IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 512 of 1997

FOR APPROVAL AND SIGNATURE:
HONOURABLE MR. JUSTICE A.S. SUPEHIA
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

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Approved for Reporting	Yes	No
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STATE OF GUJARAT
Versus
KALUBHAI AMARSHI AGHARA

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Appearance:
MS VRUNDA SHAH, APP for the Appellant(s) No. 1
MR NEERAJ SONI(3433) for the Opponent(s)/Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE A.S. SUPEHIA**
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 07/04/2025

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)

1. The present appeal filed by the Appellant-State under Section 378 of the Code of Criminal Procedure, 1973 (for short, “the Cr.P.C.”) against the judgment and order of acquittal dated 01.03.1997 passed in Sessions Case No.120 of 1995 wherein the learned Additional Sessions Judge, Jamnagar (hereinafter referred to as "the trial Court") has acquitted the respondent-accused Kalubhai Amarshi Aghara for the offence punishable under Sections 302 and 498A of the Indian Penal Code, 1860, (for short, "the IPC").

2. The case of the prosecution as per the Charge at Exh.1 and in the complaint dated 12.03.1995, Exh.35 registered

by the deceased – Jashuben is that on 12.03.1995, after the deceased instigate her husband of sitting idle and not going to work, the accused got irritated, and assaulted her by giving kick and fists blows, and poured kerosene on her from a tin and bottle and set her ablaze.

3. It is further narrated by the deceased (complainant) in the complaint dated 12.03.1995, that after she was set ablaze by the accused, she ran out in the open space (*faliya*) and on hearing her shouts, the neighbors also gathered and at that moment, her husband –accused had thrown a quilt on her and tried to extinguish the fire, and at that moment her sisters-in-law – Bhanuben Babubhai (PW-10) and Rajuben Bhupat (PW-4) also arrived along with the other persons from the adjacent area, who saved her and thereafter, she was taken to the hospital by the accused along with one Chhotugar Samgar (Mahraj) (PW-11). She has narrated that due to this incident, she has suffered burn injuries on her face, hands, chest and also on stomach. It is alleged by her that her husband, who was sitting idle and was having the habit of consuming liquor became annoyed and poured the kerosene on her and set her ablaze. She has further stated that she was conscious at the time of recording of the complaint. The complaint is recorded by the Police Sub Inspector, City “B” Division Police Station, Jamnagar. The complaint at Exh.35 also bears the toe imprint of her right foot. It also bears the endorsement of a doctor at 1:15 p.m., who has certified that “*the patient is fully conscious and well oriented at time place person*. Thus, this can be treated as “dying

declaration" of the deceased.

4. The prosecution has tried to bring home the charge on the basis of documentary as well as ocular evidence, however, the trial Court has acquitted the accused from the offence, for which he was charged. In order to establish the guilt of the accused, the prosecution has examined total 17 witnesses, and 19 documentary evidence before the trial Court. The accused, in his defence, has also examined the Defence Witness – Shantaben Jadavbhai at Exh.62.

5. Learned Additional Public Prosecutor Ms.Vrunda Shah, at the outset, while inviting the attention of this Court to the dying declaration at Exh.18 recorded by the Executive Magistrate (PW-03) – Hiren Chandrakant Purohit at Exh.16 has submitted that the dying declaration categorically establishes the complicity of the accused in the offence. She has submitted that the deceased has firmly elaborated the role attributed to the accused in pouring kerosene on her and setting her ablaze.

6. Learned APP has also placed reliance on the first treating doctor (PW-2) – Dr.Navinchandra Kanjibhai Hariya, who is examined at Exh.11, and has submitted that he has deposed before the trial Court that when the deceased was brought to the hospital at 10:40 a.m., on 12.03.1995, she was completely conscious. She has also referred to the history recorded by the doctor and also the medical papers. While referring to the history recorded by (PW-14), Dr.Harsh Prabhakar Trivedi, at Exh.41, she has submitted

that the history narrated by the deceased also describes the role of the accused in pouring kerosene over her and then igniting with the matchstick, which can be treated as dying declaration. It is submitted that thereafter, he covered her with the blanket for dousing the fire, and in the process, the accused himself got burnt on both his hands. She has referred to the history and has further submitted that this evidence also reveals that the deceased was in fit state of mind. She has submitted that he has also supported the complaint at Exh.35 by deposing that he has made the endorsement that the deceased was in fit state of mind, when the complaint at Exh.35 was recorded.

7. Learned APP has also referred to the certificate at Exh.12, which is the injury certificate issued by Dr. N. K. Hariya, (PW-2), and has submitted that the certificate dated 16.08.1996 reveals that the deceased was burnt by her husband i.e. the accused, after sprinkling kerosene on her and there were 60% to 65 % deep burnt injury.

8. Learned APP has further referred to the deposition of (PW-12), a Social Worker - Savitriben Harishbhai Makwana, who is examined at Exh.34, and has submitted that she was called by the Investigating Officer and the complaint was recorded in her presence. She has submitted that she has also supported the case of the prosecution.

9. Further reliance is placed on the deposition of Parakramsinh Kanubha Jadeja (PW-13), who is examined at

Exh.38, in whose presence the complaint at Exh.35 was recorded. It is submitted that he has also supported the case of the prosecution.

10. Learned APP has also referred to the evidence of the Investigating Officer - Bedidan Kishandan Charan (PW-15), who is examined at Exh.45, who has also proved the complaint at Exh.35.

11. While referring to the entry of the Station Diary at Exh.55, learned APP has referred to the deposition of Ranjitsinh Nagbha Rana (PW-16), who is examined at Exh.54, who has recorded Entry No.60, which mentions about the incident, occurred on 12.03.1995 and the incident is reported to him at 12:00 O'clock. While referring to the findings of the trial Court, learned APP has submitted that the same are perverse and it is urged that the findings recorded by the trial Court may be set aside. She has further submitted that the trial Court has acquitted the accused by disbelieving the dying declarations, and hence, it is submitted that the trial Court has committed grave error in ignoring the dying declaration. Thus, it is urged that the acquittal recorded by the trial Court may be quashed and set aside. In support of her submissions, learned APP has placed reliance on the judgment of the Supreme Court in the case Laxman vs. State of Maharashtra, (2002) 6 S.C.C. 710 and has submitted that once the dying declaration is found to be of sterling quality, no further corroboration is needed.

12. While opposing the aforesaid submissions and the present appeal filed by the State authority, learned advocate Mr.Neeraj Soni has submitted that the acquittal recorded by the trial Court may not be interfered with as the same is precisely passed after appreciating the ocular as well as documentary evidence.

13. Learned advocate Mr.Soni, has further submitted that the trial Court has precisely disbelieved the dying declarations since it does not satisfy the requirement of law. While referring to the dying declaration recorded by the Executive Magistrate and the deposition of the Executive Magistrate, he has submitted that the doctor, who has put the endorsement on the certificate certifying that the deceased was in a fit state of mind to give statement, is not examined as a witness, and hence, it is submitted that the dying declaration recorded by the Executive Magistrate (PW-3) cannot be taken into consideration.

14. Learned advocate Mr.Soni has further referred to the deposition of Executive Magistrate (PW-3) – Hiren Chandrakant Purohit and has submitted that his evidence does not reconcile with the medical papers and the medical condition of the deceased. So far as the complaint at Exh.35 is concerned, it is submitted that the doctor, who has made the endorsement on the complaint i.e. Dr.Harsh Prabhakar Trivedi (PW-14) in his evidence at Exh. 41, has admitted that such endorsement was taken after the recording of the complaint, and he was also not present throughout when such complaint was being

recorded by the police. Thus, it is submitted that in such circumstances, the complaint recorded by the police is also doubtful.

15. It is also contended that the evidence of Savitriben Harishbhai Makwana (PW-12) at Exh.34, who is a Social Worker, is also required to be ignored since the prosecution is unable to prove that why she was called at the first place to remain present by the Investigating Officer (PSI) (PW-13) since the Executive Magistrate has been summoned to record the dying declaration of the deceased.

16. Learned advocate Mr.Soni, appearing for the respondent - accused has endeavored to point out the discrepancy in the evidence of the doctors (PW-2) – Dr.N. K. Hariya, and (PW-14), Dr. H.P. Trivedi, and has submitted that their evidence does not reconcile with the evidence of the doctor - Dr.Satishkumar Puranchand (PW-01), who is examined at Exh.6 and has performed the postmortem of the deceased. While referring to the medical papers, it is submitted by him that the medical papers show that the deceased was not attended properly at the hospital by the doctors and due to lack of medical attendance, the deceased has succumbed to the injuries. It is submitted that such fact is also admitted by the PW-01 in his evidence before the trial Court.

17. It is submitted that the trial Court has precisely considered the evidence of Defence Witness - Shantaben Jadavbhai

(DW-1), who is examined at Exh.62, who is the mother of the deceased. It is submitted that she has clarified before the trial Court that when the incident had occurred, (PW-11) Chhotugar Samgar had immediately arrived at the place of offence and at that time, other neighbours were also present. It is submitted that she has deposed before the trial Court that the PW-11 and the accused, both of them, extinguished the fire and thereafter, the deceased was taken to the hospital. She has further submitted that her deposition reveals that the deceased was mentally unstable and was very short tempered.

18. Learned advocate Mr.Soni has also referred to the evidence of (PW-11) Chhotugar Samgar, who has been declared hostile and has not supported the case of the prosecution.

19. While referring to the further statement of the accused recorded under the provisions of Section 313 of the Cr.P.C., learned advocate Mr.Soni has submitted that in fact, the accused has explained that he was not present at the place of incident, when the incident had occurred and had gone for some work at the temple and he was with the witness – Chhotugar Samgar (PW-11). It is thus submitted that the acquittal recorded by the trial Court cannot be reversed by placing solely reliance on the history recorded by the doctors, more particularly in wake of the fact that the deceased was not in a condition to make any statement as her entire face was burnt including the lips, which were bandaged. Thus, it is submitted that the

appeal may not be entertained.

20. We have heard the learned advocates appearing for the respective parties. We have also perused the findings recorded by the trial Court, while acquitting the accused.

21. As narrated hereinabove, it is the case of the prosecution that the deceased was set ablaze by her husband as they had quarreled on the fateful day of 12.03.1995. The case of the prosecution hinges on the dying declarations, as mentioned hereinabove. We may first deal with the dying declaration, in the form of a complaint given by the deceased at Exh.35 on 12.03.1995, came to be recorded by the Police Sub Inspector, City "B" Division Police Station, District Jamnagar by PSI – Parakramsinh Kanubha Jadeja (PW-13). As per the contents of the complaint, the deceased had in detail narrated the incident. The same is translated as under: -

> *"My name is **Jashuben Wf./o. Kalu Amarshi Adhara,** Age 25 years, Occupation : House chores and labour work, Resi. - Nr. Haunted (Bhutiya) Bunglow, Gulabnagar, Jamnagar.*
>
> *On being asked in person, I declare and state my complaint that I am residing with my husband and children at the aforementioned place and doing house hold work and labor work. My marriage was solemnized before about six years. I am having two sons and one daughter in children. Wherein the youngest son is Rahul, who is of 3 months. The daughter elder than him is Tini and the eldest son is Dipak. We all are living together. My parent-in-laws have died and my maternals are residing besides our residential house. Names of my father is Jadavbhai and mother is Shantaben.*
>
> *After my marriage, my married life passed happily for some time. Thereafter, as my husband is going for labor work and he used to consume liquor from the money which he got*

against labor work. Hence, our subsistence was not maintained properly. So, I used to go for casual labour work. Despite that, my husband did not stopped to consume liquor and when I used to persuade him, then was beating me. So, I have told about this matter to my parents also.

Today, at about ten o' clock in the morning, my husband did not go for work. So, I asked him as to why he was not going for work. On being asked so, my husband was suddenly provoked and started to speak to me recklessly and he used to beat me punches and kicks. So, I told him that if you will not go for work then how does our livelyhood will be maintained. On being said such by me, my husband took the kerosene which was in a jar as well a in the bottle lying in our residential house, sprinkled it upon me and have set me on fire by lightning a match stick. So, I started burning and came outside my residence at the compound and started shouting, so the other people have gathered. So, my husband have tried to estinguish the fire by covering a mattress on me. At this time my devranis / sisters-in-law (wife of younger brother-in-laws / devars) - namely Bhanu and Raju also reached there and the people of other street have also gathered. They have rescued me. My husband and Chotu Maharaj brought me over here to get me treated. I have been sevearly burnt in this indcient at my mouth, both my hands as well as on the parts of my chest and stomach. This incident have taken place (with me) upon saying my husband to go for work and for not consuming the liquor. So, my husband got provoked and have sprinkled kerosene on my body and have lightened a match stick upon me with an intention to kill me. At present I am in proper conscious condition.

The aforemetioned complaint of mine is true and proper as dictated by me. As because, both of my hands have been sevearly burnt, so I have put right hand thumb impression on it on being read herd the same to me.

thumb impression	*Before Me.* *sd/- illegible* *P.S.I. - Inve.* *City B Div. Po. Stn.* *Jamnagar.*
This thumb impression of right leg is of Jashu Wf. /o. Kara .	

Jam. City 'B' Div. Po. Stn. C.R. no. I - 102/1995
I.P.C. - As per sections 498-A, 307

Date an time of committing the offence :
On Dt. 12/03/1995 at 10:00 hrs.

Date an time of Information of the offence received :
On Dt. 12/03/1995 at 13:30 hrs. ”

22. A perusal of the contents of the complaint reveals that the same is very crisp and is not marred by any aberration and is having minute details. We have perused the original also. As per the complaint, the incident has occurred when the deceased levelled accusation on her husband, of sitting idle and not going to work, at that moment, the accused got irritated and gave kick and fists blows and thereafter, he poured kerosene from a tin as well as from a bottle on her and set her ablaze by igniting a matchstick. It is narrated by her that while she was burning, she ran out of her room in the open space (*faliya)* and when she was crying and shouting, the persons from the adjacent area also gathered and at that moment, her husband covered her with the blanket and tried to extinguish the fire. She has also referred to the presence of her sisters-in-law – Bhanuben Babubhai (PW-10) and Rajuben Bhupat (PW-4) and other neighbours, who had gathered at that time. She has also mentioned that thereafter, her husband and the PW-11 - Chhotugar Samgar (Maharaj) have taken her to the hospital as she suffered severe burn injuries on her face and hands as well as on stomach. She has also alleged that her husband was a habitual drunkard, who has set her ablaze by pouring kerosene on her. This complaint bears the endorsement of the doctor, at 1:15 p.m., which mentions that *“the patient is fully conscious, well-oriented time place person”*.
23. The prosecution in order to prove the complaint has examined the (PW-14) – Dr.Harsh Prabhakar Trivedi, at

Exh.41. He has supported the case of the prosecution. Before the trial Court, he has deposed that the deceased - Jashuben was brought on 12.03.1995, at 10:40 a.m., in a burnt condition and he has recorded the history, which is in his handwriting. It is also mentioned by him that he was administered antibiotic, painkillers and injections, after she was admitted in the ward at 10:40 a.m. He has also submitted that till 12.03.1995, the patient-deceased was in fully conscious state. All the medical papers at Exh.13 and 14 are produced before him. When he was shown the complaint at Exh.35, he has admitted that he has made the endorsement on the said complaint about the patient being in fully conscious state, however in his cross-examination, he has admitted that he has made such endorsement after the complaint was registered and during the recording of the complaint, he was not present.

24. In his cross-examination, the nature of injuries suffered by the deceased was also elicited. He has submitted that the deceased was unable to pronounce the alphabets / consonants like *Pa, pha, ba, bha and P*, as her lips were severely burned and were torn, and she was facing severe difficulty in pronouncing such consonants in the same breath, however he has further improved her version to the extent that the deceased was speaking very clearly. He has also admitted that he has not recorded the time of recording the history.

25. Thus, from the evidence of this witness, it is established that the deceased was severely burnt on her face and her

lips were also burnt. It is also established that at the time of recording the complaint, he was not present throughout and it is also admitted by him that he has made the endorsement on the complaint after the same was recorded. We have also seen the original complaint and the endorsement recorded by the doctor appears to be formal in the corner of the complaint. Thus, the recording of history is also doubtful as there is no time mentioned in the history and this witness also admitted that he has not recorded the time. He has also admitted of administering drugs to her, on arrival at the hospital.

26. There is another treating doctor (PW-2) Dr.N.K.Hariya, who has deposed in the same line. This witness (PW-2) in his deposition before the trial Court has admitted in the examination-in-chief that the patient (deceased) was brought on 12.03.1995 and was admitted at 10:40 hours in the ward. He has also deposed that she informed him that she was burnt by her husband by pouring kerosene and accordingly, he has recorded such history. He has also deposed that when he examined the deceased, except her private parts, she had suffered burn injuries in the entire body and as per his opinion, she suffered 60-65% burns and they were second degree burns. He has also deposed that when the deceased was brought, she was fully conscious state. He has proved the injury certificate at Exh.12 issued on 16.08.1996 bearing the endorsement that she was burnt after sprinkling kerosene and she passed away on 27.03.1995. He has submitted that he has recorded the history at Exh.12 and Exh.13, when the

patient was brought, which mentions about the sprinkling of kerosene by the accused and then setting her ablaze. In his cross-examination, it is elicited that the deceased had suffered second degree burns on her lips and on her neck. He has also admitted that at Exh.14, the history is recorded of accused was recorded by him, who had also suffered second degree burns on left forearm. It is also elicited from him that he is not aware about putting his signature on the history. It is admitted by him that he has not recorded the reason of injury suffered by the accused. He has denied that the deceased had suffered 65% burns injuries. He has admitted that the smell of the kerosene was coming from the body of the deceased, however he has not recorded the same in the medical case papers at Exh.13. He has also admitted that he has altered the degree of burn from 60% to 55%, however he has not endorsed by making short signature, and he does not know the reason as why he has made the alteration. He has also admitted that the dates in Exh.13 and Exh.14 have been altered from 11th to 12th and he is unaware, who has written the dates. He has also admitted that the police station was only 200 feet away from the Causality Ward and as and when such medico legal case is reported, the police are immediately informed and it is admitted by him that he has never informed the place or he has never sent any *yadi*.

27. Thus, the evidence of this doctor will reveal that though he has recorded the history of the deceased, there is alteration in the dates and also in the degree of burns

suffered by the deceased. There is no time recorded as to when the history was recorded. His evidence does not reconcile with the doctor (PW-14), who has mentioned that the deceased has suffered 65% burns injury, whereas he has referred to 55% burns injury in his cross- examination, which again runs contrary to his examination-in-chief, wherein he has mentioned that the entire body of the deceased was burnt, except her private parts. The degree of burns is also altered and 60% is scored of to 55 %.

28. At this stage, it would be apposite to refer to the evidence of (PW-1) Dr.Satishkumar Puranchand, at Exh.1, who has undertaken the post mortem of the deceased. Before the trial Court, he has deposed that except the lower limbs, the entire upper body was burnt. He has also deposed that the face as well as the neck of the deceased were completely burnt and the chest as well as the back side of the deceased were also burnt. He has also referred that the deceased has suffered 65% and second degree of burn. It is also deposed by him that the deceased was suffering from septicemia due to infected burns and it is admitted by him that the injuries in its natural course would not have been responsible for the death, in case, appropriate treatment was given to the deceased. In the cross- examination, it is elicited from him that the lips as well as neck of the deceased were completely burnt.

29. This witness has categorically admitted as under :-

> *“8. Pain-killer should be give to such type of patient when they visits the hospital. Such patients are given Morphia and other medicines due to which patient comes under*

sedation. In such of cases, when the injuries are of third and fourth types and when the sedative drugs are given to him, then he could be able to speak at some extent.

The lips on her face was burnt and the entire part of throat was burnt. The part till jaws below the ear was also burnt. It is true that the movement is found on the part below the ear up to jaws and part of throat below the jaws when a person speaks. It is true that when a lady speaks the word ***'Pati'*** *(husband), then her both the lips are touched together and when she speaks* ***'tou'*** *(Gujarati word for 'then') then her lips are streached. When any such patient speaks the alphabet* ***'pha'*** *then his mouth is widened from upside down. Similarly if such patient speaks* ***'maar-peet'*** *(fighting) then his mouth will open upto till upside and his lips will meet / touch each other.*

9. When any person speaks during the aforesaid injuries, the pain is seen on his face. So, such patients could not speak freely and fluently. When a person is burnt, then his skin is stretched (shrinked) and its elasticity is decreased and the skin and its inner part comes in rigid condition after burning. In this case, the injuries occurred could become Homicidal and Suicidal. But such injuries could not be sustained accidental. The fingers and thumbs of the hands of Jasuben were burnt. The bandages were affixed on the burnt parts of her thumbs and fingers. ”

30. Thus this witness, who has undertaken the postmortem report, has specifically admitted that such patients could not speak freely and fluently. When a person is burnt, then his skin is stretched and its elasticity is decreased and the skin and its inner part comes in rigid condition after burning. In this case, the injuries occurred could be Homicidal and Suicidal. But such injuries could not be accidental. The bandages were affixed on the burnt parts of her thumbs and fingers.

31. The prosecution, in order to strengthen their case has also

examined a Social Worker (PW-12) - Savitriben Harishbhai Makwana, who is examined at Exh.34. She has arrived at the hospital on the instructions of Parakramsinh Kanubha Jadeja (PSI) (PW-13). She has also deposed that the complaint at Exh.35 was recorded in her presence. In her cross-examination, it is elicited that the bandage was firmly applied on the face as well as on the neck of the deceased and she could witness that the lips of the deceased were torn and her eyes were not open and when they had queried her, she did not open her eyes and she was speaking waveringly. She has also asserted that the constable recorded the complaint exactly in the same manner, as narrated by the deceased. Thus, the assertion made by this witness, that the complaint was exactly recorded as narrated by the deceased does not reconcile the lucid contents of the complaint Exh.18, which is very specific and recorded with absolute clarity. Thus, looking to the medical condition as narrated by this witness and the medical officers, P.W.1, 2 and 14, it is was not possible for the deceased to speak lucidly in a clear conscious mind.

32. Thus, from the overall appreciation of the evidence of all the three medical officers and PW.12, it is established that the deceased was unable to speak clearly or fluently. Her face, lips and neck were severely burnt. Bandages were applied on her face. She was unable to pronounce certain alphabet/consonants, and was speaking waveringly. She was also administered drugs. Thus, looking to the medical condition of the deceased, it is not palatable that she was

able to give her statement with so clarity and lucidly. Hence, the contents of the complaint at Exh.35 are unpersuasive.

33. Now we shall deal with the dying declaration recorded by the Executive Magistrate (PW-3) - Hiren Chandrakant Purohit. He has recorded the dying declaration at Exh.18 on 12.03.1995, at 14:30 hours. This dying declaration at Exh.18 bears an endorsement of doctor, at 2:30 p.m., which mentions that *"patient is fully conscious and well oriented to time, place &person*. However, the medical officer/doctor, who has made the endorsement, has not been arraigned as a witness. Thus, the dying declaration at Exh.18 becomes doubtful without examination of the doctor, who has made such endorsement. In his cross-examination, it is elicited that when the dying declaration at Exh.18 was recorded, the doctor was not present. He has further admitted that though the nurse was present, he has not inquired from her, as to whether the patient was conscious or not. He has admitted that the endorsement, which was made with red pen at Exh.18 about mental fitness of the patient was already written by him before the doctor has arrived. He has positively made a statement that the face of the deceased was not burnt and only the portion of the body below the neck of the deceased was burnt, and there was no sign of any burn injury on the face of the deceased. He has also denied that the lips of the deceased were burnt and her hair was also burned. The evidence of this witness, who is the Executive Magistrate, runs contrary to the medical evidence and the

deposition of the doctors narrating the medical conditions of the deceased. Thus, neither the evidence of this witness nor the dying declaration at Exh.18 can be considered as positive evidence to convict the accused. The evidence of this witness, who is the Executive Magistrate does not fall in line with the medical officers with regard to burn injuries. There is major contradiction in the description of injuries.

34. The prosecution has also examined (PW-11) – Chhotugar Samgar at Exh.32, who has turned hostile. He has categorically deposed before the trial Court that at the time of the incident, the accused was present with him and on hearing the uproar, both of them rushed to the home and saw that the deceased was burning and accordingly, they had covered her with the blanket and thereafter, he along with the accused, taken the deceased to the hospital.

35. The defence witness (DW-01), who is the mother of the deceased is examined at Exh.62. She has also deposed in the same line as deposed by the PW-11. She has also deposed that her daughter - Jashuben was very aggressive in nature and used to throw the utensils. She has also deposed that her son-in-law i.e. the accused is not having any bad habit.

36. In the statement recorded under the provisions of Section 313 of the Cr.P.C., the accused has deposed that he was not present when the incident was occurred and he was with (PW-11)- Chhotugar Samgar and he rushed to the

home, after hearing hue and cries and, on reaching the home, he saw her wife burning, and both of them tried to extinguish the fire by covering her with a blanket, and he got frightened and his hands also got burnt. He has narrated that at that moment, her in-laws also arrived at the scene of offence and mother-in-law informed him that a police case will be registered against him and they instigated him to admit the offence. He also deposed in his statement under Section 313 of the Cr.P.C. that, his mother-in-law had asked her daughter “deceased” to name him, if anyone inquires about the incident. He has also denied that he is in the habit of consuming liquor and has ever quarreled with her wife.

37. The Police Sub-Inspector Mr.Parakramsinh Kanubha Jadeja (PW-13), who is examined at Exh.38 has recorded the complaint at Exh.35 has deposed that he has recorded the complaint on 12.03.1995, after he has received a *yadi* at Exh.39. He has deposed that the complaint at Exh.35 was recorded in the presence of the Social Worker – Savitriben Harishbhai Makwana (PW-12). He has also admitted that he has made an endorsement of the doctor on the complaint at Exh.35, after it was recorded. He has submitted that on the oral instructions of the doctor that the deceased is fit state of mind to give her statement, he has recorded the complaint at Exh.35. Thus, the doctor has made the endorsement on the complaint after it was recorded, whereas the (PW-14) – Dr.Harsh Prabhakar Trivedi has admitted that he was not present throughout

the recording of the complaint. From the evidence of P.W.2, it is established that the police station was only 200 feet away, and police personnel are also present in the Ervin hospital, and though it was a medico-legal case, P.W.2 did not send any *yadi* to the police. This casts doubt on the case of the prosecution.

38. On an overall appreciation of the evidence describing the medical conditions of the deceased, we are of the considered opinion that it was unbearable for the deceased to narrate the incident without any inconsistencies or discrepancies or in crisp and clear manner. The medical history at Exh.13 and Exh.42, which can be said to be dying declarations also do not inspire confidence. The same is recorded within a span of half an hour. The medical histories also do not refer to any time when it was recorded.

39. The deceased was admitted in the hospital at 10:40 hours, on 12.03.1995, and she succumbed due to the burn injuries on 27.03.1995, at 3:00 p.m. Thus, she was under treatment for almost 15 days and the doctors have mentioned that throughout 15 days, she was fully conscious. Thus, the doctors though have recorded the history, have not recorded the time, when it was recorded and thereafter, during this passage of 15 days, though it is deposed by the doctor that she remained conscious, no attempts were made to record specific statement about the incident. The prosecution has also miserably failed to examine the doctor, who has given the certificate about

the consciousness of the deceased, while recording the dying declaration at Exh.18 by (PW-3) Mr.Hiren Chandrakant Purohit at Exh.16.

40. At this stage, we may also refer to the findings recorded by the trial Court on the conduct of the accused and the deceased, which is relevant under Section 8 of the Indian Evidence Act,1872. We may also refer to the evidence of Dr.Satishkumar Purnchand, (PW-1) who has conducted the postmortem of the deceased. (PW-14) – Dr.Harsh Prabhakar Trivedi, who has in his cross-examination has deposed that the injuries, which have been found on the deceased, are possible, if any person catches fire, who pours the kerosene on himself or any person pours kerosene on him/her, while sitting, then such type of burns injuries are possible. This evidence does not reconcile with the narration of the incident in the complaint.

41. The panchnama of the place of scene of offence at Exh.26, which has been prepared by the Investigating Officer (PW-15) – Bedidan Kishandan Charan reveals that there were some burnt pieces of clothes having smell of kerosene were found. A tin, containing two liters kerosene and the match-box and also an empty bottle of kerosene having smell of kerosene, were also collected from the scene of offence. Exh.26 further reveals the presence of kerosene at the house of the victim, where the incident has occurred. The trial Court has recorded that all these aspects transpire absence of resistance from the deceased and, if in case, the deceased had resisted the accused

while sprinkling the kerosene upon her then the kerosene could have spread to other articles and space of the room but nothing was found from the place of occurrence, which would suggest that the deceased has set herself ablaze by pouring kerosene on herself.

42. We may, at this stage, refer to the complaint of the deceased wherein she has specifically alleged that it was 10 a.m., the accused had assaulted her initially by giving kick and fists blows and thereafter, he got irritated and poured kerosene from the tin as well as from the bottle and set her ablaze and thereafter, she ran outside in the open space (*faliya*) wherein the neighbours had also gathered. The scene of offence panchanama and the nature of injuries suffered by her create doubt in the manner in which, she has narrated the incident and it is doubtful, as to whether the accused had poured kerosene on her, more particularly, when she has asserted that the kerosene was poured from the tin and a bottle. It is not the case of the prosecution that the kerosene was poured from an open container, but both the tin and bottles were having narrow openings and, in such circumstances, when the accused was pouring the kerosene from two containers, she had the time to escape or run out. The prosecution has not examined any independent witness or neighbours, who were present at the time of incident, except PW-11, who has also turned hostile. The scene of offence does not refer to any struggle or resistance between the accused and the deceased. The case of the prosecution also becomes doubtful, as there is no

investigation done about the injuries suffered by the accused, though both were admitted in the same ward of the hospital and the medical papers reveal that the accused had also suffered burn injuries on his both hands, while extinguishing the fire on the deceased.

43. The accused was also tried for the offence punishable under Section 498A of the IPC. There is no speck of evidence worth the name, which establishes the offence under Section 498A of the IPC. The real sister of the deceased, (PW-4) Rajuben, who is examined Exh.21, was also living at the adjacent area to the deceased, has not supported the case of the prosecution before the trial Court. The mother of the deceased has also not supported the case of the prosecution and on the contrary has entered into the witness-box as a Defence Witness. The prosecution has failed to dislodge her evidence before the trial Court.

44. In light of the aforementioned evidence, it would be apposite to refer to the decision of the Supreme Court in the case of Jayamma and another vs. State of Karnataka reported in (2021) 6 S.C.C. 213. While examining the evidentiary value of the dying declaration under Section 32 of the Evidence Act, 1872, the Supreme Court has referred to catena of decision on the evidentiary value of dying declaration. The Supreme Court, while delving into the medical condition of the patient, who has given the dying declaration, has disbelieved such dying declaration though the doctor had certified that the patient was

conscious and talking. It is held that there is no hard and fast rule of universal application in this regard and much would depend upon the nature of burns, part of the body affected, impact of burns on the deceased to think and other relevant factor. In paragraph No.14.3, the Supreme Court has held thus : -

> *"14.3. In Sham Shankar Kankaria v. State of Maharashtra,it was re-stated that the dying declaration is only a piece of untested evidence and must like any other evidence satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. Further, relying upon the decision in Paniben v. State of Gujarat wherein this Court summed up several previous judgments governing dying declaration, the Court in Sham Shankar Kankaria (Supra) reiterated::*
>
> *"11……(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See Munnu Raja v. State of M.P.[(1976) 3 SCC 104]);*
> *(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See State of U.P. v. Ram Sagar Yadav [(1985) 1 SCC 552 and Ramawati Devi v. State of Bihar [(1983)1 SCC 211]);*
>
> *(iii) The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See K. Ramachandra Reddy v. Public Prosecutor [(1976) 3 SCC 618]);*
>
> *(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See Rasheed Beg v. State of M.P. [(1974) 4 SCC 264]);*
>
> *(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See Kake Singh v. State of M.P. [1981 Supp SCC 25]);*
>
> *(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See Ram Manorath v. State of U.P. [(1981) 2 SCC 654]);*
>
> *(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (See State of Maharashtra v. Krishnamurti Laxmipati Naidu [1980 Supp SCC 455]);*

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See Surajdeo Ojha v. State of Bihar [1980 Supp SCC 769]);

(ix) Normally the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See Nanhau Ram v. State of M.P. [1988 Supp SCC 152]);

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See State of U.P. v. Madan Mohan [(1989) 3 SCC 390]);

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See Mohanlal Gangaram Gehani v. State of Maharashtra [(1982) 1 SCC 700])"

45. In paragraph No.IV, as mentioned hereinabove of paragraph No.14.3 declares that the dying declaration, which suffers from infirmity, cannot form the basis of conviction. Further, the Supreme Court, in the very same judgment, in paragraph No.22, has further held thus : -

"22. Having meditated over the issue to the extent it is possible, and on a minute examination of the original document Ex.P5 (without understanding its contents as it is in Kannada language except that the endorsement of the doctor is in English) read with its true translation placed on record, we do not find it totally safe to convict the appellants on the basis of the said document alongwith its corroboration by PW11 and PW16. We say so for several reasons as summarised hereinafter:

22.1 Firstly, the narration of events in the dying declaration is so accurate, that even a witness in the normal state of mind, cannot be expected to depose with such precision. Although it is stated that deceased was questioned by the Police officer, the purported dying declaration is not in a questions and answers format. The direct or indirect dominance of the Police Officer appears to have influenced the answers only in one direction.

22.2 Secondly, the injured victim was an illiterate old person and it appears beyond human probabilities that she would have been able to

narrate the minutes of the incident with such a high degree of accuracy.

22.3 Thirdly, there is sufficient evidence on record that the victim had been administered highly sedative painkillers. Owing to 80% burn injuries suffered by the victim on all vital parts of the body, it can be legitimately inferred that she was reeling in pain and was in great agony and the possibility of her being in a state of delusion and hallucination cannot be completely ruled out. We say so at the cost of repetition that the doctor (PW16) made the endorsement that the victim was in a fit state of mind to make the statement 'after' the statement was recorded and not 'before' thereto — being the normal practice. It further appears to us that faculties of the injured had been drastically impaired and instead of making statement in an informative form she had apparently endorsed what the Police Officer (PW11) intended to. True it is that the Police Officer (PW11) had no axe to grind or a motive to implicate the appellants, but his overenthusiasm to solve a criminal case within no time seems to have swayed the Police Officer (PW11) so much that he appears to have not asked the doctor to make an endorsement of fitness of the victim before recording the statement. He also did not deem it appropriate to call a Judicial or Executive Magistrate to record such statement, for the reasons best known to himself.

22.4 Fourthly, there is a serious contradiction between the statement of Dr. A. Thippeswamy (PW16) on one hand and the police officer K.V. Mallikarjunappa (PW11) on the other, in respect of the nature of burn injuries suffered on different body parts of the victim. While the doctor acknowledges that burn injuries included the hands of the victim, the police officer claims that her hands were safe and she could put her thumb impression. We have seen the thumb impression very scrupulously and the same appears to be absolutely natural. If that is so, the medical officer, whose statement should carry more weightage in respect of the nature and gravity of injuries, stands belied.

22.5 Fifthly, and most importantly the police officer K.V. Mallikarjunappa (PW11) candidly admits that he did not seek an endorsement from the doctor as to whether the injured was in a fit state of mind to make a statement, before he proceeded to record the statement. Both the police officer as well as the doctor have tried to cover up this serious lacuna by referring to the purported oral endorsement of the doctor. It appears that the police officer was in full command of the situation and with a view to fill up the legal lacuna, he later on secured the endorsement from the doctor (PW16) on the available space of the paper, which is ex-facie unusual and not in line with settled legal procedure.

22.6 Sixthly, the alleged motive for the homicidal death is highly doubtful. There is not an iota of evidence, and the prosecution has made no effort to verify the truth in the statement that the appellants poured kerosene and lit the victim on fire only because her son had

assaulted the husband of Appellant No.1 and the accused were insisting on payment of Rs.4,000/ which was spent on the treatment of the said assault–victim. Not much can be said when the deceased's own son and daughter-in-law have denied this incident and rather claimed that their mother/mother-in-law committed suicide.

22.7 The Seventh reason to dissuade us from harping upon Ex.P5 is the conduct of the parties, i.e., a natural recourse expected to happen. Had it been a case of homicidal death, and the victim's son (PW2) and her daughter-in-law (PW5) had witnessed the occurrence, then in all probabilities, they would have, while making arrangement to take the injured to hospital, definitely attempted to lodge a complaint to the police. Contrarily, the evidence of the doctor and the police officer suggest that while the son, daughter-in-law and neighbour of the deceased were present in the hospital, none approached the police to report such a ghastly crime. It is difficult to accept that the son and daughter-in-law of the deceased were won over by the accused persons within hours of the occurrence. This unusual conduct and behaviour lends support to the parallel version that the victim might have committed suicide.

22.8 The Eighth reason which makes us reluctant to accept the contents of purported dying declaration (Ex. P-5), is the fact that victim, Jayamma was brought to the Civil Hospital at 12.30 a.m. on 22.09.1998. She succumbed to her burn injuries after almost 30 hours later at 5:30 am on 23.09.1998. It is neither the case of prosecution nor has it been so stated by PW-11 or PW-16 that soon after recording her statement (Ex. P-5) she became unconscious or went into coma. The prosecution, therefore, had sufficient time to call a Judicial/Executive Magistrate to record the dying declaration. It is common knowledge that such Officers are judicially trained to record dying declarations after complying with all the mandatory pre-requisites, including certification or endorsement from the Medical Officer that the victim was in a fit state of mind to make a statement. We hasten to add that the law does not compulsorily require the presence of a Judicial or Executive Magistrate to record a dying declaration or that a dying declaration cannot be relied upon as the solitary piece of evidence unless recorded by a Judicial or Executive Magistrate. It is only as a rule of prudence, and if so permitted by the facts and circumstances, the dying declaration may preferably be recorded by a Judicial or Executive Magistrate so as to muster additional strength to the prosecution case.

23. The other important reason to depart from the High Court's view re. conviction of the appellants is that the power of scrutiny exercisable by the High Court under Section 378, CrPC should not be routinely invoked where the view formed by the trial court was a 'possible view'. The judgment of the trial court cannot be set aside merely because the High Court finds its own view more probable, save where the judgment of the trial court suffers from perversity or the conclusions drawn by it were impossible if there was a correct reading

> *and analysis of the evidence on record. To say it differently, unless the High Court finds that there is complete misreading of the material evidence which has led to miscarriage of justice, the view taken by the trial court which can also possibly be a correct view, need not be interfered with. This self-restraint doctrine, of course, does not denude the High Court of its powers to re-appreciate the evidence, including in an appeal against acquittal and arrive at a different firm finding of fact."*

46. In the present case also, as noticed hereinabove, and looking to the medical condition of the deceased, we are of the opinion that the history recorded by the doctors and the dying declarations, as mentioned hereinabove, become doubtful and the evidence emerging from the dying declarations and the oral testimony lacks sterling quality, which is not compelling enough to reverse the acquittal recorded by the trial Court. The complaint, Exh.35 and the dying declaration at Exh.18, the history at Exh.13 and 42 (dying declarations) do not inspire confidence. The accused cannot be convicted by exclusively placing reliance on the history recorded by the doctors without specifying the time. The degree of burn injuries recorded by the doctors and the medical officer, who carried the postmortem, also do not reconcile with each other.

47. The Supreme Court has clarified in the aforementioned judgment that the power of scrutiny under section 378 of the Cr.PC should not be routinely invoked where view recorded by the trial Court is a "possible view" and the judgment of the trial Court cannot be set aside, merely because the High Court finds its own view more probable, save where the judgment of the trial Court suffers from perversity or conclusions drawn by it were impossible, if

there was correct reading and analysis of the evidence on record. It is further cautioned by the Supreme Court that unless the High Court finds that there is complete misreading of the material evidence which has allowed miscarriage of justice, the view taken by the trial Court, which can also be possibly a correct view, need not be interfered with.

48. Keeping in mind the aforesaid observations of the Supreme Court in the light of the unpersuasive evidence, which is discussed hereinabove, we are not inclined to set aside the judgment passed by the trial Court recording the acquittal in favour of the respondent-accused. It is trite in criminal jurisprudence that if two views are possible, the view, taken by the trial Court in acquitting the accused, has to be adopted.

49. For the foregoing discussion, we do not see any valid reason to interfere with the judgment and order passed by the trial Court. Resultantly, the present appeal fails and the same is dismissed.

50. Record and proceedings, if any, shall be sent back to concerned trial Court, forthwith.

Sd/-
(A. S. SUPEHIA, J)

Sd/-
(NISHA M. THAKORE,J)

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