

STATE OF GUJARAT

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v.

JAYRAJBHAI PUNJABHAI VARU

(Criminal Appeal No. 1236 of 2010)

JULY 11, 2016

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[KURIAN JOSEPH AND R.K. AGRAWAL, JJ.]

Evidence Act, 1872 – s. 32 – Dying declaration – Death of wife by sustaining 90% burn injuries – Statement/dying declaration made by wife before police officer and Executive Magistrate as also oral dying declaration before her father – Conviction of husband u/s. 302 and sentenced to rigorous life imprisonment by the trial court – However, acquittal by the High Court – On appeal, held: There were two sets of evidence, one the statement made before police officer and Executive Magistrate wherein deceased did not name her husband or her family members and other the oral dying declaration made by the deceased before her father who deposed about the cruelty and ill behavior meted out to the deceased at her matrimonial home – On a careful scrutiny of the materials on record, it is found that both the statements before the police officer and Executive Magistrate are consistent, reliable and fully corroborated – There is no contradiction as to the role of the husband – It becomes very clear that there was no involvement of husband in the commission of offence – Conviction could not be placed on the sole testimony of the father of deceased – Thus, order passed by the High Court upheld – Penal Code, 1860 – s. 302.

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Dying declaration – Reliance upon – Held: Courts below need to be extremely careful while dealing with a dying declaration since maker not available for cross-examination – Mechanical approach in relying upon a dying declaration is extremely dangerous – Court to consider and weigh all the attendant circumstances and come to the independent finding whether dying declaration was properly recorded and was voluntary and truthful – Dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness – Further, in case of more than one dying declaration, the intrinsic contradictions in those dying declarations are extremely

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A *important – It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other innocent dying declarations have to be rejected – However, the courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where dying declarations pass all the said tests – Once the court is convinced that dying declaration is so*
 B *recorded, it may be acted upon and made a basis of conviction.*

Dismissing the appeal, the Court

HELD: 1. The courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. A number of times the relatives influence the investigating agency and bring about a dying declaration. The dying declarations recorded by the investigating agencies have to be very scrupulously examined. The court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. In case of more than one dying declaration, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other innocent dying declarations have to be rejected. Such a trend will be extremely dangerous. However, the courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests. The courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned. [Paras 10, 11] [275-H; 276-A-H]

H 2.1 It is evident from the material on record that Rekhaben

was removed to the hospital with burn injuries and her statement was recorded by PW-6, who was discharging duty with the Police at the hospital. The dying declaration of the deceased was recorded by the Executive Magistrate after following the due process of law. In both the statements given by the deceased to the Police Authorities as well as Executive Magistrate, the deceased did not name her husband or his family members. Though when a specific question was put to her that what exactly happened on that night, she narrated that on 10.03.2003, at about 5 o'clock in the morning, when all other family members were sleeping in the house, an unknown person came near her and took her into the kitchen. She further narrated that he poured kerosene on her and set her on fire and went away from the place. She further gave a statement that the unknown person was an outsider who was wearing white clothes. On hearing her cries, other family members also woke up and admitted her in the hospital. There is no denying the fact that the deceased was in her matrimonial home at the time of the incident and all other family members were also present in the house at the relevant time. In both the dying declarations recorded by two independent witnesses after following the due process of law, she gave a statement that the person was unknown and there was no involvement of her in-laws or husband. Both the statements are consistent and there is no contradiction as to the role of the respondent-husband. From a perusal of the statements, it becomes very clear that there was no involvement of the respondent in the commission of offence. [Paras 6, 7] [271-E-F; 273-H; 274-A-D]

2.2 In the instant case, there are two sets of evidence, one is the statement/declaration made before the police officer and the Executive Magistrate and the other is the oral dying declaration made by the deceased before her father who was examined as PW-1. PW-1 deposed about the cruelty and ill behavior meted out to the deceased at her matrimonial home. On a careful scrutiny of the materials on record, it cannot be said that there were contradictions in the statements made before the police officer and the Executive Magistrate as to the role of the respondent in the commission of the offence and in such circumstances, one set of evidence which is more consistent and reliable, which in the instant case being one in favour of the

A respondent, requires to be accepted and conviction could not be placed on the sole testimony of PW-1. [Para 10] [276-C-D]

2.3 On appreciation of evidence on record, the view that the dying declarations of the deceased recorded by the police officer as well as the Executive Magistrate are fully corroborated and there is no inconsistency as regards the role of the respondent in the commission of offence. A dying declaration is entitled to great weight. The conviction basing reliance upon the oral dying declaration made to the father of the deceased is not reliable and such a declaration can be a result of afterthought. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. [Para 12] [277-A-E]

2.4 The evidence available on record and the sole evidence of the father of the deceased as compared to the dying declaration do not inspire confidence in the mind of this Court to make it the basis for the conviction of the respondent-accused. [Para 14] [277-G-H]

3. The burden of proof in criminal law is beyond all reasonable doubt. The prosecution has to prove the guilt of the accused beyond all reasonable doubt and it is also the rule of justice in criminal law that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other towards his innocence, the view which is favourable to the accused should be adopted. [Para 13] [277-F-G]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1236 of 2010.

H From the Judgment and Order dated 16.07.2009 of the High Court

of Gujarat at Ahmedabad in Criminal Appeal No. 976 of 2003. A

Ms. Jesal, Ms. Hemantika Wahi, Advs. for the Appellant.

S. Sankararama Krishnan (A.C.), Adv. for the Respondent.

The Judgment of the Court was delivered by

R.K. AGRAWAL, J. 1. This appeal has been filed against the judgment and order dated 16.07.2009 passed by the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 976 of 2003 whereby the High Court allowed the appeal filed by the respondent herein against the judgment and order dated 30.06.2003 passed by the Court of Sessions Judge, Amreli in Sessions Case No. 20/2003. B

2. **Brief facts:** C

(a)Rekhaben (since deceased) was married to Jayrajbhai Punjabhai Varu-the respondent herein and was residing at Gopalgram, Taluka Chalala, Gujarat along with her in-laws, viz., Punjabhai Lakhbhai Varu-father-in-law, Manuben Punjabhai-mother-in-law and Ramjuben Punjabhai-sister-in-law. D

(b)On 10.03.2003, Rekhaben was admitted to the Government Hospital, Amreli with 90 per cent burn injuries. A First Information Report (FIR) being No. 7/03 got registered under Section 307 of the Indian Penal Code, 1860 (in short 'the IPC') wherein she stated that on 10.03.2003, at about 5 o'clock in the morning, when all other family members were sleeping in the house, an unknown person came near her and told her that he had come to take her. By saying so, he took her into the kitchen, poured kerosene on her and by lighting the matchstick set her on fire and went away from the place and, consequently, she started burning in flames. She further gave a statement that the unknown person was an outsider who was wearing white clothes. On hearing her cries, other family members also woke up and admitted her in the hospital at Amreli. It may be mentioned here that the above said FIR was registered on the basis of the statement given by the deceased herself on 10.03.2003, at about 7:30 a.m., in the hospital to Shri Bhikhu Karsanbhai, P.S.O., Amreli City which was treated as a complaint. In the said statement, the thumb impression of Rekhaben was identified by Vala Jaskubhai Suragbhai – the father of the deceased. E F G

(c)On the very same day, at 8:25 a.m., she made a statement before the Executive Magistrate, Amreli and narrated the whole incident. In H

A the afternoon, Rekhaben succumbed to her injuries. On the basis of the
statement given by the deceased, Jayrajbhai Punjabhai Varu-the
respondent herein, Punjabhai Lakhbhai Varu-father-in-law, Manuben
Punjabhai-mother-in-law and Ramjuben Punjabhai-sister-in-law were
arrayed as accused and a chargesheet was filed under Sections 302,
B 201 and 34 of the IPC and the case was committed to the Court of
Sessions and numbered as Sessions Case No. 20/2003.

(d)The Sessions Judge, Amreli, vide order dated 30.06.2003,
convicted the husband of the deceased under Section 302 of the IPC
and sentenced him to suffer rigorous imprisonment for life while acquitting
C the other accused persons.

(e)Being aggrieved, the respondent herein filed a Criminal Appeal
No. 976 of 2003 before the High Court of Gujarat. The Division Bench
of the High Court, vide order dated 16.07.2009, allowed the appeal.

(f) Aggrieved by the order dated 16.07.2009 acquitting the husband
D of the deceased of all the charges, the State has filed this appeal by way
of special leave before this Court.

3. Heard learned counsel for the parties and perused the record.

4. Learned counsel for the respondent-State submitted that the
relations between the deceased and the respondent herein were strained
E and the deceased was compelled to withdraw from her matrimonial home
several times. The deposition of Jaskubhai Suragbhai (PW-1)-father of
the deceased shows that she was subjected to torture, both mental and
physical, before she succumbed to the injuries. It was contended that
F the deceased was compelled to give false and wrong statement/
declaration before the police as well as before the Executive Magistrate
by the accused. It was further contended that the accused persons
caused physical cruelty to the deceased during the intervening night of
the incident and poured kerosene upon her and set her on fire. The
statement given by P.W.1 is consistent and his evidence is getting absolute
corroboration with the circumstantial evidence which is available on
G record. His evidence remained unimpeached during the course of the
trial and there is no reason for which his evidence can be side lined.
Learned counsel for the State vehemently contended that the deceased
Rekhaben died under mysterious circumstances in the house which was
occupied and possessed by the accused person for which the accused
H has not offered reasonable explanation, therefore, the presumption as

provided under Section 114 of the Indian Evidence Act is required to be drawn and such presumption has not been rebutted by offering reasonable explanation. A

5. Learned counsel for the respondent contended that the prosecution has relied upon the testimony of PW-1 – father of the deceased who had claimed that the deceased narrated the whole incident to him but he informed the same to the police after performing the cremation ceremony and there is every opportunity for possible concoction of a false version. Learned counsel further submitted that the deceased had not named any of the accused in her dying declaration which was recorded by two independent witnesses on two different occasions and in both the dying declarations she had stated that the person who poured the kerosene and set her on fire was a stranger and not known to her. Learned counsel further submitted that Dilubhai Valerabhai- a close relative of PW-1, who accompanied him to see the deceased in the hospital has denied having any conversation with the deceased. It was further submitted that the evidence adduced by the prosecution are not worth acceptance and are not sufficient to draw the inference of guilt of the accused, therefore, the respondent herein should be exonerated of the charges leveled against him. B
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6. It is evident from the material on record that Rekhaben was removed to the hospital with burn injuries and her statement was recorded by Bhikhubhai Karsanbhai Parmar (PW-6), who was discharging duty with the Police at the hospital. The dying declaration of the deceased was recorded by the Executive Magistrate after following the due process of law. In view of the above, it is relevant to quote the relevant portion of the statements given by the deceased before the police authorities as well as the Executive Magistrate which are as under:- E
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“ Date : 10.03.2003

My name is Rekhaben w/o Jayrajbhai Pujbhai Varu, Kathi Darbar by caste, aged 25 years, occupation: household, Res. Gopalgram, Taluka Chalala. G

On being asked in person at Armeli illegible I state that I am residing at above mentioned address with my mother in law, father in law and husband and my husband is doing work of cutting diamond at illegible. My parents are residing at Vandiya village and name of my father is Jasubhai Vala and I was married before H

A about two years from today. I have no child.

Today in the early morning at about Five O' clock the members of my family were sleeping outside during that an unknown person came near me and he woke me up and told me that wake up I have come to take you, by saying so he took me in kitchen and poured kerosene on me and kindled match and this unknown outsider person went away. This unknown person was outsider and he had put on white cloths and I was started burning on my whole body, therefore I was shouting so persons of my house woke up and they got me admitted here in Amreli Government hospital here. Here my treatment is continued. I am conscious. I have no harassment of my mother in law, father in law or my husband.

The said incident has taken place today in early morning at about Five O' clock any outsider unknown person got me woke up and took me in kitchen where he poured kerosene lying there and kindled and threw match on me and this unknown person went away and this person was outsider.

Such my fact as stated by me is true and correct.

Before

Sd/- Bhikhu Karsanbhai
P.S.O. Amreli City”

“BEFORE THE EXECUTIVE MAGISTRATE, AMRELI

Name of Hospital : Civil Amreli Ward No. Burns Bed No. 33

F 1. What is your name : Rekhaben Jayrajbhai

2. Name of father/husband : Jayrajbhai Punjabhai

3. Your age : 25

4. Residence/address : Gopalgram Tal. Dhari.

G 5. At present where are you? : Civil Hospital Amreli.

6. What has happened to you?

7. How it was happened? All were sleeping in house. An unknown person came and he made me woke up from place where I was sleeping and he brought me in kitchen and he poured liquid in box

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lying in the kitchen on me and unknown person kindled match stick and threw on me and ran away. He was a male person and he was a outsider person. A

8. At what time incident took place? : The incident has taken place today in early morning. I don't remember time.

9. At what place this incident has taken place? : Gopal gram at my house. B

10. Who were present at place of incident? : All members of my house were sleeping.

11. Who brought you at clinic/hospital? My mother in law and my husband's elder brother etc. brought me. C

12. Whether you have any physical difficulty? : No

13. If you have to say anything further then say? : I have nothing further to say.

14. The date and time of starting of D.D. and completion of D.D. : 8.25 A.M. D

8.35 A.M.

10.3.2003.

There is no presence of police at the time when above deposition is recorded. E

Sd/- illegible

The patient is conscious and

D.D. is recorded before me.

Sd/- Medical Officer, Amreli 8.25 to 8.35 A.M. D.D. recorded in my presence. F

Sd/- Thumb impression of right leg of

Rekhaben Jayraj as both hands are burnt the thumb impression of Right leg of Rekhaben is taken. G

Sd/- Executive Magistrate, Amreli."

7. It is relevant to point out here that in both the statements mentioned above, the deceased has not named her husband or his family members. Though when a specific question was put to her that what exactly H

A happened on that night, she narrated that on 10.03.2003, at about 5 o'clock
in the morning, when all other family members were sleeping in the
house, an unknown person came near her and took her into the kitchen.
She further narrated that he poured kerosene on her and set her on fire
and went away from the place. She further gave a statement that the
B unknown person was an outsider who was wearing white clothes. On
hearing her cries, other family members also woke up and admitted her
in the hospital at Amreli. There is no denying the fact that the deceased
was in her matrimonial home at the time of the incident and all other
family members were also present in the house at the relevant time. In
C both the dying declarations recorded by two independent witnesses after
following the due process of law, she gave a statement that the person
was unknown and there was no involvement of her in-laws or husband.
Both the statements are consistent and there is no contradiction as to
the role of the respondent herein. From a perusal of the statements
made before the Executive Magistrate as well as the police officer, it
D becomes very clear that there was no involvement of the respondent
herein in the commission of offence.

8. On the other hand, learned counsel for the State placed reliance
upon the deposition of the father of the deceased who deposed about
the involvement of respondent herein and in-laws of the deceased in the
commission of offence. It is relevant to quote the relevant portion of his
E deposition on the basis of which the Sessions Court convicted the
respondent herein which is as under:-

F "4. On dated 10th of Fagan month in the early morning a phone
call came at house of my uncle's son Dilubhai that Rekhaben has
been burnt, therefore I and my uncle's son Dilubhai and
Manglubhai went at Amreli Civil Hospital. Rekhaben was admitted
in the hospital and treatment was continued. Rekhaben was burnt
on whole body. I could not see therefore I went outside. After I
felt something better I and Dilubhai again went before my
daughter, Rekhaben and asked her that what this happened so
G Rekhaben told me that I have not done it. Rekhaben told me that
after giving torture for whole night thereafter she was taken in
kitchen and after pouring kerosene she was enlightened with match
stick. Jayrajbhai made Rekhaben woke up and took her in kitchen.
Rekhaben has not said as to who poured kerosene. Except this
there were no other persons present there. Rekhaben had not
H asked me anything as to who enlightened match stick. When I

asked Rekhaben she stated that except those people no other person was present there. Rekhaben told me that department came at that time I stated such that person who enlightened match stick had put on white cloth and was unknown person, because accused Punjbhai, Jarajbhai, Manuben and Ramjuben had given such threat that her only one brother will not be let live, therefore, she has not given real fact before department. When Rekhaben had such talk with me at that time my uncle's son Dilubhai was present there. During the treatment at 2.15 PM in the noon Rekhaben has expired. As Rekhaben was burnt therefore she has expired.”

Cross examination by Advocate Shri G.A. Parikh for the accused.
“6. I and Dilubhai reached at hospital at eight to eight thirty o’ clock in the morning. It is not true that at Seven O’clock in the morning I and Dilubhai reached at Civil Hospital, Amreli. It is true that in my statement name of Manglubhai is not written.

7. When I reached at hospital at that time police already came there. I don’t know that whether police recorded complaint of Rekhaben in my presence or not. It is true that I identified thumb impression of Rekhaben on the say of police. That thumb impression was of Rekhaben. Mamlatdar went inside to record statement. It is true that I identified thumb impression of Rekhaben on that statement. When I reached near Rekhaben in the hospital at that time.... was burnt. The glucose bottles were not injected to her. She had thirst of water. She could not bend lips. I caused her drink water and caused her eat ice cream. It is not true that Rekhaben had totally no talk with me.”

9. Learned Sessions Judge, on the basis of the deposition of PW-1, convicted the respondent herein for the offence under Section 302 of the IPC. PW-1 deposed before the court that the deceased informed him that after giving her torture for the whole night, she was taken to the kitchen by the respondent herein and after pouring kerosene on her; matchstick was lighted. He further deposed that except the respondent herein, no other person was present at the time of the incident. It was further deposed that the respondent herein threatened the deceased of dire consequences in case of disclosure of the incident. In a nutshell, PW-1 deposed about the cruelty and ill behavior meted out to the deceased at her matrimonial home.

10. The courts below have to be extremely careful when they deal

A with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the

B dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. In the case on

C hand, there are two sets of evidence, one is the statement/declaration made before the police officer and the Executive Magistrate and the other is the oral dying declaration made by the deceased before her father who was examined as PW-1. On a careful scrutiny of the materials on record, it cannot be said that there were contradictions in the statements made before the police officer and the Executive Magistrate as to the role of the respondent herein in the commission of the offence and in

D such circumstances, one set of evidence which is more consistent and reliable, which in the present case being one in favour of the respondent herein, requires to be accepted and conviction could not be placed on the sole testimony of PW-1. A number of times the relatives influence the investigating agency and bring about a dying declaration. The dying declarations recorded by the investigating agencies have to be very

E scrupulously examined and the court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being. In case of more than one dying declaration, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other innocent dying declarations have to be rejected. Such

F a trend will be extremely dangerous. However, the courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests.

11. The court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was

G properly recorded and whether it was voluntary and truthful. Once the court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical

H approach to the law of dying declaration has to be shunned.

12. On appreciation of evidence on record, we are of the considered view that the dying declarations of the deceased recorded by the police officer as well as the Executive Magistrate are fully corroborated and there is no inconsistency as regards the role of the respondent herein in the commission of offence. From a perusal of the statement recorded by Bhiku Karsanbhai, P.S.O., the thumb impression of Rekhaben (since deceased) which had been identified by her father-Sri Vala Jaskubhai Suragbhai as also his cross-examination in which he admitted that police had already come there and he had identified her thumb impression and Mamlatdar had gone inside to record statement, there is no reason as to why Rekhaben would give names of her husband and her in-laws in the alleged statement given to her father. A dying declaration is entitled to great weight. The conviction basing reliance upon the oral dying declaration made to the father of the deceased is not reliable and such a declaration can be a result of afterthought. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

13. The burden of proof in criminal law is beyond all reasonable doubt. The prosecution has to prove the guilt of the accused beyond all reasonable doubt and it is also the rule of justice in criminal law that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other towards his innocence, the view which is favourable to the accused should be adopted.

14. After considering the evidence and the judgments of the courts below, we are of the opinion that the evidence available on record and the sole evidence of the father of the deceased as compared to the dying declaration do not inspire confidence in the mind of this Court to make it the basis for the conviction of the respondent-accused. Hence, the appeal fails and is accordingly dismissed.