The Supreme Court has emphasised that shortness of the statement itself guarantees truth. One of the important tests of reliability of dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been devised in judicial pronouncement in order to answer the question whether the dying declaration is true:

- (1) Was the victim in a position to identify the assailant/s?
- (2) Whether the version narrated by the victim is intrinsically sound and accords with probabilities?
- (3) Whether any material part is proved to be false by other reliable evidence?

(See: (1) Khushall Rao v. State of Bombay 1958 SCR 552; (2) Tarachand Damu Sutar Vs. The State of Maharashtra, ; (3) Kusa and Others Vs. State of Orissa, ; (4) Kundula Bala Subrahmanyam and Another Vs. State of Andhra Pradesh, . (5) Meesala Ramkrishna v. State of A.P. 1994 (4) SCC 181, (6) Goverdhan Raoji Ghyare v. State of Maharashtra 1993 Supp. (4) SCC 316: (7) Gangotri Singh v. State of U.P., 1993 Supp. (1) SCC 387; (8) Smt. Paniben Vs. State of Gujarat, ; (9) State of Rajasthan Vs. Kishore, ; and (10) State of U.P. v. Ameer Ali JT 1996 (41 SCC 123).

15. In the light of above principles, we will now consider two dying declarations in the instant case and ascertain the truth with reference to the dying declarations made by deceased Dhanuben. The evidence of Rambhai Bhagubhai, P.W. 14, Exh. 44 shows that on June 28, 1984 he was discharging duties as Police Sub-Inspector, Jamnagar City "B" Division Police Station. On that day, he received information from Irwin Hospital that Bai Dhanu, residing in Machchharnagar area of Jamnagar City was admitted in the Hospital in burnt condition and she was under treatment. On receiving the information he personally went to the Hospital and contacted injured Dhanuben. His evidence clearly shows that he questioned injured Dhanuben and recorded her complaint as stated by her. His evidence further shows that the complaint as recorded by him was read over to injured Dhanuben and injured Dhanuben confirmed the same. Thereafter, Police Sub-Inspector Mr. Parmar obtained thumb-impression of injured Dhanuben on the complaint and he himself signed below thumb-impression of injured Dhanuben. The witness has produced the complaint given by injured Dhanuben and recorded by him at Exh. 45. In his evidence on oath before the Court this witness has clearly stated that he recorded complaint of injured Dhanuben at 7-30 a.m. His evidence also reveals that thereafter he had written Yadi Exh. 40 to the Executive Magistrate requesting the Executive Magistrate to record dying declaration of injured Dhanuben. His evidence, in no uncertain terms, shows that he himself had gone to the residence of Executive Magistrate to deliver the Yadi and had accompanied Executive Magistrate to Hospital in order to enable Executive Magistrate to identify Dhanuben. In his cross-examination, the witness has stated that when he went to Dhanuben for the purpose of recording complaint, at that time, medical officer was on duty and he had seen the medical officer. He has also stated in the cross-examination that injured Dhanuben was giving yells and was being treated when he contacted her. While under cross-examination the witness has stated that the complaint was got written down through his writer constable. This witness has been searchingly cross-examined on behalf of accused at a great length, but nothing has been elicited during cross-examination to shake the version given by the witness about recording of the complaint as given by injured Dhanuben.

16. As noted earlier, the complaint given by injured Dhanuben is produced at Exh. 45 and free translation of the complaint reads as under:

My name is Dhanuben. W/o. Chunilal, by caste Koli, aged 28, occupation:

household, residing at Room No. 164, Machchharnagar, Jamnagar.

On being asked I state that I reside at the above referred to address and do household work Along with me my mother-in-law, Jayaben, wife of Savji and my husband etc. also reside.

Today in the early morning at about 4-00 a.m. I was sleeping on a cot in my house and my two sons were also sleeping with me. Out of two sons, my elder son Rahul was taken away by my mother-in-law, whereas second son Ajay, aged 2, was sleeping with me. My husband was in the house. My mother-in-law was sleeping in another room. At that time, I was awoken though I was resting on the cot. At that time, my husband and my mother-in-law poured kerosene oil and ignited match stick. I received burn injuries and raised shouts. Thereafter, my mother-in-law poured water. My son Ajay also received burn injuries. I and my son are admitted in the Hospital. Yesterday night my mother-in-law had instigated my husband that I was maligning family. Thereupon, my husband beat me with stick and I received injury on right side head and was also bleeding. In our house, my husband used to beat me because of instigation of my mother-in-law. I also used to go to my parental house. In order to kill me, my husband and my mother-in-law poured kerosene on me and ignited match stick My son Ajay was also set on fire by them. Therefore, necessary action be taken against my mother-in-law and my husband according to law.

R.H.T.I. is taken, as palm is burnt. Jamnagar City "B" C.R. No. 278 of 1984. I.P.C. Sections 307. 34 Before me to be kept with F.I.R. Sd/- Illegible Date : 28-6-1984 P.S.I. City "B" P.S.I., Jamnagar. Jamnagar.

17. As deceased Dhanuben died during the course of treatment, the complaint given by her which is produced by prosecution at Exh. 45 has been treated as dying declaration. If the statement of deceased Dhanuben as to the cause of her death and death of minor Ajay is accepted as a reliable piece of evidence, it would form basis to convict the accused. We have scanned the dying declaration carefully. The dying declaration contains motive for crime in question, place of incident, names of the accused and part played by the accused. The contents of the complaint are not only germane, but also absolutely relevant and pertaining to the cause of occurrence and circumstances leading to the occurrence. The deceased had suffered severe burn injuries, yet her answers to the questions put by P.S.I. Mr. Parmar are coherent, clear and unequivocal. The perusal of the contents of the complaint inspires us to believe that deceased Dhanuben was conscious and had given cogent, coherent and direct answers to the questions put by P.S.I. Mr. Parmar from which it could easily be inferred that she was in mentally fit condition at that time to give statement. Nothing has been elicited from the post-mortem conducted by the Doctor and no contradictory evidence is brought on record that the deceased was not in mental fit condition to give statement to P.S.I. Mr. Parmar. There was no occasion for anybody to induce her to make false statement against her husband and mother-in-law. Admittedly, she had received serious burn injuries and it is obvious that she was in her

expectation of death due to burns. She would not exclude the real culprits and implicate falsely the innocent. As a matter of tact, she did not make any attempt to implicate her father-in-law though his presence at the time of occurrence is proved by the prosecution. That would clearly indicate that she was not interested to falsely implicate anyone except the real culprits. The Police Sub-Inspector obtained her thumb-impression on Exh. 45. It is neither in evidence nor elicited from the Doctor who conducted post-mortem or from Mr. Parmar that her fingers were burnt and she was not in a position to put her thumb-impression. Therefore, no doubt can be cast on her capacity to give statement or on her putting thumb- impression on Exh. 45. The complaint which is now treated as dying declaration, reflects the true state of affairs at the time of occurrence and her statement is truthful version and is reliable one. It is relevant to note that P.S.I. Mr. Parmar was discharging his official duty while recording the complaint of injured Dhanuben. Even no suggestion is made to the witness that he had any grudge against any of the accused and did not record correctly what was stated by injured Dhanuben. The learned trial Judge who had opportunity of observing of witness, has also believed him as well as the contents of the First Information Report, which is produced at Exh. 45. On overall view of the evidence on record, we are inclined to believe the evidence of P.S.I. Mr. Parmar and the contents of the complaint produced at Exh. 45.

18. The submission that as there is no endorsement made by medical officer on the complaint to the effect that patient was in fit state of mind to give statement, the contents of the complaint given by injured Dhanuben should be disbelieved, is devoid of merits. It is significant to note that at the relevant time P.S.I. Mr. Parmar was recording complaint of injured Dhanuben and was not recording her dying declaration. As noted earlier, a perusal of the answers given by injured Dhanuben to witness P.S.I. Mr. Parmar indicates and inspires us to believe that she was conscious and had given cogent, coherent and direct answers to the questions put by the Police Sub-Inspector from which it could easily be inferred that she was in mentally fit condition at that time to give statement. Therefore, the submission that in absence of endorsement by Doctor on the complaint to the effect that patient was fully conscious, the contents of the complaint should not be relied on, cannot be accepted.

19. As we have come to the conclusion that the complaint which is treated as dying declaration has passed the test of reliability, conviction can be based on it without any corroboration. However, it gets corroboration, if at all it is needed, from the subsequent dying declaration recorded by the Executive Magistrate. The evidence of Ms. Rashmiben Ishwarlal, P.W. 12, Exh. 24 shows that on June 28, 1984 she was discharging duties as Deputy Mamlatdar, Jamnagar and was conferred powers of Executive Magistrate. On June 28, 1984, she had received Yadi from police at about 8-30 a.m. when she was at her residence for recording dying declaration of injured Dhanuben. Her evidence indicates that she had left her house at about 8-45 a.m. for the purpose of reaching Hospital and had reached Irwin Hospital at about 9-00 a.m. Her evidence also indicates that she

was escorted to the cot of injured Dhanuben by police, and thereafter, police personnel had left the place. She noticed that a medical officer was on duty, and therefore, she had shown police Yadi to the medical officer and informed the medical officer that she had to record statement of Dhanuben. Her evidence clearly indicates that on inquiry being made, the medical officer informed her that Dhanuben was fully conscious. The evidence of Executive Magistrate in no uncertain terms shows that the Doctor had made endorsement on the Yadi Exh. 40 to the effect that patient was fully conscious and has signed the said endorsement. The Yadi received by this witness from the police with endorsement made by the Doctor thereon to the effect that patient is fully conscious, is produced by the witness at Exh. 40. Her evidence further indicates that she had put one question to injured Dhanuben and the answer as given by injured Dhanuben was taken down by her. In her evidence, she has clearly stated that after recording the statement, she had obtained thumb-impression of injured Dhanuben and she had also signed the statement. The dying declaration recorded by her has been produced by her at Exh. 41. In her cross-examination by the learned Counsel for the accused, she has stated that Doctor was not present at the time when dying declaration of injured Dhanuben was recorded. She has also stated in her cross-examination that she had also prepared carbon copy of dying declaration and nobody had informed her as to how injured Dhanuben received burn injuries. In her cross-examination, she has categorically stated that because of burn injuries injured Dhanuben was writhing with pain and was giving answer in a low voice. It is relevant to note that earlier this witness had adopted a very casual approach to the matter and when she was examined on January 10, 1989 as a witness in Court, had not brought relevant papers at all. However, subsequently the witness had brought necessary papers and deposed before Court on the next day pursuant to the order passed by the trial Court below Exh. 38. Though this witness has been cross-examined at length, nothing is brought on the record of the case to discredit her testimony. While recording dying declaration she was discharging official duty and had no grudge against any of the accused. It is not even suggested to this witness during the cross-examination that she had not faithfully recorded dying declaration as given by injured Dhanuben.

20. As noted earlier, dying declaration by the Executive Magistrate is produced by prosecution at Exh. 41 and the free translation of the same reads as under:

Name: Dhanuben Chunilal Savjibhai, Age: 28 Years,

Residence: Machchharnagar, Jamnagar, Quarter No. 164.

Today in the early morning at about 4-00 a.m. my husband Chunilal and my mother-in-law Jayaben poured kerosene on me and on my son and set us ablaze. We were set on fire because of frequent domestic quarrels. After we were set on fire, shouts were raised and, therefore, neighbours had collected who extinguished fire.

(Name of the person who extinguished fire is not given)

I do not want to say anything further. 28-6-1984 Sd/- Illegible Time : 9-15 a.m.
Executive Magistrate Mamlatdar Office Jamnagar. R.H.T.I.O. Dhanuben Chunilal.

21. The submission that Doctor who made endorsement on police Yadi Exh. 40 to the effect that patient was fully conscious is not examined, and therefore, prosecution has failed to prove that deceased was in a fit state of mind to make statement, cannot be accepted. The Executive Magistrate has categorically stated before the Court that on inquiry being made by her, Doctor had made endorsement on Yadi to the effect that patient was fully conscious. The fact that patient was conscious and in fit state of mind to make statement can be proved as any other fact is required to be proved by prosecution by leading cogent and reliable evidence. It would have been better if Doctor who made endorsement on Yadi Exh. 40 had been examined. However, non-examination of the Doctor who made endorsement, would not affect credibility of the evidence of the Executive Magistrate if it is otherwise found to be reliable and trustworthy. Reliance placed by learned Counsel for the accused on the case of Kanchi Komu Ramma (supra) is of no avail to defence. In the said case, evidence of Judicial Magistrate who had recorded dying declaration was found to be untruthful, and therefore, Supreme Court held that examination of Doctor was necessary. Having regard to the principle of law laid down by the Supreme Court in case of Balem Bhaskerrao and Anr. (supra), we are of the view that non-examination of doctor is not fatal to the prosecution. As indicated earlier, though Executive Magistrate has been cross-examined searchingly, nothing has been brought on record to doubt her version given by her on oath before the Court. The statement of the Executive Magistrate that deceased was writhing with pain and was giving answers in low voice, inspires confidence of the Court. The shortness of the dying declaration itself guarantees truth. The contents of the dying declaration indicate that deceased Dhanuben had stated her name, name of her husband, place at which she was residing etc. The answer given by deceased Dhanuben shows beyond pale of doubt that she was conscious and in a position to understand the implication of her statement. The contents of dying declaration, therefore, prove beyond doubt that she was in a fit mental condition to make the statement. In material particulars, viz. the motive, names of assailants and cause of burns received by deceased Dhanuben and deceased Ajay, both dying declaration corroborate each other. The learned trial Judge, who had opportunity of observing demeanour of Executive Magistrate, has believed her evidence and has reached a finding that dying declaration recorded by her is a genuine piece of evidence and reliable. On overall appreciation of evidence, we are inclined to believe the evidence as given by the Executive Magistrate as well as the contents of dying declaration Exh. 41.

22. However, curiously enough after coming to the conclusion that two dying declarations are genuine, learned trial Judge has proceeded to examine question whether the case of suicide is made out from the contents of dying declaration or

not. After appreciating the contents of two dying declarations, learned Judge has come to the conclusion that deceased was not murdered by the accused, but had committed suicide because of cruelty meted out to her by the accused. The learned Judge has, therefore, convicted the accused of the offence punishable u/s 498A of the Indian Penal Code. In our view, such a course was not open to the learned Judge at all. The first reason given by the learned Judge for the purpose of ruling out homicidal death is that none of the accused prevented Savjibhai who is father of accused No. 1, from giving information about deceased Dhanuben having received burn injuries to her relatives.

23. In our view, this ground could not have been taken into consideration for the purpose of coming to the conclusion that deceased Dhanuben committed suicide. According to the evidence led by the prosecution, neighbours had immediately collected at the place of incident. Almost all neighbours residing nearby learned that deceased Dhanuben received burn injuries, and therefore, even otherwise relatives of deceased Dhanuben would have learnt about the incident in due course of time. Under the circumstances, merely because no attempt was made by any of the accused to prevent Savjibhai from conveying information about the incident to the relatives of injured Dhanuben would not indicate that it was a case of suicide. In any view of the matter this circumstance does not affect the credibility of any of the dying declarations. The second reason which has weighed with the learned Judge for coming to the conclusion that deceased committed suicide is that quarrel had taken place in the night, and therefore, out of anger, the deceased might have committed suicide. In our view, this is an inference drawn by the learned Judge, which has no factual basis at all. Though the prosecution witnesses have been cross-examined on behalf of the accused, it is not suggested to any of the prosecution witnesses that deceased Dhanuben had exhibited tendency to commit suicide in past. The contents of two dying declarations indicate that she was tolerating beating by her husband at the instance and instigation of her mother-in-law as any other Indian women would do. If the quarrel had taken place in night hours and if she had no past tendency to commit suicide, she would have committed suicide immediately when the feelings were running high and would not commit suicide in the morning because by that time the feelings must have calmed down. Therefore, the unwarranted inference drawn by the learned Judge which has no factual basis, would not lead one to believe that suicide was committed by the deceased. The third reason given by the learned Judge is that the accused had no motive to kill minor son Ajay, and therefore, suicide is probable. In our view, it would be difficult to know the mind of accused as to what was passing in their minds at the time when the incident took place. The deceased in her complaint has clearly stated that elder son Rahul, who was also sleeping with her on cot was removed by her, mother-in-law and minor Ajay was allowed to sleep with her and thereafter, kerosene was poured on them and they were set on fire. Under the circumstances, it is very clear that the intention of the accused was to kill both of them. The circumstance to the effect that the accused had no grudge against minor Ajay, and therefore,

suicide is probable, has also no factual basis. Yet another ground which has weighed with the learned Judge while coming to the conclusion that this is a case of suicide is that deceased Dhanuben did not try to come out of the room. The learned Judge seems to be under an impression that whenever a person is set on fire, the person would try to come out of the house. It hardly needs to be emphasised that all persons do not react in similar way. Her dying declaration clearly indicates that she had raised shouts as a result of which neighbours had collected and had put off fire. Merely because the deceased did not make any attempt to come out of the room, would not indicate that she committed suicide. The next ground which appealed to the learned Judge for coming to the conclusion that this is a case of suicide is that the medical officer who sent Yadi to Dr. Gupta for the purpose of performing post-mortem on dead body and Dr. Shukla, who made endorsement on yadi Exh. 40 to the effect that patient was fully conscious, are not examined. While discussing the evidence of Executive Magistrate, we have come to the conclusion that in presence of Executive Magistrate, Doctor had made endorsement to the effect that patient was fully conscious and non-examination of the Doctor does not indicate in any manner that patient was not in fit state of mind to make statement. In our view, non-examination of the Doctor can never be treated as indicating that this is a case of suicide. The Executive Magistrate is totally an independent witness. In discharge of her official duties she came to the Hospital and recorded dying declaration. Though cross-examined effectively on this point, nothing has been brought on record to disbelieve her version on oath to the effect that Doctor had made endorsement in her presence. On overall view of the matter, we are inclined to hold that non-examination of the Doctor has not affected the reliability of evidence of the Executive Magistrate and dying declaration recorded by her. Again, another ground which has weighed with the learned Judge for discarding the prosecution case of murder is that on Exh. 41 there is no endorsement made by the Doctor to the effect that patient was conscious. As observed earlier, Exh. 41 was never recorded as dying declaration. It was recorded as complaint and on complaint, a Doctor is not required to make endorsement that patient is conscious. It is treated as dying declaration only because of the provisions of Section 32(1) of the Evidence Act. Merely because there is no endorsement on the complaint to the effect that patient was fully conscious, it will not affect its credibility when such an endorsement is found on Yadi Exh. 40. The learned Judge has also observed that no definite evidence has been led by the prosecution to indicate as to at which time the complaint was recorded. However, it is relevant to note that the evidence of P.S.I. Mr. Parmar shows that he had completed recording of complaint given by injured Dhanuben before 7-30 a.m., and thereafter, he had gone to Police Station and registered the complaint in the necessary register. This means that recording of the complaint must have started at about 7-00 a.m. Normally, in the First Information Report it is never mentioned that recording of complaint was started at particular time as would be found in dying declaration. Under the circumstances, the fact that time at which P.S.I. Mr. Parmar had started recording complaint is not mentioned in the

complaint could not have been relied on for the purpose of coming to the conclusion that the deceased committed suicide. One of the circumstances relied by the learned Judge for coming to the conclusion that the deceased committed suicide is that the Investigating Officer did not send petti-coat of accused No. 2 which was seized by the Investigating Officer Mr. Bhrahmbhatt while effecting arrest of the accused. It is true that investigating officer Mr. Bhrahmbhatt committed grave irregularity in missing to send petti-coat of accused No. 2 for chemical examination to lend corroboration to the evidence led by the prosecution. However, the arrest panchnama and panchnama of persons of the accused is admitted by the accused. Therefore, the contents of the said panchnama can be read in evidence. The panchnama Exh. 34 clearly indicates that petti-coat put on by accused No. 2 was smelling of kerosene. The mere fact that Investigating Officer committed irregularity or illegality during the course of investigation would not and does not cast doubt on the prosecution case and trustworthy and reliable evidence cannot be cast aside to record acquittal on that count. (See: State of Rajasthan Vs. Kishore, . The learned Judge has drawn adverse inference against prosecution for non-examination of Savji Manji, who is father of accused No. 1. It will not be out of place to mention that Savji Manji was never cited as a witness in the charge-sheet. It is true that panchnama Exh. 33 would indicate that Savji Manji had tried to extinguish fire and received burn injuries, but his non-examination has not affected the prosecution case at all. The neighbours and relatives of the deceased have not supported the prosecution case. It would not be out of place to draw a reasonable inference that in all probability he would not have supported the prosecution case. The last reason given by the learned Judge is that the contents of the complaint given by the injured Dhanuben and dying declaration recorded by Executive Magistrate are not corroborated by independent reliable evidence. This conclusion is reached by the learned Judge in Para 36 of the impugned judgment. While stating law on the dying declaration, we have observed that a dying declaration is not required to be corroborated by any evidence and conviction can be based on it if it is found to be reliable and trustworthy. As noted earlier, there is no evidence on record of the case to indicate that deceased Dhanuben had exhibited tendency in past to commit suicide. It is true that some times a case of suicide is presented as a case of homicide specially when the death is due to burn injuries, but it need not be pointed out that whenever the victim of torture commits suicide she leaves behind some evidence may be circumstantial in nature to indicate that it is not a case of homicide, but of suicide. It is the duty of the Court, in a case of death due to burn injuries, to examine the circumstances of each case and evidence adduced on behalf of the parties for recording a finding on the question as to how the death has taken place. While judging the evidence and the circumstances of the case, the Court has to be conscious of the fact that death due to burn injuries normally takes place inside the house where outsiders who can be said to be independent witnesses in the traditional sense, are not expected to be present. On appreciation of evidence, we have come to the conclusion that both the dying declaration are true and voluntary. It is not the

case of defence that deceased Dhanuben gave tutored version of the incident. In our considered opinion, both the dying declarations can be implicitly relied on and a conviction can be safely recorded by those two dying declarations alone. We absolutely find no reason to reject the same. Since both the deceased had admittedly suffered burn injuries in the room where accused were present, there was an obligation on the part of the accused to explain the circumstances leading to the deceased dying of burn injuries. No explanation has been offered by any of the accused though their statements were recorded u/s 313 of the Code. Theory of suicide was put up only as an argument of despair. The conduct of the accused totally betrays the theory of suicide.

24. The submission that the doors of the house were closed from inside and neighbours had entered the house by removing iron sheet roof, which probabilises suicide by deceased Dhanuben, cannot be accepted. The learned Judge on appreciation of evidence, has recorded a finding of fact that both the accused were present at the time of the incident. This finding is based on arrest panchnama and panchnama of the persons of the accused. The panchnama which is admitted by the accused indicates that at the relevant time, both the accused had received recent burn injuries whereas the petti-coat put on by accused No. 2 was smelling of kerosene. The attempt made by the learned Counsel for the accused to place reliance on the evidence of hostile witnesses to establish that doors were closed from inside is futile. The evidence of none of the hostile witnesses inspires confidence. It is well settled that evidence of an infirm witness cannot be corroborated by evidence of another infirm witness. This principle will apply with equal force while appreciating evidence of hostile witnesses. Though the Investigating Officer Mr. Brahmbhatt has stated in his evidence that he had found one iron sheet in a lifted condition, he is not further cross-examination on behalf of the accused. His evidence does not indicate that the iron sheet was lifted in the early morning of June 28, 1984. It is not brought on the record of the case that before the date of the incident, the iron sheets were intact. The contents of the panchnama which must be read in evidence indicate that both the accused had, at the relevant time, received recent burn injuries. Under the circumstances, the finding recorded by the learned Judge that the accused were present at the time when the incident took place is eminently just and must be upheld, whereas the argument that as the doors were closed from inside, and therefore, the theory of suicide is probabilised will have to be rejected. The find of smell of kerosene from the petti-coat of accused No. 2, on the contrary, corroborates the version given by deceased Dhanuben in her dying declaration that the accused were present at the time when the incident took place, and they had poured kerosene on her and her minor son and then set them ablaze.

25. Having regard to the contents of two dying declarations, it is clear that accused had an intention to kill deceased Dhanuben and deceased Ajay deliberately by pouring kerosene oil on them and then set them on fire. The death took place on account of intentional act of the accused. The trial Court was

wholly unjustified in doubting correctness of part of dying declaration recorded by the Police Sub-Inspector and Executive Magistrate respectively. The reasons given by the learned Judge for believing suicidal deaths are not only perverse and legally erroneous, but are very tenuous, flimsy and unacceptable. In fact, by disbelieving a part of dying declarations, the learned Judge has rewritten and reconstructed dying declarations, which is not permissible to a Court of law. On overall appreciation of the evidence, we hold that prosecution has proved its case against the accused beyond any shadow of doubt. The judgment and order of acquittal passed by the Sessions Judge, therefore, will have to be set aside.

26. For the foregoing reasons, the appeal filed by the State Government succeeds. The respondents are convicted u/s 302 read with Section 34 of the Indian Penal Code. As far as question of sentence is concerned, we may mention that minimum punishment provided u/s 302 of I.P.C. is that of life imprisonment, and therefore, it is not necessary to hear the accused on question of sentence as we propose to impose minimum sentence provided under law. As the incident took place in the year 1984, no case is made out by the prosecution to impose maximum sentence provided u/s 302 of I.P.C. Having regard to the facts and circumstances of the case, we are of the view that interest of justice would be met if minimum sentence provided u/s 302 is imposed on the accused. Therefore, the accused are sentenced to R.I. for life. Criminal Appeal No. 236 of 1989 is accordingly allowed.

27. Having regard to the facts of the case, the respondents-original accused are given time to surrender upto August 31, 1996.

CRIMINAL APPEAL NO. 105 OF 1989

This appeal is directed against the judgment and order dated February 6, 1989 rendered by the learned Additional Sessions Judge, Jamnagar, in Sessions Case No. 74 of 1984 convicting the appellants of the offence punishable u/s 498(A) of the Indian Penal Code and sentencing them to suffer R.I. for two years as well as fine of Rs. 250/- in default S.I. for two months.

For the reasons recorded in Criminal Appeal No. 236 of 1989, we hold that two dying declarations have passed test of reliability and can be acted upon. In the F.I.R. which was recorded by P.S.I. Mr. Parmar and which was subsequently treated as dying declaration, deceased Dhanuben has clearly stated that at the instigation of accused No. 2, i.e. mother-in-law, accused No. 1, i.e. her husband used to beat her. Reason for instigation is also mentioned in the dying declaration. According to the statement made by the deceased, the mother-in-law was instigating her son, i.e. husband of the deceased because according to her deceased was maligning the family. In her dying declaration, the deceased had stated that in the night because of instigation by accused No. 2, accused No. 1 had given stick blow on her head as a result of which she had received bleeding injury. The fact that she had such an injury is amply corroborated by post-mortem notes prepared by Dr. Gupta, P.W. 9, Exh. 17. Section 498A of the

Indian Penal Code reads as under:

498A. Husband or relative of husband of a woman subjecting her to cruelty: Whoever being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation: For the purposes of this Section "cruelly" means-

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman, or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

The contents of dying declaration read with statutory explanation appended to Section 498A of I.P.C. clearly indicate that the deceased was subjected to cruelty by both the accused. On the facts and in the circumstances of the case, we are of the opinion that conviction of the appellants u/s 498A of I.P.C. is eminently just and deserves to be upheld.

The appeal filed by the appellants, therefore, fails and is dismissed. The bail-bonds stand cancelled. As the original accused have been convicted u/s 302 read with Section 34 of I.P.C. as well as Section 498A of I.P.C. substantive sentences are ordered to run concurrently. Muddamal is ordered to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

MISC. CRIMINAL APPLICATION NO. 564 OF 1989

While admitting Criminal Appeal No. 105 of 1989, the Court suo motu issued notice calling upon the original accused to show-cause as to why sentence imposed by the learned Judge for the offence punishable u/s 498A of I.P.C. be not enhanced.

The submission made on behalf of the State that punishment imposed is grossly inadequate and too lenient, and therefore, the same should be enhanced, has no substance. It may be mentioned that maximum punishment provided is of three years and Fine. The evidence led by the prosecution clearly shows that at the relevant time there were two minor sons who were to be looked after. The learned Judge while imposing sentence of two years u/s 498A of I.P.C. has given cogent and convincing reasons in the operative part of the judgment. It would not be out of place to note that the incident had taken place more than 12 years before. On the facts and in the circumstances of the case, we are of the opinion that no case is made out by the State of Gujarat to exercise discretion to enhance sentence at this stage more particularly when the original accused have undergone agony of pending three proceedings in this Court.

For the foregoing reasons, Misc. Criminal Application No. 564 of 1989 fails and is dismissed.