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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 168 of 2010

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE NISHA M. THAKORE

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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STATE OF GUJARAT
Versus
CHHAGANBHAI KALIYABHAI BHABHOR

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Appearance:
MS. M.H. BHATT, APP for the Appellant(s) No. 1
DR. HARDIK K RAVAL(6366) for the Opponent(s)/Respondent(s) No. 1

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CORAM:**HONOURABLE MS. JUSTICE NISHA M. THAKORE**

Date : 27/09/2024

CAV JUDGMENT

The Judgment is being structured in the following conceptual framework to facilitate the discussion:

I.	THE CHALLENGE
II.	THE FACTS

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III.	APPEARANCE OF LEARNED ADVOCATES FOR THE RESPECTIVE PARTIES
IV.	SUBMISSION OF LEARNED ADDITIONAL PUBLIC PROSECUTOR FOR THE APPELLANT-STATE
V.	SUBMISSION OF LEARNED ADVOCATE FOR THE RESPONDENT-ORIGINAL ACCUSED:
VI.	THE ANALYSIS
VII.	THE CONCLUSION

THE CHALLENGE:

1. This appeal is filed under Section 378 (1) (3) of the Code of Criminal Procedure, 1973 (henceforth, "the Code") against the judgment and order dated 04.08.2009 passed by the learned Additional Sessions Judge & Presiding Officer, Fast Track Court, Dahod in Sessions Case No.215 of 2017. By the said impugned judgment and order, the learned Sessions Judge has recorded acquittal of the present respondent-original accused for the offence punishable under Sections 498(A), 306 and 504 of the Indian Penal Code, (hereinafter to be referred as "I.P.C.").

THE FACTS:

2. In nutshell, the prosecution case as argued before the Trial

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Court, is as under:

2.1 On 30.06.1992 at about 17:30 hours while the deceased Sumitraben with her husband-respondent no.1 herein had arrived at her home, she had reacted to her husband complaining to him about his conduct to attend the work of other people and keeping the work of their own field unattended, the respondent got enraged and had started using filthy language against the deceased- Sumitraben and had also slapped her. The respondent had also uttered bad words against her character while she goes to her parental house and had threaten her by saying that if she utters a word further, he would inflict her with an axe. By such conduct of the husband, the deceased was in tears. The respondent-husband had moved out of the house and while he was sitting in *Veranda* at around 5:30 hours, the deceased poured Kerosene over her whole body from small bottle and set herself on fire. Upon hearing her screams, the persons in his neighborhood namely Tejiyo and Bai Lasu and others came to rescue her and had tried to douse the fire. Since no vehicle was available during the night hours, the deceased was not taken to the hospital and in the early morning, by a rickshaw, she was shifted to the Government Hospital, Dahod on 01.07.1992.

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2.2 The aforesaid facts were reported by the Medical Officer attached with Government Hospital on 01.07.1992 with Dahod Rural Police Station, which was recorded vide Station Diary Entry No.6/1992 dated 01.07.1992. In a brief reporting, it was mentioned that the victim- Sumitraben having suffered burn injuries, is under treatment at Government Hospital.

2.3 Responding to the aforesaid Janvajog information, the Head Constable attached with Dahod Rural Police Station namely Fulsingbhai Punjabhai Pargai had visited the Government Hospital to record the statement of the victim. In her statement before the said police witness, she had stated that her marriage had taken place with respondent no.1 approximately five years back at village Tansiya and out of the said wedlock, she is blessed with two daughters, who are presently residing together with his husband. On 30.06.1992, since morning for a whole day both of them have worked at their field and around 5:00 clock in the evening, they had reported back to their home. She had further stated that since the brother of the husband namely Maganbhai had also taken crop of the Corn, her husband had helped him to collect the crop whereas their field was left out. It is in this context, she had reacted to her husband that he has time to attend the work of others. Reacting to her aforesaid words, her

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husband had immediately responded by using filthy language against her character, while she is away at her parental house and had threaten her not to utter a word otherwise, he would inflict her with an axe. Hearing such words, she was in tears and while her husband was sitting outside the house, she had poured Kerosene on herself and had set herself on fire. Later on, she was admitted to the hospital. She has further stated that the respondent-husband after their marriage used to frequently beat her; however, she did not share her agony with others. She had, therefore, attempted suicide because of the mental harassment from her husband.

2.4 During her extended treatment at the Government Hospital at Dahod, the dying declaration of the victim- Sumitraben was recorded before the learned Executive Magistrate, Dahod before whom, she had stated that since her marriage, the respondent-husband has always treated her with cruelty by beating her and by suspecting on her character while she was away at her parental house. Because of his harassment, she has poured Kerosene and set herself on fire. She had expressed before the Magistrate that she was brought to the Hospital by her husband at Government Hospital, Dahod. She had also maintained that she is married and having two children and her husband frequently beats her and her children. She had also

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maintained that her husband has expressed that if she recovers then she may be sent back to her parents. The aforesaid dying declaration has been recorded on 01.07.1992 and the same is endorsed by thumb impression of the left hand of the deceased. The Investigating Agency while conducting the accidental case, has proceeded to record the panchnama of the scene of the incident and the statements of the witnesses were also recorded. However, the deceased had succumbed to the extensive burn injuries and after surviving for 22 days, has expired on 23.07.1992. The complaint which was originally reported by the Police Head Constable- Fulsingbhai Punjabhai Pargai**,** had culminated into an FIR bearing registration No.115 of 1992 against the respondent- husband for the offence punishable under Sections 498(A), 504 and 306 of the I.P.C. At the end of the investigation, the FIR had culminated into the charge-sheet. The respondent-husband was arrested and was subsequently enlarged on bail by this Court pending the trial. The Sessions Case No.215 of 2007 was registered with the learned Additional Sessions Judge & Presiding Officer, Dahod.

2.5 Before the trial court, upon appreciation of the charge-sheet papers, the learned Judge had framed the charge against the respondent-original accused at Exh.2 for the offence punishable under

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Sections 498(A), 306 and 504 of the I.P.C. The respondent-accused had appeared before the learned Sessions Judge on 31.03.2009, whereby he had pleaded not guilty. Hence, the learned Sessions Judge had proceeded with the trial. Before the trial court, the prosecution in all has examined 12 witnesses and has led also various documentary evidences. The details of which are reproduced hereunder for ready reference:

ORAL EVIDENCE:

Witness No.	Name of the Witness	Exh.
1.	Heembahadur Manbahadur Diler	6
2	Pidiyabhai Puniyabhai	11
3	Pidiyabhai Kaliyabhai	13
4	Kanjibhai Manjibhai Bhabhor	14
5	Panglabhai Maganbhai Damor	15
6	Maganbhai Kaliyabhai Bhabhor	16
7	Kikabhai Dhaniyabhai Damor	17
8	Fulsingbhai Punjabhai Pargai	18
9	Jetliben Kasnabhai	22
10	Saburbhai Kasnabhai Mavi	23
11	Dr. Rajendrakumar Kishorilal Shrivastav	24
12	Harshadrai Pranshankar Bhatt	27

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DOCUMENTARY EVIDENCE

Sr.No	Particulars of evidence	Exh.
1	Inquest Panchnama	7
2	Panchnama of scene of offence	12
3	Complaint	19
4	Postmortem Note	25
5	Dying declaration of deceased	28

2.6 The prosecution upon completion of their evidence, had submitted pursis at Exh.29 declaring closure of their evidence. Further statement of the respondent-accused is recorded under Section 313 of the Code. Specific defence has been raised by the respondent-husband about being impleaded in a false case, however, he has chosen not to examine any witness in support of his defence. In spite of sufficient opportunity being granted in terms of Section 233 of the Code, the defence has chosen not to lead any documentary evidence. The learned Judge has, therefore, proceeded with the hearing of the case. Upon considering the submissions of the learned advocates for the respective parties and upon appreciation of the evidence brought on record by the prosecution as well as the statement of the respondent-accused, the learned Sessions Judge has taken note of the fact that the complaint is not given by the victim or her family members rather the police head constable, who had recorded the

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statement of the deceased, while she was under treatment for the extensive burns sustained by her and on his own, has registered the complaint. The learned Judge while seeking corroboration of the version of the deceased in the form of the dying declaration being brought on record at Exh.28, has noticed that the same is not endorsed with the certificate from the Medical Officer, who attended the victim. In absence of any verification of her medical condition at the time of recording of her statement in the form of dying declaration, the learned Judge found the same to be suspicious. Additionally, admission of the Executive Magistrate, Mamlatdar-Harshadrai Pranshankar Bhatt examined by the prosecution at Exh.27 who in his cross-examination responded to the defence stand that the details were subsequently incorporated against the formatted question found dying declaration to be not deceased's true version. The learned Judge further noticed on record that the original dying declaration was not produced before the Court, what was produced, was the attested copy signed by the said witness who had otherwise retired on the date when he was examined before the trial court. As regards, the issue of cruelty is concerned, the learned Judge found that nearby related witnesses i.e. the mother of the deceased and her brother had turned hostile and had not supported the case of the prosecution with regard to the mental and physical harassment at the

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hands of the husband of the deceased. With such evidence being brought on record, the learned Judge had proceeded to give benefit of doubt to the respondent-accused and had passed the impugned order of acquittal.

2.7 The State being aggrieved by the aforesaid order of acquittal, has therefore, preferred the present appeal under Section 378(3) of the Code.

3. This Court vide order dated 01.07.2010 had admitted the appeal and issued bailable warrant upon the respondent-original accused, which has been duly served. However, in absence of any appearance being entered on behalf of the respondent-accused, this Court had requested the High Court Legal Services Committee to look into the matter and to extend the legal-aid by engaging an advocate.

APPEARANCE OF THE LEARNED ADVOCATES FOR THE RESPECTIVE PARTIES:

4. Ms. Monali H. Bhatt, learned Additional Public Prosecutor has appeared for the appellant-State and Dr. Hardik Raval, learned advocate has entered appearance for the respondent-original accused.

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SUBMISSION OF LEARNED ADDITIONAL PUBLIC PROSECUTOR FOR THE APPELLANT-STATE:

5. Ms. Monali H. Bhatt, learned Additional Public Prosecutor has appeared for the appellant-State has invited the attention of this Court to the findings and the reasons assigned by the learned Judge.

5.1 The charge framed by the learned Judge was read over. The original complaint filed by Police Head Constable - Fulsingbhai Punjabhai Pargai, Dahod Rural Police Station registered on 02.07.1992 was read, which was treated as an accidental case. She had further invited my attention to the evidence of the witness Fulsingh Poojabhai Pargi who has been examined by the prosecution as witness no.8 at Exh.18. Much emphasis was made on the fact that the said witness has categorically deposed before the court that the victim was in conscious state of mind and was able to speak. While reading his cross-examination, she had pointed out that the said witness has categorically denied the fact that the statement of the victim was not recorded in presence of any relative or the Doctor. She had further submitted that there is a consistency maintained by the deceased in her version as reproduced in the original complaint as well as in the dying declaration as recorded by the learned Executive Magistrate at Exh.28. She has further pointed out that on both the occasions,

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though the Doctor had not endorsed about her mental fitness, however, the presence of doctor has come on record. She has referred to the dying declaration and the contents of her statement as reproduced in the original complaint and had submitted that just before the occurrence of the incident, the deceased was abused by her husband physically as well as mentally, which had lead the deceased to take such extreme step of committing suicide.

5.2 While referring to the circumstances, prior to the occurrence of incident, she had submitted that the marriage span was hardly of five years and out of such wedlock, she had given birth to two daughters. The precise statement of the deceased as recorded in the dying declaration is the fact that the respondent-husband used to beat her and her children frequently. By referring to the aforesaid facts, she had submitted that the learned Judge ought to have raised presumption about the element of cruelty, taking into consideration the marriage span of less than 7 years, in view of Section 113(A) of the Evidence Act. She had, therefore, submitted that cogent material was available on record to arrive at a finding that the respondent-husband had treated the deceased with cruelty.

5.3 The attention of this Court was invited to the definition of the

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VERDICTUM.IN

term “cruelty” as appears under Section 498(A) of the I.P.C. According to learned APP, the learned Judge committed serious error in discarding the dying declaration of the deceased produced on record at Exh.28 upon misconception and misinterpreting the cross-examination of the Executive Magistrate. According to her, merely because the attested copy of the dying declaration was produced by the Officer who had retired on the date of his examination, would not make the dying declaration suspicious. In absence of the original document being produced on record, she had further submitted that merely because the aforesaid witness in his cross-examination had admitted about incorporation of the answers in a formatted questionnaire, cannot be a reason to discard such valuable piece of evidence, more particularly, when the statement reflected in the dying declaration was consistent with the version which had emerged on record in the form of the original complaint. She had further submitted that the learned Judge has unnecessary given weightage to the absence of endorsement of the Medical Officer as regards the mental fitness of the victim at the time of recording of dying declaration.

5.4 The reliance was placed on the decision of the Hon’ble Supreme Court, to contend that in absence of any suspicious circumstances

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being pointed out, the dying declaration could not be discarded. She has, therefore, urged to quash and set aside the impugned judgment and order of acquittal and to pass appropriate order of sentence, by allowing this appeal.

SUBMISSION OF LEARNED ADVOCATE FOR THE RESPONDENT-ORIGINAL ACCUSED:

6. Dr. Hardik Raval, learned advocate for the respondent-original accused, at the outset, had once again taken to the relevant evidence of the witnesses more particularly, the evidences of P.W. No.3-Pidiyabhai Kaliyabhai, the brother of the accused, P.W. No.4-Kanjibhai Manjibhai Bhabhor, the nephew of the accused, P.W. No.5-Pangalbhai Maganbhai Damor, the brother-in-law of the accused, P.W. No.6-Maganbhai Kaliyabhai Bhabhor, the neighbour of the deceased and P.W. No.7-Kikabhai Dhaniyabhai Damor, the uncle of the deceased, and had submitted that though the aforesaid witnesses have turned hostile, it has come on record that no complaint or FIR has been preferred by any of the aforesaid relatives of the deceased. It was submitted that even the deceased had not lodged any complaint while she was arrived or even during her marriage span of five years, he had therefore submitted that there was no such incident of any mental or physical cruelty to the deceased as contended by the prosecution. He

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had, therefore, submitted that the incident is alleged to have occurred on 30.06.1992, whereas the deceased Sumitraben had died on 23.07.1992 i.e. after period of 22 days. Even if the case of the prosecution is believed that the deceased was mentally fit to make the statement, the prosecution has failed to give any reason as to why the deceased herself did not lodge the complaint against her husband though she survived for 22 days. The FIR is lodged by un-armed head constable attached with Dahod Rural Police Station, who has been examined by the P.W. No.8, however, he has failed to produce any document to show that he was appointed or authorize by his superior to lodge the FIR. He has clearly admitted in his cross-examination that no directions were issued to lodge the complaint. By referring to the aforesaid submissions, learned advocate had contended that only with a *mala fide* intention to harass the respondent-accused, the false FIR has been lodged

6.1 It was further pointed out that when the deceased was admitted in the hospital, the mother and the brother of the deceased have visited her in hospital even they did not choose to lodge any complaint against the accused. It was only P.W. No.8 who on his own lodged the complaint after period of 3 days, for which, no satisfactory reason has been explained by the prosecution.

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6.2 While responding to the submissions of learned APP for the appellant-State that the dying declaration of the deceased brought on record , learned advocate had submitted that the dying declaration recorded by the learned Executive Magistrate, which is produced on record at Exh.28 has rightly been discarded by the learned Judge noticing the fact that the original copy of the dying declaration has not been produced. The attention of this Court was invited to the record and proceedings to indicate that what is admitted as an evidence at Exh.28 is an attested copy signed across by the learned Executive Magistrate, who has otherwise retired from the service on the date of the production of the aforesaid document on record. The aforesaid fact was pointed out from the evidence of P.W. No.12.-Harshadrai P. Bhatt. It was also pointed out that there is no clarity on the aspect as to whether he was delegated or authorized to record the dying declaration, more particularly, when he was in charge as Deputy Executive Magistrate. The dying declaration at Exh.28 was also challenged on the ground that there is no endorsement of the Doctor opining on mental condition of the deceased at the time of recording of the same. Also, there is no signature of any witnesses who have remained present at the time of dying declaration. While referring to the evidence of the aforesaid evidence, learned advocate has submitted that even as per his evidence, the defence has successfully

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brought on record the fact that the questionnaire format was filled up subsequently. Hence, it was submitted that when the witness himself has entered the answer, there is strong ground to discard such evidence as it does not inspire any confidence.

6.3 Learned advocate for the respondent-accused had relied upon the decision of the Hon’ble Supreme Court in the case of **Lakhan vs State Of Madhya Pradesh** reported in **2010 (8) SCC 514,** to contend that the Courts have time and again opined on the relevance/probative value of the dying declarations recorded under different situations. The law is that if the court is satisfied that the dying declaration is true and made voluntarily by the deceased, conviction can be based solely on it, without any further corroboration. However, when dying declaration is found suspicious, the courts should be careful and ensure that the declaration is not the result of tutoring, prompting or any imagination. In such circumstances, the corroboration of the fact that the deceased was in fit state of mind to make the declaration is essential. He had, therefore, submitted that before applying the aforesaid principles, the courts have to be vigilant in scrutinizing the facts of the individual case carefully and take the decision as to which of the declaration is worth reliance.

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6.4 Learned advocate for the respondent-original accused had, thereafter, drawn my attention to the charge framed against the respondent-accused for the offence punishable under Section 498(A) of the I.P.C. It was submitted that heavy burden lies upon the prosecution to establish that the charge against the accused are proved beyond reasonable doubt and if in case there is a slightest doubt about the occurrence of the incident as alleged, the benefit has to be given to the respondent-husband. It was submitted that the matrimonial life of the deceased was peaceful by contending that two daughters have borne out of their wedlock and merely in the spur of moment, where suddenly the quarrel took place between the wife and the husband which led the deceased to commit suicide, cannot attract the charge of cruelty attributed to the husband. On the charge of Section 306 of the I.P.C., learned advocate has submitted that essential ingredient of abatement as defined under Section 107 of the I.P.C. must be established by the prosecution. It was submitted that no evidence has been brought on record to suggest that the act of the respondent-accused had instigated the deceased with a clear intention and knowledge that it would lead the deceased to commit suicide. He had therefore, submitted that ingredient of abetment was missing and the respondent has rightly been acquitted for the offence alleged

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6.5 While referring to the witnesses examined by the prosecution, learned advocate had pointed out that Dr. B.L. Mittal (Medical Officer) who had provided treatment to the deceased and the Investigating Officer Mr. N.C. Rajput who had filed the charge-sheet have not been examined by the prosecution before the trial court. Learned advocate had therefore, submitted that the prosecution has failed to prove their case beyond reasonable doubt and in absence of any error or perversity been pointed out by learned Additional Public Prosecutor, calls for no interference by this Court in reversing the order of acquittal of the respondent-accused.

6.6 In support of his submissions, learned advocate for the respondent-original accused has relied upon the unreported decision of the Co-ordinate Bench of this Court passed in the case of **State Of Gujarat vs. Vaghri Dineshbhai Babubhai & Ors** delivered in **Criminal Appeal No.273 of 2008 on 14.05.2024,** to point out the scope of the powers of the appellate court while dealing with acquittal appeal. He therefore, prayed to dismiss the criminal appeal and revoke the bailable warrant issued against the respondent-accused

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THE ANALYSIS:

7. Having heard the learned advocates for the respective parties, they were permitted to place on record their written submissions and the authorities relied upon. At the conclusion of the arguments, the matter was kept for orders.

8. I have given thoughtful consideration of the submissions made by the learned advocates for the respective parties and have also perused the original record and proceedings of the trial court.

9. The only question which falls for consideration of this Court in the present appeal is as to whether the learned Sessions Judge has committed any error in the facts of the case recording acquittal of the respondent-accused.

10. Before examining the merits of the case, it would be appropriate to consider the scope of the appellate court while dealing with acquittal appeal as argued by learned advocate for the respondent-original accused. As rightly pointed out by learned advocate for the respondent-accused ordinarily while exercising the powers in appeal against the order of acquittal, the High Court should

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restrain from interfering with the order of acquittal, unless the High Court notices that the approach of the trial court was vitiated by some manifest illegality and the conclusion arrived, was not plausible, then such decision is characterized as perverse. **(Emphasis : State of Goa vs. Sanjay Thakran and Anr. reported in 2007(3) SCC 755).**

11. On the other hand dealing with an acquittal appeal, the High Court is entrusted or confer with jurisdiction to analyze the findings and the reasons assigned by the trial court and duties casted upon the High Court to scan through and to re-appreciate the entire evidence so as to held an absolute assurance about the acquittal of the accused merely because a different view was possible cannot be a ground for the High Court to intervene. In light of series of decisions time and again pronounced by the Hon'ble Supreme Court, undoubtedly, even in a case of an acquittal appeal, the appellate court has power to re-appreciate the evidence and upon such analysis, the Court finds that the conclusion arrived upon by the trial court, is perverse and a manifest error of law has crept in or the court below has ignored material evidence on record, then the High Court is justified in interfering with such order of acquittal.

12. In light of the aforesaid legal position, this Court has

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undertaken the exercise to re-appreciate the evidence brought on record by the prosecution. Asrightly pointed out by the learned advocate for the respondent-original accused, the independent witnesses who were the near relatives of the deceased and their evidence could have reflected the past incidents of alleged cruelty committed by the respondent-original accused to the deceased, have unfortunately turned hostile. The evidences of P.W. No.3-Pidiyabhai Kaliyabhai, the brother of the accused, P.W. No.4-Kanjibhai Manjibhai Bhabhor, the nephew of the accused, P.W. No.5-Pangalbhai Maganbhai Damor, the brother-in-law of the accused, P.W. No.6-Maganbhai Kaliyabhai Bhabhor, the neighbour of the deceased and P.W. No.7-Kikabhai Dhaniyabhai Damor, the uncle of the deceased, when closely read, do not throw any light of any mental or physical harassment given by the respondent-original accused to the deceased. The aforesaid witnesses have been declared hostile by the court. The prosecution has relied upon the dying declaration of the deceased which has emerged on record in the form of her statement recorded by the un-armed head constable, who was deputed to inquire about an accidental case reported by the Medical Officer attached with the Dahod Government Hospital. Admittedly, Station Diary Entry No.6 of 1992 dated 01.07.1992 records the information received by the Officer of Dahod Rural Police Station of 01.07.1992 about the victim-

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Sumitraben having received burn injuries and being admitted in government hospital.

13. Upon close scrutiny of the evidence of P.W. No.8-Fulsingbhai Punjabhai Pargai who was discharging his duty as head constable at the relevant point of time with Dahod Rural Police Station has categorically deposed before the court that when the statement of the deceased was recorded by him, the deceased was in conscious state of mind and was able to speak. Her statement has been reproduced in the complaint which was later on recorded by the aforesaid officer with Dahod Rural Police Station, whereby the accidental case has culminated into an FIR. Apart from the aforesaid submission, the prosecution has also brought on record the statement of the deceased recorded by the Executive Magistrate, Dahod on 01.07.1992. The evidence of the P.W. No.12- Harshadrai P. Bhatt, though indicate that the aforesaid witness has retired on the date when his evidence was recorded, would have no bearing as regards the credibility of the dying declaration which is produced on record at Exh.28.

14. Learned advocate for the respondent-accused has vehemently emphasized on the fact that the attested copy has been produced on

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record, the original dying declaration has not been brought on record. The defence is raised which has unfortunately being believed by the trial court being surrounded by suspicious circumstances. The reason assigned is that the formulated questions were subsequently entered upon by the aforesaid witness in his hand writing, and therefore, there is reason to disbelieve the aforesaid dying declaration. In my view, upon close examination of the aforesaid statement of the deceased in the form of dying declaration produced at Exh.28 as against the statement reproduced in the form of the complaint recorded by the P.W. No.8-Fulsingbhai Punjabhai Pargai does not reveal any contradictions. In fact, there is a consistency maintained by the deceased in her statement which gives a strong indication that the aforesaid version were given by the deceased herself and has been recorded by the respective government officers in its true form. The second reason which has been considered by the learned Sessions Judge while discarding the aforesaid statements of the deceased, is that there is no endorsement of any Medical Officer verifying the fact of the medical fitness of the state of mind of deceased at the time of recording of such statements.

15. The law on the aforesaid aspect is well settled. The Constitutional Bench of the Hon'ble Supreme Court in the case of

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Laxman vs State Of Maharashtra reported in **2002(6) SCC 710** as well as in the case of **Atbir vs Govt. Of N.C.T Of Delhi** reported in **2010 (9) SCC 1,** has laid down guiding principles in regard to dying declaration to be admissible under Section 32 of the Indian Evidence Act. The Hon'ble Supreme Court has observed that if the circumstances disclose therein indicates proximate relation to the actual occurrence then such sole evidence is sufficient to bring home the charge alleged. It would also be relevant to refer to the recent decision of the Hon'ble Supreme Court in the case of **Manjunath and others vs. State of Karnataka** reported in **2023 SCC OnLine SC 1421.** Relevant observations are as under:

> "11. Section 32 the Indian Evidence Act, 18723 relates to statements, written or verbal of relevant fact made by a person who is dead or who cannot be found, in other words, dying declaration. The various principles laid down by pronouncements of this court in respect of dying declarations can be summarised as under:
>
> 11.1 The basic premise is "nemo moriturus praesumitur mentire" i.e. man will not meet his maker with a lie in his mouth.
>
> 11.1.1 In Laxman v. State of Maharashtra a constitution bench of this court observed: –

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"when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement."

11.2 For a statement to be termed a "dying declaration", and thereby be admissible under Section 32 of IEA, the circumstances discussed/disclosed therein "must have some proximate relation to the actual occurrence".

11.3 The Privy Council in Pakala Narayana Swamy v. Emperor5 explained the phrase "circumstances of the transaction" as under: -

"The circumstances must be circumstances of the transaction: general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him

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would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. 'Circumstances of the transaction' is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in 'circumstantial evidence' which includes evidence of all relevant facts. It is on the other hand narrower than 'res gestae'. Circumstances must have some proximate relation to the actual occurrence: though, as for instance, in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of the actual fatal dose. It will be observed that 'the circumstances' are of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that 'the cause of (the declarant's) death comes into question'."

11.3.1 In the well-known case of Sharad Birdhichand Sarda v. State of Maharashtra,6 principles in respect of the application of section 32 have been noted as under: –

Per S. Murtaza Fazal Ali J.,- "21. …

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(1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-anddried formula of universal application so as to be confined in a straitjacket. 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 context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased

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who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

(3) The second part of clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of crossexamination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible.

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The distance of time alone in such cases would not make the statement irrelevant."

11.4 Numerous judgments have held that provided a dying declaration inspires confidence of the court it can, even sans corroboration, form the sole basis of conviction. In this regard, reference may be made to Khushal Rao v. State of Bombay7 , Suresh Chandra Jana v. State of West Bengal8 and Jayamma v. State of Karnataka .

11.5 In order to rely on such a statement, it must fully satisfy the confidence of the court, since the person who made such a statement is no longer available for crossexamination or clarification or for any such like activity.

11.5.1 In Madan v. State of Maharashtra10 , while referring to an earlier decision in Ram Bihari Yadav v. State of Bihar 11 it was observed that a Court must rely on dying declaration if it inspires confidence in the mind of the court.

11.5.2 On a similar note, this Court in Panneerselvam v. State of T. N12 has observed: –

"Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation

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of oath could be. This is the reason the court also insists that the dying declaration should be of such nature as to inspire full confidence of the court in its correctness."

11.5.3 However, a note of caution has also been sounded. If such a declaration does not inspire confidence in the mind of the court, i.e., there exist doubts about the correctness and genuineness thereof, it should not be acted upon, in the absence of corroborative evidence.

11.5.3.1 In Paniben v. State of Gujarat13 it was observed- "The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination."

A reference may also be made to K. Ramachandra Reddy v. Public Prosecutor.

11.6 The Court must be satisfied that at the time of making such a statement, the deceased was in a "fit state of mind". In Shama v. State of Haryana,15 a fit state of mind has been held to be a prerequisite, alongside the ability to recollect the situation and the state of affairs at that point in time in relation to the incident, to the satisfaction of the court.

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11.6.1 In Uttam v. State of Maharashtra16 , it was discussed that it is for the court to determine, from the evidence available on record, the state of mind being fit or not.

11.6.2 In order to make a determination of the state of mind of the person making the dying declaration, the court ordinarily relies on medical evidence.17 However, equally, it has been held that if witnesses present, while the statement is being made, state that the deceased while making the statement was in a fit state of mind, such statement would prevail over the medical evidence.18 The statement of witnesses present prevailing over the opinion of the doctor has been reiterated in Uttam (supra).

11.6.3 It has also, however, been held in Laxman (supra) that the mere absence of a doctor's certificate in regard to the "fit state of mind" of the dying declarant, will not ipso facto render such declaration unacceptable. This position had been once again recognised in Surendra Bangali @ Surendra Singh Routele v. State of Jharkhand .

11.7 In case of a plurality of such statements, it has been observed that it is not the plurality but the reliability of such declaration determines its evidentiary value. The principle as held in Amol Singh v. State of M.P20 was:-

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"13. … it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration [but] the statement should be consistent throughout. … However, if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not [and] while scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances."

11.7.1 Faced with multiple dying declarations, this Court in Lakhan v. State of M.P21 observed-

"21. …. In such an eventuality no corroboration is required. In case there are multiple dying declarations and there are inconsistencies between them, generally, the dying declaration recorded by the higher officer like a Magistrate can be relied upon, provided that there is no circumstance giving rise to any suspicion about its truthfulness. In case there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported

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VERDICTUM.IN

by the other evidence, the court has to scrutinise the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance."

11.7.2 This Court, in Jagbir Singh v. State (NCT of Delhi) 22 , in this respect, concluded as under: –

"32. We would think that on a conspectus of the law as laid down by this Court, when there are more than one dying declaration, and in the earlier dying declaration, the accused is not sought to be roped in but in the later dying declaration, a somersault is made by the deceased, the case must be decided on the facts of each case. The court will not be relieved of its duty to carefully examine the entirety of materials as also the circumstances surrounding the making of the different dying declarations. If the court finds that the incriminatory dying declaration brings out the truthful position particularly in conjunction with the capacity of the deceased to make such declaration, the voluntariness with which it was made which involves, no doubt, ruling out tutoring and prompting and also the other evidence which support the contents of the incriminatory dying declaration, it can be acted upon. Equally, the circumstances which render the earlier dying declaration, worthy or unworthy of acceptance, can be considered."

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11.8 The presence of a Magistrate in recording of a dying declaration, is not a necessity but only a rule of Prudence. To this effect in Jayamma (supra), this Court observed :

"…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 judicial or executive Magistrate. It is only 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."

Referring to the Constitution bench in Laxman (supra) the principle of a dying declaration not necessarily to be recorded by a Magistrate stands reiterated in Rajaram v. State of Madhya Pradesh.

11.9 Dying Declaration is not to be discarded by reason of its brevity is what is held in Surajdeo Ojha v. State of Bihar .

11.9.1 It was observed in the State of Maharashtra v. Krishnamurti Laxmipati Naidu25 that if the dying declaration, while being brief, contains essential information, the courts would not be justified in ignoring the same.

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11.9.2 In fact, the Constitution bench in Laxman reiterated this principle, stating: –

“Marely because a dying declaration does not contain the details of the occurrence, it cannot be rejected and in case there is merely a brief statement, it is more reliable for the reason that the shortness of the statement is itself a guarantee of its veracity.”

11.10 Examination of the person who reduced into writing, the dying declaration, is essential. Particularly, in the absence of any explanation forthcoming for the production of evidence is what stands observed in Govind Narain v. State of Rajasthan.

11.10.1 In fact, in Kans Raj v. State of Punjab27 it was held: –

“11. …To make such statement as substantive evidence, the person or the agency relying upon it is under a legal obligation to prove the making of such statement as a fact. If it is in writing, the scribe must be produced in the Court and if it is verbal, it should be proved by examining the person who heard the deceased making the statement.” and;

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In Sudhakar v. State of Maharashtra28 , this Court categorically observed:

"5. If it is in writing, the scribe must be produced in the court and if it is verbal, it should be proved by examining the person who heard the deceased making the statement. However, in cases where the original recorded dying declaration is proved to have been lost and not available, the prosecution is entitled to give secondary evidence thereof."

11.11 The questions that a court must ask when dealing with a case concerning a dying declaration, as listed out by this Court in Irfan@Naka v. State of U.P.29 along with the principles culled out hereinabove form the complete gamut of consideration required on part of a court when deciding the weightage to be awarded to a dying declaration.

12. Ocular evidence undoubtedly fares better than other kinds of evidence and is considered evidence of a strong nature. The principle is that if the eyewitness testimony is "wholly reliable", then the court can base conviction thereupon. This applies even in cases where there is a sole eyewitness.

13. The facts at hand, the trial court has

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disbelieved such evidence. The discarding of eye-witness testimony is a factspecific inquiry, and therefore the correction of such an action by the trial court shall be discussed later.

14. The law on circumstantial evidence, is well settled. The locus classicus on the issue is Sharad Birdhichand Sarda, (supra) which stands consistently followed up until very recently in Kamal v. State (NCT of Delhi)31 .

14.1 Illustratively, in Gargi v. State of Haryana this court has, referring to various earlier judgments, summarised the principles relating to circumstantial evidence. The principle, is that the sum total of circumstances, when examined should point to the guilt of the accused, while ruling out all other possible hypotheses including his innocence and absence of second party guilt. Further reference may be made to Indrajit Das v. State of Tripura33 and Prakash Nishad v. State of Maharashtra ."

16. Applying the aforesaid guiding principles laid down by the Hon'ble Supreme Court, more particularly, the Constitutional Bench in the case of **Laxman (supra),** in the facts of this case merely because dying declaration is not having endorsement of the Medical Officer in regard to the fit state of mind of the deceased will not *ipso facto*

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render such of the declaration unacceptable. In the present case, admittedly the deceased has survived for 22 days and has thereafter, succumbed to the burn injuries. Though the complaint was lodged by a responsible police officer in absence of any complaint being lodged by the parents or nearby relatives of the deceased, would not make the complaint suspicious. Even otherwise, nothing contradictory has been brought on record by the defence to suggest that such complaint has been lodged with malicious intention to harass the respondent-accused. In such circumstances, delay of three days not being explained in the FIR would not be of such significant. In fact, the complaint is lodged while the deceased was alive and no further statement of the deceased was attempted by the defence to contradict such lodgment of the FIR.

17. For the foregoing reasons, in my view, the learned Sessions Judge committed serious error in discarding the aforesaid two statements which could have been treated as a dying declaration in terms of Section 32 of the Indian Evidence Act. It is required to be noted that said statements were free from tutoring, prompting or a product of imagination as nothing contradictory facts have been suggested about the presence of any relatives to prompt or tutor the deceased. In fact, the close reading of the statement of the deceased

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goes to suggest minute particulars being mentioned by her in her brief statement which could have been declared by the deceased herself and no one else.

18. In my considered view, the aforesaid submissions of the deceased points the guilt of the accused having accepted the aforesaid two statements as dying declarations in light of Section 32 of the Indian Evidence Act. This Court is required to undertake the appreciation of the statement of the deceased as regards the offence of cruelty alleged. In her statement recorded by the Police Head Constable as well as by the learned Executive Magistrate, the deceased has clearly in her brief statement indicated that she herself and both children were meted with physical and mental harassment at the hand of the respondent-accused. Though, she has not suggested any past incident in her brief statement, the fact remains that the victim had taken such extreme step to commit suicide within marriage span of less than seven years i.e. five years. Section 113 (A) of the Indian Evidence Act, permits the Court to raise presumption that the husband or the relatives of the husband had subjected the deceased to cruelty as defined under Section 498(A) of the I.P.C. However, this does not shift the burden on the prosecution to show the evidence of cruelty and continuous harassment in that regard. As recorded earlier

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VERDICTUM.IN

the independent witness which included the relatives as well as the neigbours of the deceased have turned hostile and have not supported the case of the prosecution. Thus, the Court is left with the evidence of the deceased herself in the form of her dying declaration. The statement of the deceased in the form of dying declaration which has been brought on record by the prosecution though does not contain details of the past incidents; however, merely because it is a brief statement is itself a guarantee of its veracity.

19. In absence of any inconsistency being noticed the Hon'ble Supreme Court in different situations had an occasion to consider the declaration to establish the guilt of the accused. The Hon'ble Supreme Court has held that if dying declaration is found to be true and inspire confidence, the sole evidence can also be basis of recording conviction. The case on hand is therefore, required to be examined in light of the aforesaid two statements. Upon bare comparison of the aforesaid two statements of the deceased, though in a brief narration the deceased, who was otherwise on the deathbed has reiterated about the physical and mental harassment given by the respondent-accused. The same reads as under:

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Mark 5/1 Sessions Case No. 215/07 Date :- 13/04/2009 Sd/-(illegible) Additional Sessions Judge and P.O.F.T.C, Dahod	Exh. No. 19 Sessions Case No. 215/07 Date :- 17/06/2009 Sd/-(illegible) Additional Sessions Judge and P.O.F.T.C, Dahod

Date:- 02/07/1992

I, Fulsing Punjabhai, Unarmed Head Constable, B.No. 1639, serving at Dahod Rural Police Station, state the facts of the complaint on behalf of the Government that as the investigation in respect of Janva Jog Station Diary Entry No. 6/92 dated 01/07/1992 was handed over to me by Police Station Officer on 01/07/1992, I went to the Government Hospital as Sumitra, wife of Chhagan Kaliya Bhabhor, aged 25 years, residing at Tansia, who sustained burns injuries, was under the treatment at the Government Hospital and recorded her statement in the presence of Medical Officer Mr. D.S. Mittal. Sumitra dictated her statement to the effect that, “Her marriage took place at Tansia village about five years back from today and she has two daughters and reside with her husband Chhagan. Both husband and wife sowed maize in the field throughout the day on 30/06/1992 and thereafter, they returned home at about five o’clock. At that time, her husband Chhagan helped as maize was sown in his brother

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Magan's field. Therefore, Sumitra stated that, "There is pending work in the our field and you are doing the work of other people." Therefore, Chhagan provoked and abused and slapped Sumitra twice or thrice and stated that, "When you go to your parental home, you establish relationship with other male persons. If you speak further, I will inflict axe blow." On hearing the same, she cried. When Chhagan was sitting in front of his house at about half past five, Sumitra sprinkled kerosene on her whole body and set her on fire by lighting match-stick. Meantime, as she shouted, Tejiyo and Lasubai came and extinguished the fire by tearing her clothes. Thereafter, as no vehicle was found in the night, Sumitra was kept at her husband's house in Tansia. She was put in the cot and brought to Vadli Faliya on 01/07/1992 and from there, she was brought to the Government Hospital by the rickshaw and admitted for the treatment. Chhagan frequently used to beat Sumitra after the marriage, and I did not use to tell to anyone about the same in view of the reputation. On being fed up with the harassment being meted out to me by my husband, I set myself on my fire by sprinkling kerosene to kill myself, and I have sustained burns injuries all over the body." The Executive Magistrate, Dahod, recorded dying declaration of Sumitra, the wife of Chhagan Kaliya Bhabhor, wherein she dictated that, "My husband beats me since my marriage and

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doubt my character. He gets angry saying that, "When you go to your parental home, you go there to establish relationship with other male persons. I have set myself on fire after sprinkling kerosene due to harassment. When you recover, you will be handed over to your father. I do not want to reside with you." As statements of witnesses (1) Jetli, wife of Kasna Jokhla Mavi, residing at Nagarala, (2) Kasna Jokhla Mavi, residing at Nagarala, (3) Sabur Kasna Mavi, residing at Nagarala, (4) Lasu, widow of Kaliya Bijiya Bhabhor, residing at Tansia were recorded, they stated that, "As the quarrel took place between Sumitra and her husband Chhagan, Chhagan slapped Sumitra twice or thrice and abused her and started saying that, "You go to your parental home to establish relationship with other male persons." and subjected her to harassment by doubting on her character. Chhagan used to subject her to harassment earlier also, but out of reputation, she did not tell anyone about the same. She was also beaten one year back and she went to her parental home after being displeased." The separate statements were recorded.

Therefore, Chhagan Kaliya Bhabhor, husband of the aforesaid Sumitra w/o. Chhagan Kaliya Bhabhor, resident of Tanasia used to beat her frequently. He used to harass her by saying that he did not want to keep her and he told her that she goes to the house of her parents to establish

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relationship with other male person. Thus, he used to harass Sumitra mentally and physically and therefore, Sumitra poured kerosene on herself and attempted suicide. Therefore, complaint is to be lodged against Chhagan Kaliya as per section-498(A), 504 of the IPC. My witnesses are as stated in the complaint and the persons found in investigation. This incident took place at 17:30 hours on 30/06/92.

The aforesaid complaint is true and correct.

	Before me Sd/- Investigation Officer Dahod Rural

Dahod Rural-I-115/92

As per section-504, 498(A) of the IPC

Mark-5/5 Sessions Case No.215/07 Date:13/04/09 Sd/- Additional Sessions Judge and P.O.F.T.C. Dahod.		**Exhibit:28** Sessions Case No.215/07 Date:15/07/09 Sd/- Additional Sessions Judge and P.O.F.T.C. Dahod.

Dying Declaration before the Executive Magistrate, Dahod.

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Date: 01/07/1992	Time:13:15 hours
Place: Dahod cottage	
My name: Sumitraben Kashnabhai Mavi	
Age: 25 years	Occupation: household work
Resident of: Tanasia, Taluka: Dahod	Address: Jambudi Faliya

Question:	Do you know me?
Answer:	No
Question:	What happened to you?
Answer:	Chhagan Kaliya is my husband. He beats me since the day we got married. He has suspicion on me. When I visit the house of my father, he gets angry and says that I visit my father's house to establish relationship with other male person. He

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VERDICTUM.IN

	drinks alcohol and beats me. Due to harassment, I have poured kerosene on myself and got burned.
Question:	Where are you at present? Do you know who has brought you to the hospital?
Answer:	My husband has brought me to the Government cottage Hospital.
Question:	Are you married? Does any of your family member or any other person harasses you mentally or physically?
Answer:	I am married and I have two children. My husband beats me and children frequently. Due to harassment, I have poured kerosene on myself and got burned.
Question:	Do you want to say anything else?
Answer:	Yes, my husband says that he wants to hand over me to my parents after my treatment.

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My aforementioned statement is read over to me and the same is true and correct. I have signed or affixed my thumb-impression after reading-understanding the same.

Dahod. Date:01/07/1992	Sd/- Executive Magistrate, Dahod. 01/07/1992

I have studied upto standard 7 but my hands are burned and glucose syringe is being administered in my body, therefore thumb-impression of left hand is affixed.

<u>THE CONCLUSION:</u>

20. Hence, in my opinion, the inescapable conclusion which can be drawn is that the learned Sessions Judge, Dahod committed serious error in recording acquittal, and therefore, the appeal deserves consideration and the same is allowed. The impugned judgment and order dated 04.08.2009 passed by the learned Additional Sessions Judge & Presiding Officer, Fast Track Court, Dahod in Sessions Case No.215 of 2017, is hereby quashed and set aside.

21. Record and proceedings, if any, be sent back to the concerned court forthwith.

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22. Accordingly, issue notice to the respondent-original accused on hearing of pronouncement of the sentence to be imposed for the offences punishable under Sections 498(A), 306 and 504 of the I.P.C., returnable on **25.10.2024,** to be served through concerned police station. The Registry is directed to issue bailable warrant in the sum of Rs.10,000/- (Rs. Ten Thousand only) to be served through concerned police station upon the respondent-original accused.

(NISHA M. THAKORE,J)

SUYASH SRIVASTAVA

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