IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 691 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HEMTAJI MANCHHAJI MARWADI & ANR.
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 691 of 1996
MR HN JHALA, Sr.Adv. with MR YV VAGHELA
for Appellants
MR SUDHANSHU S PATEL, APP for Respondent

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 30/06/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374 of the Code of Criminal Procedure, 1973 is directed against judgment dated July 5, 1996 rendered by the learned Additional City Sessions Judge, Court No.10, Ahmedabad, in Sessions Case No.43 of 1995 by which the appellants are convicted of the offences punishable under Sections 302, 452 read with 114 of Indian Penal Code ("IPC" for short), and sentenced to suffer R.I. for life for having committed offence punishable under Section 302 IPC as well as R.I. for one year and fine of Rs.200=00, in default, R.I. for one month for having committed offence punishable under Section 452 IPC. It may be stated that the learned Judge has directed that the substantive sentences shall run concurrently.

2. Deceased Divaben alias Divaliben, wife of Bhomaji Markaji, was residing with her husband, brother-in-law and two children in the area known as `Somnath Bhodar No Aro', Jamalpur, Ahmedabad. The appellants were also residing in a hut in the same area. It may be stated that the deceased and her husband as well as the appellants are Marwadi by caste. One Pepiben, wife of Masharaji Marwadi, who is also residing in the neighbourhood, had told the appellant No.2 that she was moving around with her husband and was flirting with him. On inquiry being made by the appellant No.2 as to who had given such information to her, Pepiben had replied that the information was given by deceased Divaben. Thereupon, a quarrel had ensued between the appellants and Pepiben wherein Pepiben was assaulted by the appellants. However, no complaint regarding the incident of assault on Pepiben was filed as they were of the same caste.

The incident in question had taken place on November 18, 1994. On that day, the deceased was cooking food in her house at about 7.00 a.m. whereas her husband and brother-in-law had gone to the market and two young children were playing in the neighbourhood. When the deceased was cooking food, the appellant No.2 in the company of the appellant No.1 had come to the house of the deceased and started hurling abuses at her. The grievance made by the appellant No.2 was that the deceased was a cunning lady and had defamed the appellants by informing Pepiben that the appellant No.2 was flirting with the husband of Pepiben. After abusing the deceased, the appellant No.1 had picked up a kerosene can lying in the house of the deceased and poured the same on Divaben whereas the appellant No.2 had picked up a burning firewood from hearth and set clothes of the deceased on fire. Within no time, the deceased was engulfed in fire.

She had raised cries for help as a result of which, the appellants had run away whereas neighbours had collected in the house of the deceased. The women collected had poured water on the deceased to put out the fire. Bhomaji Markaji, who was husband of the deceased, was informed about the incident when he was at the market, and on learning about the incident, had rushed back home. In the meantime, some one had sought help of ambulance and on arrival of ambulance van, Divaben was removed to V.S.Hospital for treatment. In view of severe burn injuries sustained by her, the deceased was admitted as an indoor patient in the Burns Ward of the hospital at about 10.27 a.m. At about 10.55 a.m., a message was sent from V.S.Hospital to Gaekwad Haveli Police Station mentioning that Divaben Bhomaji Marwadi had received burn injuries at the hands of her neighbour Dipuben Hemtaji (the appellant No.2). On receipt of the message, PSI Mr.M.K.Paramar had gone to the hospital and visited Burns Ward where the deceased was being treated. He had asked the doctor on duty to state whether the deceased was conscious. The doctor had informed PSI Mr.Parmar that the deceased was conscious and able to speak. In view of the state of affairs of the deceased, as informed by the doctor, PSI Mr.Parmar had addressed a Yadi requesting Executive Magistrate to do the needful for recording dying declaration of the deceased. At the bottom of Yadi, an endorsement was obtained from the doctor to the effect that the deceased was conscious. On receipt of Yadi, Mr.Nanjibhai Karamshibhai Patel, who was then discharging duties as Deputy Mamlatdar in the office of City Mamlatdar, had gone to V.S.Hospital at about 12.15 p.m. for the purpose of recording dying declaration of the deceased. Mr.Patel had gone to the Burns Ward of the hospital, and after ascertaining that the deceased was conscious and in a fit state of mind to make a statement, had recorded dying declaration of the deceased as narrated by her. Meanwhile, Jivanbhai Vastabhai Desai, who was then Police Inspector of Gaekwad Haveli Police Station, had also gone to the V.S.Hospital in view of the message which was received earlier indicating that the deceased was burnt by the appellant No.2. PI Mr.Desai had also gone to Burns Ward of the hospital and after ascertaining that the deceased was conscious and in a fit state of mind to make a statement, had recorded her complaint as narrated by her. On the basis of the complaint of the deceased, offences were registered and further investigation into the said complaint was made by PI Mr.Desai. PI Mr.Desai had drawn panchnama of place of occurrence and taken into custody certain incriminating articles. The Investigating Officer had requisitioned services of officers of Forensic Science Laboratory and

arrested the appellants. Further, the Investigating Officer had recorded the statements of those persons who were found conversant with the facts of the case. The deceased succumbed to her injuries on November 20, 1994 and, therefore, inquest on the dead body was held by PI Mr.Desai. On the same day, the offence under Section 302 IPC was registered against the appellants and further statements of witnesses were recorded. The Investigating Officer had also made necessary arrangements for sending dead body of the deceased for autopsy. The incriminating articles, which were seized during the course of investigation, were sent to Forensic Science Laboratory for analysis. After obtaining necessary reports and on completion of investigation, the appellants were chargesheeted of the offences punishable under Sections 302, 452, 307, 294 read with 114 IPC in the Court of learned Metropolitan Magistrate, Court No.12, Ahmedabad. As the offences punishable under Sections 302 and 307 are exclusively triable by a Court of Sessions, the case was committed to the City Sessions Court, Ahmedabad, for trial where it was numbered as Sessions Case No.43 of 1995.

3. The learned Additional City Sessions Judge, Ahmedabad, to whom the case was made over for trial had framed charge against the appellants at Exh.3 of the offences punishable under Sections 452, 307, 302, 114 IPC. The charge was read over and explained to the appellants, who had pleaded not guilty to the same, and claimed to be tried. The prosecution had, therefore, examined, (1) Dr.Dilip Manubhai Desai, P.W.-1 at Exh.7; (2) Pradhan Visabhai Dantani, P.W.-2 at Exh.10; (3) Bhomaji Markaji, P.W.-3 at Exh.12; (4) Samnaram Markaji, P.W.-4 at Exh.13; (5) Jatnaben Chhaganlal, P.W.-5 at Exh.14; (6) Pepiben Masraji, P.W.-6 at Exh.15; (7) Durgaprasad Sahdev Kahar, P.W.-7 at Exh.16; (8) Vikramsinh Banaji Solanki, P.W.-8 at Exh.18; (9) Vishnuprasad Manilal Pandya, P.W.-9 at Exh.24; (10) Mithabhai Kacharabhai Parmar, P.W.-10 at Exh.26; (11) Nanjibhai Karamshibhai Patel, P.W.-11 at Exh.29; (12) Jivanbhai Vastabhai Desai, P.W.-12 at Exh.33; and, (13) Dr.Tushar Bipinchandra Soni, P.W.-13 at Exh.42, to prove its case against the appellants. The prosecution had also produced documentary evidence such as; postmortem notes of the deceased at Exh.8, inquest report at Exh.9, map of scene of incident at Exh.11, panchnama of place of occurrence at Exh.17, report of analysis, entry from diary maintained at the Police Station at Exh.25, yadi sent to the Executive Magistrate for recording dying declaration at Exh.28, dying declaration recorded by the Executive Magistrate at Exh.31, complaint of the deceased recorded by PI Mr.Desai at Exh.34, medical papers from the hospital indicating as to how the deceased was treated and what was

her condition during the relevant time, etc. in support of its case against the appellants.

4. After recording of evidence of the prosecution witnesses was over, the learned Judge had explained to the appellants the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code of Criminal Procedure, 1973. In their further statements, the case of the appellants was that they were innocent and were falsely implicated in the case. However, none of the appellants had examined himself/herself on oath nor any witness was examined by any of them to substantiate the defence mentioned in their further statements.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution that deceased Divaben @ Divaliben had met with a homicidal death. According to the learned Judge, the deceased was conscious and in a fit state of mind to make a statement, as a result of which, her dying declaration, which was recorded by the Executive Magistrate, and her complaint, which was recorded by PI Mr.Desai, were trustworthy. What was noticed by the learned Judge was that the deceased had no motive or cause to implicate the appellants falsely in the case and though there were more than one dying declarations on record, they were consistent with each other, and it was safe to act upon them. In view of abovereferredto conclusions, the learned Judge further held that it was proved by the prosecution that the appellants had committed criminal trespass in the hut of the deceased with an intent to make an attack on her life and the appellant No.1 had poured kerosene over her whereas the appellant No.2 had set clothes of the deceased on fire by burning firewood as a result of which, the deceased had died and, therefore, the appellants were liable to be convicted of the offences punishable under Sections 302, 452 read with 114 IPC. On the basis of these conclusions, the learned Judge has convicted the appellants under Sections 302, 452 read with 114 IPC and imposed the sentences on the appellants which are referred to earlier by judgment dated July 5, 1996, giving rise to instant appeal.

6. Mr.H.N.Jhala, learned Senior Advocate assisted by Mr.Y.V.Vaghela, learned counsel, of the appellants, contended that neither the dying declaration was recorded by the Executive Magistrate Mr.Patel in presence of doctor nor the complaint was recorded by PI Mr.Desai in presence of doctor, nor any certificate was obtained by either Mr.Patel or Mr.Desai to the effect that the deceased was

conscious and in a fit state of mind to make a declaration though the doctor was very much available and, therefore, it was hazardous to base the conviction of the appellants on the basis of those dying declarations. The learned counsel pointed out that endorsement made on Exhs.28 & 30, which are Yadis sent by PSI and PI respectively to the Executive Magistrate requesting him to record dying declaration bear endorsement to the effect that the patient was conscious, but this does not satisfy the requirement of law, namely, that the dying declaration must bear the endorsement of medical officer to the effect that the declarant was conscious and in a fit state of mind to make a statement and, therefore, those dying declarations should not have been relied upon by the learned Judge. What was asserted was that the medical papers on record establishes that on November 18, 1994, the deceased was drowsy whereas her general condition was poor and pulse rate was above normal and, therefore, it was highly improbable that the deceased had made dying declaration as claimed by the Executive Magistrate or lodged detailed complaint as asserted by PI Mr.Desai and, therefore, the two dying declarations should not have been relied upon by the learned Judge for recording conviction of the appellants. It was argued that the deceased had sustained 100% burns of second degree and, therefore, the two dying declarations should not have been acted upon more particularly when there was absence of any endorsement by the medical officer to the effect that the deceased was conscious and in a fit state of mind to make a statement. According to the learned counsel of the appellants, morphine injection was administered to the deceased to minimise the pain which was bound to cause drowsiness and as Dr.Tushar B.Soni was not able to state that the injection was administered before or after recording of dying declaration, it was hazardous to rely upon so-called dying declaration recorded by Executive Magistrate, Mr.Patel. While attacking veracity of the two dying declarations, it was emphasised that as per the evidence of PI Mr.Desai, first information report was recorded between 12.15 p.m. and 12.40 p.m. whereas according to the Executive Magistrate, dying declaration was recorded between 12.30 p.m. and 1.05 p.m., and as inconsistency about the time of recording dying declaration and first information report is not explained by the prosecution, both the documents should have been ignored from the consideration. The learned counsel of the appellants emphasised that it is not the case of any one that at the same time, the Executive Magistrate was recording dying declaration of the deceased whereas PI Mr.Desai was recording the complaint of the deceased, and as inconsistency regarding time of recording of the two

documents raises serious doubts about their genuineness, the conviction of the appellants should be set aside. It was further argued by the learned counsel of the appellants that the incident in question had taken place at about 7.00 a.m. or 7.15 a.m. in the morning whereas so-called dying declaration was recorded by the Executive Magistrate as well as first information report was noted down by PI Mr.Desai in the hospital when the deceased was surrounded by her close relatives and as tutoring of the deceased by her close relatives is not ruled out, both the documents should have been ignored while considering the case of the prosecution against the appellants. What was stressed was that the deceased had not mentioned the name of the appellants as assailants at the first earliest opportunity available to her when history of assault was sought to be ascertained by the doctor at the time of her admission into hospital and, therefore, dying declaration and the complaint should not be acted upon by this Court. According to the learned counsel of the appellants, the evidence of witness, Samnaram Markaji, indicating that the deceased had made oral dying declaration before him was not trustworthy and reliable inasmuch as his testimony suffers from vital contradictions as he had not referred to oral dying declaration in his previous police statement and, therefore, the same should not have been relied upon by the learned Judge. According to the learned counsel of the appellants, the evidence of husband of the deceased would indicate that the deceased had never regained consciousness after she was admitted in the hospital and, therefore, assertion made by witness, Samnaram, that the deceased had made oral dying declaration before him implicating the appellants, should be disbelieved. It was asserted by the learned counsel of the appellants that the learned Judge of the trial Court has not appreciated the evidence on record in its true perspective and, therefore, the appeal should be allowed. In support of these submissions, the learned counsel of the appellants has placed reliance on the decisions rendered in (1) Mohar Singh & Ors. v. State of Punjab, A.I.R. 1981 SC 1578, (2) Darshan Singh & Ors. v. State of Punjab, A.I.R. 1983 SC 554, (3) Paparambaka Rosamma & Ors. v. State of Andra Pradesh, A.I.R. 1999 SC 3455, (4) Panchdeo Singh v. State of Bihar, (2002) 1 SCC 577, and (5) Chacko v. State of Kerala, A.I.R. 2003 SC 265.

7. Mr.Sudhanshu S.Patel, learned Additional Public Prosecutor, contended that recording of dying declaration in presence of the doctor and getting it certified that declarant is conscious and in a fit state of mind to make statement is a rule of prudence, but not requirement of law and as the Executive Magistrate and PI Mr. Desai had

satisfied themselves that the deceased was conscious and in a fit state of mind to make a statement, absence of certificate from the doctor to the effect that the deceased was conscious and in a fit state of mind to make statement is of no consequence. It was argued that the endorsement made by the doctor on Police Yadi indicated that the deceased who was in injured condition was fully conscious and, therefore, the assertion of the two officers, i.e. the Executive Magistrate and the Police Inspector, that the deceased was conscious and was in a fit state of mind to make statement does not get vitiated merely because the statements were not recorded by those two officers in presence of the doctor or that none of the statements was certified by the doctor to the effect that the deceased was conscious and in a fit state of mind to make statement. The learned counsel of the State Government pointed out that over and above the reliable and cogent testimony of the Executive Magistrate and PI Mr.Desai indicating that the deceased was conscious and in a fit state of mind to make statement, there is evidence of doctor as well as that of other witnesses which establishes beyond reasonable doubt that the deceased was conscious as well as in a fit state of mind to make statement and, therefore, it would not be correct to contend that the learned Judge has committed error in placing reliance on those dying declarations while recording the conviction of the appellants. What was maintained by the learned counsel of the State Government was that the questions put by the Executive Magistrate as well as the answers given by the deceased and the information recorded by PI Mr.Desai unerringly establishes that the deceased was not only conscious, but was in a fit state of mind to make statement and, therefore, those documents should be acted upon by this Court while confirming the conviction of the appellants. The learned Additional Public Prosecutor argued that there is nothing suspicious about recording of dying declaration or complaint of the deceased and, therefore, those vital documents cannot be brushed aside on specious plea that there is absence of certificate from the medical officer to the effect that the deceased was conscious and in a fit state of mind to make statement. The learned counsel further pointed out that it is not the case of the defence that any close relatives of the deceased was on inimical terms with the appellants and had, therefore, tutored the deceased to implicate the appellants falsely though they were innocent and, therefore, the plea that there was possibility of the deceased being tutored should not be accepted by the Court. The learned counsel argued that the deceased who had sustained severe burn injuries would be the last person to spare her assailants and involve

innocent persons falsely and, therefore, implication of the appellants by her should not be doubted on so-called remote possibility that the relatives had tutored the deceased. According to the learned Additional Public Prosecutor, in fact, there is no inconsistency about the time of recording of the dying declaration and the complaint inasmuch as time of recording the dying declaration and the complaint are stated by the witnesses approximately before the Court and that too after a long period and, therefore, so-called inconsistency about the time of recording of the dying declaration and the complaint of the deceased would not got to show that those two documents are not genuine. The learned Additional Public Prosecutor took pains to point out to the Court that the evidence of Dr.Soni establishes beyond reasonable doubt that the deceased was conscious for twenty-four hours from the time of her admission into hospital, which rules out the possibility that she had lost consciousness or was not in a position to understand the questions put to her by the Executive Magistrate or the Police Officer and, therefore, neither recording of dying declaration nor recording of first information becomes doubtful merely because her general condition was poor or that she was drowsy or that her blood pressure was above normal. According to the learned Additional Public Prosecutor, the evidence of Dr.Soni read together with the contents of history of assault recorded by him as well as evidence of witness, Mr.Parmar, would show that the deceased was conscious as well as in a fit state of mind to make statement and, therefore, the claim advanced by the Executive Magistrate that the deceased had made dying declaration as well as claim made by PI Mr.Desai that he had recorded the complaint of the deceased as narrated by her, deserve acceptance. It was also argued that the evidence of the Executive Magistrate, who had recorded dying declaration, as well as that of Police Officer, who had recorded first information report, would indicate that not only the deceased was writhing in pain, but also demanding water which, in turn, establishes that the deceased was fully conscious and, therefore, it would not be correct to say that she was not able to make any statement as claimed by the Executive Magistrate or the Police Officer because her general condition was poor or that she was drowsy or that her blood pressure was above normal or that she had sustained 100% burns of second degree. The learned counsel emphasised that the evidence tendered by witness, Samnaram Markaji, P.W.-4, Exh.13, regarding oral dying declaration inspires confidence as the same is corroborated by other evidence on record and as the dying declarations of the deceased produced on record of the case are consistent as well as cogent with

each other, well recorded conviction of the appellant should be upheld by this Court. It was pointed out that the deceased herself was not on inimical terms with the appellants nor had any motive to implicate them falsely in such serious case and, therefore, well reasoned judgment of the trial Court convicting the appellants of major offence should be confirmed by this Court. In support of his submission, the learned Additional Public Prosecutor has relied upon decisions in (1) Laxman v. State of Maharashtra, (2002) 6 SCC 710, (2) Sohanlal alias Sohan Singh & Ors. v. State of Punjab, 2004 SCC (Cri.) 226, (3) State v. Rabari Pancha Punja & Ors. 22 G.L.R. 426, and (4) Habib Usman v. The State of Gujarat, A.I.R. 1979 SC 1181.

8. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. The fact that the deceased had died a homicidal death is not in dispute. Though before the trial Court, an attempt was made by the appellants to show that the deceased had died accidentally, the same is given up at the appellate stage. It is not the case of the appellants that the deceased had died a natural death or suicidal death or accidental death. Dr.Dilip Desai, P.W.-1, Exh.7, has specifically stated in paragraph 4 of his deposition that the injuries sustained by the deceased were not accidental. Though it was stated by him that it was not possible for him to say whether injuries sustained by the deceased were suicidal or homicidal, it was mentioned by the said witness in paragraph 5 of his deposition that the injuries noticed on the deceased were possible if kerosene was poured over the head of the deceased and, thereafter, she was set on fire. The injuries sustained by the deceased were noticed by Dr. Desai while performing autopsy on her dead body. External as well as internal injuries noticed by the doctor have been enumerated by him in his substantive evidence before the Court. Those injuries are also mentioned in detail in postmortem notes produced on record at Exh.8. As per the medical evidence, the cause of death of the deceased was shock as a result of burns. The evidence of Dr. Soni, P.W.-13, Exh.42, shows that he had recorded the history of assault as narrated by the deceased and, according to the deceased, she had received burns with kerosene by opposite party. The doctor stands fully corroborated by contemporary documents maintained by him. Under the circumstances, this Court finds that the finding recorded by the learned

Judge of the trial Court that the deceased had died a homicidal death is eminently just and is hereby upheld.

10. Before appreciating the evidence of the witnesses and the contents of dying declarations, it would be relevant to notice the law relating to dying declaration. Section 32(1) of the Indian Evidence Act, 1872 is an exception to the general rule that hearsay evidence is not admissible evidence and unless evidence is tested by cross-examination, it is not creditworthy. Under Section 32 when a statement is made by a person as to the cause of death or as to any of the circumstances, which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased, called the dying declaration, falls in that category provided it has been made by the deceased while in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. A dying declaration made by a person on the verge of his death has a special sanctity, as at that solemn moment, a persons is most unlikely to make any untrue statement. The sanctity attached to dying declaration is that a person on the verge of death would not commit sin of implicating somebody falsely. The shadow of impending death is by itself the guarantee of truth of the statement made by the deceased regarding cause of circumstances leading to his death. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the person is at the point of death and when every hope of this world is gone. At that point of time every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth. Such a solemn situation 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. A dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Courts, it becomes very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration by itself can be sufficient for recording conviction even without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance then the Courts have to look for corroboration. The rule of corroboration requires

that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise unreliable. Any evidence adduced for this purpose can only detract from its value, but does not affect its admissibility. It is also well settled that it is not necessary that recording of dying declaration should be in the form of question and answer. One of the important tests of reliability of dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been devised in judicial pronouncements in order to answer the question whether the dying declaration is true:-

(1) Was the victim in a position to identify the assailant/s?

(2) Whether the version narrated by the victim is intrinsically sound and accords with probabilities?

(3) Whether any material part is proved to be false by other reliable evidence?

(See : (1) Khushall Rao v. State of Bombay (1958) SCR 552; (2) Tarachand Damu Sutar v. State of Maharashtra (1962) 2 SCR 775; (3) Kusa and Ors. v. State of Orissa, (1980) 2 SCC 207; (4) Meesala Kundulal Bala Subrahmaniyam and another v. State of A.P., (1993) 2 SCC 684; (5) Meesala Ramkrishna v. State of A.P., (1994) 4 SCC 181; (6) Govardhan Raoji Ghyare v. State of Maharashtra, 1993 Suppl. 4 SCC 316; (7) Gangotri Singh v. State of U.P. 1993 Suppl. 1 SCC 387; (8) Smt.Paniben v. State of Gujarat, A.I.R. 1992 SC 1817; (9) State of Rajsthan v. Kishore, JT 1996 (2) SC 595; and (10) State of U.P. v. Ameer Ali, JT 1996 (4) SC 123.)

11. In the light of above stated principles, this Court will have to consider dying declarations relied upon by the prosecution and ascertain the truth with reference to those dying declarations made by the deceased Divaben. The evidence of witness, Bhomaji Markaji, P.W.-3 recorded at Exh.12, shows that the deceased was his wife. According to him, at the time when the incident had taken place except the deceased no one else was residing with him. It was also stated by him that he had earlier married to one Jyotsanaben and as she was retarded, he had divorced her and married the deceased. The witness has stated that the deceased had given birth to two children

during the subsistence of the marriage. It was further stated by him that on the day of incident, he had gone to market at about 7.00 a.m. to purchase vegetables, soap, etc. and had returned home within half-an-hour. According to him, when he had returned home, he had found that his wife was lying in burnt condition. It was also stated by him that at about 11.00 p.m. of the previous day, the appellant No.2 had quarreled with his wife. What was mentioned by him was that the appellants had beaten his wife and that his wife and Pepiben had gone to the Police Station to lodge the complaint. It was frankly stated by him that he was not knowing as to how his wife had received burn injuries, but what was asserted by him in his evidence was that in the hospital, he was informed by his wife that the appellants had burnt her. The witness had given go-by to his case as mentioned in the previous police statement and, therefore, was permitted to be cross-examined by the prosecution. The witness was confronted with his previous police statement, but it was maintained by him that the facts narrated in the statement were not stated by him. During the cross-examination by the defence counsel, it was stated by the witness that he had lost consciousness after noticing burn injuries sustained by his wife and that he had regained consciousness only in the evening. It was also mentioned by the witness that on regaining consciousness, he had found that several relatives had collected at the hospital. The witness had agreed with the suggestion made by the learned counsel of the defence that he had learnt about the incident only when he was informed by his relatives who were present at the hospital. It was also admitted by him that after he had regained consciousness, he had noticed that his wife was not able to speak anything till she had died. It was asserted by him that he had stated in his police statement that the deceased had informed him at the hospital that she was burnt by the appellants.

12. Before discussing the effect and evidentiary value of testimony tendered by the husband of the deceased, it would be relevant to refer to the sworn testimony of witness, Samnaram Markaji, P.W.-4 recorded at Exh.13. His evidence shows that he was brother-in-law of the deceased, i.e. younger brother of witness Bhomaji Markaji. According to him, at the relevant time, he was residing with his brother. He has stated in his deposition that on the day of incident, he had gone to market and learnt from a boy residing in his mohalla that the deceased was burnt. According to him, on returning home, he had found that the deceased was lying in conscious condition and that he with the help of his brother, Bhomaji, had removed the deceased

to V.S.Hospital. Though it was stated by him that he had no talk with the deceased when he had returned home from market, it was specifically asserted by him that the deceased had regained consciousness at Vadilal Hospital and informed him that she was burnt by the appellants. According to him, he was not knowing as to why her sister-in-law was burnt by the appellants. In cross-examination by the learned counsel of the defence it was stated by the witness, inter alia, that when he had returned home from the market, about 200-300 persons had collected outside his house. It was also mentioned by this witness that time of about half-an-hour was taken before his sister-in-law was removed to V.S.Hospital. The suggestion made by the defence that several relatives had collected at the hospital was accepted by the witness. It was further asserted by the witness in his cross-examination that his sister-in-law had regained consciousness at the hospital and that he was in the hospital up to 5.00 to 6.00 p.m. It was also admitted by the witness that his sister-in-law had received burn injuries all over the body and was writhing in pain and was groaning loudly. According to this witness, the deceased had taken time of about 2-3 minutes while narrating as to how she had sustained burn injuries. The suggestion made by the defence that after information was conveyed to the witness, the deceased had again lost consciousness, was specifically denied by him. It was admitted by him that till his sister-in-law had expired, he was in the hospital. What was maintained by the witness in his cross-examination was that at the time when the deceased had informed him as to how the incident had taken place, his brother, i.e. Bhomaji Markaji, was also present, but police personnel and his relatives were not present. The witness was confronted with his police statement and certain contradictions were sought to be proved. It was put to the witness that he had not stated in his police statement that on the second day of admission of the deceased to V.S.Hospital, the deceased had again regained consciousness and told him that she was burnt by the appellants. However, the said suggestion was emphatically denied by the witness, and it was asserted by him that it was so stated by him in his police statement. It was maintained by the witness that he had a talk with the deceased about the incident and that he was not deposing falsely because he was brother-in-law of the deceased.

13. On reappreciation of evidence of witness, Samnaram Markaji, there is no manner of doubt that the deceased had made oral dying declaration before him that the appellants had burnt her. His assertion that witness, Bhomaji

Markaji, who is husband of the deceased, was also present when the deceased had made oral dying declaration before him, inspires confidence of the Court. The record of the case does not show that the husband of the deceased had lost consciousness on the day of incident. The husband of the deceased had made certain statements to oblige the defence for the reasons best known to him. However, witness, Samnaram Markaji, proves oral dying declaration made by the deceased. His assertion that the deceased had made oral dying declaration to him at the hospital also gets some corroboration from the testimony of witness, Bhomaji Markaji, who in his examination-in-chief, has, in terms, stated that the deceased had informed him that the appellants had burnt her. It is relevant to notice that though certain contradictions appearing in the evidence of witness, Samnaram, were sought to be proved with reference to his earlier police statement, no questions were put to the Investigating Officer regarding statement of witness, Samnaram. Thus, this Court finds that there are no major contradictions or omissions in the testimony of witness, Samnaram. The claim made by this witness that the deceased had made oral dying declaration before him inspires confidence of the Court because he was close relative of the deceased and the deceased would naturally confide in him. Moreover, the claim made by the witness that the deceased was conscious on the day on which she was admitted in the hospital gets full corroboration from the testimony of Dr.Tushar Soni, P.W.-13, Exh.42, who has asserted that the deceased was conscious for twenty-four hours from the time of her admission in the hospital. As there are no major contradictions or omissions in the evidence of witness, Samnaram, his claim that the deceased had made oral dying declaration before him implicating the appellants will have to be accepted. Thus, this Court finds that oral dying declaration made by the deceased before witness, Samnaram, implicates the appellants with reference to murder of the deceased.

14. This brings the Court to consider the question whether two other dying declarations which are produced on record of the case, i.e. (a) one which was recorded by the Executive Magistrate, Mr.Patel, and (b) second which was recorded by PI Mr.Desai in the form of the complaint of the deceased are reliable. The evidence of the Executive Magistrate, Mr.N.K.Patel, is recorded at Exh.29. This witness has stated that on November 18, 1994, he was serving as the Deputy Mamlatdar (Supply) in the Office of City Mamlatdar and was also conferred powers of the Executive Magistrate. According to him, it was his duty to record dying declaration. The witness has further mentioned that when he was on duty on November 18, 1994,

police constable, Vikramsinh, of Gaekwad Haveli Police Station had approached him and produced Yadi wherein a request was made to record dying declaration of the deceased. The witness has stated that Yadi was received by him at about 12.15 hours. It was also stated by this witness that there was an endorsement made by the doctor on Yadi to the effect that the patient was conscious. According to him, on receipt of Yadi, he had signed the same in token of having received it, and gone to the hospital in a jeep for the purpose of recording dying declaration of the deceased. The witness has informed the Court that the deceased was lying on a cot and that he had asked her name as well as name of her husband and that the names mentioned by her were noted down by him. The witness has specifically asserted that he had asked the deceased questions and that the answers given by her were written down by him. According to this witness, after recording of dying declaration was over, he had obtained right hand thumb impression of the deceased on the declaration and he himself had also signed the same. It was asserted by him that at the time when the dying declaration of the deceased was recorded, neither her relatives nor police personnel were present. What is mentioned by the witness is that before recording the dying declaration of the deceased, he had ascertained and satisfied himself that the deceased was conscious regarding which he had made an endorsement on the dying declaration itself. According to him, he had started recording of dying declaration of the deceased at about 12.30 p.m. and completed the same at about 13-05 p.m. The original dying declaration was produced by the witness at Exh.31 on the record of the case. What is mentioned in paragraph 3 of his examination-in-chief is that he was satisfied that the deceased was conscious because the deceased was giving answers to the questions put by him to her. In cross-examination, it was stated by the witness that V.S.Hospital is situated at a distance of about 4-5 kms. from Mamlatdar's Office, and that he was not knowing as to which doctor had made endorsement below the Yadi to the effect that the patient was conscious. It was also admitted by the witness that the police personnel had come with him up to entrance of Burns Ward. It was also stated by the witness that he had not obtained any opinion from the doctor to the effect that the patient was conscious and in a fit state of mind to make statement. The suggestion put to the witness by the defence that there were about 10-15 persons near the patient when he had gone to record dying declaration of the deceased, was denied by the witness and it was asserted by him that there were about two to three persons present near the patient. It was also admitted by the witness that as the deceased had

sustained burn injuries, she was writhing in pain and was groaning loudly. It was also admitted by the witness that during the course of recording of dying declaration of the deceased, he was required to re-ask one or two questions to the deceased, but it was denied by the witness that the deceased was not in a position to give clear answers to the questions put to her. It was also denied by the witness that he had asked the questions to the deceased which were prepared earlier. According to the witness, after answers were given by the deceased to question Nos.6 & 7, he had asked question No.8 and that he had not written the reply at a stretch, but noted down the reply as and when different replies were given by the deceased. According to him, he had taken about 2-3 minutes in recording the reply to question No.8. What was maintained by the witness was that having regard to nature of the answers given by the deceased to question No.8, it was not thought proper by him to put further questions to the deceased and that he had also not thought it fit to divide answer given to question No.8 in parts. According to this witness, one of the hands of the deceased was burnt, but her thumb was not burnt. It was also admitted by the witness that he had not tried to ascertain as to what was the pulse rate of the deceased or what was her blood pressure. The suggestion made by the defence that he had concocted the whole dying declaration in connivance with the police was emphatically denied by the witness. It was also denied by the witness that he had not obtained thumb impression of the deceased on her dying declaration. This is all what appears from the evidence of the Executive Magistrate. The dying declaration of the deceased recorded by Executive Magistrate, Mr.Patel, is produced on record at Exh.31. The dying declaration is in Gujarati language and free translation of the same reads as under:

"Recording of dying declaration started at 12-30
Date : 18-11-04.

(1) What is your name? Divaben

(2) What is the name of your husband? Bhomaji Marwadi

(3) What is your age? About 30 Years.

(4) Where do you stay? On the bank of Somnath Bhudar, Jamalpur.

(5) What are you doing? Household work

(6) Who is residing with you in the house? Myself, my husband, two daughters and my brother-in-law

(7) When are you married? My marriage had taken place prior to ten years. The eldest daughter is aged five years.

(8) When & how the incident happened? :

Today in the morning at 7.00 a.m., I was kneading the flour and was all alone in the house. My husband and my brother-in-law had gone to market whereas my two daughters were playing in the neighbourhood. At that time, Dipuben and her husband, whose name is Hemtuji, who are residing near my house, had come. Hemtuji had a can with him containing kerosene. Dipuben had caught hold of me whereas Hemtuji had poured kerosene over me and Dipuben had taken burning wood from hearth and thrown the same on me, as a result of which I have received burn injuries on my body. I had raised shouts and, therefore, neighbours had rushed and extinguished fire by pouring water over me. I do not know as to who had poured water over me. The cause of incident is that on previous day Dipuben had quarreled with Pepiben wherein Dipuben had involved me and informed me that she was told by Pepiben that I was instigating her. So saying, they had quarreled with me and Dipuben and Hemtuji had burnt me. On the previous day at about 8.00 a.m., Dipuben had given a bite on my right chick and quarreled with me.

(9) Do you want to say anything more? : I do not wish to say any thing more about the incident. I am an illiterate. I have received burn injuries on hands, legs, mouth, chest.

The facts stated above are written down as stated by me. As I am illiterate, I have put my thumb impression.

Place: V.S.Burns Ward Room No. Right hand thumb impression of Divaben Bhomaji Marwadi.

Sd/- (Illegible) Executive Magistrate, Metropolitan Area, Ahmedabad.

Completed at 13.05
18-11-1994.

CERTIFICATE

It is certified that at the time of recording dying declaration neither any police officer nor relatives of the deceased are present. The fact that the deceased is conscious is ascertained by me.

Sd/- (Illegible) Executive Magistrate, Metropolitan Area, Ahmedabad."

A fair reading of the evidence of witness, Nanjibhai Patel, makes it evident that he had recorded dying declaration of the deceased in discharge of his official duty. The assertion made by the witness that the deceased was conscious gets corroboration from the testimony of Dr.Tushar Soni who in no uncertain terms has maintained before the Court that the deceased was conscious for 24 hours from the time of her admission into the hospital. The medical record shows that the deceased was admitted in the hospital at about 10.30 a.m. on November 18, 1994 and, therefore, in view of evidence of Dr.Soni, the deceased was conscious up to 10.30 of November 19, 1994. The Executive Magistrate has given deposition before the Court in a natural manner. There are no exaggerations in his evidence. No material

contradictions and/or omissions can be brought on record with reference to his earlier police statement. It could not be suggested to the Executive Magistrate that he was either interested in the deceased or her relatives or was on inimical terms with any of the appellants and was, therefore, falsely deposing before the Court. The only suggestion, which could be made by the defence to the Executive Magistrate, was that he had concocted the whole dying declaration of the deceased at the instance of the police. This suggestion is as vague as anything could be. The defence could not suggest the name of the Police Officer/s at whose instance the Executive Magistrate had concocted the dying declaration against the appellants nor could point out to the Court as to why the Executive Magistrate would play in the hands of police officer and oblige the deceased. It is the case of the defence itself that the deceased was in great pains and was groaning loudly and also demanding water. The fact that the deceased was writhing in pain and was groaning loudly would indicate that the deceased was conscious. The satisfaction derived by the Executive Magistrate that the deceased was conscious, could not be said to be erroneous or factually wrong inasmuch as answers given to the questions by the deceased would indicate that she was able to understand the nature of questions put to her and had given answers which were consistent with the questions put to her.

15. The plea that dying declaration recorded by the Executive Magistrate should not be acted upon by the Court in absence of any endorsement from the doctor to the effect that the deceased was conscious and in a fit state of mind to make a statement, cannot be accepted.

In Laxman (supra), a five Judge Constitution Bench of the Supreme Court has authoritatively ruled that though it is duty of the Court to decide the question whether the deceased was in a fit state of mind to make a declaration, the evidence of the Magistrate who had recorded the dying declaration to the effect that the deceased was conscious and in a fit state of mind to make statement, cannot be brushed aside merely because there is absence of doctor's certification as to fitness of declarant's state of mind. In the case before the Constitution Bench of the Supreme Court, there was absence of doctor's certification as to mental fitness of the declarant. The question which was considered by the Supreme Court was whether doctor's certification as to mental fitness of the declarant was sine qua non for the credibility of the dying declaration. After considering the provisions of law on the point and previous decisions, the Supreme Court has ruled that what

is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind and where it is proved by testimony of the Magistrate that the declarant was fit to make statement, even without examination by the doctor, the declaration can be acted upon provided the Court ultimately holds the same to be voluntary and truthful. What is emphasised by the Supreme Court in the said decision is that the certification by the doctor is essentially a rule of caution and, therefore, voluntary and truthfully nature of the declaration can be established otherwise also.

Further, in Sohanlal @ Sohan Singh & Ors. (supra), it was argued by the learned counsel of the accused that dying declaration was not legally sustainable because certificate of fitness was not endorsed on the dying declaration itself, but on a separate paper. It was also contended that the certificate of fitness alleged to have been given by the doctor was not proved as the doctor who had given certificate, was not examined at all and, therefore, the dying declaration was liable to be disbelieved. Rejecting those contentions, the Supreme Court has held that the evidence tendered by P.W.-6, who had recorded the dying declaration, was trustworthy. In that case, no circumstance was brought on record to suspect bona fide of the witness who had recorded the dying declaration nor anything could be elicited to show that he was interested in fabricating or that he had any motive to make out, a false case against the accused. In view of the evidence of the person, who had recorded the dying declaration, the Supreme Court had negatived the contentions which were based on the absence of certificate indicating fitness of the declarant to make statement. Moreover, in the said case, it was found that the circumstances under which the deceased had died were narrated differently on five different occasions. While considering the effect of the same, the Supreme Court has held that the dying declaration recorded by Naib Tahsildar, which was consistent with the statement of the deceased, could be relied upon for convicting the accused persons.

Applying the principles laid down by the Supreme Court in the abovequoted decisions to the facts of the present case, this Court finds that absence of certificate from the doctor to the effect that the deceased was conscious and was in a fit state of mind to make statement is of no consequence because reliable, cogent and consistent testimony of the Executive Magistrate Mr.Patel establishes that the deceased was conscious and had given

answers after fully understanding the questions put to her. Therefore, dying declaration recorded by the Executive Magistrate is not liable to be discarded on the ground that there is absence of certificate from the doctor indicating that the deceased was conscious and in a fit state of mind to make a statement.

16. The decision of the Supreme Court in Chacko (supra), which is relied on by the learned counsel of the appellants in support of his contention that absence of certificate of doctor though the doctor was very much available would make recording of declaration doubtful is of little assistance to the appellants. In the said case, the deceased was 70 years old. Not only the deceased had suffered 80% burn injuries, but declaration was made by the deceased after about 8-9 hours of the incident. What was found by the Supreme Court was that a person aged 70 years after receiving 80% burn injuries could not have made detailed declaration mentioning minute details and, therefore, that fact itself was sufficient to create doubt about its genuineness. The facts of instant case are quite different from the facts which were presented before the Supreme Court in the case of Chacko (supra). Under the circumstances, the principle laid down therein cannot be made applicable to the facts of the case nor any benefit can be given to the appellants on the basis of the said decision. The learned counsel of the appellants has also cited other decisions in support of the arguments which were advanced by him. However, on perusal, this Court finds that they turn on their owner facts and principles laid down therein would not applicable to the facts of the case. Therefore, detailed reference to those decisions is not made.

17. The contention that the doctor was available in the next room and, therefore, certificate regarding consciousness of the deceased should have been obtained by the Executive Magistrate before recording dying declaration and that failure on the part of the Executive Magistrate to obtain certificate from the doctor, who was easily available, would make dying declaration doubtful, has no merits. The Executive Magistrate has given cogent and convincing reasons as to why he had not obtained any certificate from the doctor indicating that the deceased was conscious and in a fit state of mind to make statement. According to the Executive Magistrate, Yadi which was received by him was bearing an endorsement of the doctor that the patient was conscious. Yadi, according to him, was received at about 12-15 p.m whereas he had started recording dying declaration at about 12-30 p.m. Under the circumstances, his assertion that he had

not felt it necessary to obtain necessary certificate regarding consciousness of the deceased deserves acceptance by the Court. Further, Dr.Soni, who had treated the deceased, has specifically and in no uncertain terms, asserted before the Court that the deceased was conscious for twenty-four hours. Therefore, absence of certificate of the doctor to the effect that the deceased was conscious is of little consequence nor there was failure on the part of the Executive Magistrate in not obtaining appropriate certificate from doctor before recording dying declaration of the deceased. The dying declaration of the deceased, as recorded by the Executive Magistrate, is consistent with oral dying declaration made by the deceased before her brother-in-law, i.e. Samnaram Markaji. The learned Judge of the trial Court who had advantage of observing demeanour of the witnesses has relied upon the testimony of Executive Magistrate Mr.Patel. On re-appreciation of evidence of the Executive Magistrate, this Court is of the firm view that the Executive Magistrate had recorded the dying declaration of the deceased as narrated by her and that it proves beyond pale of doubt that on November 18, 1994 at about 7.00 a.m. in the morning, the appellant No.1 had poured kerosene over the deceased whereas the appellant No.2 had set her ablaze with a burning wood.

18. Another dying declaration, which is sought to be relied upon by the prosecution, is in the form of the complaint of the deceased recorded by the PI Mr.J.V.Desai. The testimony of PI Mr.Desai is recorded at Exh.33. His evidence would show that on November 18, 1994, he was discharging duty as PI at Gaekwad Haveli Police Station and that on the basis of information received from the hospital, he had gone to the hospital and recorded the complaint of deceased Divaliben as narrated by her. The complaint which was reduced into writing by this witness was produced on record of the case at Exh.34. Naturally after the death of the deceased her complaint would assume the status of dying declaration and, therefore, the learned Judge has treated the same as dying declaration of the deceased. According to this witness, after reducing the complaint of the deceased into writing, he had sent the same to PSO for registering the offences and that after C.R.No.191 of 1994 was registered, the same was handed over to him for further investigation. What is asserted by the witness is that he had sent Yadi to the Executive Magistrate requesting him to record dying declaration of the deceased and had also drawn panchnama of place of occurrence in presence of panch witness. The witness has stated that during the course of investigation, he had seized incriminating articles such

as clothes of the deceased, handkerchief, etc. and requisitioned the services of Forensic Science Laboratory on the spot. It may be stated that several prosecution witnesses, i.e. Bhomaji Markaji, P.W.-3, Exh.12, Jatnaben Chhaganlal, P.W.-5, Exh.14, had turned hostile and, therefore, this Police Officer had referred to relevant portions from their police statements. In his cross-examination, it was stated by the witness that he had learnt about the incident at about 12.00-12.15 p.m. when he was on patrolling duty. It was also stated by him that he was not able to state as to at which place he was when he had received the information. According to him, he had reached the hospital within ten minutes after receiving the information and that PSI Mr.Parmar and other members of his staff were also present at the hospital. According to him, he was present in the hospital for about one hour. It was mentioned by this witness in his cross-examination that after reaching the hospital, he had straight gone to Burns Ward and read verdhi pointed out by PSI Mr.Parmar. According to him, the Executive Magistrate had come to the hospital after about one hour of his going to the hospital. It was further stated by the witness that at the time when he had gone near the patient, the treatment was going on and that he had found that the deceased had sustained burn injuries. It was also admitted by the witness that one of the relatives of the deceased was in the room where the deceased was being treated whereas others were outside the room. The suggestion made to the witness that he had ascertained the facts from others before recording first information report as narrated by the deceased, was emphatically denied by him. According to him, he had taken about 20-25 minutes in recording the complaint of the deceased. What is stated by him is that he had started recording of the complaint of the deceased after five minutes of his arrival in the hospital. It was admitted by him that he had not obtained any endorsement on the complaint of the deceased from the doctor that the deceased was conscious and was in a fit state of mind to make statement. What was asserted by this witness was that PSI had obtained endorsement of the doctor on Yadi which was sent to the Executive Magistrate to the effect that the deceased was conscious and, therefore, he had not thought it necessary to obtain further opinion regarding consciousness of the deceased from the doctor. Though it was admitted by the witness that bandages on chest, neck and face of the deceased were applied, it was asserted by the witness in no uncertain terms that the deceased was in a position to speak. Though the witness has agreed to the suggestion made by the defence that at the time when he was recording the complaint of the deceased, he had noticed that the

deceased was writhing in pain and demanding water and was also groaning loudly, the suggestion made by the defence that the doctor and nurse were administering medicine to the deceased while he was recording complaint of the deceased was denied by him. What was claimed by the witness before the Court was that though the patient was uncomfortable because of burn injuries, she was able to speak clearly. The suggestion made by the defence to the effect that the witness was required to ask the questions two to three times and, thereafter only, the deceased was able to give answers, was denied by him. This is what transpires from the cross-examination made of this witness by the learned counsel of the defence regarding complaint of the deceased.

19. Evidence of this witness also shows that in discharge of his duty as Police Inspector, he had gone to the hospital and recorded the complaint of the deceased. This witness has also deposed in a most natural manner. Though an attempt was made to show that the deceased was not in a position to state her complaint, the witness has specifically stated that the deceased was conscious and had narrated her complaint which was reduced into writing by him. It is relevant to notice that it was the suggestion of the defence that at the time of recording of the complaint, the deceased was undergoing severe pain due to burn injuries and was demanding water as well as groaning loudly. This suggestion has been accepted by the witness. The suggestion made by the defence itself would indicate that not only the deceased was writhing in pain, but she was conscious and was, therefore, demanding water. If the deceased had become unconscious, she could not have demanded water. The suggestion made by the defence would itself indicate that the deceased was conscious. The assertion made by the Police Officer that the deceased was conscious and was in a fit state of mind gets corroboration from the testimony of Dr.Soni, who has categorically stated that the deceased was conscious for twenty-four hours from the time when she was admitted in the hospital for treatment. It could not be suggested to the witness that he had any special interest either in the deceased who was poor unfortunate lady or any of her relatives or that he had animosity with any of the appellants and was out to implicate the appellants falsely in the case. On overall view of the matter, this Court finds that the claim made by the police officer that in discharge of his duty, he had gone to the hospital and recorded the complaint of the deceased, as narrated by her, inspires confidence of this Court and deserves acceptance. In the complaint, which is produced on record of the case at Exh.34, it was stated by the deceased that

the appellant No.1 had poured kerosene over her whereas she was set on fire by the appellant No.2 with the help of burning wood which was taken out from the hearth. Further, the motive for commission of crime is also stated in the complaint. It is well settled that on the death of maker of first information report, the same will have to be treated as her dying declaration. Therefore, the dying declaration made by the deceased before PI Mr.Desai also establishes that the appellant No.1 had poured kerosene over the deceased whereas she was set ablaze by the appellant No.2 and, therefore, the appellants are liable to be convicted of the offences punishable under Sections 302, 452 read with 114 IPC.

20. The three tests which have been devised in judicial precedents in order to answer the question whether the dying declaration is true or not, stand satisfied in the case. The victim, i.e. the deceased, was in a position to identify the appellants as her assailants because incident in question had taken place in her house at 7.00 a.m. in the morning when she was cooking food. The version narrated by the victim is intrinsically sound and accords with probabilities. No material part of any dying declaration is proved to be false by other reliable evidence on record. Therefore, it is safe to act upon the dying declarations, which are produced by the prosecution.

21. The plea that the deceased had sustained 60% second degree burn injuries and was administered morphine injection and was, therefore, not in a position to make any statement either before the Executive Magistrate or before the Police Officer and, therefore, the two dying declarations sought to be relied upon by the prosecution should be discarded, has no substance. Regarding state of affairs of the deceased at the relevant time, it is not permissible to the Court to raise inferences, and the issue will have to be decided on the basis of the evidence on record. The evidence on record would indicate that though the deceased had received serious burn injuries and was in great pain, she was able to give cogent and consistent answers to the questions which were put by the Executive Magistrate, and had also narrated the facts about the incident to PI Mr.Desai. As observed earlier, what is relevant while deciding the reliability or otherwise of a dying declaration is satisfaction of the person recording the dying declaration as to whether the maker was conscious or not. The Executive Magistrate has, in his substantive evidence before the Court in terms, asserted that from the answers which were given by the deceased to questions put to her, he was satisfied that

the deceased was conscious and in a fit state of mind to make statement and that in view of this satisfaction, he had made an endorsement below the dying declaration that the deceased was conscious and that consciousness of the deceased was ascertained by him. This Court has no reason to disbelieve the claim advanced by the Executive Magistrate in absence of good reasons. The medical evidence on record does not show that the deceased had lost consciousness at or about the time when her dying declaration was recorded by the Executive Magistrate or when the complaint, as narrated by her, was reduced into writing by PSI Mr.Desai nor the evidence on record shows that her bodily pain was such that she had become speechless. On the contrary, testimony of another witness, i.e. PSI Mr.M.K.Parmar, P.W.-10, Exh.26, would indicate that he had also gone to the hospital on receipt of verdhi from the hospital and had addressed a Yadi to the Executive Magistrate for recording dying declaration of the deceased. It was Mr.Parmar who had obtained endorsement on Yadi from the doctor to the effect that the patient was conscious. What is asserted by the witness is that the doctor had personally visited the Ward in which the deceased was admitted for treatment and after verifying that she was conscious, he had made such endorsement below Yadi. It was also stated by him in paragraph 2 of his deposition that he himself had made inquiries with the deceased, but had not noted the same. This assertion was not challenged by the defence. This assertion was made by the witness during his cross-examination by the learned counsel of the appellants. Thus, the evidence of PSI Mr.Parmar also shows that the deceased was conscious and was in a fit state of mind to make statement. The above discussion makes it more than clear that neither injuries sustained by the deceased nor administration of pain-relieving injection had rendered her unconscious or deterred her from making relevant statements.

22. At this stage, it would be relevant to notice certain decisions of the Supreme Court on the point. In State of Haryana v. Harpal Singh & Ors., A.I.R. 1978 SC 1530, it was shown that the pulse of the deceased was not palpable and blood pressure was unrecordable and the patient was in gasping condition. In view of this state of affairs, it was urged before the Supreme Court that the deceased was not in a position to make declaration and, therefore, the dying declaration should be discarded. While negativing this contention, the Supreme Court has made the following pertinent observations:

"The High Court was of the view that a person in the state of health as depicted in the Bed Head Ticket could not have possibly made a coherent and detailed statement as contained in Ex.P.L. We are unable to share the view of the High Court The doctor was fully aware of the condition and certified that the patient was in a fit condition to give a dying declaration and has deposed that she was conscious and was in a fit condition to give the dying declaration. The fact that the pulse was not palpable and blood pressure unrecordable and the patient was in a gasping condition would not necessarily show that the patient's condition was such that no dying declaration could be recorded. We see no reason for rejecting the testimony of the doctor."

Again, in Suresh v. State of Madhya Pradesh, A.I.R 1987 SC 860, it was argued that dying declaration, which was recorded by Dr.Bhargava in that case should not be relied upon inasmuch as at the time when dying declaration was stated to have been recorded by her, Lachhibai was sinking and was unable to make any statement. The attention of the Supreme Court was drawn to the postmortem report of Dr.Bhargava wherein serious injuries sustained by Lachhibai on account of the burns were mentioned. On the basis of those injuries, it was argued before the Supreme Court that in view of serious injuries sustained by Lachhibai, she must have been in an unconscious state at the time when her dying declaration was stated to have been recorded and, therefore, her dying declaration should be disbelieved. While rejecting the contention, the Supreme Court has held as under:

"We are unable to accept the contention. Dr. Bhargava had examined Lachhibai. According to her Lachhibai was in a fit state of health to make a declaration. Indeed, her evidence is that when she recorded the dying declaration of Lachhibai, she was capable of deposing and was in her senses. She further stated that when she was recording her dying declaration, "she had started going into coma"."

In Padmaben Shamalbhai Patel v. State of Gujarat, 1991 SCC (Cri.) 275, it was noticed that the deceased had sustained 90% burn injuries. What was argued in the said case was that testimony of the doctor about fitness of the

deceased to make statement as supported by documentary evidence, should be discarded because the deceased was severely burnt and her condition was poor at the time when she had spoken to the doctor. While negativing this contention, the Supreme Court has held as under:

> "Mr.Mehta then submitted that having regard to the fact that the victim had 90 per cent burns and her general condition was poor, it would be hazardous to hold that her statements to the two medical men were true. He also argued that she had burns on her lips and her tongue was swollen making it doubtful if she could talk. We do not think there is any merit in this submission. In Suresh v. State of M.P., this Court was required to deal with a more or less similar situation. In that case the victim had sustained 100 per cent burns of the second degree and her dying declaration was recorded by Dr Bhargava in the hospital. Dr Bhargava had deposed that the victim was in a fit state of health. The evidence, however, disclosed that while Dr Bhargava was recording her statement the victim had started going into a coma. Yet this Court accepted the dying declaration made by the victim to Dr Bhargava. Therefore, the mere fact that she had suffered 90 per cent burns and her general condition was poor is no reason to discard the testimony of both the medical men when they say that she was in a fit state of mind and was able to make the dying declaration in question."

23. Though this Court is aware of the principle that each decision turns on its own facts, sufficient guidance is provided by the Supreme Court in the above quoted decisions. Here, medical evidence read with that of Executive Magistrate and the Police Officer clinchingly establishes that the deceased was conscious and in a fit state of mind to make a statement and had made dying declaration as well as the complaint notwithstanding serious burn injuries. Thus, the dying declarations are not liable to be rejected on the specious plea that the deceased had sustained burn injuries and must have become unconscious before or at the time when those declarations were recorded.

24. The plea that the deceased was surrounded by her close relatives and as tutoring is not ruled out, the appellants should be given benefit of doubt, is merely

stated to be rejected. The testimony of the Executive Magistrate read with endorsement made by him below the dying declaration would show that no relatives of the deceased was present when he had recorded dying declaration of the deceased whereas testimony of PI Mr.Desai would show that one or two relatives of the deceased were present near the cot of the deceased when her complaint was being reduced into writing. The defence could not specifically suggest to PI Mr.Desai that at the time of recording of her complaint, she was being tutored either by her husband or by her brother-in-law or any other close relatives. Tutoring would imply that the deceased was inclined to allow her real assailants to go scot-free and involve the appellants falsely in such serious case because either she had enmity with the appellants or because she had no opportunity to identify her assailants. The deceased was on the verge of the death and would not allow her real assailants to go scot-free and involve innocent persons falsely. Such is not a normal human conduct. It is not the case of any one that the deceased had no opportunity to identify the appellants as her assailants. In fact, the incident had taken place in the house of the deceased at 7.00 a.m. when she was cooking. She had clearly identified the appellants who had trespassed into her house. Her claim is that she was abused by the appellants and, thereafter, she was burnt by the appellants. Therefore, there is no manner of doubt that she had ample opportunity to identify the appellants as her assailants. Further, while dealing with question of tutoring, the Supreme Court in Habib Usman v. State of Gujarat (supra), has held that great weight must naturally and necessarily be attached to a dying declaration recorded very shortly after the occurrence. It was argued before the Supreme Court that some friends and relatives of the deceased were with the deceased before her statement was recorded and, therefore, her statement was liable to be thrown out as tutored. Rejecting the said contention, the Supreme Court has held that merely because some friends and relatives happened to be with the deceased before her statement was recorded, the statement cannot be thrown out as tutored. The reason given by the Supreme Court for laying down this principle is that in the first place it was indeed natural for friends and relatives of the deceased to be with the deceased at that time and in the second place, there was nothing to indicate, either in the evidence of the Doctor or of the Sub-Inspector or of the brother of the deceased that anyone had tutored the deceased. It was noticed by the Supreme Court that it was not suggested to the brother of the deceased that anyone was interested in falsely implicating the accused or that anyone had tutored the

deceased to implicate the accused. Applying this principle laid down by the Supreme Court to the facts of this case, this Court finds that no attempt was made by any of the relatives of the deceased to tutor her. Dying declaration recorded by the Executive Magistrate and the complaint recorded by PI Mr.Desai cannot be branded as tutored version of the deceased.

25. It is also necessary to make reference to a binding decision of the Division Bench of this Court rendered in State v. Rabari Pancha Punja & Ors. (supra), An argument was advanced by the learned defence counsel that the dying declaration should not be accepted in view of the fact that the relatives of the deceased had come to the hospital and were near about the cot of the deceased, which did not rule out tutoring of the deceased. While negativing the said contention, the Division Bench has made following pertinent and weighty observations:

> "It is difficult to conceive of a case where relatives would not rush to the hospital and go near the injured person if they are in the same town and come to know of the injuries caused to their near and dear ones. In almost every case, relatives are bound to rush to his beside. Unless the Court is prepared to virtually hold that a dying declaration is practically speaking not a relevant piece of evidence at all and no dying declaration can form the basis of a finding of guilt, the Court cannot countenance the argument that merely because the relatives are there, the dying declaration should be disbelieved. To do so would tantamount to saying that a dying declaration is practically speaking a worthless piece of evidence. No doubt the presence of relatives in the context of the possibility of tutoring is a relevant consideration. It is one thing to say that it is a relevant consideration and if the Court has reason to believe that the dying declaration owes its origin to tutoring it may be disregarded. It is another to say that merely because the relatives are present and there is such a remote possibility it should be disbelieved. There are two conceivable situation (the test is not meant to be exhaustive) in which the presence of relatives may give rise to a reasonable belief that tutoring may have taken place and the dying declaration may not be true. (1) Such an argument can be advanced in a given case when the conditions of visibility at the time

> of the occurrence were such that the victim could not have identified the assailants. In such a case, the victim may not know the identity of the assailants. And then he would be faced with a temptation to implicate those against whom he has enmity or those against whom he entertains suspicion by reason of such enmity at the instance of his relatives. (2) Another conceivable case is where the relatives lodge a FIR naming the culprits on the mere basis of suspicion while the victim is unconscious and the victim comes to be questioned after the names of the alleged assailants are disclosed in the FIR. In that case, the victim may be faced with the situation where the names of suspects have already been disclosed and if he does not know the identity of the assailants by reason of the fact that he was not able to identify them on account of darkness or on account of lack of opportunity, he may fall in line and implicate the persons already named. In such cases, it would be permissible to make an approach of suspicion in order to doubt the dying declaration with scepticism on the ground that the relatives had come near the victim or had an opportunity to tutor the injured person. Merely because the relatives were in the hospital near about the injured person, it would not be reasonable to draw the inference that the injured person did not know the names of the culprits or had not been able to identity the culprits and was implicating the persons named in the dying declaration only on account of suspicion or tutoring. We are, therefore, unable to accept this argument."

26. This Court would prefer to be guided by weighty, practical and intelligent observations made by Hon'ble Mr.Justice M.P.Thakkar (as he then was) in 22 G.L.R. 426. The evidence on record clinchingly establishes that the deceased had ample opportunity to identify the appellants as her assailants. The record does not show that the first information report was lodged by any of her close relatives. On the contrary, the evidence of PI Mr.Desai would show that the first information report was lodged by the deceased herself. Under the circumstances, so-called remote possibility of tutoring has no relevance whatsoever and the two dying declarations on record cannot be disbelieved on specious plea that there was possibility of the deceased being tutored by her close relatives who were by her side in the hospital.

27. It would not be out of place to mention here that Dr.Soni, who had treated the deceased, had ascertained the history of assault from the deceased herself and the deceased had stated that she had received burns with kerosene by opposite party. The plea that the deceased had failed to name the appellants as her assailants at the first available opportunity when history of assault was recorded by Medical Officer and, therefore, the dying declarations on record should be disbelieved, is devoid of merits. It is well settled that a Medical Officer is not expected to know from the injured as to who were his assailants. Normally, history of assault is ascertained by the Medical Officer so that well defined line of treatment can be chalked out. The effect of non-mention of names of assailants before Medical Officer is examined by the Supreme Court in two leading decisions, i.e. (1) Pattipati Venkaiah v. State of Andhra Pradesh, A.I.R. 1985 SC 1715, Paragraph 17, and (2) P.Babu & Ors. v. State of Andhra Pradesh, (1994) 1 SCC 388 at Page 392. The Supreme Court has settled this controversy by holding that failure on part of the injured to mention names of his assailants before Medical Officer has no vitiating effect on prosecution case nor does it affect credibility of other reliable and cogent evidence on record. Therefore, non-mention of names of the appellants by the deceased before Dr.Soni is of little consequence. However, recording of history of assault by the Medical Officer, as narrated by the deceased, would also show that the deceased was conscious and able to state relevant facts. Further, the evidence of witness, Mr.V.M.Pandya, P.W.-9, Exh.24, would show that he was on duty as Head Constable at V.S.Hospital and on the basis of information given by Dr.Chandana, who was then C.M.O. of V.S.Hospital, he had conveyed information to Prabhatsinh, who was then P.S.O. of Haveli Police Station that Divaben Gomaji was burnt by her neighbour Dipuben on November 18, 1994 at 8.00 a.m. and was admitted as an indoor patient in Burns Ward of the Hospital at 10.30 a.m. The information conveyed was noted down by P.S.O. Prabhatsinh in diary maintained at the Police Station. That entry is produced on record of the case at Exh.25. However, Dr.Chandana is not examined by the prosecution. If he had been examined, it could have been ascertained from his evidence as to from whom he had received the information that the deceased had received burn injuries at the hands of the appellant No.2. In absence of evidence of Dr.Chandana and P.S.O. Prabhatsinh, information recorded in Exh.25 will have to be regarded as hearsay evidence and of no consequence.

28. On overall view of the matter, this Court is satisfied that it is established by the prosecution beyond reasonable doubt that the appellants had entered the house of the deceased in the morning of November 18, 1994 and the appellant No.1 had poured kerosene over her whereas the appellant No.2 had set her ablaze with the help of a burning wood and caused her death. The learned Judge of the trial Court has given cogent and convincing reasons for recording conviction of the appellants under Sections 302, 452 read with 114 IPC. The learned counsel of the appellants could not persuade this Court to take a different view of the matter. The appeal is, therefore, liable to be dismissed.

29. For the foregoing reasons, the appeal fails, and is dismissed. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment. The appellant No.2, who is on bail, shall surrender to the authorities within fifteen days from today failing which appropriate steps shall be taken so she undergoes the sentence imposed by the trial Court, which is confirmed by this Court in instant appeal.

(J.M. Panchal, J.)

(D.P. Buch, J.)

Rajendra