23. In view of above, the petition is allowed and the complaint being FIR RC No.9(A)/97 ABD dated 22.01.1997 registered with C.B.I. Gandhinagar Police Station and subsequent proceedings related to it are hereby quashed and set aside in so far as it relates to present petitioners only and consequently order dated 30.07.2009 passed by the learned Special Judge, C.B.I. Court No.5, Mirzapur, Ahmedabad below Exh.77 is also hereby quashed and set aside in case of present petitioners. Petition is allowed. Rule is made absolute.

Result:- Petition allowed.

ABC 2016 (II) 583 GUJ
ACQUITTAL & BAIL CASES

HIGH COURT OF GUJARAT

(Z.K. Saiyed, J.)
Criminal Appeal No. 547 of 2000
Decided on 29 November, 2016

JITENDRA NATWARLAL BHAVSAR & ORS. ***- Appellant(s).***

Versus

STATE OF GUJARAT ***- Respondent(s).***

Law Covered:- ***(A) Indian Evidence Act, 1872 — Section 32 — Dying declaration — Accused persons & the deceased were staying in different cities — Presence of relatives of the deceased — At the time of recording of dying declaration the parents of the deceased were very well present — Held, it can be presumed that the names of the accused were implicated at the instance of her parents. (Para 14)***

(B) Indian Penal Code, 1860 — Section 498-A — Conviction under — Implication of relatives — Residing separately in different city — dying declaration recorded in the presence of the parents of the deceased — False implication not ruled out — their role not proved — Acquittal — Admitted fact — husband of the deceased beaten her & threatened her to give divorce — & go to her parental home — was present at the time of her committing suicide — Conviction of husband upheld. (Para 14)

Facts:- *As per the case of the prosecution the deceased was married with accused No.1 before three years from the incident. The accused Nos.2 and 3 are the father and mother and the accused No.4 is sister of the accused No.1. it was alleged that she was harassed by the accused, even she was scolded for having brought less dowry and she was ill-treated and therefore, she committed suicide. It was also the case of the prosecution that after the marriage, the deceased resided with her husband i.e. accused No.1 and her in-*

laws were resided at a different city. It was further alleged that on the relevant day, when the deceased committed suicide by pouring kerosene on herself, her husband was already at home and tried to save her and therefore, he also sustained burn injury. She was taken to hospital and her statement was taken in which she alleged the accused persons. The accused were convicted u/s 498(A), 306 and 114. In the present appeal it was Mr. R. J. Goswami appearing for the appellants submitted that the prosecution relied upon the evidence i.e. parents and aunt of the deceased regarding cruelty meted out upon the deceased, are the interested witnesses and there is no any independent witness was examined by the prosecution. It was also submitted that while recording the complaint the parents of the deceased were present there. It was further submitted that the complaint, which was given by the deceased is concocted.

The hon'ble High Court accepted the submission of Mr. Goswami and observed that the accused Nos.2 to 4 were residing at a different city and parents of the deceased were present when the complaint of the deceased was recorded in the hospital. Therefore, accused nos. 2 to 4 were acquitted. However, convection of the husband was maintained.

Law of relief:- ***Recording of dying declaration in the presence of relatives is fatal to prosecution.***

Held:- It appears from the fact that the accused Nos.2 to 4 were residing at Palanpur and the accused No.1 - husband was residing at Bapunagar, Ahmedabad with the deceased. Secondly, when the complaint of the deceased was recorded in the hospital, the parents of the deceased were very well present. Therefore, it can be presumed that the names of the accused Nos.2 and 3 were implicated in the alleged offence at the instance of her parents, because when the deceased committed suicide, the accused No. 1 was very well at the house and it is admitted fact that the accused No.1 had beaten her and threatened her to give divorce and go to her parental home and therefore, the deceased felt wrong and committed suicide by pouring kerosene on herself and set her at fire. Therefore, this Court is of the opinion that the accused - appellant Nos.2 to 4 are required to be acquitted for the charges levelled against them, as they were residing separately and their role is not proved so far as incident is concerned. So far the judgment and order of conviction and sentence imposed upon the appellant No.1, the same is required to be confirmed. (Para 14)

Counsel:- ***For Appellant(s):*** *Mr. R.J. Goswami, Advocate.*
For Respondent(s): *Mr. N.J. Shah APP.*

JUDGMENT

Z.K. SAIYED, J.: - 1. This appeal is at the instance of appellants - original accused, in an Appeal under Section 374 of the Code of Criminal Procedure and is directed against an judgment and order dated 22.5.2000 passed by the learned Principal Judge, City Civil and Sessions Court, Ahmedabad, in Sessions Case No.1 of 1997, by which learned Sessions Judge has convicted the appellants - accused and has ordered to undergo sentence of 1 year rigorous imprisonment and to pay a fine of Rs.250/- each, in default, to further undergo rigorous imprisonment for one month, for the offence punishable under Section 498(A)of the Indian Penal Code. Learned Sessions Judge has further ordered the appellant Nos. 1 to 3 to undergo the sentence of 5 years rigorous imprisonment and to pay a fine of Rs.250/- each, in default, to further undergo rigorous imprisonment of one month, for the offence punishable under Section 306 and 114 of the Indian Penal Code and for the appellant No.4, to undergo sentence of 2 years and 9 months rigorous imprisonment and to pay fine of Rs.250/-, in default, to further undergo one month rigorous imprisonment. All the sentences shall run concurrently.

2. Brief case of the prosecution is that the deceased Sushmaben was married with accused No.1 before three years from the incident. The accused Nos.2 and 3 are the father and mother and the accused No.4 is sister of the accused No.1. As per the case of the prosecution, after the marriage, Sushmaben was treated well and thereafter, she was harassed by the accused, even she was scolded for having brought less dowry and she was ill-treated and therefore, she committed suicide on 14.9.1996 at about 10 O'clock a.m. at her residence i.e. Satyam Flats, Bapunagar, Ahmedabad. It is also case of the prosecution that after the marriage, Sushmaben resided with her husband i.e. accused No.1 and her in-laws were resided at Palanpur. It is also the case of the prosecution that on 14.9.1996, when the deceased committed suicide by pouring kerosene on herself, the accused No.1 i.e. her husband was already at home and tried to save her and therefore, he also sustained burn injury. Thereafter, the accused No.1 took the deceased at the Civil Hospital, where the complaint was given by the deceased, which was recorded by the Police Inspector, Bapunagar Police Station. Thereafter, the deceased succumbed to the injuries at about 3:00 p.m. The police registered the offence and arrested the accused and after due investigation charge-sheeted the

accused for the aforesaid offences. The accused pleaded not guilty to the charge and claimed to be tried.

3. The prosecution has also produced documentary evidence on record, which are as under:

Sr. No.	Name of the Document	Exh.
1	Inquest Panchnama	18
2	Panchnama - Place of incident	20
3	P.M. Note	25
4	Complaint given by deceased	27
5	Report for registering the complaint	28
6	Yadi to Magistrate	32
7	Case papers of Civil Hospital	41
8	Case papers signed by Doctor Dave	42

4. In order to bring home the charges against the accused persons, prosecution has examined following witnesses

Sr. No.	Name of the witness	Exh.
1	P.W. 1 Nareshbhai Babulal Bhavsar	16
2	P.W. 2 Radhaben Nareshbhai Bhavsar	17
3	P.W.3 Bhagvanbhai Dhanjibhai Patel	19
4	P.W.4 Lalitaben Ishwarbhai Bhavsar	23
5	P.W. 5 Dr. Digant Kalidas Dikshit	24
6	P.W.6 I.O. Ganpatsinh Bhimsinh Chauhan	24
7	P.W.7 Dr. Bhat Shankarlal Dave	26

5. The defence produced following documentary evidence :

Sr. No.	Name of the Document	Exh.
1	Original Bill	48
2	Bill issued by Pinki Jwellers	50
3	Kaccha Bill	49
4	Bill of Nice Photo Art	53

	5	Photographs	54 to 56
a	6	prescription on letter-pad issued by Anand Nursing Home	64
	7	Papers issued by Dr. of Central Jail, Sabarmati, for accused No.1	61
b	8	Case paper issued by Civil Hospital, for accused No.1	67

6. The defence has also examined following witnesses, which are as under:

c	Sr. No.	Name of the witness	Exh.
	1	D.W.1 Mahendrakumar Mohanlal Sonani	46
	2	D.W.2 Maheshkumar Gulabbhai Barot	51
	3	D.W.3 Dr. Kant Sadabhai Desai	60
d	4	D.W.4 Dr. Jagdishbhai Bhaganbhai Patel	63
	5	D.W.5 Hasmukhbhai Nanjibhai Sojitra	66

7. Thereafter, after filing closing purshis by the prosecution, further statements of accused persons under Section 313 of the Code e of Criminal Procedure, 1973 were recorded. The accused persons have denied the case of the prosecution and submitted that they are innocent persons.

8. At the conclusion of trial and after appreciating the oral as well as documentary evidence, the learned Sessions Judge vide f impugned Judgment, convicted and sentenced the accused as stated above.

9. Being aggrieved by and dissatisfied with the said judgment and order of acquittal dated 22.5.2000 rendered by the learned Principal Judge, City Civil and Sessions Court, Ahmedabad, in g Sessions Case No.1 of 1997, the appellant- accused have preferred the present appeal before this Court.

10. Learned advocate Mr. R.J. Goswami appearing for the appellants stated that the judgment and order passed by the learned trial Judge is contrary to law and evidence on record. He further h stated that the prosecution failed to prove its case beyond reasonable doubt. He further stated that the prosecution relied upon the evidence

i.e. parents and aunt of the deceased regarding cruelty meted out upon the deceased, are the interested witnesses and there is no any independent witness was examined by the prosecution. There are several infirmities and the learned trial Judge has wrongly relied upon their evidence while convicting and sentencing the accused persons. He further submitted that there were 99% burn injuries on the person of the deceased and as per the evidence of P.W.5 Dr. Digant Dixit examined at Exhibit 24, who performed the post mortem of the deceased, stated about 99% burn injuries on the person of the deceased and even her palms and hands were burnt, her brain was congested and therefore, it is not possible to believe that the deceased was conscious when she was admitted in the Civil Hospital for treatment and therefore, the deceased was not in a position to record her complaint before the Police Inspector Mr. Bhimsinh Chauhan, who was not a Gazetted Officer and the same is therefore, not considered as dying declaration and while recording the complaint as per the case of the prosecution, the parents of the deceased were very well present there. Learned advocate therefore, submitted that when a person who suffers 99% burn injuries, how he/she can give complaint before the police or any other authority. He therefore, submitted that the complaint, which was given by the deceased is concocted and even then, the trial Court has believed the case of the prosecution and the trial Court has grossly erred in treating the said complaint as dying declaration while awarding the sentence upon the accused. Learned advocate further submitted that prior to the recording of the complaint of the deceased, Dr. Bharat Dave, who is P.W.7 examined at Exhibit 40, before whom, the deceased gave case history. The said Doctor examined the deceased and produced case papers at Exhibit 41 and according to him, as per the history given by the deceased, the deceased committed suicide by pouring kerosene on herself because of the harassment and ill- treatment of mother-in-law and sister-in-law i.e. accused - appellant Nos.3 and 4 herein, but she did not give the names of the appellant Nos.1 and 2. Learned advocate further submitted that thereafter, by a telephonic message to Bapunagar Police Station, P.I. came at the hospital and recorded the detailed complaint of the deceased, wherein names of all the accused were stated and therefore, it cannot be said that the dying declaration is consistent and there is an improvement in the story. He also submitted that the evidence of Dr. Dave suffers from infirmities and his evidence also creates more doubt and his evidence does not

inspire any confidence. He also submitted that no independent witness was examined for proving the aspect of cruelty or ill-treatment either from the in-laws or husband upon the deceased, by the prosecution. He further submitted that the evidence of deceased Sushmaben is concocted and same is treated as dying declaration by the trial Court.

11. Learned advocate Mr. Goswami read the charge at Exhibit 1 and contended that in the said charge, at para 1, it is disclosed that all the accused are relatives of the deceased and at para 2, all were residing in joint family. He read the complaint at Exhibit 27 and submitted that at the relevant point of time, the deceased was staying with her husband i.e. accused No.1. He read Section 107, 108 and 114 of the Indian Penal Code and submitted that as per the meaning of instigation, provocation and abetment, the same are not proved beyond reasonable doubt by the prosecution. He therefore, submitted that when the appellant Nos.2 to 4 were not staying with the deceased, the said appellants cannot be said to be held guilty for the alleged offence and they have been implicated at the instance of the parents of the deceased. He also submitted that the appellant No.1 - husband of the deceased, had never harassed or meted out any cruelty but due to neck-less, which was given by the father of the deceased at time of marriage and the same was sold out and therefore, the father of the deceased had scolded the appellant No.1 and therefore, at the instance of father of the deceased, the appellants are wrongly implicated in the alleged offence. Therefore, ingredients of instigation, provocation and abetment cannot be applied in the present case. He also submitted that the marriage life of the deceased and appellant No.1 is of only 4 years. He also submitted that in P.M. Note, Column 17 reflects the burn injury caused on the body of the deceased and presumption is required to be drawn for cause of death is due to accidental injury. He also submitted that there is no evidence shows that the provocation, instigation or abetment on the part of the husband, who lead the deceased to commit suicide. Even after the incident, the husband tried to save the deceased and he took her to the hospital for medical treatment. Therefore, the conduct of the husband is required to considered. There was no intention or object on the part of the husband with regard to the incident. In the present case, the minor issue i.e. neck-less is involved, which was sold to the goldsmith and new one was purchased. The said goldsmith was also examined as defence witness. He also submitted that defence

witnesses examined during the trial and they had supported the defence version, but the learned trial Judge did not properly appreciate the same in true spirit. From the overall evidence and defence made by the present appellants, the appeal is required to be allowed by quashing and setting aside the impugned judgment and order passed by the trial Court.

12. Learned APP Mr. N.J. Shah for the State supported the impugned judgment and order of conviction and sentence passed by the trial Court. He read the oral evidence of the witnesses and submitted that the prosecution has established the case against the accused beyond reasonable doubt. He further submitted that the deceased herself gave her complaint before the Police and the said complaint was given by her at Civil Hospital, where she was admitted after obtaining burn injuries and therefore, there is no reason to disbelieve the case of the prosecution. He also submitted that when she was giving her complaint, she was conscious as per the endorsement of the Doctor available at the hospital. He also submitted that the complaint, later on formed as dying declaration, which was recorded by the PI can be treated as dying declaration and it is not necessary that the same is required to be recorded by the Gazetted Officer as per law laid down by the various High Courts and Hon'ble Supreme Court. He also submitted that even the constable can record the dying declaration, which is admissible in the eye of law. He read the complaint at Exhibit 27, wherein the deceased herself levelled allegations against the appellants for cruelty and harassment upon her. He also submitted that the appellants were harassing the deceased on the issue of dowry and when the father of the deceased scolded the appellant No.1 about selling out the golden neck-less, the appellant No.1 beaten the deceased and told her to go to her parental home and give him divorce. Therefore, the deceased committed suicide by pouring kerosene on herself. Learned APP further submitted that in view of the above position, it is established by the prosecution that due to provocation, instigation and abetment on the part of the appellants, the deceased was compelled to commit suicide. He also submitted that even in cross-examination, the independent witness i.e. P.W.6 - Ganpatsinh Bhimsinh Chauhan, has stated that he received varthi from Civil Hospital and therefore, he reached there and the deceased herself gave complaint, wherein she stated that due to mental and physical harassment on the part of the appellants, the deceased took the step of suicide. The deceased was

admitted in emergency burns ward and he verified the fact about consciousness of the deceased and thereafter, he started to take complaint. Therefore, as per the submission of the learned APP, the accused committed such alleged offences and learned trial Judge has rightly held them guilty for the same. He also submitted that looking to the overall evidence i.e. documentary as well as oral, the prosecution has proved its case beyond reasonable doubt. He also submitted that the evidence, which were led and produced before the trial Court, are corroborated with each other and therefore, the ingredients under Section 107, 108 and 114 of the Indian Penal Code are proved against the accused and submitted that the accused committed alleged offence and therefore, the appeal is required to be dismissed by confirming the impugned judgment and order of conviction and sentence imposed by the trial Court.

13. Perused the records of the case and considered the submissions made by the learned advocates for the respective parties. As per the complaint, the deceased Sushmaben married with the accused No.1 and at the time of marriage, the parents of the deceased gave golden neck-less to the deceased. After the marriage, the deceased was residing with accused No.1 at Satyam Flats, Bapunagar, Amedabad and there was a son aged about 3 years at the time of incident. It also appears that in-laws were residing at Gayatri Parivar Society, Palanpur. During the festival of "Satam-Atham", the deceased and accused No.1 went to Palanpur, where the deceased demanded the golden neck-less, which was given by her father at the time of marriage and she came to know that her golden neck-less, which was sold out by the appellant Nos. 2 to 4. Therefore, the quarrel took place between the accused and the deceased and accused had beaten the deceased. Thereafter, the deceased along with her minor son were driven out from the house in rainy season. Thereafter, the deceased went to her home at Ahmedabad and she told her father about the incident and therefore, her father on next day met the appellant No.1 and scolded the appellant No.1 and then her father went from that place. Thereafter, the accused No.1 gave fist and kick blows to the deceased and told her as to why she talked to her father about neck-less and if you want to go with her father, then take divorce from him. Thereafter, deceased at about 10:00 a.m., poured kerosene on her and set her at fire. At that time, the accused No.1 was very well there and he tried to save the deceased from the fire and he therefore, received some burn injuries. The accused took the deceased to the hospital and admitted her in emergency ward, where the hospital

sent varthy to the Bapunagar Police Station and as the deceased was conscious as per the endorsement made by Doctor, the Police Inspector Shri Ganpatsinh Bhimsinh Chauhan started to record the complaint, which was given by the deceased herself, wherein she stated that on the issue of dowry, the in-laws of her were harassing her and they were beating her. As per the evidence of D.W. 1 Mahendrakumar Mohanlal Soni examined at Exhibit 46, he issued bill of golden neck-less, which was given to the deceased at the time of her marriage and said bill is also produced on record. Therefore, it is admitted fact that the said neck-less was sold out by the accused. D.W. 3 - Dr. Kant Sadabhai Desai examined at Exhibit 60 and D.W. 4 - Dr. Jagdisbhai Bhagabhai Patel examined at Exhibit 63, who had examined the accused No.1 and he admitted that there were burn injuries on the person of the accused No.1. Even the defence side has produced documentary evidence and therefore, it is clearly established that the incident of suicide took place at the house of the accused. Now, from the evidence of P.W.1 - Nareshbhai Babulal Bhavsar examined at Exhibit 16, it appears that the appellant (accused) Nos.2 and 3 were harassing his daughter i.e. deceased and the deceased when came at her parental home, she talked about the same to her mother. He also stated in his evidence that during the festival of "Satam-Atham", the deceased and accused No.1 went at Palanpur to meet the accused Nos.2 to 4 and the accused Nos.2 to 4 had quarreled with the deceased on the issue of golden neck-less and the deceased was thereafter driven out from the home at Palanpur. Thereafter, the deceased came at Ahmedabad and told him about the incident and therefore, this witness went to the house of the accused No.1 at Bapunagar, where this witness scolded the accused No.1 about incident took place at Palanpur. Thereafter, this witness left the house of the accused No.1 and the accused No.1 got exited and beaten the deceased and therefore, the deceased poured kerosene on herself and set her at fire. The witness has admitted the same in his cross-examination. Same versions have been narrated by the P.W.2 - Radhaben Nareshbhai Bhavsar examined at Exhibit 17, P.W.4 - Lalitaben Ishwarlal Bhavsar, Exhibit 23 and same is also corroborated with the complaint which was given by the deceased in the hospital. This Court has perused the evidence of P.W.3 - Bhagvanbhai Dhanjibhai Patel, Exhibit 19, P.W.- 5 Dr. Digan Kalidas Dixit, Exhibit 24, P.W. - 6 Ganpatsinh Bhimsinh Chauhan, Exhibit 26 and P.W.7 - Dr. Bharatbhai Shankarlal Dave examined at Exhibit 40 as well as this Court perused the documentary evidence produced on record.

14. Now, as per the submissions of the learned advocate Mr. Goswami for the appellants, the complaint, which was later on formed as dying declaration cannot be recorded by the P.I. and it is required to be recorded by the Executive Magistrate. Here in present case, the same is recorded by police and therefore, same cannot be considered as dying declaration. But as per the various decisions of the Hon'ble Supreme Court and High Courts, the dying declaration recorded even by the constable, can be said as valid dying declaration and therefore, the submissions of learned advocate Mr. Goswami is not accepted. It appears from the fact that the accused Nos.2 to 4 were residing at Palanpur and the accused No.1 - husband was residing at Bapunagar, Ahmedabad with the deceased. Secondly, when the complaint of the deceased was recorded in the hospital, the parents of the deceased were very well present. Therefore, it can be presumed that the names of the accused Nos.2 and 3 were implicated in the alleged offence at the instance of her parents, because when the deceased committed suicide, the accused No. 1 was very well at the house and it is admitted fact that the accused No.1 had beaten her and threatened her to give divorce and go to her parental home and therefore, the deceased felt wrong and committed suicide by pouring kerosene on herself and set her at fire. Therefore, this Court is of the opinion that the accused - appellant Nos.2 to 4 are required to be acquitted for the charges levelled against them, as they were residing separately and their role is not proved so far as incident is concerned. So far the judgment and order of conviction and sentence imposed upon the appellant No.1, the same is required to be confirmed.

15. In the result, the appeal is partly allowed. The impugned Judgment and order dated 22.5.2000 rendered by the learned learned Principal Judge, City Civil and Sessions Court, Ahmedabad, in Sessions Case No.1 of 1997, convicting and sentencing the appellant No.1 Jitendra Natvarlal Bhavsar is hereby confirmed. So far as the appellant Nos.2 to 4 are concerned, the aforesaid impugned judgment and order of conviction and sentence is hereby quashed and set aside.

The appellant No.1 - Jitendra Natvarlal Bhavsar is directed to surrender before the Jail Authority with a period of four weeks from today.

Bail Bonds stands cancelled. Record and Proceedings be sent back to the trial Court concerned forthwith.

***Result*:-** Appeal partly allowed.
