IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 722 of 2007

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE DIVYESH A. JOSHI **Sd/-**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
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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MUKESHBHAI MOHANLAL SARAGRA
Versus
STATE OF GUJARAT

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Appearance:
MR MAULIN G PANDYA(3999) for the Appellant(s) No. 1
MS. MONALI BHATT, LD. ADDL. PUBLIC PROSECUTOR for the Opponent(s)/Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE DIVYESH A. JOSHI**
Date : 23/09/2024

CAV JUDGMENT

1. This is an appeal at the instance of the appellant-convict under Section 374(2) of the Criminal Procedure Code, 1973 (for short “the Code”) against the judgment and order of conviction dated 22.02.2007 passed by the learned Addl. Sessions Judge, Vadodara in Sessions Case No.230 of 2002, whereby the learned trial judge convicted the appellant-

accused of the charges for the offence punishable under Sections 302, 323 and 114 of the Indian Penal Code and Section 135 of the Bombay Police Act.

2. **CASE OF THE PROSECUTION:-**

2.1 It appears that the PW-1, Kishanbhai Ramabhai Marvadi, the brother of the deceased lodged a first information report, Exh.18 on 18.03.2004. In the complaint at Exh.18 lodged by the brother of the deceased, it has been stated that the deceased viz. Kantibhai Ramabhai happened to be his real brother. They were three brothers, namely, the complainant Kishanbhai Ramabhai himself who is the elder brother, then younger to Kishanbhai is Bhagwanbhai and the most youngest one was deceased Kantibhai Ramabhai. They all were residing at Harni, Vadodara along with their parents. It has been stated that both the complainant and Bhagwanbhai are married and the deceased was bachelor. The complainant is a tailor by profession whereas the deceased Kantibhai Ramabhai was running a tea stall along with his father in the vicinity. Accused Babubhai Samnaji was their neighbor. It has been further alleged that one Suresh Punamji was working at the tea stall of the deceased, who met with an accident and sustained disability. Therefore, he was being looked after by the mother of the complainant and the deceased, at which point of time, the said Sureshbhai Punamjibhai received certain amount of accidental claim. It is also stated that the said Sureshbhai Punamjibhai, before his death, executed a will for the amount of claim received by him and lying in his bank account in favour of the mother of the complainant and the deceased.

However, accused Babubhai Samnaji also claimed to have the same will executed by Sureshbhai Punamjibhai in his favour, Thus, there were counter claims from both the sides, which resulted in the disputes between them and both the sides initiated legal proceedings against each other in the court of law. It is also alleged that keeping a grudge of the same, on 31.12.2001, at around 23:30 hours, when the deceased Kantibhai Ramabhai was going for urinating towards the canal, the said Babubhai along with the appellant and other co-accused, confronted the deceased Kantibhai and started altercation with him. It is alleged that all the accused persons then started beating the deceased and the appellant herein inflicted knife blow on the left side of the stomach of the deceased due to which the deceased received serious injuries. It is the case of the prosecution that thereafter the deceased was taken to the S.S.G. Hospital where on 11.01.2002 at around 10:15, the deceased Kantibhai Ramabhai succumbed to the injuries, and thereby all the accused persons, with the aid of each other, committed the offence under Sections 302, 323 and 114 of the IPC as well as Section 135 of the Bombay Police Act.

2.2 Under the aforesaid circumstances, the complainant thought fit to lodge the complaint at the police station.

2.3 On the complaint being lodged the investigation had commenced. The inquest panchnama, Exh.30, of the dead body of the deceased was drawn in presence of the panch witnesses. The panchnama of the place of occurrence, Exh.24, was drawn in presence of the panch witnesses. The dead body

of the deceased was sent for postmortem examination and the postmortem report, Exh.51, revealed that the cause of death was "shock following septicemia following injury". Thereafter, all the accused persons were arrested. The statements of various witnesses were recorded. Finally on completion of investigation, the investigating officer filed charge sheet against all the accused persons in the Court of the Judicial Magistrate, First Class, Vadodara. As the case was exclusively triable by the Sessions Court, the Judicial Magistrate, First Class, Vadodara, committed the case to the Sessions Court under Section 209 of the Criminal Procedure Code.

2.4 The Sessions Court framed the charge against the accused persons at Exh.6 for the offence punishable under Sections 302, 323 and 114 of the IPC as well as Section 135 of the Bombay Police Act and the plea of the accused were recorded wherein the accused persons did not admit the charge and claimed to be tried.

2.5 The prosecution adduced in all twenty oral evidences and twenty one documentary evidences in support of its case;

2.6 After completion of oral as well as documentary evidence of the prosecution, the statements of the accused persons under Section 313 of the Criminal Procedure Code were recorded in which the accused persons stated that the complaint was a false one and they were innocent.

2.7 At the conclusion of the trial, the learned trial Judge convicted the appellant-accused of the offence under Section

302, 323 and 114 of the Indian Penal Code as well as Section 135 of the Bombay Police Act and sentenced him to undergo simple imprisonment of seven years with fine of Rs.2000/-, and in default to make the payment of fine, further simple imprisonment of three months. whereas the rest of the accused persons came to be acquitted of all the charges.

2.8 Being dissatisfied with the judgment and order of conviction and sentence, the accused-appellant has come up with the present appeal.

3. **CONTENTIONS ON BEHALF OF THE ACCUSED-APPELLANT:-**

3.1 Learned advocate Mr. Maulin Pandya appearing for the appellant-accused vehemently submits that the trial Court committed a serious error in convicting the accused-appellant for the offence of murder while acquitting the other co-accused persons on the same set of evidence. As per the case of the prosecution, there were three eye-witnesses to the incident in question, however, at the time of considering and appreciating the evidence of those eye-witnesses, the learned trial judge has completely discarded their evidence and recorded the findings to the effect that the depositions of those eye-witnesses do not inspire any confidence as they cannot be considered as the eye-witnesses. It is further recorded that at the most, they can be termed as chance witnesses who might reach at the scene of offence after occurrence of the incident, and by giving such findings, the trial judge has completely discarded the evidence of the three so called eye-witnesses,

and based upon such findings, the learned trial judge has acquitted the other co-accused persons, and the said judgment and order of acquittal has not been assailed by the State any further and thus the said findings recorded by the trial court has attained finality. He further submits that, therefore, in the absence of any eye-witness, the case of the prosecution would automatically turn into a case hinges upon the circumstantial evidence, and it is the settled proposition of law that in a case of circumstantial evidence, the prosecution is required to establish the continuity in the links of the chain of the circumstances so as to lead to the only and inescapable conclusion of the accused being the assailant, inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. He further submits that if a single link is missing, then the benefit of doubt should always go in favour of the accused. Mr. Pandya also submits that if the oral evidences of the prosecution may be seen, there are so many discrepancies, omission and improvements in the depositions of the witnesses, and despite the said contradictions and discrepancies in the evidence of the key witnesses apparent on the face of it, yet the learned trial judge has passed an order of conviction, which is required to be interfered with.

3.2 Learned advocate Mr. Pandya submits that while convicting the appellant-accused, the learned trial court has given much weightage to the evidence of the Executive Magistrate who recorded the dying declaration of the deceased. In his deposition, the said witness has categorically

stated that he went to the hospital for recording the dying declaration after 48 hours of the incident, which has not been taken note of by the learned trial judge. The trial judge has also erred in appreciating the fact that before giving the dying declaration to the Executive Magistrate, a history was given to the doctor by the deceased at the very fist in point of time when he was brought to the hospital, wherein the deceased had stated that as he fell down from the terrace, he was hit by the metal sheet and, therefore, sustained injuries. Even at the time of giving the Janva Jog entry before the police who was present over there in the hospital, the same version was given by the deceased. Subsequently, before the Executive Magistrate, an altogether a different story was narrated by the deceased and, thus, there are two contradictory statements made by the deceased before the different authorities, and in such a situation, the learned trial judge has to give specific findings to the effect that from the two different set of evidences available on record, why a particular piece of evidence is being given more weightage, discarding another, which the learned trial judge has failed to do in the present case, and solely relying upon the dying declaration given before the Executive Magistrate without thee being any corroborative piece of evidence to the same, order of conviction cannot be passed. He submits that in his dying declaration, the deceased has mentioned that Mukesh had inflicted a knife blow to him, but which Mukesh, as there are two accused named as Mukesh. Thus, the said evidence is also shaky and cannot be relied upon to pass an order of conviction.

3.3 Learned advocate Mr. Pandya submits that none of the circumstances emerging from the record of the case points towards the guilt of the accused-appellant. According to Mr. Pandya, the theory of homicidal death due to stab injuries advanced by the prosecution is not fully established by the medical evidence on record. Mr. Pandya submits that none of the circumstances on which reliance has been placed by the trial Court in convicting the accused-appellant are conclusive in nature. Mr. Pandya further submits that the prosecution has cited three witnesses as the eye-witnesses and all those so called three eye-witnesses are the family members of the deceased and, therefore, what has been stated by them in their testimonies cannot be believed as the gospel truth. Moreover, as per the case of the prosecution, the so called incident had occurred at a public place in the night hours of 31.12.2001, and generally on the last day of the year, i.e, on 31st December, there is a frequent movement of the people even in the late night, however, except the interested witnesses, the prosecution has not examined any independent witnesses who can be called as the actual eye-witnesses. Mr. Pandya also submits that the complainant, in his cross-examination, has admitted the fact that after the incident, at the very first instance when they took the deceased to the hospital, they informed the police as well as to the doctor present over there in the S.S.G. Hospital that as the deceased went over the roof to adjust the antenna of the T.V., he fell down from the roof and sustained such an injury being hit by metal sheet. Even they did not bother to register the FIR on that day and on 02.01.2002, at the instance of the police, they

gave a written complaint to the police. The police started investigation after two to three days from the incident and the dying declaration of the deceased also came to be recorded after two to four days from the incident and during that period, the deceased was in a conscious state of mind. Learned advocate Mr. Pandya submits that however subsequently they have changed their version and came with altogether a different story and stated that the deceased was beaten by the appellant-accused and he inflicted knife blow to the deceased following the altercation took place between them on the fateful day. Learned advocate Mr. Pandya further submits that the medical officer who treated the deceased has also deposed in his deposition at Exh.41 that when the deceased was taken to the hospital, the deceased himself had given history before him wherein the deceased stated that as he fell down from the roof, he sustained injuries. Moreover, it is an admitted position of fact and as averred in the complaint itself that the complainant side and the accused were having inimical terms and, therefore, with a view to teach lesson to the accused and to settle the score, he might have been implicated in the present crime with a malice. Mr. Pandya also submits that the dying declaration of the deceased also came to be recorded after 48 hours from the incident. In his cross-examination, the said witness PW-14, Exh.43, has admitted that when he reached to the hospital he straightway went to the deceased without contacting and obtaining certificate from the concerned medical officer as regards as to whether the injured victim was in a full conscious state of mind to give the statement in a proper manner and, therefore, reliability of the

said dying declaration is also doubtful as the Executive Magistrate himself did not follow the prescribed procedure and thereby committed a grave error. Further, the deceased died after almost 11 days and as per the deposition of the medical office at Exh.50 wherein he has stated that the cause of death of the deceased might be due to 'pus cell and decay' and, therefore, looking to the evidence of the said vital witness, the appellant-accused is entitled to get the benefit of doubt. To bolster his submissions, learned advocate Mr. Pandya relies upon the following case laws;

i) In the case of Irfan @ Naka vs. State of Uttar Pradesh, reported in AIR 2023 SC 4129;

ii) In the case of Suchand Pal vs. Phani Pal, reported in 2003 (0) AIJEL-SC 30631;

iii) Phulel Singh vs. State of Haryana, reported in AIR 2023 SC 4653;

iv) In the case of Harisinh Motisinh Jodha vs. State of Gujarat, Criminal Appeal No.2010 of 2004;

3.4 In such circumstances, referred to above, Mr. Pandya prays that there being merit in the appeal, the same deserves to be allowed.

4. CONTENTIONS ON BEHALF OF THE STATE:-

4.1 Ms. Monali Bhatt, learned Additional Public Prosecutor appearing for the State has vehemently opposed the present appeal. Ms. Bhatt submits that the trial Court committed no

error in finding the appellant-accused guilty of the offence of murder. Ms. Bhatt supported the impugned judgment and argued that PW Nos.1 to 3 cannot be discredited simply because they happen to be the brother, mother and sister-in-law of the deceased and that their statements were very natural and logical. She further submits that the complainant in the present case is the eye-witness who claimed to have witnessed the unfortunate incident. In the present case, the prosecution has, in all, examined significant witnesses consisting of the eye-witnesses, doctors, panch witnesses and the Executive Magistrate as well as also produced the documentary evidence including the dying declaration of the deceased. Ms. Bhatt submits that all the eye-witnesses have very categorically stated in their depositions that the accused Mukesh Mohanbhai stabbed the deceased with a knife on his stomach, which is corroborative with the dying declaration, medical papers and the contents of the FIR. She also submits that the prosecution has successfully proved its case through medical evidence and the evidence of the eye-witnesses are completely supported by the medical evidence and, therefore, their evidence can be believed to be true. Ms. Bhatt submits that even in the dying declaration given by the deceased before the Executive Magistrate, he has specifically given the name of the appellant-accused as one of the assailants who inflicted knife blow to him, which also supports the case of the prosecution. She submits that initially the complainant and his family members did not disclose the correct fact before the police and the doctor due to the threats administered by the accused persons, however, later they gathered the courage

and registered the FIR by narrating true and correct facts and, therefore, merely relying upon the initial story given by the complainant, the entire case of the prosecution cannot be brushed aside.

4.2 Learned APP Ms. Bhatt submits that it is a settled proposition of law that when the dying declaration of the deceased itself is found to be credible, believable and inspires confidence, then there is no corroborative evidence is required to establish the guilt of the accused. Admittedly, in the case on hand, the prosecution has proved its case beyond reasonable doubt by leading cogent and convincing evidences, and relying upon piece of evidences, more particularly the dying declaration given before the Executive Magistrate, the learned trial judge has rightly passed an order of conviction, which does not require any interferecne.

4.3 Ms. Bhatt submits that the appellant-accused is a headstrong person and there was an ongoing enmity between the complainant side and the accused persons due to some earlier disputes and, therefore, the fact of incident of quarrel took place between the accused persons and the deceased on the fateful day cannot be completely ruled out and the medical evidence also suggests that there was a stab injury on the stomach of the deceased which can be caused by some sharp weapon. Learned APP Ms. Bhatt lastly submits that it is a settled proposition of law that if the person recording the dying declaration is satisfied that the declarant is in a fit medical condition to make a dying declaration, then such dying declaration will not be invalid solely on the ground that the

doctor has not certified as to the condition of the declarant to make the dying declaration. In support of her submission, learned APP Ms. Bhatt has put reliance upon the following precedents;

i) In the case of Muthu Kutty & Anr. vs. State by Inspector of Police, T.N., reported in (2005) 9 SCC 113;

ii) In the case of Atbir vs. State (Govt. Of NCT of Delhi), reported in 2010 (0) AIJEL-SC 48718;

4.4 In such circumstances, referred to above, Ms. Bhatt prays that there being no merit in the conviction appeal, the same deserves to be dismissed.

ANALYSIS

5. I have carefully examined the trial court record, perused the testimony of the witnesses and the medical evidence and given my thoughtful consideration to the arguments advanced by both sides.

6. Before embarking on examining the evidence brought on record, it may be noted that there is no direct evidence in the present case to connect the accused with the offence in question and the case of the prosecution rests solely on circumstantial evidence. I am saying so because the persons who are cited as the eye-witnesses are the interested witnesses who happens to be the real brother, mother and sister-in-law of the deceased and they have not elaborated the entire sequence of events of the incident that had taken place on the fateful day and, therefore, the trial court in the

impugned judgment itself has made detailed discussion in this regard and given the findings to the effect that the said witnesses cannot be termed as the eye-witnesses as they might have reached to the place of offence immediately after the occurrence of the incident and the said findings of the trial court has not been challenged by the prosecution side and thus has attained finality. Thus, after the said findings of the trial court rendered in the final judgment whereby the other co-accused have been acquitted, the entire case of the prosecution would now become the case based on circumstantial evidence. Thus, keeping this aspect in mind, it is necessary to state the law relating to circumstantial evidence. It is well settled that in a case of circumstantial evidence, the cumulative effect of all the circumstances proved, must be such as to negative the innocence of the accused and to bring home the charge beyond reasonable doubt. [Refer: Prem Thakur vs. State of Punjab; 1983 Cri.LJ 155, Ram Avtar vs. State (Delhi Administration); 1985 Cri.LJ 1865 and State of Tamil Nadu vs. Rajendran; AIR 1999 SC 3535]

7. Let me at the outset, before delving into the issue as regards the circumstantial evidence, reproduce the excerpt in the form of a Quote of an American Philosopher from the judgment of the Hon’ble Apex Court in the case of Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh, Criminal Appeal Nos.64-65 of 2022, penned by His Lordship Justice J.B. Pardiwala, as under;

> 1. Mark Twain, the great American writer and philosopher, once said:
>
> "It is like this, take a word, split it up into letters, the

> letters, may individually mean nothing but when they are combined they will form a word pregnant with meaning. That is the way how you have to consider the circumstantial evidence. You have to take all the circumstances together and judge for yourself whether the prosecution have established their case."

8. It is well settled that the following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established.

(i) The circumstance from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.

(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(iii) The circumstances should be of a conclusive nature and tendency.

(iv) They should exclude every hypothesis but the one to be proved, and

(v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that within all human probability the act must have been done by the accused.

9. A case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction.

10. In Padala Veera Reddy vs. State of Andhra Pradesh & Ors. reported in 1989 Supp (2) SCC 706, the Supreme Court had laid down the tests that must be satisfied in a case that rests upon circumstantial evidence as follows:-

> "*10. Before adverting to the arguments advanced by the learned counsel, we shall at the threshold point out that in the present case there is no direct evidence to connect the accused with the offence in question and the prosecution rests its case solely on circumstantial evidence. This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:-*
>
> (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
>
> (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

11. Keeping in mind the aforesaid principles of law, I shall now proceed to examine the relevant circumstances that are appearing in the present case.

12. P.W.No.1-complainant, i.e, the brother of the deceased, namely, Kishanbhai Ramabhai Marvadi has deposed in his

examination-in-chief that the incident in question took place on 31.12.2001 at around 11:30 in the night and at that time he was present over there. He has also deposed that the cause for occurrence of the incident was due to some past enmity. It has been further deposed that at the time of the incident, accused Mukesh Mohanlal was having knife in his hand, accused Babubhai was having stick accompanied by accused Rameshbhai Mohanlal Marvadi and accused Mukesh Nemaji Marvadi. It has also been deposed by the said witness that accused Mukesh Mohanlal Marvadi, i.e, the appellant inflicted knife blow to the deceased Kantibhai and, therefore, they took the deceased to the stairs of the temple where he became unconscious. Thereafter, the said witness, accompanied by his mother and one another person, took the deceased Kantibhai to S.S.G Hospital for treatment where a mob of almost 15 to 20 persons of Marvadi community immediately came at the hospital and tried to lure the complainant that they will bear the entire expenses of the deceased likely to be incurred behind his treatment and threatened him not to register a complaint, otherwise, the complainant will also have to face the same consequences. Therefore, for about two days, they did not register the complaint. It has been further deposed that then on the next day, they all went to the police station to register the complaint and explained the delay in registering the complaint. Thereafter, upon insistence of the police to file a written complaint, he gave a written complaint to the police. In his examination-in-chief, the said witness had also identified the knife used in the commission of the offence.

13. In his cross-examination conducted by the defense

counsel, the P.W. No.1-complainant has admitted that there was a civil litigation going on between the accused and the complainant side and accused Babubhai got the stay in his favour on the basis of the will and the said suit is still pending. He has admitted in his cross-examination about the occurrence of the incident on 31.12.2001. The said witness has also admitted in his cross-examination that when they took deceased Kantibhai to the S.S.G. Hospital, at the very first instance when the police and the doctor present over there asked about the cause of injuries received by the deceased, they told them that as there was 31st December, various year ended programs were running on the TV and, therefore, deceased Kantibhai went to the terrace to adjust the antenna and fell down down from the terrace, due to which, Kantibhai sustained injuries being hit by metal sheet. He has also admitted in his cross-examination that the area where they are residing is a very dense locality and due to 31st December, there was a frequent movement of the people and people were awaken. He has also admitted that the Executive Magistrate came after two to three days and at that time, his deceased brother was in a conscious state of mind. The said witness in his cross-examination has also admitted that in the Exh.18 complaint, he has not stated that the mob of 15 to 20 people of Marvadi community came to the hospital and threatened them not to register the complaint and, therefore, they did not register the complaint on that day. He has also admitted that his brother was treated as an indoor patient for about 11 to 12 days and he was operated twice due to some medical complications in the first operation, and after the second

operation due to septicemia, the health condition of his brother got more critical. He has also admitted that after the second operation, within a period of two to four days, his brother had died.

14. Thus, there are vast discrepancies in the Exh.18 complaint filed by the complainant and his testimony recorded during the trial. On one hand, in the FIR which can be called as a report that reaches the police first in point of time, the complainant has stated that before the occurrence of the incident in question, there was quarrel between accused Babubhai and one person of the Marvadi community wherein the deceased had intervened to segregate them. Thereafter, after some time, when the deceased was going for urinating towards the canal, the accused persons stopped him and started quarreling with the deceased which resulted in foul play. On the other hand, in his examination-in-chief as also in his cross-examination, there is no mention about the quarrel that had taken place just prior to the incident. Further, in his complaint, the complainant has stated that after the incident, when his deceased brother was coming towards the house in a wounded condition, the complainant and his mother rushed to the deceased and at that point of time, all the accused already fled away. Contrary to the same, in his examination-in-chief, at the very outset, the complainant has deposed that he was present at the time of the incident. Thus, there appears to be vast contradictions in the evidence of the complainant itself.

15. PW No.2-Jamnaben, the mother of the deceased and the

complainant has deposed in his examination-in-chief that they had a quarrel with accused Babu Samna regarding execution of will by one Suresh and cross-complaint were filed by them in this regard. She has further deposed that Mukesh was having the knife and inflicted blow with the same to his son. She was present at the time of the said incident. She has also deposed that all the accused persons came to the hospital along with the other people and threatened them not to register the complaint.

16. In his cross-examination, the PW No.2 has admitted that she and her son Kishan took the deceased Kantibhai to the hospital and none else was there along with them. She has also admitted that when they took the deceased to the hospital, they told the police and the doctor present over there that as his son went to the terrace, he fell down and sustained injuries being hit by metal sheet. She has also admitted that the place where the incident took place was a very dense area.

17. Thus, there appears to be vast contradictions in the testimonies of the PW No.1 and PW No.2. In the evidence of the PW No.1, he has stated that mob of 15 to 20 people of Marvadi community came to the hospital and threatened them and not the accused persons. whereas the evidence of the PW No.2 states that all the accused persons came to the hospital and administered threat to them. She has also deposed that she was present at the time of the incident whereas in the complaint, the complainant has stated that they rushed to the deceased after seeing him coming towards the house.

18. PW. No.3- Paliben Kishanbhai Marvadi, the sister-in-law of the deceased has deposed in her examination-in-chief that accused Mukesh killed the deceased with knife and she had witnessed the said incident.

19. PW No.3, in her cross-examination, has stated that after the occurrence of the incident, police came at the place of offence after 10 to 15 minutes and at that time, police had interrogated her. She has also stated in her cross-examination that the quarrel continued for about ten minutes and people from the vicinity also gathered there.

20. The above evidence of the PW No.3 makes the picture more clear. She has stated in her cross-examination that after 10 to 15 minutes of the incident, police reached at the place of occurrence and interrogated her. Now the question that arises is that when the complaint was registered on the next day, then how the police could reach at the scene of offence as there was no compliant registered till that time. Thus, the version given by the PW No.3 is also contradictory to the versions given by the PW Nos.1 and 2. Even the PW No.1 in his cross-examination has stated that on 01.01.2002, neither police came to the hospital nor they went to the police station.

21. Thus it appears from the above that all the three key witnesses have given contradictory versions in their depositions and such contradictions are vast contradictions, which cannot be ignored while deciding the conviction appeal.

22. PW No.13-Dr. Uday Hriday Prakash Exh.41, who gave the preliminary treatment to the deceased has stated in his

examination-in-chief that the deceased was brought to the hospital at around 12:15 by the complainant. The deceased was injured and there was a wound on the left side of his stomach and the patient was in a conscious state of mind at that point of time. He has further deposed that at that time, the deceased had given a history before him that as he fell down from the terrace, he sustained injuries.

23. PW No.14- Jayantilal Manilal Salot-an Executive Magistrate, Exh.42 has deposed in his examination-in-chief that he received a Vardhi on 02.01.2002 at around 10:45 in the night. Therefore, he reached at the S.S.G. Hospital and started recording the dying declaration of the deceased. The certificate of the doctor was also obtained. He has further deposed that the deceased in his dying declaration has stated that Mukesh had inflicted knife blow to him. However, the said witness, in his cross-examination has stated that after reaching the hospital, he did not contact the doctor and straightway went to the deceased for recording dying declaration. He has further admitted that after the recording of the dying declaration, the endorsement of the doctor was obtained.

24. PW No.16- Dr. Hareshbhai Budhabhai Kothari, Exh.50, who conducted the autopsy has deposed in his examination-in-chief that when the body of the deceased was brought for the postmortem, there was a bleeding from the nose and mouth of the deceased. In his entire examination-in-chief, the said witness has only disclosed the nature of the injuries, however, he has specifically stated that number of incised wounds were found on the body of the deceased having stench septicemia.

The said witness in his cross-examination has admitted that except one vertical injury, all those injuries were surgical injuries. He has also admitted in his cross-examination that the cause of death given by him is due to increase in the septicemia which can be happened due to side effects of the medicine.

25. From the cumulative assessment of the aforesaid evidences, it appears that the accused and the complainant side were having some inimical terms as apparent from the body of the complaint itself and they all were residing in the same vicinity. The incident alleged to have taken place on 31.12.2001 at a public place at around 11:30 hours in the night. It appears that in the FIR it is stated that when the deceased was going for urinating towards the canal, he was stopped by the accused persons and brutally beaten by them, however, I am unable to find anywhere in the entire body of the complaint that whether the complainant was accompanying the deceased or not and how he came to know about the occurrence of the incident. It has not been stated anywhere in the complaint that whether he rushed to the place of occurrence on some noise of quarrel being heard by him or whether somebody informed him about the said quarrel. The complaint is completely silent about the same. The record further reveals that in the complaint, the complainant has stated that after the incident, when the deceased was returning home and slumped on the road, the complainant and his mother rushed to him and found the deceased wounded lying on the road, whereas in his examination-in-chief, he has

stated at the very outset that he was present at the time when the alleged incident took place. Therefore, there are contradictory statements made by the complainant in the complaint and in his examination-in-chief. The postmortem report (Ex.51) mentions that no other injury was noticed on the dead body except the wound on the stomach and as per the case of the prosecution, some altercation took place between the deceased and the accused persons and there was a free fight between them. However, the PM report does not reflect any swelling injuries on the body of the deceased. As per the PM Note Exh.51, the cause of death is due to " shock following septicemia following injury", which as per the evidence of the medical officer recorded by the defense side, can be due to not lack of proper treatment. Moreover, as per the evidence of the P.S.I. Shri Jayantilal Manganlal Sharma, Exh.53, initially a Janva Jog entry was given to the police wherein all the witnesses had given the information that the deceased went to the roof of the house to adjust the antenna of the TV and fell down from the roof due to which he sustained injuries being hit by metal sheet. The medical officer Dr. Uday Prakash in his deposition at Exh.41 has also deposed that when the deceased was brought to the hospital, he stated before him that he fell down from the roof and sustained the injuries. This Court has also taken note of the fact that the dying declaration of the deceased came to be recorded after 48 hours of the incident and in the said dying declaration he has stated that Mukesh inflicted knife injuries to him, however, it was not clearly stated by the deceased that which Mukesh inflicted injuries to him as there are two accused persons having similar name as Mukesh.

26. Thus, it appears that all the above referred evidences are corroborative to each other and predominantly supporting the case of the defense side and not the prosecution. It is the case of the prosecution that the alleged incident took place on 31.12.2001 in the night hours and there was a frequent movement of the people on the road due to last calendar day of the year. However, not a single independent witness has been examined by the prosecution. All the witnesses are either the family members of the deceased or the police witnesses as well as the medical officers.

27. The next important question is as to whether the circumstances attending the case establish the guilt of the accused satisfactorily and unerringly so as to incriminate him with the crime of murder. The prosecution has heavily relied on the testimonies of PW Nos. 1 to 3 who are the brother, mother and sister-in-law of the deceased and has sought to draw an inference against the guilt of the appellant on the following circumstances:-

(i) That the appellant-accused had an enmity with the deceased and his family members due to some earlier disputes;

(ii) On the fateful day, when the deceased was going for urinating towards the canal, the accused persons caught the deceased and started quarreling with the deceased;

(iii) That in the night hours of 31.12.2001, during such quarrel, the appellant-accused inflicted knife blow to the deceased and fled from the spot;

28. Now coming to the argument advanced by the defense side that the evidences of PW Nos.1 to 3 stand discredited as they are the interested witnesses, it is a well settled rule of prudence that the evidence of a related or interested witness should be examined very meticulously. In circumstances where the related/interested witness has some enmity with the accused, then the yardstick for evaluating his evidence should be more stringent and the scrutiny, doubly so. The law with regard to appreciation of evidence of a related and/or interested witness has been explained by the Supreme Court in Dalip Singh vs. State of Punjab reported as 1954 SCR 145, in the following words:-

> "*26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation, is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.*"

29. In Darya Singh vs. State of Punjab reported in AIR 1965 SC 328, the following are the observations made by the Supreme Court on evaluation of evidence of an interested

witness:-

> *"6. There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal courts must examine the evidence of the interested witnesses, like the relatives of the victim, very carefully. But a person may be interested in the victim, being his relation or otherwise, and may not necessarily be hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce any infirmity in his evidence. But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal courts examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it.....It may be relevant to remember that though the witness is hostile to the assailant, it is not likely that he would deliberately omit to name the real assailant and substitute in his place the name of the enemy of the family out of malice. The desire to punish the victim would be so powerful in his mind that he would unhesitatingly name the real assailant and would not think of substituting in his place the enemy of the family though he was not concerned with the assault. It is not improbable that in giving evidence, such a witness may name the real assailant and may add other persons out of malice and enmity and that is a factor which has to be borne in mind in appreciating the evidence of interested witnesses. On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars." (emphasis added)*

30. In Sarwan Singh v. State of Punjab, reported in (1976) 4 SCC 369, the Supreme Court held as under:-

> "*10. .....The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the court is satisfied that the evidence of interested witnesses have a ring of truth, such evidence could be relied upon even without corroboration.*"

31. In Kartik Malhar vs. State of Bihar, reported in (1996) 1 SCC 614, the Supreme Court opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested" postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason.

32. In Jayabalan v. UT of Pondicherry, reported in (2010) 1 SCC 199, once again, the Supreme Court highlighted the caution required to be taken in appreciating the evidence given by the interested witness as under:-

> "*23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency.*"
>
> *(emphasis added)*

33. I may also profitably refer to Raju vs. State of Tamil Nadu, reported in (2012) 12 SCC 701 where the Supreme Court held as follows:-

> "*24. For the time being, we are concerned with four categories of witnesses - a third party disinterested and unrelated witness (such as a bystander or passer-by); a third party interested witness (such as a trap witness); a related and therefore an interested witness (such as the wife of the victim) having an interest in seeing that the accused is punished; a related and therefore an interested witness (such as the wife or brother of the victim) having an interest in seeing the accused punished and also having some enmity with the accused. But, more than the categorization of a witness, the issue really is one of appreciation of the evidence of a witness. A court should examine the evidence of a related and interested witness having an interest in seeing the accused punished and also having some enmity with the accused with greater care and caution than the evidence of a third party disinterested and unrelated witness. This is all that is expected and required.*"
>
> *(emphasis added)*

34. A glance at the above decisions makes it clear that the evidence of an interested and/or related witnesses should not be examined with a coloured vision simply because of their relationship with the deceased. Though it is not a rule of law, it is a rule of prudence that their evidence ought to be examined with greater care and caution to ensure that it does not suffer from any infirmity. The court must satisfy itself that the evidence of the interested witness has a ring of truth. Only if there are no contradictions and the testimony of the related/interested witness is found to be credible, consistent and reasonable, can it be relied upon even without any corroboration. At the end of the day, each case must be examined on its own facts. There cannot be any sweeping generalisation.

35. At this stage, before I conclude, it is worth noting that the deceased when brought to the hospital, has stated before the doctor that as he slumped from the terrace, he sustained such injuries. Subsequently, before the Executive Magistrate, the deceased gave altogether a different story. Thus, there are two contradictory statements/dying declarations of the deceased on record and the question that arises is whether which one is to be considered as trustworthy. It is on record that the dying declaration by the Executive Magistrate was recorded after 48 hours of the incident. Now the question arises what would have been if the deceased died immediately after being brought to the hospital. In that case, we would have left with no other option but to consider the history given by the deceased at the first in point of time before the doctor as the dying declaration, wherein he stated that he sustained injuries being hit by metal sheet when he fell down from the terrace. The factors to be considered while determining the dying declaration has been very elaborately discussed by the Hon'ble Apex Court in a decision penned by His Lordship Justice J.B. Pardiwala in the case of Irfan @ Naka vs. State of U.P., reported in 2023 SCC Online SC 1010, the relevant observations of which, are as follows;

> *"DYING DECLARATIONS VIS-A-VIS ORAL EVIDENCE OF THE EYE-WITNESSES ON RECORD*
>
> *39. The picture that emerges on cumulative assessment of the materials on record is that the appellant-convict had strained relationship with his son Islamuddin (deceased) born in the wedlock of his first marriage with Ishrat. His relations with his two brothers (deceased persons) were also strained. The defence put forward by the appellant-convict is that with a view to grab the*

property, PW-2 Shanu alias Shahnawaz, PW-4 Soni and others conspired to eliminate the deceased persons and thereafter, to throw the entire blame on the appellant-convict of having committed the crime. The incident occurred in the night hours. The three deceased were sleeping in one room. The PW-2 and PW-4 are said to have been sleeping in an adjoining room in the house. The appellant-convict is said to have locked the door of the room from outside in which, the deceased persons were sleeping. He poured inflammable substance in the room and set the room on fire. The three deceased persons suffered severe burn injuries and ultimately succumbed to death. Islamuddin and Irshad are said to have given their dying declarations before the A.S.I. as referred to above. Why the dying declaration of Naushad could not be recorded is not clear. A close perusal of the two dying declarations indicates that Irshad and Islamuddin raised alarm on getting severely burnt and they were taken out of the room by the neighbour. Who is this neighbour, they are referring to in their dying declarations is also not clear? At the same time, it is pertinent to note that the Irshad and Islamuddin in their respective dying declarations do not say a word about the presence of the PW-2 Shanu alias Shahnawaz and PW-4 Soni. Both these witnesses do not figure in the two dying declarations. It is also pertinent to note that in both the dying declarations it has been very clearly stated that after a long time a neighbour came to their rescue and took them out of the burning room.

40. Keeping the aforesaid in mind, if we look into the oral evidence of the PW-2 Shanu alias Shahnawaz then according to him, he along with his sister Soni (PW-4) noticed fire in the room in which the deceased persons were sleeping. According to the PW-4, she also witnessed the appellant- convict pouring kerosene and setting the room on fire in which, the deceased persons were sleeping. PW-2 also claims to have witnessed, the appellant-convict fastening the door latch from outside and thereafter, running away from that place. In the same manner, if we closely look into the oral evidence of the PW-4 Soni, then according to her on seeing the flames of fire in the room, in which the deceased persons were sleeping, she immediately opened the door and saw

that the appellant-convict was running from the roof towards the stairs. The PW-4 claims that Amzad and Shafiq also saw the appellant-convict running away. Amzad and Shafiq have not been examined as the prosecution witnesses. It is not clear whether police even recorded the statements of Amzad and Shafiq under Section 161 of the CrPC?

41. If PW-2 and PW-4 were present at the time when the room was on fire and it is they who opened the door and took out the three deceased persons, then why the PW-2 and PW-4 do not figure in the dying declarations of Irshad and Islamuddin? Why Islamuddin and Irshad said in their dying declarations that after a long time, the neighbour came to their rescue and took them out of the room? If a neighbour came to their rescue, then where were PW-2 and PW-4 at the time of the incident? PW-2 and PW-4 have deposed that they both were sleeping in the room adjacent to the room in which the deceased persons were sleeping. This is one very crucial aspect of the matter which, the prosecution has not been able to explain or clarify.

42. In such circumstances referred to above, we are left with either to believe the dying declarations or the oral evidence of the two so called eye- witnesses to the incident. It is also important to note that the PW-4 Soni, in her cross-examination has stated that to the best of her knowledge, Islamuddin and Naushad had fastened the latch from inside. If the door of the room, in which the deceased persons were sleeping was closed from inside, then how did the appellant-convict manage to open the door and enter the room so as to set the room on fire as alleged?

43. The juristic theory regarding the acceptability of a dying declaration is that such declaration is made in extremity, 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. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their 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. It is for this reason, the requirements of oath and cross- examination are dispensed with. Since the accused has no power of cross- examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, should always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. [See: Laxman v. State of Maharashtra, (2002) 6 SCC 710]

44. The mode and manner, in which the dying declarations came to be recorded, is also something which creates a doubt, as regards its truthfulness and trustworthiness. Although, the Investigating Officer says that the recording of the dying declarations was video-graphed and the CD has been exhibited in evidence yet it is very important to determine the evidentiary value of the same.

45. We should also look into the genesis of the occurrence from a different angle. It is not in dispute that the three deceased died on account of severe burn injuries. It is also not in dispute that the room in which they were sleeping caught fire on account of which they suffered severe burn injuries. It is also not in dispute that inflammable substance like kerosene was found from the room which ignited the fire. However, the moot question is who set the room on fire? Could it be said that the prosecution has been able to prove beyond reasonable doubt that it was only and only the appellant-convict who set the room on fire by pouring the inflammable substance?

46. It appears to us that whoever did the act, the inflammable substance was not directly poured or sprinkled on the three deceased persons. Had it been so, they would have immediately woken up and by the time, the room is sat on fire, they would make good their escape or catch hold of the culprit. It appears that the inflammable substance might have been poured on the floor of the room and thereafter, the fire must have been ignited. Once, the room is on fire, the person responsible

for setting the room on fire would immediately leave that place. We find it very difficult to believe that the appellant-convict was still inside the room or even outside the room to be witnessed by the deceased persons as well as by the PW-2 and PW-4, locking the room from outside after setting the room on fire. The conduct of the accused may be unnatural because he was residing in the very same house, however, the conduct which may be a relevant fact under Section 8 of the Indian Evidence Act, 1872 (for short, 'the Act 1872'), by itself may not be sufficient to hold a person guilty of the offence of murder.

47. On overall assessment of the materials on record, we have reached to the conclusion that neither the two dying declarations inspire any confidence nor the oral evidence of the PW-2 and PW-4 respectively inspire any confidence. Had the dying declarations stood corroborated by the oral evidence of the PW-2 and PW-4, then probably, it would have been altogether a different scenario. However, as noted above, the two dying declarations are not consistent or rather contradictory to the oral evidence on record.

48. The justification for the sanctity/presumption attached to a dying declaration, is two fold; (i) ethically and religiously it is presumed that a person while at the brink of death will not lie, whereas (ii) from a public policy perspective it is to tackle a situation where the only witness to the crime is not available.

49. One of the earliest judicial pronouncements where the rule as above can be traced is the King's Bench decision of the King v. William Woodcock reported in (1789) 1 Leach 500 : 168 ER 352, where a dying woman blamed her husband for her mortal injuries, wherein Judge Eyre held this declaration to be admissible by observing: -

> *"...the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone: when every motive to falsehood is silent, and the mind is induced by the most powerful consideration to speak the truth; a situation so solemn, and so*

> *awful, is considered by the law as creating obligation equal to that which is imposed by a positive oath administered in a Court of Justice. (b) But a difficulty also arises with respect to these declarations; for it has not appeared and it seems impossible to find out, whether the deceased herself apprehended that she was in such a state of morality as would inevitably oblige her soon to answer before her Maker for the truth or falsehood of her assertions. .... Declarations so made are certainly entitled to credit; they ought therefore to be received in evidence: but the degree of credit to which they are entitled must always be a matter for the sober consideration of the Jury, under all the circumstances of the case." (Emphasis supplied)*

50. Interestingly, the last observation of Judge Eyre showcases, even at the inception of this principle, that the Courts were wary of the inherent weakness of dying declarations and cautioned for great care to be adopted.

51. It is significant to note the observations made by Taylor that "Though these declarations, when deliberately made under a solemn sense of impending death, and concerning circumstances wherein the deceased is not likely to be mistaken, are entitled to great weight, if precisely identified, it should always be recollected that the accused has not the power of cross examination, a power quite as essential to the eliciting of the truth as the obligation of an oath can be, and that, where a witness has not a deep sense of accountability to his Maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may effect the accuracy of his statements and give a false colouring to the whole transaction. ...". [See: Taylor on "Treatise on the Law of Evidence", 1931, 12th Edition Pg. 462]

52. It is observed in Corpus Juris Secundum Vol XL, Page 1283 that:

> *"In weighing dying declarations, the jury may consider the circumstances under which they were made, as, whether they were due to outside influence or were made in a spirit of revenge, or when declarant was unable or unwilling to state the*

facts, the inconsistent or contradictory character of the declarations, and the fact that deceased has not appeared and accused has been deprived of the opportunity to cross- examine him, and may give to them the credit and weight to which they believe, under all the circumstances, they are fairly and reasonably entitled."

53. In India in the relevant provision of Section 32 of the Act 1872, the first exception to the rule against admissibility of hearsay evidence, is as under:

“32(1). When it relates to cause of death.— When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

54. Jon R. Waltz, American Jurist observed that, "It has been thought, rightly or wrongly, that Dying Declarations have intrinsic assurances of trustworthiness, making cross examination unnecessary. The notion is that a person who is in the process of dying, and knows it, will be truthful immediately before departing to meet his Maker. (Of course, the validity of this hearsay exceptions is open to some debate. What about the person who is not deeply religious? What of the person who, as his last act, seeks revenge by falsely naming a life-long enemy as his killer? How reliable is the perception and memory of a person who is dying?)” [See: Waltz, J.R. (1975) Criminal Evidence, Chicago: Nelson-Hall. pp.75-76]

55. The Privy Council in Neville Nembhard v. The Queen reported in (1982) 1 AII ER 183, on Section 32(1) of the Act 1872 opined that the evidence of dying declaration under the Indian law lacks the special quality as in Common Law and hence, the weight to be attached to a dying declaration admitted under Section 32 of the Act 1872 would necessarily be less than that attached to a dying declaration admitted under the common law rules.

56. The below cited observations from the decision of Nembhard (supra) are of significant importance:

> *"final observation should be made concerning the cases al ready mentioned that have been decided in the Court of Appeal for Eastern Africa. It appears that rule of practice has been developed that when a dying declaration has been the only evidence implicating an accused person a conviction usually cannot be allowed to stand where there had been a failure to give a warning on the necessity for corroboration: see for example Pius Jasunga s/o Akumu v. The Queen (1954) 21 E.A.C.A. 331 and Terikabi v. Uganda [1975] E.A. 60. But it is important to notice that in the countries concerned, the admissibility of a dying declaration does not depend upon the common law test:*
>
> *upon the deceased having at the time a settled hopeless expectation of impending death. Instead there is the very different statutory provision contained in section 32 (1) of the Indian Evidence Act 1872. That section provides that statements of relevant facts made by a person who is dead are themselves relevant facts:*
>
> *“When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.” (emphasis added).*
>
> *In Pius Jasunga s/o Akumu v. The Queen it was pointed out (for the reason associated with the italicised words in the subsection) that the weight to be attached to a dying declaration admitted by reference to section 32 of the Indian Evidence Act 1872 would necessarily be less than that attached to a dying declaration admitted under the common law rules. The first kind of statement would lack*

that special quality that is thought to surround a declaration made by a dying man who was conscious of his condition and who had given up all hope of survival. Accordingly it may not seem surprising that the courts dealing with such statements have felt the need to exercise even more caution in the use to be made of them than is the case where the common law test is applied."

57. This Court in Muthu Kutty & Anr. v. State by Inspector of Police, T.N. reported in (2005) 9 SCC 113, while discussing the decision in Woodcock (supra) referred to above had cautioned the courts to ensure that a dying declaration is reliable before relying on it, with the following observations: -

"13. ... The general principle on which this species of evidence is admitted is that they are declarations made in extremity, 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 mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. These aspects have been eloquently stated by Eyre, L.C.B. in R. v. Woodcock ((1789) 1 Leah 500 : 168 ER 352). Shakespeare makes the wounded Melun, finding himself disbelieved while announcing the intended treachery of the Dauphin Lewis explain:

"Have I met hideous death within my view, Retaining but a quantity of life, Which bleeds away even as a form of wax, Resolveth from his figure 'gainst the fire? What is the world should make me now deceive, Since I must lose the use of all deceit?

Why should I then be false since it is true That I must die here and live hence by truth?" (See King John, Act V, Scene IV) The principle on which dying declaration is admitted in evidence is indicated in the legal maxim "nemo moriturus praesumitur mentire — a man will not meet his Maker with a lie in his mouth".

14. ... The situation in which a person is on the deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.

15. 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 of oath could be. 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 the deceased was not as a result of either tutoring, or 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 assailant. 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. ..." (Emphasis supplied)

58. This Court in Nallapati Sivaiah v. Sub-Divisional Officer, Guntur, Andhra Pradesh reported in (2007) 15 SCC 465 and Bhajju alias Karan Singh v. State of Madhya Pradesh reported in (2012) 4 SCC 327 had explained the meaning and principles of dying declarations upon which its admissibility is founded, with the following observations: -

"20. There is a historical and a literary basis for recognition of dying declaration as an exception to the hearsay rule. Some authorities suggest the rule

is of Shakespearian origin. In The Life and Death of King John, Shakespeare had made Lord Melun utter "Have I met hideous death within my view, retaining but a quantity of life, which bleeds away, ... lose the use of all deceit" and asked, "Why should I then be false, since it is true that I must die here and live hence by truth?" William Shakespeare, The Life and Death of King John, Act 5, Scene 4, lines 22-29.

Xxx xxx xxx

22. It is equally well settled and needs no restatement at our hands that dying declaration can form the sole basis for conviction. But at the same time due care and caution must be exercised in considering weight to be given to dying declaration inasmuch as there could be any number of circumstances which may affect the truth. This Court in more than one decision has cautioned that the courts have always to be on guard to see that the dying declaration was not the result of either tutoring or prompting or a product of imagination. It is the duty of the courts to find that the deceased was in a fit state of mind to make the dying declaration. In order to satisfy itself that the deceased was in a fit mental condition to make the dying declaration, the courts have to look for the medical opinion.

23. It is not difficult to appreciate why dying declarations are admitted in evidence at a trial for murder, as a striking exception to the general rule against hearsay. For example, any sanction of the oath in the case of a living witness is thought to be balanced at least by the final conscience of the dying man. Nobody, it has been said, would wish to die with a lie on his lips. A dying declaration has got sanctity and a person giving the dying declaration will be the last to give untruth as he stands before his creator.

24. There is a legal maxim "nemo moriturus praesumitur mentire" meaning, that a man will not meet his Maker with a lie in his mouth. Woodroffe and Amir Ali, in their Treatise on Evidence Act state:

"when a man is dying, the grave position in which he is placed is held by law to be a sufficient ground for his veracity and therefore the tests of oath and cross- examination are dispensed with".

25. The court has to consider each case in the circumstances of the case. What value should be given to a dying declaration is left to court, which on assessment of the circumstances and the evidence and materials on record, will come to a conclusion about the truth or otherwise of the version, be it written, oral, verbal or by sign or by gestures." (Emphasis supplied)

59. This Court in Bhajju (supra) has observed as under:

"23. The "dying declaration" essentially means the statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that of a conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful considerations to speak the truth.

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26. The law is well settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. ..."

60. Since time immemorial, despite a general consensus of presuming that the dying declaration is true, they have not been stricto-sensu accepted, rather the general course of action has been that judge decides whether the essentials of a dying declaration are met and if it can be admissible, once done, it is upon the duty of the court to see the extent to which the dying declaration is entitled to credit.

61. In India too, a similar pattern is followed, where the Courts are first required to satisfy themselves that the dying declaration in question is reliable and truthful before placing any reliance upon it. Thus, dying declaration while carrying a presumption of being true must be wholly reliable and inspire confidence. Where there is any suspicion over the veracity of the same or the evidence on record shows that the dying declaration is not true it will only be considered as a piece of evidence but cannot be the basis for conviction alone.

62. There is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. Certain factors below reproduced can be considered to determine the same, however, they will only affect the weight of the dying declaration and not its admissibility: -

(i) Whether the person making the statement was in expectation of death?

(ii) Whether the dying declaration was made at the earliest opportunity? "Rule of First Opportunity"

(iii) Whether there is any reasonable suspicion to believe the dying declaration was put in the mouth of the dying person?

(iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?

(v) Whether the statement was not recorded properly?

(vi) Whether, the dying declarant had opportunity to clearly observe the incident?

(vii) Whether, the dying declaration has been consistent throughout?

(viii) Whether, the dying declaration in itself is a manifestation / fiction of the dying person's imagination of what he thinks transpired?

(ix) Whether, the dying declaration was itself voluntary?

(x) In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other

dying declaration?

(xi) Whether, as per the injuries, it would have been impossible for the deceased to make a dying declaration?

63. It is the duty of the prosecution to establish the charge against the accused beyond the reasonable doubt. The benefit of doubt must always go in favour of the accused. It is true that dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind. It is just not enough for the court to say that the dying declaration is reliable as the accused is named in the dying declaration as the assailant.

64. It is unsafe to record the conviction on the basis of a dying declaration alone in the cases where suspicion, like the case on hand is raised, as regards the correctness of the dying declaration. In such cases, the Court may have to look for some corroborative evidence by treating the dying declaration only as a piece of evidence. The evidence and material available on record must be properly weighed in each case to arrive at an appropriate conclusion. The reason why we say so is that in the case on hand, although the appellant-convict has been named in the two dying declarations as a person who set the room on fire yet the surrounding circumstances render such statement of the declarants very doubtful.

65. In Sujit Biswas v. State of Assam reported in (2013) 12 SCC 406, this Court, while examining the distinction between "proof beyond reasonable doubt" and "suspicion" in para 13 has held as under:

> *"13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and something that "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not*

take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense."

66. It may be true as said by this Court, speaking through Justice Krishna Iyer in Dharm Das Wadhwani v. State of Uttar Pradesh reported in (1974) 4 SCC 267, that the rule of benefit of reasonable doubt does not imply a frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must take a practical view of the legitimate inferences flowing from the evidence, circumstantial or direct. Even applying this principle, we have a doubt as regards the complicity of the appellant-convict in the crime.

67. In the present case, it is difficult to rest the conviction solely based on the two dying declarations. At the cost of repetition, the PW-2 has been otherwise also not believed by the High Court.

68. As discussed above, the oral evidence of the PW-4 Soni, also does not inspire any confidence. We are not satisfied that the prosecution has proved its case against the appellant-convict beyond reasonable doubt."

36. In the aforesaid judgment, the Hon'ble Apex Court has

summarized the categories of the dying declarations when to be considered as truthful. It is observed that there is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. I would like to again reproduce that excerpts of the judgment where the Hon'ble Apex Court has highlighted the factors to be kept in mind while determining the truthfulness of the dying declaration, as under :-

> *"(i) Whether the person making the statement was in expectation of death?*
>
> *(ii) Whether the dying declaration was made at the earliest opportunity? "Rule of First Opportunity"*
>
> *(iii) Whether there is any reasonable suspicion to believe the dying declaration was put in the mouth of the dying person?*
>
> *(iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?*
>
> *(v) Whether the statement was not recorded properly?*
>
> *(vi) Whether, the dying declarant had opportunity to clearly observe the incident?*
>
> *(vii) Whether, the dying declaration has been consistent throughout?*
>
> *(viii) Whether, the dying declaration in itself is a manifestation / fiction of the dying person's imagination of what he thinks transpired?*
>
> *(ix) Whether, the dying declaration was itself voluntary?*
>
> *(x) In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other dying declaration?*
>
> *(xi) Whether, as per the injuries, it would have been impossible for the deceased to make a dying*

declaration?"

37. In the instant case, there can be said to be two dying declarations of the deceased on record, and both the dying declarations are not consistent with each other. They both are contradictory in nature. Further, it was recorded after 48 hours of the incident and, therefore, cannot be said to be at the earliest opportunity. Thus, it can safely be said that the evidence in the form of dying declaration in the present case does not fall in any of the above categories enumerated by the Hon'ble Apex Court so as to inspire any confidence to hold the appellant-accused guilty of the offence.

38. Further, in the case on hand, there are in all total four accused persons named in the FIR. They all have been tried together on the selfsame evidences. However, at the end of the trial, though the evidences against all the accused persons are similar, the trial court, after considering the same, has reached to a discriminating conclusion by acquitting the three other co-accused and convicting appellant-accused. The law is well settled in this regard that when there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the court cannot convict one accused and acquit the other. In such a case, the cases of both the accused will be governed by the principle of parity. Which means that the criminal court should decide like cases alike, and in such cases, the Court cannot make a distinction between the two accused, which will amount to discrimination. To further elaborate the above position, I would like to refer to and rely upon the recent past decision of the Hon'ble Supreme

Court in the case of Javed Shaukat Ali Qureshi vs. State of Gujarat, reported in 2023 SCC Online SC 1155, wherein while deciding an appeal challenging the judgment of the High Court whereby the Court convicted some of the accused, while acquitting others, the Division Bench of Abhay S. Oka and Sanjay Karol, JJ. has acquitted the convict by setting aside the judgment of the Trial Court as well as the judgment of the High Court, by observing thus;

> "15. When there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the Court cannot convict one accused and acquit the other. In such a case, the cases of both the accused will be governed by the principle of parity. This principle means that the Criminal Court should decide like cases alike, and in such cases, the Court cannot make a distinction between the two accused, which will amount to discrimination.
>
> 16. As far as accused nos.3 and 4 are concerned, they did not prefer any appeal. In the case of Pawan Kumar vs. State of Haryana, (2003) 11 SCC 241 this Court dealt with similar contingency in some detail. This Court held that the jurisdiction under Article 136 of the Constitution of India can be invoked in favour of the party even suo moto when the Court is satisfied that compelling ground for its exercise exists. However, such suo moto power should be used very sparingly with caution and circumspection. The Court held that the power must be exercised in the rarest of the rare cases.
>
> 17. Accused nos. 1,5 and 13 were convicted only on the basis of the testimony of PW25 and PW26. They were acquitted by holding that the testimony of both witnesses was unreliable and deserved to be discarded. If the same relief is not extended to accused nos. 3 and 4 by reason of parity, it will amount to violation of fundamental rights guaranteed to accused nos. 3 and 4 by Article 21 of the Constitution of India. Therefore, we have no manner of doubt that the benefit which is granted to accused nos. 1,5 and 13 deserves to be extended to accused nos.3 and

4, who did not challenge the judgment of the High Court. In this case, the suo motu exercise of powers under Article 136 is warranted as it is a question of the liberty of the said two accused guaranteed by Article 21 of the Constitution.

18. Now, we come to the case of accused no.2. By the order dated 11th May 2018, a special leave petition filed by accused no.2 was summarily dismissed without recording any reasons. The law is well settled. An order refusing special leave to appeal by a nonspeaking order does not attract the doctrine of merger. At this stage, we may refer to a three judge Bench decision of this Court in the case of Harbans Singh v. State of U.P. & Ors., (1982) 2 SCC 101 In paragraph 18, this Court held thus:

"18.To my mind, it will be a sheer travesty of justice and the course of justice will be perverted, if for the very same offence, the petitioner has to swing and pay the extreme penalty of death whereas the death sentence imposed on his co-accused for the very same offence is commuted to one of life imprisonment and the life of the coaccused is shared (sic spared). The case of the petitioner Harbans Singh appears, indeed, to be unfortunate, as neither in his special leave petition and the review petition in this Court nor in his mercy petition to the President of India, this all important and significant fact that the life sentence imposed on his co accused in respect of the very same offence has been commuted to one of life imprisonment has been mentioned. Had this fact been brought to the notice of this Court at the time when the Court dealt with the special leave petition of the petitioner or even his review petition, I have no doubt in my mind that this Court would have commuted his death sentence to one of life imprisonment. For the same offence and for the same kind of involvement, responsibility and complicity, capital punishment on one and life imprisonment on the other would never have been just. I also feel that had the petitioner in his mercy petition to the President of India made any mention of this fact of commutation of death sentence to one of life imprisonment on his co accused in respect of the very same offence, the President might have been inclined to take a different view on his petition." (emphasis added)

> 19. We have found that the case of accused no 2 stands on the same footing as accused nos. 1,5 and 13 acquitted by this Court. The accused no.2 must get the benefit of parity. The principles laid down in the case of Harbans Singh (supra) will apply. If we fail to grant relief to accused no 2, the rights guaranteed to accused no.2 under Article 21 of the Constitution of India will be violated. It will amount to doing manifest injustice. In fact, as a Constitutional Court entrusted with the duty of upholding fundamental rights guaranteed under the Constitution, it is our duty and obligation to extend the same relief to accused no.2. Therefore, we will have to recall the order passed in the special leave petition filed by accused no.2." (Emphasis added).

39. In the instant case, it is the case of the prosecution that before the incident in question, there was a fight between the accused Babubhai and one person belonging to Marvadi community, and at that time, the brother of the complainant, i.e, the deceased intervened and tried to segregate them. After such a row, the said Babubhai along with the appellant-accused and one another Mohan was standing there and when the deceased Kantibhai was going for urinating towards the canal, they stopped him and started beating him and in the said quarrel appellant-accused inflicted knife blow to the deceased. If that was the case of the prosecution, then the evidence of the said witness with whom accused Babubhai had a quarrel just before the occurrence of the incident in question had to be recorded and he had to be examined by the prosecution, which the prosecution has miserably failed to do in the present case. A mere fight between the accused and the deceased on the fateful day over a petty issue cannot be treated as an acceptable evidence to prove that there was a serious quarrel between the accused and the deceased which

led the appellant-accused to kill the deceased. Except the PW Nos.1 to 3, there is no independent witness who has seen the fight allegedly taken place between the accused persons and the deceased. Learned defense counsel is therefore justified in stating that in the above circumstances, the sole testimonies of the PW Nos.1 to 3, without any independent corroboration, cannot lead to an irresistible inference that it was the appellant-accused who inflicted the knife blow. The picture is so foggy in the present case. There is no independent witness who has come fore to depose that he had seen the incident. Even the complainant has not stated that he had seen the appellant-accused inflicting knife injuries. What he has stated in the complaint is that after the incident when they saw his deceased brother coming towards the home and fell down on the road they rushed to him and by that time, the assailants were fled away. Contradictory to what has been stated in the complaint, the complainant, in his examination-in-chief, has deposed that he was present there at time of the incident.

40. No doubt, a family has lost its loved one in the present case, but the pivotal issue remains as to whether the totality of the circumstances unerringly point a finger at the appellant-accused as the real culprit and none else. The circumstances indicated by the learned APP do create a suspicion against the appellant-accused but the point is whether those circumstances would be sufficient to hold that he was guilty of this crime. In my opinion, the distance between "may be true" and "must be true" has not been satisfactorily traversed by the prosecution to establish an unbroken link between the appellant-accused and the crime. One must be mindful of the

fact that no one can be convicted on the basis of a mere suspicion however strong such a suspicion may be. [See: Palvinder Kaur vs. State of Punjab AIR 1952 SC 354; Chandrakant Ganpat Sovitkar vs. State of Maharashtra (1975) 3 SCC 16; Sharad Birdhichand Sarda vs. State of Maharashtra (1984) 4 SCC 116; Padala Veera Reddy (supra) and State of Uttar Pradesh vs. Wasif Haider & Ors. 2018 SCC OnLine SC 2740]

41. I am therefore of the view that the circumstances appearing in the present case when examined in the light of the above legal principles, do not lead to an inevitable and decisive conclusion that the appellant-accused had committed the murder of the brother of the complainant. As the prosecution has not been able to dispel the cloud of doubt as to the culpability of the appellant-accused, I am inclined to extend him the benefit of doubt.

42. Resultantly, the present appeal succeeds and is hereby allowed. The impugned judgment of conviction dated 22.02.2007 passed by the learned Addl. Sessions Judge, Vadodara in Sessions Case No.230 of 2002 is quashed and set aside and the appellant-accused is ordered to be acquitted of all the charges. Since the appellant-accused is on bail pending trial, the bail bonds furnished by him stands discharged.

(DIVYESH A. JOSHI,J)

VAHID