

(1998) 07 GUJ CK 0008
In the Gujarat High Court
Case No : Criminal Appeal No. 446 of 1992

Vinodkumar Baderbhai Patel

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 29-07-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374
Evidence Act, 1872 — Section 32, 32(1), 6
Penal Code, 1860 (IPC) — Section 114, 302, 307, 498A

Citation : (1999) CriLJ 1650 : (2000) 2 DMC 705

Hon'ble Judges : J.N. Bhatt, J; Arunkumar Kantilal Trivedi, J

Bench : Division Bench

Advocate : M.H. Barejia and Sudhanshi S. Patel, for the Appellant; K.P. Raval, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

J.N. Bhatt, J.—The appellant has assailed the judgment of the Ld. Addl. Sessions Judge, Sabarkantha, at Himmatnagar, dated 23-3-92, convicting him for offence under Sections 302 and 498-A, IPC and sentencing him to imprisonment for life for the offence u/s 302, IPC and to pay fine of Rs. 200/- and in default to undergo Rigorous Imprisonment for 10 days u/s 302, IPC and Rigorous Imprisonment for one year and to pay fine of Rs. 100/- in default to undergo Rigorous Imprisonment for seven days for the offence punishable u/s 498-A, IPC with a direction that substantive sentences and imprisonments shall run, concurrently, by filing this appeal u/s 374, Cr.P.C, 1973.

2. Few material facts giving rise to this appeal may be, stated, at the outset.

3. In short, the prosecution case is that on 7-4-1991, at about 2.30, early morning, the appellant who is the husband of the deceased Bai Sharda, the mother-in-law and the brother-in-law put her on fire. The kerosene was poured on the person of Bai Sharda and the appellant with the help of match-stick put her on fire. The motive is, also, ascribed for the commission of crime of bride-

burning to the appellant-original, who is hereinafter, referred to, as "the accused No. 1" for the sake of convenience and brevity, who did not like his wife and the sisters of deceased-Bai Sharda were not permitted to go to the matrimonial house of Girish, the brother of deceased Sharda. In short both the parties are related to the sister of accused-Neeru who was engaged to Girish, the brother of deceased Sharda who was not calling to the sister of accused No. 1-husband. The accused party was interested thus in causing cruelty and torture to the deceased.

4. The deceased-Shardahad sustained serious burn injuries. The parents of the deceased came to the venue of offence upon being informed by the neighbours of the accused that the deceased was suffering from excruciating pain. The venue of offence is the house of the accused-husband in the village Abdasan from where the deceased-Sharda was shifted, initially, to Civil hospital at Idar, and later on, on the same day, she was shifted to the Civil Hospital, at Himmatnagar, in view of serious injuries. The incident occurred in the early morning of 7-4-91, at about 3.00 a.m., and as per the evidence on record the wife of the accused-the deceased Sharda succumbed to burn injuries at 3.00 p.m. on 11 -4-91. In the course of treatment Dying Declarations were made by the deceased. The complaint was also lodged by the father of the deceased on 8-4-1991.

5. On getting the news by the PSO of Wadali PS from the Civil Hospital, at Himmatnagar, Entry No. 3/91, was recorded and the PSI, Wadali, PS, took over the investigation. He had also informed the Executive Magistrate for recording the Dying Declaration of Sharda.

6. Initially, the offence came to be registered with Cr. No. 22/91 for the offences punishable u/s 307, IPC against the present appellant-original accused No. 1 - husband of the deceased. Subsequently, all the accused persons in the course of investigation came to be arrested, on 9-4-1991. After the completion of investigation accused persons were chargesheeted. The accused persons were sent up for trial before the Sessions Court, at Himmatnagar. The charge came to be framed against all the accused persons, on 13-10-91, by the Ld. Addl. Sessions Judge. In that it was alleged that on 7-4-1991, at about 2.30 a.m., at village Abdasan, Idar taluka the accused persons in abatement of each other intentionally committed murder of the deceased Bai Sharda by pouring kerosene on her body and lighting match-stick. It was also alleged that the accused No. 1-respondent did not like his wife-deceased Bai Sharda and he was quarrelling and torturing his wife and, thereby, he was giving intolerable cruelty, physically as well as mentally, to the deceased in which the accused Nos. 2--the brother, accused No. 3-mother of the accused No. 1 abated. Therefore, accused persons came to be charged with offence punishable u/s 302, IPC read with Sections 114 and 498-A, IPC to which the accused persons denied and claimed to be tried.

7. The prosecution, in order to substantiate the charges against the accused persons place reliance on 13 PWs and the Dying Declarations and other

documentary evidences to which reference shall be made by this Court as and when required, at an appropriate, stage. Upon the assessment and analysis of the documentary evidence and the evidence of the witnesses, the trial Court found the original accused No. 1 appellant the husband of the deceased guilty for the offence punishable u/s 302 and Section 498-A, IPC and acquitted original accused Nos. 2 & 3 of the charges by his judgment, dated 23-3-92. After hearing the appellant-original accused No. 1 on the quantum of sentence, the trial Court sentenced the accused for life and fine of Rs. 100/- and in default to undergo further Rigorous Imprisonment for ten days for often, punishable u/s 302 and sentenced him for Rigorous Imprisonment of one year and to pay fine of Rs. 100 and in default to undergo 7 days Rigorous Imprisonment for the offence punishable u/s 498-A, IPC.

8. The appellant-original accused No. 1 married the deceased-Bai Sharda almost 9 years before. There was one baby boy born out of the said wedlock who unfortunately died. The deceased-Bai Sharda had also conceived and she was carrying six months pregnancy, even at the time of unfortunate and ghastly crime was committed. The deceased Sharda was aged about 24 and she was staying with her husband-appellant-original accused No. 1-Vinodkumar, at village Abdasan, since 5 years before the occurrence of the incident. The father, mother and the brother of the accused No. 1-Vinodkumar were staying jointly.

9. The father-in-law of the deceased was working as a teacher in a school at village Rampur. He used to commute from Rampur to Abdasan. Son of the complainant-Girish was studying in the 1st year degree course in college and he has three daughters, eldest one Madhu, who had got married, at village Idar, and the younger daughter Sharda married with Vinodkumar and the youngest daughter Kailash was in 12th Std. The deceased Bai Sharda and accused No. 1 Vinod were not enjoying the marital bliss and on the contrary they were quarrelling. Accused No. 1-Vinod did not like his wife-deceased Bai Sharda. On account of paucity of number of marriageable girls the sister of accused-Neeru who was engaged with the brother of deceased-Girish was not allowed to go to the husband's house. Thus, the brother of deceased-Kailash did not call his wife to his house who is the sister of accused No. 1-Vinod which was one of the motives for the accused No. 1 -Vinod to cause mental torture and cruelty in the past and the actual incident was preceded by two incidents within a spell of almost a week as a result of cruel treatment meted out to the deceased, Bai Sharda, by accused No. 1-Vinod and his parents.

10. The incident occurred, on 7-4-1991, in the early morning at about 2-30 a.m., a week before deceased-Bai Sharda had gone to the parental home where she stayed for two days and she was pregnant at that time. She had left the Matrimonial Home on account of ill-treatment, physical and mental cruelty, severe beating by her in-laws. However, as it happens in many such cases, in the social life of the Indian society, the parents of the deceased Bai Sharda with great difficulty but firmly persuaded her to return to the matrimonial home as a

result of which she returned back to the husband's place.

11. Again, the incident which occurred after 3/ 4 days of her going back to the matrimonial home added fuel to the fire. Since the deceased-Bai Sharda, was advised to be in the matrimonial home and to suffer, as advised, by the parents for the good of the daughter, she had to go to her maternal uncle-Jitabhai Hirabhai P.W. 5, as she was again tortured and subjected to cruelty by her husband and-in-law. She stayed with her maternal uncle-Jitabhai and thereafter upon receipt of such information her parents deputed Girish to take her back. The deceased Bai Sharda, again had gone to the place of the husband at village Abdasan from village Rampur, under great stress and strain involuntarily and she was not allowed to enter the house by the husband and in-laws as they wanted her to come with some responsible persons with some social security as they called it. As ill-luck would have been, she could not obey the command of the in-laws and the husband on account of her personal difficulties, more so, when her parents had advised her to be in the house of the husband. The return of Bai Sharda on that late evening from her maternal uncle's house to the place of her husband aggravated the situation and accelerated not only quarrelling and cruelty but physical beating also. Thus, the de-ceased-Sharda had to abandon her matrimonial house on account of cruelty, torture, physical beating by the husband and her in-laws and had to go back again to her maternal uncle-Jitabhai Hirabhai's house at village Bhanpur from where she was brought back to the place of her husband by Jitabhai Hirabhai and Girish who was deputed by his father went back to his father and informed him of the incident, and the ghastly crime came to be committed on deceased-Bai Sharda who was aged 24 who was carrying 6th months' pregnancy, at that time. She was done away with by the husband by pouring kerosene on her body in the midnight with the help of the mother and brother, and she has sustained extensive burn injuries on the entire" body of first and second degrees. It is noticed on the record of the present case that there were 100% first and second degree burn injuries on the body of the deceased. The incident which occurred in the early morning, at 2-30 on 7-4-1991, she was set to fire by pouring kerosene on her body and then burning or lit match stick by the accused No. 1 with the help of his mother and brother and she was shifted to Idar from Abdasan for treatment and since injuries were of very serious nature she was shifted from Idar to Himmatnagar civil hospital. She made Dying declarations in the course of her survival and treatment. She succumbed to the said 100% first and second degree injuries on 11-4-1991 at about 3-00 am while undergoing medical treatment in Civil Hospital at Himmatnagar.

12. After having gone through the testimonial collections and documentary evidence, "in extenso" and having heard the Ld. advocate appearing for the appellant-accused No, 1 in defence and the Ld. APP, we find that the ultimate conclusion recorded by the trial Court in convicting and sentencing the accused No. 1 for the offence punishable u/s 302, IPC and 498-A, IPC is quite justified.

13. The trial Court has, rightly, placed reliance on the evidence of the father of the deceased-complainant-Jivabhai Muljibhai-PW. 1 Exh. 12. He is the, unfortunate, father who lost his daughter aged about 24 on account of heinous crime committed by the accused No. 1-husband of the deceased at the matrimonial home. It becomes clear from his evidence that the main incident had preceded by two incidents within a spell of 7 days and that there was bad blood between his daughter and his son-in-law-accused No. 1-Vinod. In fact there was domestic - violence to which the deceased-Sharda was wrongly subjected to. The accused No. 1 - Vinod did not like his wife-Sharda. The brother of the deceased-Girish was not calling at his house wife-Neeru, the sister of the accused. The evidence of the father, who is a complainant, who is working as teacher since a very long spell is found quite trustworthy and reliable.

14. The PW. 2-mother of the deceased Kodriben examined, at Exh. 13 is also quite reliable. The trial Court has, rightly, placed reliance on her testimony. No doubt, there are some contradictions and discrepancies in the evidence of the father and the mother of the deceased, but there are not of any consequence insofar as the main story and substratum of the prosecution case is concerned.

15. The PW. 3-M.B. Shah is examined, at Exh. 14, who was working as Executive Magistrate, who after summoned by the police reached the hospital, at Himmatnagar, and recorded the Dying Declaration of the deceased after satisfying himself that the deceased was in a position to make her rational statement. The Dying Declaration is produced at Exh. 15. In the dying declaration-Exh. 15 the deceased-Sharda has not specifically stated as to what was the role played by the accused Nos. 2 & 3, however, she has stated that her husband had poured kerosene on her body in the early morning at about 2-30 on 7-4-91 as a result of which the trial Court accorded benefit of doubt to the original accused Nos. 2 & 3* Nonetheless, in Dying Declaration at Exh. 15 recorded by the Executive Magistrate it is clearly stated that the husband-accused No. 1 -Vinod had put her to fire and when she started screaming and raising shouts quilt was also placed on her body by the husband. The trial Court, therefore, has rightly placed reliance on the dying declaration-Exh 15.

16. The P.W.4-Girishkumar is examined at Exh. 17 and he is the brother of the deceased who also supports the prosecution case that her sister-deceased Bai Sharda suffered cruelty at the place of her husband. He has also supported clearly the incidents which was preceded before the main incident as he had gone to the place of his maternal uncle-Jitabhai where deceased Sharda had also gone because of severe domestic violence committed on her at the place of her husband.

17. The P.W. 5-Jitabhai Hirabhai examined at Exh. 18 has turned hostile to the prosecution case. However, one thing is certain from his evidence that deceased Bai Sharda had come to his house four days prior to the date of incident and thereafter he had taken her to the place of her in-laws. He stays at the village Bhanpur and the maternal uncle of the deceased is at village Abdasan and there

is a distance of one KM in between. No doubt, he is not supporting the main version of the prosecution that she was a victim of domestic violence and that she was given ill-treatment and subjected to cruelty at the place of her husband.

18. The PW. 6-Dr. Narendra Chunilal is examined at Exh. 25. He had conducted the Post Mortem. The post mortem report is at Exh. 26 He was working as a medical officer in the civil hospital at Himmatnagar. It is very clear from his evidence and post mortem report that the deceased Bai Sharda had sustained extensive first and second degree burn injuries and those injuries were ante-mortem and were possible by burns. The medical case papers along with medical certificate are produced at Exhs. 27 & 28. The external injuries sustained by Bai Sharda are enumerated in Column 17 of the Post Mortem report. According to the evidence of the medical officer Dr. Narendra Chunilal the cause of death was due to shock due to toxemia arising out of extensive burn injuries. It could, therefore, very well be seen that the case of the prosecution and the dying declaration recorded by the Executive Magistrate is fully corroborated by the medical evidence.

19. The PW. 7 Bhikabhai Hirabhai is examined at Exh. 29. He was a panch witness of panchnama of scene of incident. According to his evidence the place of offence was in the open Osri of the portion of the house of the accused No. 1 Vinod and the smell of kerosene was also noticed in the panchnama. The kerosene soaked earth was also collected. He supports prosecution case. Panchnama of scene of offence is produced at Exh. 37.

20. The PW. 8 Punjaji Mavji is examined at Exh. 38. He was working as Police Head Constable who had prepared the panchnama of scene of incident. He had also collected Muddamal articles like earth, quilt and other things from the venue.

21. The PW. 9 Dr. Hansaben Shukla is examined at Exh. 40. The reliance is placed by both sides on the evidence of this witness. It is very clear from her evidence that she had examined the injured at about 8-30 on 7-4-91 in Civil Hospital at Himmatnagar. She found extensive burn injuries on the person of Bai Sharda who was carrying 6 months pregnancy also. Medical case papers are produced in her evidence at Exh. 41. The deceased succumbed to burn injuries according to her evidence on 11 -4-1991 at 3-00 p.m. during the course of treatment in the hospital. She has also clearly stated in her examination-in-chief that the severe burn injuries could not be caused by accident due to stove. However, she was also stated in her cross-examine that the history was given by the deceased-Bai Sharda that she got burns due to stove blast while she was preparing tea. This part of evidence of Dr. Shukla is strongly relied on by the defence. The history stated in the case papers is that there were burns due to stove blast while making tea at about 2-30 a.m. on 7-4-91.

22. PW. 10 Dr. P. K. Gohel, who was working as Medical Officer in Community Health Centre at Idar is examined at Exh. 42 who had initially examined Bai Sharda for burn injuries at about 7.15 hours on 7-4-91. He has stated that

without the police yadi he was brought to Idar Community Health Centre, and therefore, before administering the treatment he communicated through telephone to Idar Police. According to his evidence the deceased had sustained 100% first and second degree burns and there was smell of kerosene on the body and clothes of the deceased-Shardaben. Her body had been burnt and she was suffering from excruciating pain. He had given her preliminary treatment. In view of serious nature of injuries he had referred her to civil hospital at Himmatnagar. Medical certificate issued by him is produced at Exh. 43. It is very clear from his evidence that the deceased-Bai Sharda was carrying six months pregnancy. It is also very clear from his evidence as well as case papers that no history was stated or is mentioned in the record.

23. The P.W. 11 Arjansinh Lalsinh, Head Constable is examined at Exh. 44 who went to the civil hospital at Himmatnagar being informed by the Medical Officer Dr. Shukla about the burn injuries to the PSO at Himmatnagar town Police Station. Accordingly, an entry was made in the Station diary being Entry No. 11 which is produced at Exh. 45. He was directed by the PSO to go to the Civil Hospital and make enquiry and investigation.

24. He had visited the civil hospital and after getting confirmation from Dr. Shukla he goes in a room where deceased Bai Sharda was undergoing treatment. On being asked to Bai Sharda he was informed by her that she was burnt by her husband, brother-in-law and the mother-in-law. She had also stated before this witness Arjansinh that kerosene tin was in the hands of her mother-in-law who had poured kerosene on her body and her husband after lighting the match-stick put her on fire as a result of which she started screaming and raising shouts. The dying declaration recorded by the said police head constable Arjansinh is produced at Exh. 54. It came to be recorded at about 9-20 a.m. in civil hospital at Himmatnagar.

25. The P.W. 12 police head constable Dhulasinh Harisinh is examined at Exh. 46 and PW. 13 Kasiran Khemchandbhai is examined at Exh. 48. After completion of investigation accused persons were chargesheeted for the offence as stated hereinbefore.

26. It has been seriously contended before us by the Ld. advocate for the appellant-accused No. 1 Vinod that (i) the dying declarations made by deceased Bai Sharda cannot be relied on as they are inconsistent and contrary, (ii) such dying declarations cannot form basis for conviction as they do not represent the truthful version of the deceased as the close relatives like parents had an opportunity to tutor and prompt her. Our attention is also drawn to the evidence of Dr. Hansha Shukla who is examined at Exh. 40 and the medical case papers at Exh. 41. It is vehemently contended that the history recorded in the case papers by Dr. Hansa Shukla in her evidence at Exh. 40 is suggestive of accidental burns. It is true that it is stated in the evidence as well as relevant medical case papers that as per the history burns were caused due to stove while making tea at about 2-30 a.m. on 7-4-1991. It is, therefore, contended that Dr. Hansa Shukla PW. 9

examined at Exh. 40 does not support the prosecution case who had examined deceased first in point of time. Prima facie, this submission may appear to be attractive, but not acceptable for the reasons elaborately articulated here in below :

(i) Medical case papers at Exh. 41 admittedly do not remotely indicate as to who had given the history of incident.

(ii) No note is made by Dr. Hansa Shukla as to how the history came to be recorded in the medical case papers. She has, however, stated in her evidence that the history was given by deceased-Bai Sharda. It is also clearly admitted by her in her evidence that extensive burn injuries sustained by Bai Sharda would not be possible by accident due to stove.

(iii) The history came to be recorded in the case papers at about 8-30 a.m. on 7-4-91 without mentioning the source thereof or the maker thereof as deposed by medical officer Dr. Shukla on 15-1-1992 before the Court. In course of cross-examination, it is stated, for the first time, after a spell of 9 months that the history was given by Sharda that about 2-30 a.m. she had sustained accidental injuries while preparing tea upon her memory. Ordinarily, when the history is given, the source or maker thereof is ordinarily if not invariably stated in the case papers.

(iv) Apart from that, it would not be ordinarily possible and probable for a busy medical officer of a public dispensary or hospital to really remember that what would have been narrated by the deceased 9 months before. Therefore, it is possible that in cross-examination Dr. Shukla when being confronted about the maker of history must have presumed that history must have been given by deceased-Bai Sharda and accordingly she must have deposed. It may be remembered that no such history, if ever it was so real and genuine, was given to Dr. P. K. Gohel who examined, for the first time, deceased Bai Sharda. He, according to his medical certificate, produced at Exh. 43, says that she has sustained 100% first and second degree burns. ,

(v) It may be again mentioned that the appellant-original accused No. 1 husband of the deceased was with the deceased Bai Sharda along with police in the hospital. Parents would not be interested in giving any history contrary to the story mentioned by their daughter to them. Why and how such a narration of history came to be made in the medical case papers has not been explained, and Dr. Shukla, it appears, has upon presumption, after a spell of 9 months, when being confronted in cross-examination must have presumed that the history must have been given by the victim as she was conscious though she had sustained severe burn injuries.

(vi) Again, it is very clear from her evidence that extensive burn injuries sustained by the deceased were not at all possible due to stove blast.

27. In the light of the aforesaid and other reliable circumstances and the dying

declarations made by the deceased Bai Sharda before the Executive Magistrate on the same and two other oral dying declarations involving the appellant-Original Accused No. 1 husband, the defence is not in a position to make much capital out of the history of incident stated upon memory in the testimony of Dr. Hansaben Shukla.

28. Parents of the deceased have clearly stated in their evidence that the deceased Bai Sharda had stated that she was burnt by her husband-accused No. 1 with the help of her brother-in-law and mother-in-law. So, insofar as the dying declarations before the parents are concerned, the deceased had indicated that her husband put her to fire by pouring kerosene on her body and lighting or burning match-stick with the help of her brother-in-law and mother-in-law.

29. The trial Court has placed much reliance on the written Dying Declarations recorded by the Executive Magistrate who is examined as PW. 3, at Exh. 14, which came to be recorded at 5-20 p.m. on 7-4-91. The dying declaration is produced and filed in the evidence of Executive Magistrate at Exh. 15. The involvement of Appellant-Orig. Accused No. 1 the husband of the deceased in the commission of crime in this written dying declaration recorded by the Executive Magistrate at Exh. 15 is rightly relied on by the trial Court. Since names of the original Accused No. 2 brother and original accused No. 3 mother of accused No. 1 are not stated in the dying declaration Exh. 15 the trial Court accorded benefit of doubt to accused Nos. 2 & 3 though their names are disclosed and stated in oral dying declarations made by the" deceased before her parents. The prosecution has not challenged the acquittal in the impugned judgment, insofar as the original accused Nos. 2 & 3 are concerned.

30. It is also the case of the defence that the dying declaration recorded by the Executive Magistrate produced at Exh. 15 should not have been relied upon as it was recorded at 5-10 p.m. and therefore there was no sufficient scope and change of it being voluntary. It is also objected on the ground that there is no evidence to show that the deceased was in a fit state of mind and was able to render her rational statement. It is also contended on behalf of the defence that in view of discrepancies in disclosing the names of accused persons in respect of previous dying declarations, the genesis and gist of prosecution case is not properly disclosed.

31. The history recorded in the case papers at Exh. 41 by Dr. Hansa Shukla speaks about the accidental burn injuries while making tea on stove. In fact, it may be noted that the doctor who examined first in point of time is one Dr. P. K. Gohel. He examined Bai Sharda at 7-10 am on 7* 4-1991 in the Community Health Centre at Idar at which she was shifted first. There is no mention of any history nor any names of the accused persons. Since she had sustained 100% first and second degree burns she was advised to be shifted to Himmatnagar Civil Hospital where she was examined by Dr. Shukla. The deceased had made two oral dying declarations before her parents. Her mother PW. 2 Kodriben was informed by the deceased while being shifted to the hospital on 7-4-1991 and

according to oral dying declaration made to the mother the deceased had disclosed the names of three accused persons. So is the case in oral dying declaration before the father who is the complainant PW. 1 Jivabhai Muljibhai. Subsequently, Police Head Constable Arjansinh had also recorded the written dying declaration at, about 10 in the morning in the hospital on the same day. The dying declaration recorded by the Head Constable-Arjansinh is produced at Exh. 54. He after consulting Dr. Shukla met the deceased Bai Sharda when she was undergoing treatment in a ward. In this written dying declaration it is specifically stated by Bai Sharda that her husband, brother-in-law and mother-in-law had put-set her to fire. It is also clearly stated that her mother-in-law was holding kerosene tin and it was poured on her and thereafter her husband had lit the match-stick and put her to aflame. So, in the written dying declaration the deceased has clearly disclosed the names of all the three accused persons.

32. However, the trial Court while examining and appreciating the evidence did not attach any importance to two oral dying declarations before the parents and one written dying declaration recorded by the Head Constable Arjansinh produced at Exh. 54, but placed reliance only on the last written dying declaration which came to be recorded at 5-20 p.m. on 7-4-1991 by the Executive Magistrate produced at Exh. 15 only. Since the name of the only accused No. 1 appellant-husband is disclosed by the deceased Bai Sharda in the dying declaration Exh. 15 before the Executive Magistrate it was also earlier in point of time is preferred and relied on by the trial Court and the written dying declaration at Exh. 54 before the Head Constable-Arjansinh and oral dying declarations made by the deceased before the parents involving all the accused persons and mentioning the role played by them are not accepted and relied on as a result of which the original accused persons brother, Jasubhai, Mother, Jiviben are given benefit of doubt and since the State has not questioned the acquittal of original accused Nos. 2 & 3 we are handicapped and it would not be expedient to deal with that aspect their acquittance at this stage. Notwithstanding that it could safely be stated that the trial Court has taken very lenient and liberal view in giving benefit of doubt to the original accused Nos. 2 & 3 by not relying on one written dying declaration before the police Head Constable at about 10.00 a.m. on the same day and two oral dying declarations before the police which came to be made before the Head Constable Arjansinh nothing has been shown as to why the State has acquiesced with the impugned acquittal order of original accused Nos. 2 & 3.

33. However, in order to examine and appreciate the contentions against the written dying declaration Exh. 151 recorded by the Executive Magistrate it would be necessary to highlight the important and salient aspects of law on the dying declaration.

34. A dying declaration can be described as a statement of a person on apprehension of death or upon anticipating approaching death. General principles of oral evidence are diluted in incorporating the provisions of Section 32 of the

Indian Evidence Act, 1872. The general rule is that a oral evidence must be direct. In case it refers to a fact which could be seen, it must be the evidence of witness who says he/she saw it. There is purpose and policy behind incorporating the provisions of Section 32 in the Evidence Act. The following aspects are highlighted which are settled insofar as the question of appreciation of dying declaration is concerned:

(i) Mode of dying declaration is not prescribed, but ordinarily it should be in a question and answer form, but not following this method would not, in anyway, render the dying declaration weak piece of evidence.

(ii) In fact, a dying declaration is a statement made by a person as to cause of death or as to in what circumstances and transactions it resulted in his/her death, and therefore, it becomes relevant u/s 32(1) of the Evidence Act. Dying declaration is not a deposition, but the statement of a person made in the teeth of fast approaching death assures the credibility of the statement.

(iii) Unlike English law Section 32(1) makes relevant not only the statement to the cause of his death but as to the circumstances of transaction resulting in his death. The grounds of admission are : (a) necessity for the victim being generally the only principal eye-witness to the crime, (b) the exclusion of his or her such a statement might defeat the ends of justice and (c) the sense of impending death, which creates a sanction equal to the obligation of an oath, (d) dying declaration is a substantive piece of evidence and therefore conviction could be passed upon the dying declaration, may be oral or written, provided it is shown to the satisfaction of the Court that the declaration and the statement made by the deceased was voluntary, truthful and untutored and in a fit of mental condition.

(iv) Section 32 itself is an exception to the rule of hearsay and makes admissible the statement of a person who dies whether the death is homicide or suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death.

(v) The Section 32(1) of the Indian Evidence Act widens the scope and sphere than the English provision in respect of not only the cause of death stated by the deceased but any of the circumstances of transaction which result in his death in case in which because of that person the death comes into question.

35. Therefore, the test of proximity has to be decided and judged in the light of facts of the case. Again, the test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket formula. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the factual context. Sometimes,

statements relevant to or furnishing an immediate motive may also be admissible as being apart of transaction of death. No doubt, it is clear that all these statements come to light only after the death of the deceased who speaks from death. For example, where death occurs within a very short time.

36. There is no rule of law that the dying declaration should be corroborated by material particulars in other evidence.

37. The test of dependable and reliable dying declaration may be articulated at this stage in the light of settled proposition of law :

(i) That it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated and reinforced by some other evidence.

(ii) That each case has to be examined on the strength of its own merits keeping in view the circumstances in which the dying declaration came to be made.

(iii) That it cannot be laid down as a general proposition that the dying declaration is a weaker kind of evidence than other pieces of evidence. It is like any other piece of substantive evidence.

(iv) That a dying declaration which has been recorded by the Executive Magistrate in the proper manner preferably in form of "question and answer" and as far as practicable in the words of the maker of the declaration which depends upon the oral testimony which may suffer from all infirmities of human memory and human character.

(v) That in order to test the reliability of the dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night, whether the capacity of the man to remember the facts stated had not been impaired at the time when he was making the statement, by circumstances beyond his control, that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it, and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties. It must also be shown that it is a voluntary, untutored and unprompted statement of the deceased.

The Circumstances which lend strength and assurance to a dying declaration :

(i) In case of a written dying declaration by a competent Magistrate after taking precautions;

(ii) That it was taken down in the exact words as far as possible in which the declarant had uttered and questions formulated by the recorder and the answers given by the declarant,

(iii) That the declarant was in a fit state of mind to make a rationale and

voluntary statement as to the cause of death or the circumstances forming the transaction leading to the death;

(iv) That the deceased was not under any pressure, fear in making the declaration.

38. In case of any infirmity or discrepancy in the dying declaration, the necessity for corroboration arises not from any inherent weakness as a piece of evidence, but from the fact the Court in a good case has come to conclusion that the dying declaration was not completely free from prompting or such other infirmities. Insofar as main core of transaction is concerned, no corroboration is necessary in a case of dying declaration which is shown to be totally voluntary, rational and truthful version made by the deceased as to the cause of his death, and the conviction could also be founded upon sole dying declaration representing fruitful version of the cause of death.

39. The aforesaid legal settled proposition would undoubtedly answer the questions raised against the written dying declaration produced at Exh. 15 recorded by the Executive Magistrate. The contention that it was not in a question answer form is of also no consequence in placing reliance on dying declaration. It is true that ordinarily as far as possible the dying declaration should be recorded in question answer form, but when it is taken in a narrative form it would not ipso-facto discredit the authenticity of the dying declaration. It is also noticed from the evidence that the Executive Magistrate had ascertained about the fitness of the deceased to make rational statement. In fact, the medical officer on duty accompanied the Executive Magistrate and he had shown and identified the deceased Shardaben who was undergoing treatment. Thereafter, the Executive Magistrate started asking questions and recording dying declaration. The fact that it is not in clear terms stated in the dying declaration or in the evidence of the Executive Magistrate that he had taken the opinion of the medical officer about the mental condition of the deceased is of no consequence in the factual scenario of the present case.

40. It is also clear from the written dying declaration-Exh. 15 that the incident which was preceded by another episode in which the deceased had gone to the place of her maternal uncle at village Bhanpur and thereafter on return from there the husband accused No. 1 did not allow the deceased to enter the house. She was asked to bring five persons from her family by way of social security to which deceased pleaded inability and entered the house about which there was a very serious quarrel between the deceased and the husband-accused No. 1 Vinod. The written dying declaration Exh. 15 recorded by the Executive Magistrate is a truthful, voluntary, rational and reliable declaration of the deceased. She has disclosed in clear terms about the unfortunate complicity of the accused No. 1 her husband Vinod. Reliance placed by the trial Court on this written dying declaration is quite justified and the serious criticism over such dying declaration is totally misconceived.

41. The deceased Bai Sharda has clearly and consistently disclosed the name of her husband-accused No. 1 Vinod in all the dying declarations. Last written dying declaration recorded by the Executive Magistrate does not disclose the names of accused No. 2 brother and accused No. 3 mother of the accused No. 1 husband and it cannot be said to be an embellishment Or a change of original place and on the contrary it becomes clear and more acceptable and reliable as it radiates an imprint of truth disclosing also the incident preceded at night on account of her insistence in joining the matrimonial home without 5 responsible members of family by way of social security. It also speaks volumes about the maltreatment, in-human conduct of the husband and the cruelty and torture to which she was subjected to. No doubt, PW. 5 the maternal uncle of the deceased Bai Sharda Jitabhai Hirabhai examined at Exh. 18 has turned hostile to the prosecution case. However, it is clearly stated by PW. 5 Jitabhai in his evidence that the deceased Sharda had come to his house and she stayed with him and thereafter he brought her back to the house of the accused. Why she was to go to another village at the place of maternal uncle alone? Why was she subjected to bring social security in the guarantee form of five family members before entering into the house of the husband? Not only that it becomes crystal clear from the evidence of parents and also the brother-Girish that the deceased Bai Sharda was subjected to physical and mental cruelty. No doubt, they are relatives of the deceased, but they would not be interested to lie and involve son-in-law-accused No. 1 husband of the deceased.

42. It is also interesting to refer at this juncture one more episode which was preceded to the incident in question. Deceased Bai Sharda had to run to the parental home on 30-3-1991 as she was meted out with not only unreasonable, unjust but cruel treatment in the matrimonial home by the husband and other close relatives like husband's brother and mother. Despite this, the parents of the deceased Bai Sharda not only persuaded her but forced her to go back to her husband's place despite the fact that she was carrying six months' old pregnancy. As usual it happens in our society to which judicial notice can be taken that ordinarily parents would be playing positive role and try to see that the married daughter, more so, when she was pregnant second time, should not abandon the matrimonial house and be with her better-half (?) even if the daughter has to undergo some sufferings. Probably, that was one of the reasons that when second time it became intolerable for her to stay with husband and she could not take shelter at parental home and she had to rush and take rescue at the house of her maternal uncle at village Bhanpur. She was sent back within a period of one week prior to the date of ghastly crime and even four days thereafter it was repeated and she had to go to the house of maternal uncle and she was sent back from the house of maternal uncle to the house of her husband and she was not acceptable as stated hereinbefore. She could not oblige the husband to provide social security in the form of five members of the family to stand as security which became the bone of contention culminating into serious quarrel among spouses and finally resulting into heinous crime. Deceased Bai

Sharda had to suffer physical and mental cruelty at the cruel hands of the husband and his relatives in the matrimonial house and as ill-luck would have been apart from not enjoying mental bliss she became victim of macabre offence. In the matrimonial house, at midnight, that too when she was carrying six months pregnancy, what else could be provided for showing cruel treatment and demon like conduct of the husband and his relatives.

43. Ld. advocate for the appellant has placed strong reliance on the decision of the Supreme Court rendered in the case of Smt. Kamla Vs. State of Punjab, and has submitted that four dying declarations were made by the deceased in that case revealing glaring inconsistency, vis-a-vis, naming the culprit as in the present case, and hence, the dying declaration should be totally excluded from consideration. We have exhaustively and dispassionately examined this decision and we are of the opinion that it does not apply to the facts of the present case.

44. In that case, the facts were totally different. The deceased Smt. Kamla had categorically stated in all her dying declarations that her husband had as such rescued her. Again, the involvement of parents-in-law on the basis of dying declarations of the deceased Bai Kamla was not shown to be totally free from doubt. The defence version was probalised in the light of the facts and circumstances of the evidence of the defence witnesses. The accused in his defence examined four defence witnesses. Upon the assessment of the evidence and factual scenario emerged from the evidence of defence it was held that the defence version was probalised and the version of the prosecution parents-in-law were involved in the commission of crime was found doubtful, and more over, it was the consistent case in all dying declarations that the husband of the deceased had run to help her and rescue her. The objection that the husband had raised a defence plea so as to save his parents was found not acceptable as the deceased herself had stated in all dying declarations that her husband had helped her whereas in the present case the factual scenario is altogether different. Deceased Bai Sharda has clearly and consistently disclosed the name of her husband in all her dying declarations. So reverse is the situation in the case before us. Again the conviction was founded upon the first dying declaration of the deceased in that case. Again, in the case of Smt. Kamla Vs. State of Punjab, the defence of parents-in-law that they had gone to a temple in view of Navratri festival at the time of incident was found probable by the Court, particularly, in view of the fact that on being returned from the temple, the telephonic messages were given to the uncle and the father of the deceased-Bai Kamla about the incident. Therefore, in that case in view of the evidence on record, the evidence of the accused as a defence witness was found probable and justified. Unlike that, in the case on hand, the conduct of the accused No. 1 husband of the deceased is not only reprehensible but is totally unusual, uncommon indicating the incriminating and providing also the material link to the case of the prosecution. What was normal and average husband, if not prudent one, behave or will react who is innocent? The first and main anxiety of the innocent in such situation would be to immediately call for medical aid or to rush

for medical aid with an intention to save her life. It would also be the anxiety to inform the close relatives like parents, as it happens in case of Bai Kamla (supra). It is also admitted fact that the accused No. 1 husband Vinod did not even inform the police, Neighbours were also not informed. The manner and mode in which he reacted immediately after the occurrence of incident of serious burning of wife speaks volumes about his incriminating conduct. Not only that even there was no remorse on the part of the husband even in the case of premature delivery of six months pregnancy on account of severe burns during the course of treatment in the hospital. Coupled with that fact, he had quarrelled with his wife and had insisted for social security of five responsible family members on her return from her maternal uncle's house in the evening on the previous day incident occurred early morning 2.30 hrs on the next day. The wife had to abandon the matrimonial house even one week prior to the incident. It is very clear from the evidence of Bai Sharda had taken shelter at the parental home on account of ill-treatment and cruelty at the hands of the husband and other relatives. Therefore, there is no manner of doubt for complicity of the accused No. 1 appellant before us the husband of the deceased is rightly held to be succinctly established without shadow of doubt by the trial Court.

45. At this stage it would be appropriate to refer to relevant case law relied on by the prosecution.

46. Placing reliance on the decision of the Supreme Court in the case of Meharban and Others Vs. State of Madhya Pradesh, it has been contended that the dying declaration can be relied on to base the conviction even in the absence of motive. It has been so in the Meharban's case (supra) that the dying declaration is corroborated from the medical evidence and last articles recovered from the accused persons, no explanation from them in their examination u/s 313, Cr. P.C. The dying declaration was accepted even in the absence of any motive and without any material to show that the deceased would falsely implicate the accused persons. Similarly, in the case of Kumbhar Dhirajlal Mohanlal Vs. State of Gujarat, it has been held by the Supreme Court that the dying declarations before the medical officer and Executive Magistrate found reliable and conscious and fit state and the conviction could be founded upon only on dying declarations.

47. Again in the case of Baldev Krishan etc. Vs. State of Haryana, it is held by the Supreme Court that the deceased proved to have sustained burn injuries in her matrimonial home which was a convenient place, and coupled with the motive and ill-treatment it was also proved from the statement of the mother of the deceased and the letters written to her aunt. The plea of alibi by one of the accused, a mother-in-law was not accepted. It was further held that the accused persons gave false information that the deceased died due to accidental burn injuries. The cloths of the deceased were smelling kerosene and the reliable inquest panchnama and medical evidence were there. Piece of cloth which was found in the mouth of the deceased was taken out by the medical officer. It was

therefore contended that the benefit of doubt should go to the accused.

48. Reliance is also placed on the decision of the Apex Court in the case of Bhayani Luhana Radhabai v. State of Gujarat reported in 1977 SCC(Cri) 181. This decision was rendered by the three-Judge bench. It was also a case of bride burning-wife Mukta, aged about 23. The following propositions have been succinctly propounded :

(i) A dying declaration stands on the same footing as any other evidence and it is to be judged in the surrounding circumstances and with reference to the principles governing the assessment of evidence.

(ii) The Court must, in order to test the reliability of a dying declaration, keep in view the circumstances like the opportunity of the dying man for observation should also be considered.

(iii) If the deceased had several opportunities of making dying declarations, apart from the official record of it and whether the statements have been made at the earliest opportunity and was not the result of torturing by interested parties.

Therefore, the anxiety of the Court should be to see that the dying declaration is free from any influence or prompting and is rational, voluntary statements of the deceased as to her cause of death. The conduct of the husband is also seriously criticised. The death of the wife by sustaining burns was held to be homicidal, by the strange conduct of the husband wholly inconsistent with the ordinary course of human nature and incompatible with the hypothesis of accidental death. Hence, this decision of the Apex Court fully applies to the facts of the case on hand.

49. In Bhayani Luhana Radhabai's case 1977 SCC (Cri) 181 (supra) several dying declarations were made and the defence had submitted that they are of accidental death which was found to be false. The dying declaration of Bai Mukta was accepted and preferred than the dying declaration recorded by the Taluka Magistrate. There was discrepancy between the dying declaration made by deceased Bai Mukta before Mulubha, Police Head Constable and the dying declaration made by her before the Taluka Magistrate. The discrepancy was held to be of any consequence as the dying declaration recorded by Mulubha, Police Constable at the earliest point of time was found quite reliable and trustworthy and therefore though there was discrepancy and contradiction in the dying declaration recorded by the Taluka Magistrate, the dying declaration recorded by the Police Constable Mulubha was preferred. The principle laid down in this case hardly applies to the present case. In that case one of dying declarations which was found full of discrepancies recorded by the Taluka Magistrate was not preferred, whereas in the present case the dying declaration recorded by the Police Head Constable Arjansinh in which dying declaration of deceased Bai Sharda discloses names of all the accused persons is not preferred than the dying declaration recorded by the Executive Magistrate which was last in point of time Since the deceased had not narrated and disclosed the names of original

accused Nos. 2 & 3, the brother and Mother of accused No. 1 respectively, the trial Court in its liberal approach granted benefit of doubt to the other accused while preferring dying declaration recorded by the Executive Magistrate.

50. In *Umedsing Sursing Mahida Vs. State of Gujarat*, the Division Bench of this Court to which one of us (J. N. Bhatt, J.) was a party there were 4 dying declarations in that case, two oral and two written. It was also the case of a bride burning. It was held from the evidence on record that the dying declaration recorded by the Executive Magistrate was consistent and reliable. The pith and substance of dying declarations recorded by the Govt. officials in discharge of their duties pointing unerringly the guilt of the accused are accepted. It was further held that the dying declaration made by the deceased which is relevant under the provisions of Section 32(1) of the Evidence Act is a substantive piece of evidence and conviction can be founded upon the sole basis of a dying declaration.

51. Very important principles are expounded illustratively and material ingredients of provisions of Section 32 of the Evidence Act are propounded by the Apex Court in the case of *Sharad Birdhichand Sarda Vs. State of Maharashtra*, . Since we have already discussed such principles "in extenso" it would not be necessary to reiterate the some of them. However, one aspect which is made very clear in this decision is with regard to the scope of Section 32. It has been held that the Indian Law on the question of nature and scope of dying declaration has made a distinct departure from the English law where only the statements which directly relate to the cause of death are only admissible.

52. In this connection, it may be rioted that the quarrel took place between the spouses on the night preceded by the incident was referable to the conduct on the part of the husband-accused No. 1 in demanding social security in the form of 5 respectable family members before her re-entry into the matrimonial home and for her leaving the place of the husband on account of ill-treatment and cruelty and bringing back her by maternal uncle. This incident was preceded by another incident that which occurred on 30-3-1991 when the helpless wife had to take shelter at the parental home as she was subjected to physical and mental cruelty. These are the circumstances which could be said to be very relevant and the transaction which resulted into death of Bai Sharda. So, Section 32(1) also includes in its ambit any of the circumstances and transaction which result into death subject to the proximity of the facts of the case. Apart from treating the two incidents as part of the relevant statement u/s 32 of the deceased or the conduct of the accused-husband which could be exclusively employed into service by the prosecution u/s 6 of the Act. Section 6 of the Evidence Act reads as under :

Section 6 :

Relevancy of facts forming part of same transaction -

Facts, which though not in issue, are so connected with a fact in issue as to form

part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

53. It is therefore clear that a fact forming part of same transaction is relevant whether it occurred at the same time and place or at different time and place. This view is also clearly supported by the decision of the Apex Court in the case of Rattan Singh Vs. State of Himachal Pradesh, . Section 6 of the Evidence Act pertains to the principle of Resgestae which means, as per Law Lexicon, "Things done, or liberally speaking, the facts of the transaction the facts of a transaction; explanatory of an act or showing a motive for acting; matters incidental to a main fact and explanatory of it; including acts and words which are so closely connected with a main fact as will constitute a part of it, and without a knowledge of which the main fact might not be properly understood, even speaking for themselves, though the instinctive words and acts of participants, not the words and acts of participants when narrating the events, the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it and serve to illustrate its character, or those circumstances which are the automic and undersigned incidents of a particular litigated act, and are admissible when illustrative of such act".

54. We are also tempted to refer to one decision of the Apex Court which will be clear answer to one of the contentions raised before us with regard to mode of recording the dying declaration. In State of Rajasthan Vs. Bhup Singh, it is held that even recording of dying declaration in a different language than the deceased gave her statement in her own language would not vitiate it on that ground. It is not unusual that Courts record evidence in the language of the Court even when witnesses depose in their own language. Judicial officers are used to the practice of translating the statements from the language of the parties to the language of the Court. Such translation process would not upset either the admissibility of the statement or its reliability, unless there are other reasons to doubt the truth of it. It is further held that the dying declaration would not go bad merely because the Magistrate did not record it in the form of questions and answers. It is axiomatic that what matters is the substance and not the form. Questions put to the dying man would have been formal and hence the answers given are material. Criminal Courts may evince interest in knowing the contents of what the dying person said and the questions put to him are not very important normally. That part of the statement which relates to the circumstances of the transaction which resulted in his death gets the sanction of admissibility. Here it is improper to throw such statement overboard on a pedantic premise that it was not recorded in the form of questions and answers. Therefore, the contention that the dying declaration of the deceased was not in her own language and not in question and answer form is required to be rejected.

55. The facts and circumstances narrated hereinbefore emerging from the testimonial collections and documentary evidence unequivocally go to compaginate the appellant-accused No. 1 husband of the deceased Bai Sharda

with the complicity for the offence punishable under Sections 302 and 498-A of the IPC. Ingredients of Section 498-A are also fully established. We, therefore, are satisfied that the impugned judgment and order and the resultant conviction and sentence are quite justified and require no interference. In the result, appeal, merits rejection and is accordingly rejected.