

Satish Kumar Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Sep-14-2004

Reported in : RLW2005(2)Raj1133; 2005(2)WLC638

Judge : Sunil Kumar Garg and; Dalip Singh, JJ.

Acts : [Evidence Act, 1872](#) - Sections 3, 32 and 105; Code of Criminal Procedure (CrPC) - Sections 162, 164 and 313; Indian Penal Code (IPC) - Sections 34, 147, 148, 149, 299, 300, 302, 304, 307, 342 and 354; Criminal Law

Appeal No. : D.B. Criminal Appeal No. 485 of 2001

Appellant : Satish Kumar

Respondent : State of Rajasthan

Advocate for Pet/Ap. : V.R. Mehta, Public Prosecutor; M.L. Garg and; Sandeep Me

Judgement :

Sunil Kumar Garg, J.

1. This appeal, has been filed by the accused appellant against judgment and order dated 13.7.2001 passed by the learned Addl. Sessions Judge No. 2, Sri Ganganagar in Sessions Case No. 8/98 by which he convicted the accused appellant for the offence under Section 302/34 IPC and sentenced him to undergo

imprisonment for life and to pay fine of Rs. 1000, in default of payment of fine, to further undergo one month RI.

2. It may be stated here that in this case there was one more accused, namely, Yogesh Kumar, who was also being tried by the learned Trial Court alongwith accused appellant, but during the pendency of trial, he died on 12.4.1999 and therefore, proceedings against him were dropped by the learned Trial Court vide order dated 8.6.1999 and thus, thereafter, trial continued only against the present accused appellant.

3. It arises in the following circumstances:

On 14.1.1998, PW14 Jeerudin, who was at that time ASI, Police Station Purani Abadi, Sri Ganganagar received a cryptic telephonic information/message that one person was lying in injured condition in the lane and he was being brought to the hospital and the information was reduced into writing by PW14 Jeerudin in the Rojnamcha Ex.P/40A and thereafter, PW14 Jeerudin reached hospital, where he found Ram Kishan (hereinafter referred to as the deceased) in injured condition and deceased gave parcha bayan (Ex.P/32) to PW14 Jeerudin on 14.1.1998 at about 12.30 AM to the effect that he was LDC in the Sales Tax Department and at about 10.00 PM when he was going to dhani of Surjeet Singh on foot and when he reached near the turn of road, accused appellant Satish Kumar and his nephew Yogesh Kumar (another accused, who died during the pendency of trial) and 2-3 more boys met him and they caught hold him and thereafter, he was taken to the house of the accused appellant, where he was given beating by knives by the accused appellant and his nephew (Yogesh Kumar, who died during the pendency of trial), as a result of which, blood came out from his body and seeing blood coming out from his body, he was shunted out from the house by the accused appellant and another accused Yogesh and thereafter, he made hue and cry and after some time, he was brought to the hospital by some persons. It was brought to the hospital by some persons. It was further stated by the deceased that he was demanding Rs. 25000/- from the accused appellant and the papers of the house of the accused appellant were with him, which were taken by the accused appellant from him and since he was again demanding papers of the house from the

accused appellant, therefore, because of this, he was beaten by the accused appellant and another accused Yogesh by knife.

That parcha bayan of deceased was reduced into writing by PW14 Jeerudin and the same is Ex.P/32 and that parcha bayan Ex.P/32 of deceased was recorded by PW 14 Jeerudin in presence of PW 9 Dr. Avinash, who made endorsement on it to the effect that it was recorded in his presence.

On the basis of that parcha bayan of deceased Ex.P/32, a case for the offence under Section 307, 342, 354, 147, 148, 149 IPC was registered and regular FIR Ex.P/39 being No. 18/98 dated 14.1.1998 at Police Station Purani Abadi, Sri Ganganagar was chalked out and investigation was started.

During investigation, deceased was got first medically examined by PW2 Dr. B.M. Sharma and his injury report is Ex.P/3, which shows that he received as many as 14 injuries and they all were caused by sharp edged weapon.

It may be stated here that deceased died on 16.1.1998 at 5.00 AM in the hospital and therefore, the case was converted into Section 302 IPC and thereafter, post mortem of the dead body of the deceased was got conducted by PW2 Dr. B.M. Sharma and the post mortem report is Ex.P/4, where it was opined that the cause of death of the deceased was shock due to injuries to the liver lung and pancreas.

The site plan Ex.P/2 was got prepared by PW14 Jeerudin and from the house of accused appellant, PW14 Jeerudin seized jacket (article 8) and watch (article 7) belonging to deceased through fard Ex.P/7 in presence of two motbirs, namely, PW3 Bheemsen and PW8 Lekhraj.

The accused appellant was got arrested through arrest memo Ex.P/42 and during arrest, the accused appellant gave information Ex.P/44 to PW15 Loonsingh, SHO Police Station Purani Abadi that he could get recovered two katars, which were wrapped in the shawl (article 9) from his house and in pursuance of that information Ex.P/44, through fard Ex.P/33, in presence of PW 11 Nandlal and Rajkumar, PW15 Loonsingh Seized katar (article 1) and shawl (article 9) and

similarly, another katar (article 10) was seized through fard Ex.P/34 from another accused Yogesh Kumar, though information about recovery of katars was given by the accused appellant.

The seized articles were sent to FSL and the FSL report is Ex.P/46.

After usual investigation, police submitted challan for the offence under Section 302/34 IPC against the accused appellant and another accused Yogesh Kumar (who died during the pendency of the trial) in the Court of Magistrate and from where the case was committed to the Court Session.

On 18.6.1998, the learned Sessions Judge, Sri Ganganagar framed the charges for the offence under Section 302/34 IPC against the accused appellant and another accused Yogesh Kumar. The charges were read over and explained to them. They denied the charges and claimed trial.

During the course of trial, the prosecution got examined as many as 15 witnesses and exhibited several documents. Thereafter, statement of the accused appellant under Section 313 Cr.P.C. was recorded and in that statement, the accused appellant gave explanation that on the fateful day, deceased came to his house at about 11-11.30 PM in the night and deceased, after holding his wife DW 1 Santosh, sat on her with the intention to commit rape with her and when his wife DW1 Santosh cried, his nephew Yogesh Kumar (another accused) came there and he lifted the deceased, who was lying on DW 1 Santosh and thereafter, Yogesh Kumar gave knife blows to the deceased and thereafter, deceased ran away after climbing over the wall and he came to the house in then night at about 12-12.30 AM and thereafter, he was told the whole incident by Yogesh Kumar and his wife DW1 Santosh.

In defence, one witness DW1 Santosh, wife of the accused appellant, was examined.

After conclusion of trial, the learned Addl. Sessions Judge No. 2, Sri Ganganagar through impugned judgment and order dated 13.7.2001 convicted the accused appellant for the offence under Section 302/34 IPC and sentenced him in the

manner as indicated above inter-alia holding:-

(i) That parcha bayan of deceased Ex.P/32 was treated as dying declaration and thus, he placed reliance on it.

(ii) That statement of deceased Ex.P/32 was recorded by PW14 Jeerudin in presence of Dr. Avinash, PW9 and PW14 Jeerudin had given explanation why Magistrate was not called by stating that since the deceased was being taken in the operation theatre for operation, therefore, Magistrate was not called for.

(iii) That over writing, which was found on the parcha bayan of deceased Ex.P/32 with respect to time, was not found serious one as according to the learned trial Judge since in the Rojnamcha Ex.P/40A, time of departure was mentioned as 12.05 AM, therefore, in these circumstances, parcha bayan Ex.P/32 could be recorded at 12.30 AM in the night.

(iv) That plea of the accused appellant that the incident had taken place in grave and sudden provocation and therefore, offence under Section 302 IPC should have not been found proved, was rejected by the learned trial Judge.

(v) That prosecution has proved its case beyond all reasonable doubt against the accused appellant for the offence under Section 302/34 IPC.

Aggrieved from the said Judgment and order dated 13.7.2001 passed by the learned Addl. Sessions Judge No. 2, Sri Ganganagar, this appeal has been filed by the accused appellant.

4. In this appeal, the following submissions have been made by the learned counsel for the accused appellant:-

(i) That parcha bayan Ex.P/32, which was recorded by PW14 Jeerudin should have not been treated as dying declaration because of the following reasons:-

(a) That there was no certificate of the doctor certifying that the deceased was in a fit condition to give statement.

(b) That since the statement of deceased Ex.P/32 was recorded by the police officer, therefore, there was full opportunity for calling the Magistrate and since Magistrate was not called for, therefore, a doubt has arisen on the veracity of parcha bayan Ex.P/32 and thus, no reliance should have been placed on it.

(c) That since the statement of deceased Ex.P/32 was recorded by police officer (PW14 Jeerudin), therefore, the same could not be treated or regarded as dying declaration.

(ii) That since the alleged incident had taken place in the house of the accused appellant and the deceased came there with bad intention to commit rape with DW 1 Santosh, wife of accused appellant and since at that time, another accused Yogesh Kumar came there and injuries, which were caused to the deceased, were caused by another accused Yogesh Kumar and not by the accused appellant as he came later on and therefore, in these circumstances, the accused appellant had been falsely implicated in this case.

(iii) That so far as recovery of katar (article 1) from the accused appellant is concerned, as per FSL report Ex.P/46, no blood was found on it and thus, this recovery is of no value.

(iv) That since all other prosecution witnesses, especially PW1 Karma Singh and PW8 Lekhraj have been declared hostile and deceased had not narrated the incident before them just after occurrence, therefore, the prosecution case did not get corroboration from independent witnesses.

This, it was submitted that the findings of conviction recorded by the learned trial Judge against the accused appellant for the offence under Section 302/34 IPC cannot be sustained and liable to be set aside and the accused appellant is entitled to acquittal.

5. On the other hand, the learned Public Prosecutor and the learned counsel for the complainant have supported the impugned judgment and order dated 13.7.2001 passed by the learned Addl. Sessions Judge, No. 2, Sri Ganganagar.

6. We have heard the learned counsel for the accused appellant and the learned Public Prosecutor and the learned counsel for the complainant and gone through the record of the case.

7. Before proceeding further, first medical evidence of this case has to be seen. Injury report Ex.P/3 and post mortem report Ex.P/4 of deceased

8. The deceased was got medically examined by PW2 Dr. B.M. Sharma on 14.1.1998 and his injury report is Ex.P/3 and thereafter, deceased died in the hospital on 16.1.1998 at about 5.00 AM and post mortem of the dead body of the deceased was got conducted by PW2 Dr. B.M. Sharma on 16.1.1998 at about 9.00 AM and the post mortem report is Ex.P/4 and for proving the same, the prosecution has produced Dr. B.M. Sharma, PW2.

9. PW2 Dr. B.M. Sharma in his statement recorded in Court has stated that on 14.1.1998, he was Medical Jurist in the Government Hospital, Sri Ganganagar and on that day, he medically examined deceased and found the following, injuries on his body:-

1. Incised wound 1' x 1/6' deep not ascertained on right chest near middle line.
2. Incised wound 3/4' x 1/6' deep not ascertained on right epigetric region.
3. Incised wound 3/4' x 1/6' on right abdomen depth not ascertained 3' away from umblica.
4. Incised wound 1' x 1/6' depth not ascertained, 1/2' away from injury No. 3.
5. Incised wound 1/2' x 1/6' depth not ascertained on right abdomen, 6' away from umblica.
6. Incised wound 1' x 1/6' depth not ascertained, 2' left umblica.
7. Incised wound 3/4' x 1/6' depth not ascertained, 2' left mid line lower chest.
8. Incised wound 1-1/4' x 1/6' depth not ascertained, below injury No. 7.
9. Incised wound 1' x 1/6' depth not ascertained, 3-1/2' below injury No. 8.

10. Incised wound 1-1/4' x 1/6' depth not ascertained, left iliac foss.
11. Incised wound 1' x 1/2' x muscle deep, Rt. Forearm Lt. end middle half.
12. Incised wound 1' x 1/6' x muscle deep, Rt. forearm lower 1/3 near wrist.
13. Incised wound 1' x 1/6' x muscle deep, Rt. thigh.
14. Incised wound 3' x 1/2' x muscle deep, RT. inqui. area.

He has further stated that all the aforesaid injuries were caused by sharp edged weapon. He has proved the injury report Ex.P/3.

He has further stated that deceased died on 16.1.1998 at about 5.00 AM and on that day at about 9.00 AM, he conducted that post mortem of the dead body of the deceased and he found twelve injuries on his body and these injuries were sufficient in the ordinary course of nature to cause death and he opined that cause of death of the deceased was shock due to injuries to the liver, lung and pancreas. He has proved the post mortem report Ex.P/4.

10. Thus, from the statement of PW 2 Dr. B.M. Sharma, it is very much clear that deceased received as many as 14 injuries (incised wounds) by sharp edged weapon as mentioned above in the injury report Ex.P/3 and since the injuries have been repeated in the post mortem report Ex.P/4, therefore, they have not been mentioned again and injuries sustained by deceased were sufficient in the ordinary course of nature to cause death and deceased died because of shock due to injuries to the liver, lung and pancreas and thus, the death of the deceased might be classified as homicidal one.

11. The first question for consideration is whether the statement Ex.P/32 was given by deceased on 14.1.1998 at about 12.30 AM to PW14 Jeerudin, who was at that time ASI in Police Station Purani Abadi, or not.

12. In this respect, the main evidence is that of PW 14 Jeerudin himself, who has categorically stated that as soon as he received telephonic information on 14.1.1998 at about 12.05 AM that one person was lying injured in the lane and he was being taken to the hospital, Ganganagar, he reduced it into writing in

Rojnamcha Ex.P/40A and thereafter, proceeded to Government Hospital, Sri Ganganagar where deceased gave parcha bayan Ex.P/32 to him. He has also proved the signatures of deceased at place E to F on parcha bayan Ex.P/32. He has further stated that he also took certificate from Dr. Avinash, PW9 on Ex.P/32 where PW9 Dr. Avinash had certified that statement was taken in his presence.

In cross examination, he has admitted that following facts:-

(i) That before recording statement of deceased Ex.P/32, he did not make any application in writing to the doctor for taking his opinion on the point whether deceased was in a position to give statement or not nor he had taken any certificate from the doctor in that respect.

(ii) That since deceased was being taken in the operation room, therefore, he did not call for Magistrate and since after operation, deceased did not come to senses, therefore, Magistrate was not called for by him. But, he took doctor's certificate on parcha bayan Ex.P/32.

13. PW9 Dr. Avinash, who gave certificate on the parcha bayan of deceased Ex.P/32, has clearly admitted in cross-examination that he made endorsement on parcha-bayan Ex.P/32 at place C to D after statement was recorded meaning thereby before recording statement Ex.P/32 of deceased, PW14 Jeerudin did not taken certificate or endorsement from Dr. Avinash, PW9.

14. Thus, the fact that when PW14 Jeerudin recorded the statement of deceased Ex.P/32, he did not take certificate from Dr. Avinash, PW9 and statement of deceased Ex.P/32 was verified by PW9 Dr. Avinash after it was recorded, has come to light from the statements of PW14 Jeerudin and PW9 Dr. Avinash.

15. But, so far as recording of statement of deceased Ex.P/32 by PW14 Jeerudin is concerned, it cannot be doubted in any manner because PW14 Jeerudin had no enmity with the accused appellant and he has categorically stated that the recorded the statement Ex.P/32 as per version given by deceased and not only this, he took the signatures of deceased on it at place E to F.

16. No doubt in parcha bayan of deceased Ex.P/32, there is interpolation or over-writing at place G to H where time 12.30 AM has been mentioned and for that, the learned counsel for the accused appellant has submitted that since it was interpolation or over writing of time, therefore, whole statement of deceased Ex.P/32 had become doubtful.

17. In our considered opinion, the above argument does not carry any weight because in Rojnamcha Ex.P/40A, time of departure was shown by PW14 Jeerudin as 12.05 AM and if statement of deceased Ex.P/32 was recorded at 12.30 AM, it cannot be said that from that point of view, statement has been hit and that aspect was considered by the learned trial Judge in the impugned judgment and order and after considering the entire evidence and materials on record and after giving cogent reasons, the learned trial Judge came to the conclusion that the so-called interpolation or over writing on time at place G to H on the statement of deceased Ex.P/32 would not affect the veracity of Statement of deceased Ex.P/32 and these finding of the learned trial Judge cannot be said to be erroneous or perverse one.

18. Apart from this, the statement of PW14 Jeerudin on point that he recorded the statement of deceased Ex.P/32 on 14.1.1998 in hospital, gets corroboration from the statement of PW9 Dr. Avinash, who has stated that police recorded statement of deceased Ex.P/32 in his presence and deceased has put his signatures at two places marked E to F on it and this doctor (PW9 Dr. Avinash) is an independent witness and he has no grudge to grind with accused appellant and therefore, reliance can be placed on his statement.

19. Thus, it is held that the statement for deceased Ex.P/32 was recorded by PW14 Jeerudin on 14.1.1998 at 12.30 AM in the hospital and certificate of Dr. Avinash, PW 9 was taken after that statement Ex.P/32 was recorded.

20. In this case, there is no dispute on the point that through the statement of deceased Ex.P/32 was recorded by PW14 Jeerudin on 14.1.1998 at about 12.30 AM, but deceased died on 16.1.1998 at about 5.00 AM.

21. The next question for consideration is whether the statement of deceased Ex.P/32 recorded by Police Officer PW14 Jeerudin, ASI can be regarded as dying

declaration or not.

22. Before proceeding further, something should be said on dying declaration.

23. The dying declaration is generally accepted because of the following proverb:-

'... Memo moriturus proesumitur mentiri-a man will not meet his maker with a lie in his mouth.'

24. By the above proverb, it is meant that the person who is dying would not tell a lie.

25. Dying declarations are statements oral or documentary made by a person as to the cause of his death or as to the circumstances of the transactions resulting in his death. The grounds of admission of a dying declaration are:-

Firstly, necessity, for the victim being generally the only principle eye-witness to the crime, the exclusion of his statement might defeat the ends of justice; and

Secondly, the sense of impending death which creates a sanction equal to the obligation of an oath.

Difference between the English Rule and the Indian law.

26. In English law a dying declaration is admissible only on a criminal charge of homicide or manslaughter, whereas in India it is admissible in all proceedings, civil or criminal. Secondly, under the English law the declarations should have been made under the sense of impending death, whereas under the Indian Law it is not necessary that the deceased, at the time of making the dying declaration, should have been under expectation of death. Under the English Law the declarant must have been competent as a witness, thus imbecility or tender age will exclude the declaration. It is, however, doubtful whether this rule is applicable in India. The credit of such a declarant may be impeached in the same way as that of a witness actually examined in a court.

27. Thus, so far as Indian law is concerned, it can easily be held that Section 32 of Evidence Act is an exception to the rule of hearsay and makes admissible the

statement of a person, who dies where death is homicidal or suicide provided the statement relates to the cause of death of exhibits circumstances leading to death, but it is not necessary that at the time when the statement was given the person giving statement must have been under expectancy of death because this is a departure from English law.

28. In this case, when the statement of deceased Ex.P/32 was recorded by PW14 Jeerudin, at that time, it could not be expected the deceased would die later on. Therefore, if maker of that statement dies subsequently, that statement can be treated as dying declaration and thus, the learned trial Judge has rightly treated the statement of deceased Ex.P/32 as dying declaration, as expectation of death when statement is made is not a necessary ingredient in Indian law.

Person to whom a dying declaration may be made especially whether it can be made before police or not

29. It is immaterial to whom the declaration is made. It may be made to Magistrate, to a police officer, a public servant or a private person. It may be in writing or oral, or made by signs and gestures in answer to questions when the declarant is unable to speak. It may take the form of a First Information Report or a statement before the police. Section 162 Criminal Procedure Code, not declaring it to be inadmissible by reason of its having been made in the course of investigation.

30. So far as the legal position whether dying declaration can be recorded by police official or not is concerned, the Hon'ble Supreme Court in Charipalli Shankararao v. Public Prosecutor High Court of Andhra Pradesh, Hyderabad, AIR 1995 SC 777 has observed that if the police Head Constable had made attempt to procure services of Magistrate, but Magistrate was not available, then in such a situation, Police Head Constable was competent to record the dying declaration.

31. In P.V. Radhakrishna v. State of Karnataka, JT 2003 (6) SC 84, RLW 2003(4) SC 557, the Hon'ble Supreme Court found the dying declaration of deceased recorded by the police official in presence of doctor, who attended her, as trustworthy and credible.

32. In this respect, it may be stated here that a dying declaration recorded by the police officer before investigation was started could not be challenged on the ground that it was recorded by the Investigation Officer. In this respect the law laid down by the Hon'ble Supreme Court in *Gulam Hussain and Anr. v. Shabnam*, AIR 2000 SC 2480 may be referred to.

33. Thus, it can be held that the dying declaration recorded by the Police Officer when the deceased was in critical condition is admissible under Section 32 of the Evidence Act, but it would be better if the services of the Magistrate could be availed.

34. In view of the above, the statement of deceased Ex.P/32, which was recorded by police officer PW14 Jeerudin, in the hospital, can be treated as FIR and later on, it can be treated as dying declaration. The statement of deceased Ex.P/32 cannot be challenged on the ground that it was recorded by police officer PW 14 Jeerudin and for that, the law laid down by the Hon'ble Supreme Court in the case of *Gulam Hussain (supra)*, may be referred to where it was held that statement recorded by the police officer, which was later on treated as dying declaration, after the death of the maker, cannot be challenged on the ground that it was recorded by investigating officer.

35. Apart from that, there is one more point that has to be kept in mind. When PW14 Dr. Jeerudin recorded parcha bayan of deceased Ex.P/32 on 14.1.1998 at about 12.30 AM, he simply recorded that to give shape of FIR and that is why on that basis, regular FIR Ex.P/39 was chalked out and investigation started. Therefore, at that time, PW14 Jeerudin was not expecting that deceased would die later on and Ex.P/32 would become dying declaration.

36. Hence, the argument that since the dying declaration Ex.P/32 was made to the Police Officer, therefore, it could not be acted upon, does not carry any weight and the same stands rejected, for reasons mentioned above.

37. No doubt, after recording the statement of deceased Ex.P/32, PW14 Jeerudin did not take any steps for recording statement of deceased by the Magistrate, but for that, he has given explanation in his statement recorded in Court that since

deceased was being taken to the operation room and his condition was serious one and after operation, deceased did not come to senses, therefore, Magistrate was not called by him. In our considered opinion, in such a situation, if the Magistrate was not called for by PW14 Jeerudin, it cannot be said that the statement of deceased recorded by PW14 Jeerudin in the shape of Ex.P/32 cannot be acted upon and explanation for not calling Magistrate appears to be plausible and for that account, veracity of Ex.P/32 cannot be doubted.

38. In this case, before recording the statement of deceased Ex.P/32 by PW14 Jeerudin on 14.1.1998 at 12.30 AM, the certificate of doctor that deceased was in a fit condition to give statement was not taken, but the certificate of Dr. Avinash, PW9 was taken after the statement of deceased Ex.P/32 was recorded and it bears the endorsement of Dr. Avinash, PW9 at place C to D that the statement was taken in his presence.

Legal position in respect of dying declaration and its certification by doctor.

39. It may be stated here that the position of law has changed from various judgments of the Hon'ble Supreme Court and now even in absence of certificate of doctor, if dying declaration is otherwise found truthful, that can be believed.

40. For the above proposition of law, authority of the Hon'ble Supreme Court reported in *Laxman v. State of Maharashtra* 2002(8) SRJ 493 = 2002 AIR SCW 3479 (Criminal Appeal No. 609/2001, decided on 27.8.2002), may be referred to where it was observed as under:-

'Dying declaration-Regarding of-Absence of certification of doctor as to fitness of mind of declarant-would not render dying declaration not acceptable-What is essentially required is that person who records it must be satisfied that deceased was in fit state of mind-certificate by doctor is rule of caution-Thus voluntary and truthful nature of declaration can be established otherwise.'

41. Earlier three Hon'ble Judges of Supreme Court in *Paparambika Rosamma and Ors. v. State of Andhra Pradesh* 1999 Cr.L.R. (SC) 658 = 1999 AIR SCW 3440, (decided on 13.9.1999) held that in the absence of medical certification that

the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in a fit state of mind at the time of making a declaration.

42. With due respect, the law laid down by three Hon'ble Judges of the Supreme Court in the case of Paparambaka Rosamma (supra), has been over-ruled by the Bench of five Hon'ble Judges of Supreme Court in the judgment delivered on 27.8.2002 in the case of Laxman (supra), and the Hon'ble Supreme Court in the case of Laxman (supra) affirmed the judgment delivered on 29.9.1999 in Koli Chunni Lal v. State of Gujarat, 1999 AIR SCW 3737 = 1999(9) SCC 562 where it was held as under: -

'Absence of doctor's endorsement on, as to mental fitness of the deceased to make the declaration-Effect, it any, on its credibility-Requirement of such endorsement, held, is only a rule of prudence and the ultimate test is whether the dying declaration is truthful and voluntary.'

43. In another judgment in the case of Kodadi Srinivasa Lingam v. The State of Andhra Pradesh, JT 2002(6) SC 200 the Hon'ble Supreme Court held that there is no requirement that a dying declaration should be certified by medical officer with reference to mental state of the deceased.

44. Thus, the law of Hon'ble Supreme Court is very much clear on the point that even a dying declaration which is not certified by a doctor as to the fitness of mind of declarant can be acted upon as the requirement of certificate by the doctor is a rule of caution and not rule of law.

Finding in present case.

45. In view of the above, no doubt in this case, before recording the statement of deceased Ex.P/32, PW14 Jeerudin did not take any certificate from the doctor to the effect that deceased was in a fit condition to give statement, but since at that time, PW14 Jeerudin was not expecting death of the deceased and he was simply recording the statement of deceased and the requirement of certificate by doctor is

a rule of caution and not rule of law, therefore, in these circumstances, if certificate of doctor that deceased was in a fit condition to give statement was not taken by PW14 Jeerudin, it would not affect the veracity of statement of deceased Ex.P/32, though as per statement of PW9 Dr. Avinash, he certified after statement Ex.P/32 was recorded by PW14 Jeerudin. As stated above, PW9 Dr. Avinash has not only proved the fact that PW14 Jeerudin recorded statement of deceased Ex.P/32 in his presence and deceased put his signatures at two places, but he has further stated that deceased was in fit condition to give statement.

46. For the reasons stated above, all the contentions that statement of deceased Ex.P/32, which was recorded by Police Officer PW14 Jeerudin should have not been treated as dying declaration stand rejected.

47. Before proceeding further, something should be said on corroboration to dying declaration.

On corroboration

48. It may be stated here that the statement of the deceased relating to the cause of death of the circumstances of the transaction which resulted in his death must be sufficiently or closely connected with the actual transaction. To make such statement as substantive evidence, the person or the agency relying upon it is under a legal obligation to prove the making of such statement as a fact. If it is in writing, the scribe must be produced in the Court and if it is verbal, it should be proved by examining the person who heard the deceased making the statement.

49. The Hon'ble Supreme Court in the case of Munnu Raja v. State of M.P., AIR 1976 SC 2199 has held as under:-

'It is settled law that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subjected to cross-examination, there is neither a rule of law nor a rule of prudence which has hardened into rule of law that a dying declaration cannot be acted upon unless it is corroborated. Thus, Court must not look out for corroboration unless it comes to the conclusion that the dying declaration suffered from any infirmity by reason of

which it was necessary to look out for corroboration.'

50. The Hon'ble Supreme Court in another case of Panchdeo Singh v. State of Bihar, JT 2001(1) SC 322 = RLW 2002(1) SC 76 has held that dying declaration can be relied upon even without corroboration and there is no rule of law that a dying declaration cannot be acted upon unless it is corroborated. Where, however the court finds some infirmity howsoever negligible, then it has to look for some corroboration. Dying declaration alluring confidence of the court, would be sufficient piece of evidence to sustain conviction. Dying declaration need not be drawn with mathematical precision.

51. The Hon'ble Supreme Court in the case of Ramdas v. State of Madhya Pradesh, JT 2002 (Supp.1) SC 588 has further dealt with same point and has held that conviction can be based on dying declaration and corroboration is not necessary.

52. Thus, from the above discussions, it can be held as under:-

(i) That is cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated.

(ii) That once a dying declaration is found to be true and is not vitiated in any other manner, it can be acted upon without corroboration.

53. In the light of the above legal position, the statement of deceased Ex.P/32, which was treated as dying declaration, is being examined.

54. A bare perusal of Ex.P/32 dying declaration reveals that it has three important components:-

(i) That the accused appellant and another accused Yogesh Kumar (who died during the pendency of trial) caused knife injuries to him in the house of the accused appellant and when the alleged incident had taken place, deceased was in the house of the accused appellant where deceased was given knife blows by the accused appellant as well as Yogesh Kumar (who died during the pendency of trial). In other words, accused appellant was not only present in his house when

the incident took place, but he also took active part in causing injuries to deceased.

(ii) That incident had taken place in the house of the accused appellant.

(iii) That motive of causing injuries to deceased was also stated by him stating that since he was demanding Rs. 25,000/- from the accused appellant, therefore, he was beaten.

55. The next question for consideration is whether there is corroboration to the statement of deceased Ex.P/32 on above facts or not.

56. Before proceeding further, it may be stated here that so far as the fact that on the fateful day, deceased was in the house of accused appellant is concerned, the same has been admitted by deceased himself in his statement Ex.P/32 and apart from this, when the defence evidence would be discussed latter on, this fact has been well established from the defence evidence also.

Presence of accused appellant

57. The accused appellant in his statement recorded under Section 313 Cr.P.C. has stated that on the fateful day, deceased came to his house at about 11-11.30 PM in the night and deceased, after holding him wife DW1 Santosh, sat on her with the intention to commit rape with her and when his wife DW1 Santosh cried, his nephew Yogesh Kumar (another accused) came there and he lifted the deceased, who was lying on DW1 Santosh and thereafter, Yogesh Kumar gave knife blows to the deceased and thereafter, deceased ran away after climbing over the wall and he came to the house in the night at about 12-12.30 AM and thereafter, he was told the whole incident by Yogesh Kumar and his wife DW1 Santosh.

58. Now the statement of DW1 Santosh, who is wife of accused appellant, has to be examined and discussed.

59. Before examining the statement of DW1 Santosh, legal position with respect to status of defence witness has to be seen and for that, the law laid down by the

Hon'ble Supreme Court in *Munshi Prasad and Ors. v. State of Bihar*, (2002) 1 SCC 351 may be referred to, where it was held that the evidence tendered by the defence witnesses cannot always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to equal respect and treatment as that of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution, a lapse on the part of the defence witnesses cannot be differentiated and be treated differently than that of the prosecutor's witnesses.

60. In the light of the above legal position, the statement of DW1 Santosh is being examined.

61. DW1 Santosh, who is wife of accused appellant, in her statement recorded in Court has stated that after marriage, she and her husband (accused appellant) had lived as tenant in the house of deceased for about 10-11 years and one day in the night deceased came to her house and tried to commit rape with her, but she did not narrate that incident to her husband (accused appellant) because threat was given by the deceased. She has further stated that on the fateful day when she was in the house alone and accused appellant had gone somewhere, deceased come to her house in the night and started to commit rape with her and when she cried, Yogesh Kumar (another accused, who died during pendency of trial) came there and thereafter, he took out knife and gave several knife blows to the deceased and the accused appellant came later on. She has further stated that when deceased came to her house, he was wearing jacket, which he put off and kept on the cot and deceased wrapped that jacket (article 8) with her shawl (article 9). She has further stated that whole incident was narrated by her to police as well as to Magistrate. (It may be stated here that the statement of DW1 Santosh was recorded by Magistrate under Section 164 Cr.P.C. on 4.2.1998 and the same is Ex.P/47)

In cross-examination, she has admitted the following facts:-

(i) That she was tenant in the house of deceased and at that time, deceased did not commit any wrong with her.

(ii) That however, after that, when she had gone to her house, one day deceased came to her house and committed rape with her.

(iii) That after committing that rape and before the date of fateful incident, deceased had come 4-5 times to her house.

(iv) That whenever deceased used to come to her house, she used to say to him not to do anything with her, but deceased did not accept her advice.

(v) That she was confronted with her previous statement Ex.P/47 recorded under Section 164 Cr.P.C. by Magistrate on point that on fateful day, deceased came to her house and when he was intending to pass night alongwith her on cot, accused appellant suddenly came there and thereafter, both quarreled and she has further admitted that above statement was given by her before the Magistrate under pressure of police.

(vi) That is was wrong to say that her husband (accused appellant) had given knife blows to deceased.

(62). Thus, from the statement of DW 1 Santosh, the fact that deceased used to come to her house is well established. It is also well established that deceased had sex with her earlier and deceased used to come to her house and though she resisted his coming, but she has surrendered herself before the deceased. The fact that she used to live earlier in the house of deceased as tenant is also well established and the fact that when accused appellant and she had shifted to their house, deceased used to visit her house frequently is also well proved. Thus, intimacy between the deceased and DW 1 Santosh, wife of accused appellant is well established. From her statement, it is also well established that on the fateful day, deceased came to her house and thereafter, the fact that another accused Yogesh Kumar (who died during trial) came there and he caused injuries to deceased, is also well established, but so far as the presence of accused appellant is concerned, she has stated that he came later on.

63. In our considered opinion, the deceased in his statement Ex.P/32 has clearly stated that both accused appellant and another accused Yogesh Kumar caused

knife injuries to him and from his statement, the presence of accused appellant is very much there in night. So far as the statement of DW1 Santosh, wife of accused appellant, on that aspect is concerned, it appears that she is concealing that aspect in order to save her husband (accused appellant) and apart from this, in her earlier statement Ex.P/47 recorded under Section 164 Cr.P.C. by Magistrate, she has clearly not only mentioned the presence of accused appellant, but she has also stated that he also caused injuries to deceased. Therefore, that part of the statement of DW Santosh where she has stated that accused appellant was not present when the incident and taken place, is not accepted because it appears that she is telling lie on this aspect.

64. Thus, from the above evidence, it appears that on the fateful day, deceased had gone to the house of the accused appellant to share bed with the wife of accused appellant, namely, Santosh, DW1 and when deceased and DW1 Santosh were alone in the house of accused appellant, at that time, accused appellant and his nephew (another accused Yogesh Kumar) reached there and thereafter, they both murdered deceased by causing injuries by knife.

65. In this respect, it may be stated here that that part of statement of deceased Ex.P/32 where he has stated that he had gone to the house of accused appellant for the purpose of demanding money in night, cannot be accused in view of the evidence, just discussed above, because presence of deceased in the house of accused appellant was meant for enjoying himself with the wife of accused appellant, namely, Santosh, DW1 and not for demanding money. Therefore, that part of the statement of deceased in Ex.P/32 where he has stated that he had gone to the house of the accused appellant for demanding money appears to be false one. Furthermore, since deceased himself was guilty conscious as he was visiting the house of the accused appellant frequently to satisfy his lust with DW1 Santosh, wife of accused appellant, therefore, in dying declaration Ex.P/32 to show his presence in the night, he had developed the theory of demanding money.

66. The next question for consideration is whether in a case where some part of dying declaration is found false one, can the whole dying declaration be thrown out?

67. In this respect, the law laid down by the Hon'ble Supreme Court in *Godhu v. State of Rajasthan*, 1974 Cr.L.J. (SC) 1500 = AIR 1974 SC 2188 may be referred to where it was held that there may be cases wherein a part of a dying declaration which is not covered is so closely inter-mixed with the other part that it is not possible to separate them. In such cases the Court would be justified in rejecting the whole of the dying declaration. There may, however, be cases wherein two parts of dying declaration may be separable and the correctness of the one part does not depend on the correctness of the other part. In such cases, the Court should normally act upon a dying declaration part of which is found to be false unless part to be relied upon is corroborated in material particular by other evidence. If such other evidence shows that the part of dying declaration relied upon is correct and trustworthy, the Court can act upon that part of dying declaration.

68. Therefore, it can be concluded that even if some part of dying declaration is found false one, the rest part of it can be relied upon, if found reliable, correct and trustworthy. If one part of dying declaration has been rejected, it does not mean that whole dying declaration should be thrown out.

69. Thus, in this case, that part of dying declaration of deceased Ex.P/32 where participation of accused appellant and another accused Yogesh Kumar in causing injuries by knife to deceased was stated, has been accepted, but that part of dying declaration Ex.P/32 where deceased had stated that he had gone to the house of accused appellant for demanding money, has been rejected.

Corroboration to dying declaration Ex.P/32 by other prosecution evidence.

70. So far as recovery of two katars on the information of accused appellant Ex.P/44 is concerned, the same is also well proved from the statement of PW15 Loon Singh, SHO and also from the statement of PW11 Nandlal, one of the motbirs of fard of recovery of katars.

71. There is no dispute on the point that out of two katars, one katar was fund stained with blood and the other katar was not found blood stained.

72. In this respect, it was submitted by the learned counsel for the accused appellant that since the katar, which was not found blood stained, was recovered at the instance of accused appellant, therefore, he was innocent.

73. In our considered opinion, the above argument does not carry any weight because the information contained in Ex.P/44 was given by accused appellant and it relates to the recovery of shawl (article 9) as well as two katars and in pursuance of that information Ex.P/44 of accused appellant, these articles were recovered and thereafter, it has been bifurcated that one katar was recovered at the instance of accused appellant and another katar was recovered at the instance of another accused Yogesh Kumar, who died during trial. But, the fact that katars were recovered at the information of the accused appellant is well proved and when katars were discovered on the information of accused appellant, it becomes incriminating not because of its recovery at the instance of the accused appellant, but the element of criminality tending to connect the accused appellant with the crime lies in the authorship of concealment, namely, that the accused appellant who has information leading to its discovery was the person who concealed it.

74. Apart from this, evidence of recovery of katars on the information of the accused appellant cannot be held to be of no utility merely because no blood was found on it because the important aspect concerning recovery of the weapon is that it renders the statement made by accused admissible in evidence. The incriminating circumstance in such a case is not merely that the weapons were disinterred by the police, but that those persons admitted to the police that such weapons were concealed by them at those places.

75. Therefore, the argument that the recovery of katars on the information of accused appellant does not connect the accused appellant with the commission of crime, stands rejected.

76. So far as the argument that since all other prosecution witnesses, especially PW1 Karm Singh and PW8 Lekhraj have been declared hostile and deceased had not narrated the incident before them, therefore, the prosecution case did not get corroboration from independent witnesses is concerned, it may be stated here that since the deceased himself was at fault and guilty conscious, therefore, the

possibility cannot be ruled out that for that reason, he did not narrate the incident before some of the prosecution witnesses. Furthermore, if some of the prosecution witnesses have been declared hostile, it would not affect the prosecution case, as it is well proved from the dying declaration Ex.P/32 that accused appellant and another accused Yogesh caused knife blows to the deceased.

77. Thus, in view of the discussion made above, it is held that the statement of deceased Ex.P/32, which was treated or regarded as dying declaration, that the alleged incident had taken place in the house of the accused appellant and the accused appellant and another accused Yogesh Kumar (who died during trial) had caused injuries to him by knife appears to be reliable, credible and trustworthy and the same is corroborated by medical evidence and other evidence on record including recovery of katars at the instance of accused appellant and therefore, if the learned trial Judge, placing reliance on the dying declaration Ex.P/32, has come to the conclusion that apart from accused Yogesh Kumar, the accused appellant has also caused knife injuries to the deceased, he has committed no illegality or infirmity in doing so.

78. It may be stated here that the learned trial Judge in the concluding part of the impugned judgment and order rejected the argument that the accused appellant committed the murder of the deceased alongwith another accused Yogesh Kumar in sudden and grave provocation.

79. The question for consideration is whether in the facts and circumstances of the case and the facts that deceased used to visit the house of the accused appellant frequently and deceased had earlier sex with DW1 Santosh, wife of the accused appellant and on the fateful day, deceased was found in the house of the accused appellant in the company of DW1 Santosh, wife of accused appellant in night and deceased had gone there to share bed with DW1 Santosh, wife of accused appellant, therefore', in such a situation, if injuries by knife had been caused to deceased by accused appellant and another accused Yogesh Kumar, the act of the accused appellant can be covered by exception I of Section 300 IPC or not, though that argument was not found favorable by the learned trial Judge.

80. Exception 1 of Section 300 I.P.C. reads as under:

'Exception 1: Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:

First:-That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly-That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly-That the provision is not given by anything done in the lawful exercise of the right of private defence.

Explanation : Whether the provision was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.'

81. To appreciate the above, legal position in respect of burden of proof, whether exception is pleaded or not but if circumstances justify it, that has to be seen and for that following heading is formulated:

ONUS OF PROOF ON THE ACCUSED TO BRING HIS CASE WITHIN THE GENERAL OR SPECIAL EXCEPTIONS OR PROVISOs UNDER THE PENAL LAW.

82. To appreciate the above question, Section 105, of the Indian Evidence act and its illustration (b) is quoted hereunder:

'105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.'

(b) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of power of self-control.

83. The general exceptions are those applicable to all crimes and are laid down in Chapter IV of the Indian Penal Code. The special exceptions are those which are restricted to particular crime. The present case is a case of special exception.

84. Section 105 is stated in two forms—that of a rule as to the burden of proof, and that of a presumption. The result is apparently the same in both forms and yet the two forms are introduced. There does not appear to be a parallel anywhere in the Act to this sort of introduction of two forms of practically the same thing in one and the same Section. It is, therefore, expedient to find some meaning for what otherwise should be a meaningless duplication. It is now well settled that the accused can discharge the burden placed on him under Section 105, by the evidence of the witnesses for the prosecution. It stands to reason that if the prosecution has already performed the task for him, it is clearly not necessary for the accused to do it all over again.

85. The phrase 'Burden of proof' is held to have been used with two distinct meanings in the law of evidence, namely the burden of establishing a case, and the burden of introducing evidence. In Section 105, the phrase is used in the sense of burden of introducing evidence, and not in the sense of burden of establishing a case, for such a burden remains throughout the trial on the prosecution and it never shifts. It is, therefore, the duty of the accused to introduce such evidence as will displace the presumption of the absence of circumstances bringing the case within an exception, and as will suffice to satisfy the Court that such circumstances may have existed.

86. There is, therefore, a subtle but fundamental line of distinction between the degree of certainty required where the burden of proving a fact is on the prosecution and where the burden is on the accused. Where the burden of the issue is on the prosecution, it must be proved beyond reasonable doubt. Where it is on the accused, he is not required to prove it beyond reasonable doubt or in default to incur a verdict of 'guilty'; for, even if he fails to prove definitely the existence of those circumstances, he can still claim to be governed by the general

principles of the criminal law that an accused is presumed to innocent till he is proved to be guilty and that the benefit of any doubt that exists in the mind of the Court should be given to him. If upon a review of all the evidence, the Court is left in doubt whether the circumstances bringing the case of the accused within exception exist or not, the accused is entitled to acquittal.

87. Thus, the general burden of prosecution to prove its case beyond reasonable doubt never shifts and it always rests on the prosecution.

88. On the point whether there is conflict in respect to special burden on the accused or not, the Hon'ble Supreme Court in famous case reported in K.M. Nanvati v. State of Maharashtra, AIR 1962 SC 605 as observed that alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused under Section 105 of the Evidence Act is more imaginary than real. Indeed, there is no conflict at all. There may arise three different situations (1) A statute may throw the burden of proof of all or some of the ingredients of an offence on the accused. . (2) the special burden may not touch the ingredients of the offence, but only the protection given on the assumption of the proof of the said ingredients. .(3) It may relate to an exception, some of the many circumstances required to attract the exception if proved affecting the proof of all or some of the ingredients of the offence. . . In the second case, the burden of bring in the case under the exception lies on the accused..... the general burden to prove the ingredients of the offence, unless there is a specific statute contrary, is always on the prosecution, but the burden to prove the circumstances coming under the exception lies upon the accused. The failure on the part of the accused to establish all the circumstances bringing his case under the exception does not absolve the prosecution to prove the ingredients of the offence; indeed, the evidence, though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence.

89. Thus, it can be held that burden which rests with the accused does not absolve the prosecution from discharging its initial burden of establishing the case beyond reasonable doubt.

90. The Hon'ble Supreme Court in the case of Vijayee Singh v. State of U.P., AIR 1990 SC 1459 has observed that when the evidence on record is sufficient to prove the existence of a fact conclusively then no difficulty arises. But where the accused introduces material to displace the presumption which may affect the prosecution case or create a reasonable doubt about the existence of one or other ingredients of the offence, then it would amount to a case where the prosecution failed to prove its own case beyond reasonable doubt. The accused may also show on the basis of the material of preponderance of probability in favour of his plea of exception to criminal liability.

91. On degree of proof it may be stated here that when the burden of proof lies on the accused under Section 105, Evidence Act, the burden can be discharged by him by showing preponderance of probability and for that following authorities of the Hon'ble Supreme Court may be referred to :

Hazara Singh v. State of Punjab, AIR 1957 SC 649

State of Madras v. A. Vaidyanath Iyer, AIR 1958 SC 61

Swami v. State, AIR 1960 SC 7

Delhi Administration v. Ram Singh, AIR 1962 SC 63

Bhikhari v. State of U.P., AIR 1966 SC 1

Harbhajan Singh v. State of Punjab, AIR 1966 SC 97

Munshi Ram v. Delhi Administration, AIR 1968 SC 702

Mahinder Paul v. State of Punjab, AIR 1979 SC 577 &

Mahesh Prasad v. State of Rajasthan, AIR 1974 SC 773

**DUTY OF COURT WHERE PLEA OF GENERAL EXCEPTION IS NOT PLEADED
BUT COMING FORWARD FROM RECORD**

92. Even when the accused denies, in toto, the act or acts alleged, if evidence of the existence of circumstances bringing the case within a general of

circumstances bringing the case within a general or special exception is to be found in the evidence for the prosecution, the court must review the whole evidence and either acquit the accused or convict him of the minor offences as the case may be. Section 105 of the Indian Evidence Act does not relieve a Judge, even in cases where the accused has not pleaded that his case come within any particular exception, from pointing out such facts in the evidence as might justify the Court in taking the view that the accused's case was covered by one or other exception. In this respect reference may be made to the following decisions:

Munshi Ram v. Delhi Administration (supra),

Mahinder Pal v. State of Punjab (supra).

93. The Hon'ble Supreme Court in the case of Yogendra Morarji v. Gujarat, AIR 1980 SC 660 has observed that the burden of proving defence arises only when the prosecution discharges its initial and traditional burden of establishing the complicity of the accused. Even under this section, the standard of proof required for establishing a defence is that of a prudent man as laid down in Section 3 of the Evidence Act. But within that standard, there could be degree of probabilities. The accused may discharge his burden by establishing mere balance of probabilities in his favour with regard to alleged crime.

94. The Hon'ble Supreme Court had occasion to consider the above proposition of law in so many cases and in this respect following cases may further be referred to:

Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, (1964) 7 SCR 361.

Bhikhari v. State of U.P. (supra).

Sheralli Wali Mohammed v. The State of Maharashtra, (1973) 4 SCC 79

Mohd. Ramjani v. State of Delhi, AIR 1980 SC 1341

Bhupendra Singh v. State of Gujarat, AIR 1997 SC 3790 &

Shrikant Anandrao Bhosale v. State of Maharashtra, JT 2002 (7) SC 386

BENEFIT OF DOUBT GIVEN TO THE ACCUSED WHEN EXCEPTION PLEADED BUT NOT PROVED

95. In a case in which any General exception in the Indian Penal Code, or any special exception or proviso contained in another part of the same Code, or in any law defining the offence, is pleaded or raised by an accused person and the evidence led in support of such plea, judged by the test of preponderance of probability, as in a civil proceedings, fails to displace the presumption arising from S. 105 of the Evidence Act, in other words, to disprove the absence of circumstances bringing the case within the said exception; but upon a consideration of the evidence as a whole including the evidence given in support of the plea based on the said exception or proviso, a reasonable doubt is created in the mind of the Court, as regards one or more the ingredients of the offence, the accused person shall be entitled to the benefit of the reasonable doubt as to his guilt and hence to acquittal of the said offence. In this regard, reference may be made to the old Full Bench majority decision of Allahabad High Court in the case of Prabhu v. Emperor AIR 1941 All 402 (FB). The majority decision in the case of Prabhu (supra) was as follows:-

'That in a case in which, in answer to a prima facie prosecution case, any general exception in Indian Penal Code is pleaded by an accused and evidence is adduced to support such a plea, but such evidence fails to satisfy the court affirmatively that the accused has fully established his plea, he will still be entitled to an acquittal provided that, after weighing the evidence as a whole prudently (including the evidence given in support of the plea of the said general exception), the Court reaches the conclusion that, as a consequence of the doubt arising about the existence of the exception, the prosecution has failed to discharge its onus of proving the guilt of the accused beyond reasonable doubt.'

96. The case of Prabhu (supra), was further re-considered by Full Bench of Allahabad High Court consisting of 9 judges in the case of Rishikesh Singh v. State, AIR 1970 ALL 51 and Full Bench of Allahabad High Court came to the conclusion that law laid down in Prabhu's case (supra), calls for elucidation and not amendment and held that majority decision in the case of Prabhu (supra), was

still got law holding that accused person is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the general exception) a reasonable doubt is created in the mind of the Court about the guilt of the accused. The law laid down in the case of Prabhu (supra), was further relied on by Division Bench of Patna High Court in the case of Kamla Singh v. State, AIR 1955 Pat. 209 and the Hon'ble Supreme Court in the case of Dahyabhai (supra) has approved the case of Kamla Singh (supra), meaning thereby that the law laid down in Prabhu's case (supra), was approved in substance by the Hon'ble Supreme Court also.

97. Thus, the law can be summarized in the following manner:

- i) That general burden never shifts and always rests on the prosecution.
- ii) However, where burden is on the accused to prove his general exception or special exception as the case may be, he is not required to prove it beyond reasonable doubt.
- iii) It is sufficient if accused succeeds in proving the case by preponderance of probabilities. The accused has to satisfy the standard of a 'prudent man'. If the material placed before the court satisfies the test of 'prudent man', it can be said that the accused has discharged the burden. It may raise a reasonable doubt in the mind of the judge whether the accused and requisite intention laid down in Section 299 IPC. If the Judge has such reasonable doubt, he has to acquit the accused and the accused can plead his case on the basis of probabilities and preponderances.
- iv) That in case general exception or special exception is pleaded but not proved by the accused, but reasonable doubt is created in the mind of the court as to whether the accused person is entitled to the benefit of exception or not, in such a case, benefit of doubt should be given to the accused.
- v) That even in the cases where accused has not pleaded that his case comes within a particular exception whether general or special, duty is cast upon the judge to see such plea is still available to the accused from the facts and evidence

rendered in the Court. In other words even if in a case where the accused has not taken the defence of any general or special exception, still it is open to the Court to consider such plea if same arises from the material available on record.

vi) Thus, there is no conflict between general burden, which is always on the prosecution and which never shifts, and the special burden that rests on the accused to make out his defence.

98. Now the question is whether in the facts and circumstances just mentioned above, the accused appellant is entitled to the benefit of Exception (1) of Section 300 I.P.C. or not keeping in mind the principles of law laid down on burden of proof as stated above.

99. Before accused gets the benefit of exception 1 of Section 300, he must establish following circumstances:

- i) there was provocation which was both grave and sudden;
- ii) such provocation had deprived the accused of his power of self control; and
- iii) whilst the accused was so deprived of his power of self-control, he had caused the death of the victim.

100. The above points may further be illustrated that in order to bring the case under Exception I, the accused has to establish not only that the provocation was grave, but it was also sudden. The word 'sudden' involves two elements. Firstly, the provocation must be unexpected. If an accused plans in advance to receive a provocation in order to justify the homicide, the provocation cannot be said to be sudden. Secondly, the interval between the provocation and the homicide should be brief.

101. In the present case, the fact that the wife of the accused appellant (D.W.1) was having illicit relations with the deceased and the fact that the incident had taken place in the house of the accused appellant in odd night time are established facts and the fact that the deceased had put off his jacket and had taken shawl of D.W.1 itself reveals that he had come there to satisfy his lust with

D.W.1 Santosh, but with her consent as the fact that he had earlier sex with D.W.1 Santosh is also well established from the statement of D.W.1 Santosh and thus, the deceased could be classified as paramour of D.W.1 Santosh and thus it was a case of seducement of D.W.1 Santosh, wife of the accused appellant by the deceased and the fact that the accused appellant found his wife in the company of deceased, is the circumstance in which it can be said that the accused appellant and another accused Yogesh Kumar could have lost power of self control and that situation was sufficient for depriving them of self-control and if under such circumstances, they had committed murder of the deceased, their act would certainly fall within the ambit of Exception 1 of Section 300 I.P.C.

102. Apart from this, if a husband sees his wife in his house in the company of another man in the night time, this fact itself would lead to make out a case of grave and sudden provocation to the husband.

103. Thus, from the above discussion, it appears that the deceased was found in the house of accused appellant on the fateful day in night sharing bed with DW1 Santosh, wife of accused appellant, as her paramour and this fact itself is sufficient to hold that the accused appellant must have received a grave and sudden provocation to cause injuries to the deceased and this, if in such circumstances, the injuries to the deceased by knives were caused by the accused appellant and his nephew (another accused, who died during trial), it can easily be said that there was provocation, which was not only grave, but sudden also and that provocation deprived them of their self-control and thus, in such a situation, if both accused appellant and his nephew another accused Yogesh Kumar (who died during trial) had committed murder of deceased by knives on the spot, the act of the accused appellant as well as of another accused Yogesh Kumar would be covered by Exception-I of Section 300 IPC and it would amount to culpable homicide not amounting to murder punishable under Section 304 Part-1 IPC and murder of deceased cannot be termed as cold blooded murder attracting Section 302 IPC.

104. Thus, the findings of the learned trial Judge convicting the accused appellant for the offence under Section 302/34 IPC cannot be sustained and the same are

liable to be altered in the manner that instead of 302/34 IPC, the accused appellant is to be convicted for the offence under Section 304 Part-I/34 IPC.

On point of sentence

105. In our considered opinion, Looking to the entire facts and circumstances of the case, if for the offence under Section 304 Part-I/34 IPC, the accused appellant is sentenced to undergo ten years RI and to pay fine of Rs. 1000/-, in default of payment of fine, to further undergo one month RI, it would meet the ends of justice.

For the reasons stated above, the appeal filed by the accused appellant Satish Kumar is partly allowed in the manner:-

(i) That the conviction of the accused appellant for the offence under Section 302/34 IPC recorded by the learned Addl. Sessions Judge No. 2 Sri Ganganagar through impugned judgment dated 13.7.2001 is altered in the manner that instead of 302/34 IPC, he is convicted for the offence under Section 304-Part-1/34 IPC.

(ii) That for the offence under Section 304 Part-I/34 IPC, the accused appellant is sentenced to undergo ten years RI and to pay fine of Rs. 1000/- in default of payment of fine, to further undergo one month RI.

(iii) That the impugned judgment and order dated 13.7.2001 passed by the learned Addl. Sessions Judge No. 2 Sri Ganganagar stand modified accordingly to the extent as indicated above.

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