

A RAMILABEN HASMUKHBHAI KHRISTI AND ANR. ETC.

v.

STATE OF GUJARAT

AUGUST 14, 2002

B [R.C. LAHOTI AND BRIJESH KUMAR, JJ.]

*Evidence Act, 1872:*

C *Dying declaration—Whether dying declaration could form sole basis of conviction—Held, yes, if it is free from any doubt and recorded in the manner as per provisions of law—However, it is not a correct to record conviction solely on the basis of dying declaration in the absence of fitness certificate as regards mental condition of the deceased and there are deviations indifferent declarations made and consistency is conspicuously missing—Penal Code, 1860—Sections 302 and 120-B—Murder—Conviction.*

D *Dying declaration—Held, could be acted upon without corroboration if Court is convinced about its trustworthiness and if it inspires confidence.*

E According to the prosecution, the victim/deceased was cordoned by accused No. 2 and ten other accused persons. Accused No.2 allegedly sprinkled kerosene oil on deceased and one of the remaining accused set him on fire. He received severe burn injuries and was taken to Police Station by CW1, PW4 and others. PSI advised them to take the victim to hospital and to record complaint thereafter. Later on he was shifted to another hospital where he succumbed to his burn injuries. During his stay and treatment in the hospitals, four dying declarations were recorded at different stages by the P.S.I., Medical Officer and two Executive Magistrates. PW2, a Medical Officer, recorded a history of Medico legal case and sent a telephonic information to the Police Station. PSI, PW1 recorded the statement of injured/victim and took his thumb impression since victim was unable to put his signature due to injuries; subsequently, Executive Magistrate, Kheda town recorded the statement of the injured/victim. As per medical advise, victim was shifted to another hospital where also Executive Magistrate, Ahmedabad recorded incomplete statement of the victim as his condition became deteriorated and he died.

H In the meanwhile, PSI acting upon information received from the

hospital, investigated the matter and concluded it as a case of accidental death. Father of the deceased, not satisfied with the investigation at the instance of Divisional Police Superintendent, got the matter re-investigated. Trial Court convicted six of the accused under Section 302 read with Section 120-B IPC but acquitted four accused and one of the accused died during trial. High Court upheld the conviction of the six accused persons. Hence these appeals.

As for motive, it was stated that the deceased and accused No. 2 were deeply attached to each other, both of them eloped and stayed away together for some time; that the father of the accused lodged a complaint against the deceased; and police apprehended them and handed back accused No.2 to her parents.

It was contended for the appellants that it would be improbable that accused, who was in deep love and affection with victim/deceased, would have sprinkled kerosene oil on her lover to kill him; that such improbability is re-affirmed by the acquittal of the said accused by the Courts below; that it was a case of suicidal death as marriage of accused-lover was settled somewhere else and the deceased had suicidal tendency and earlier also he had attempted to commit suicide; and since none of the four dying declarations conform to the requirement of acceptable dying declaration, the conviction solely based on those dying declarations, is not justified.

Allowing these appeals, the Court

**HELD:** 1.1. The victim/deceased was brought to civil hospital on the fateful day at about 10.00 a.m. and all the four dying declarations were recorded between 10.00 a.m. to 3.00 p.m. The first one was recorded by PW2, Medical Officer in the hospital, who noted that the injured was passing on a public road, when accused persons living in the lane, rounded him and sprinkled kerosene on his body and set him ablaze. Thereafter the last line reads as "Patient conscious. Police station informed for D/D." Thus, the doctor had already taken steps for recording the dying declaration yet preferred to record the statement without waiting for the police to arrive or the Magistrate to come for recording the dying declaration. The certificate about the condition of the patient only says that he was conscious. There is nothing about his mental fitness. [546-B-C]

1.2. Police Sub-Inspector also recorded a statement of the victim without waiting for the Executive Magistrate. In the statement, there are some such details which hardly seem to be related to the incident. It makes

**A** repetitions also and due care has also been taken to makè it believable by stating that the victim/deceased was conscious while making the statement and whatever has been stated is true and correct and it further says that victim/deceased puts his thump impression. It is found in the statement that the fact has been introduced that accused No.2 had sprinkled kerosene oil on him and he was burnt with matchstick. In respect of this statement, there is  
**B** no certificate of mental fitness by the doctor. [546-F-H; 547-A-B]

**C** 1.3. PW3, Executive Magistrate, Kheda, also recorded a statement after ascertaining from the Doctor that the victim was conscious. In this statement, it is for the first time indicated that the victim was beaten by those who surrounded him, but no injuries were found either by PW2 or by the other doctor performing the post-mortem examination. Another deviation in the statement is that accused No.2, on instigation of her father, had poured kerosene oil on the body of the victim. The statement was recorded for more than 35 minutes. No certificate of any doctor about mental fitness of the victim/  
**D** deceased to make such a statement is appended in the dying declaration. Time and again there is repetition on the part of the injured indicating that he was conscious and he was declaring the truth. It is highly doubtful that he could give such lengthy statement with the language used. [547-C-E]

**E** 1.4. The last of the four statements was recorded by PW7, Executive Magistrate, Ahmedabad at 3.30 p.m. But this statement is incomplete as after answering a few questions, the victim was not able to speak. The Magistrate in his statement deposed that the injured was not replying the question and he was made to understand the same. He had to explain the questions frequently, sometimes for about 15 times. The mental state of the injured can well be understood by the fact that he had to be explained the question, as  
**F** many as about 15 times before eliciting any reply. The Magistrate himself noted that the dying declaration was written to the extent the injured dictated and spoke in state of his consciousness. It also does not bear any endorsement or certificate of the doctor about the mental condition of the injured as to whether he was fit or not to make a statement. This statement also ascribes  
**G** the role of sprinkling of kerosene oil upon his body by one of the accused.

[547-F-H; 548-A]

**H** 2.1. Under the law, dying declaration, can form sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be

recorded by an Executive Magistrate with certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the form of question and answer and the answers be written in the words of the person making the declaration. But Court cannot be too technical and in substance if feels convinced about the trustworthiness of the statement which may inspire confidence, such a dying declaration can be acted upon without any corroboration. [545-G-H; 546-A]

*Uka Ram v. State of Rajasthan*, [2001] 5 SCC 254; *Paparambaka Rosamma and Ors. v. State of Andhra Pradesh*, [1997] 7 SCC 695; *Laxmi (Smt.) Vs. Om Prakash and Ors.*, [2001] 6 SCC 188 and *Panchdeo Singh v. State of Bihar*, [2002] 1 SCC 577, relied on.

2.2. In the instant case, none of the dying declarations contain any certificate by the doctor about the mental fitness of the victim/deceased to make a statement although doctor was always available. In two dying declarations it is only indicated that victim/deceased was conscious. No amount of subsequent statement of the doctor can supplement the endorsement of Certificate while recording the dying declaration. The first two statements have been recorded in quick succession without waiting for the Magistrate to arrive even though steps had been taken for recording of the dying declaration by the Magistrate who actually got the message at about 10.30 a.m. and had contacted the doctor at the hospital at 11.05 a.m. [548-B-C]

3. There are deviations from statement to statement, consistency is conspicuously missing. The first dying declaration recorded by PW1, the Medical Officer, does not say that one of the accused sprinkled kerosene oil on the victim/deceased. Eight or nine persons living in the lane are said to have surrounded him but who sprinkled oil and who lighted the matchstick is not stated. In view of the settled position of law, it may not be possible to base the conviction on the sole basis of dying declarations. There is no eyewitness to the incident. In two dying declarations the deceased had stated about being beaten by the accused persons but no such injuries are found in any report. Looking to all the facts and circumstances of the case, it is not a case in which conviction can be recorded only on the basis of dying declarations which fail to inspire confidence. Hence the conviction and sentence passed against the appellants are set aside. [548-C-E; 549-B, D]

CRIMINAL APPELLATE JURISDICTION : CrI. Appeal No. 245 of 2002.

From the Judgment and Order dated 21.9.2000 of the Gujarat High Court

A in CrI. A. No. 591 of 1998.

WITH

Cr.I A. No. 246 and 247 of 2001.

B Ranjit Kumar, Yashank Adhyaru, H.A. Raichura, Maulik Nanavati, Vimal, Chandra S. Dave, Ms. Aruna Gupta, Ms. Anu Sawhney, Ms. Hemantika Wahi, Ms. Natasha and Mrs. S.H. Raichur for the appearing parties.

The Judgment of the Court was delivered by

C **BRIJESH KUMAR, J.** All the three criminal appeals, noted above, arise out of the judgment and order dated 21.9.2000, passed by the Gujarat High Court upholding the conviction and sentence of all the appellants in the three appeals as awarded by the Additional Sessions Judge, Kheda at Nadiad by the order dated 08.6.1998 in Sessions Case No.195/1993. The appellants have been convicted under Section 302 read with Section 120-B IPC and sentenced to imprisonment for life. They have also been sentenced to pay a fine of Rs. 5000 each, in default to suffer simple imprisonment for a period of three years, except accused no.5 Ramilaben and accused no.11 Elisaben, who have been sentenced to pay a fine of Rs. 2000 each, in default thereof to suffer simple imprisonment for a period of two years. Four persons, namely, Pushpaben D Dahyabhai, Ravinaben Dahyabhai, Gersombhai Yakubhai and Mariyamben E Ashabhai, had been acquitted as no case was found to have been made out for their conviction.

F In all, there were eleven accused persons, out of which accused no.6 Rameshbhai Ashabhai died during the trial, six of them have been convicted and four have been acquitted as indicated earlier. For the sake of convenience, it may be better to note the "accused number" of all eleven persons, since they have been so referred at many places in the judgments of the Sessions Court and the High Court.

**Name of the Persons CONVICTED:**

G Accused No. 1 Dahyabhai Ashokbhai.  
 Accused No. 4 Hasmukhbhai Ashabhai.  
 Accused No. 5 Ramilaben Hasmukhbhai  
 H Accused No. 8 Sulemanbhai Yakumbhai.

Accused No. 10 Daudbhai Shivabhai.

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Accused No.11 Elisaben Yusufbhai.

Accused No.6 Rameshbhai Ashabhai (died during trial)

**Name of the Persons ACQUITTED:**

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Accused No.2 Pushpaben Dahyabhai.

Accused No.3 Ravinaben Dahyabhai.

Accused No.7 Gersombhai Yakubhai.

Accused No.9 Mariyamben Ashabhai.

C

The prosecution story is that on 15.02.1992 at about 9.30 a.m., the deceased Pragnesh Kumar aged about 24 years, was going towards market in town of Matar, District Kheda. While he was passing through the road, Accused No.2-Pushpaben Ashabhai Khristi along with other ten accused persons surrounded him and she is said to have sprinkled kerosene oil on Pragnesh Kumar and one of the remaining ten persons lighted a match stick, as a result of which Pragnesh Kumar caught fire. He received severe burn injuries to the extent of 90% all over the body. The same day Pragnesh Kumar died of the said injuries in Vedilal Sarabhai Hospital, Ahmedabad sometime around 4.00 p.m.

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Matar town is situated about 15 to 18 Kms. from the District Headquarters Kheda and 40 Kms. away from Ahmedabad. CW-1 Ramilaben, sister-in-law of the deceased, on coming to know about the incident, rushed to the place of the occurrence opposite to the house of one Chandrakantbhai. PW-4 Jaykarbhai Mohanbhai Mecwan, the brother of the deceased Pragnesh Kumar and Hasmukhbhai Khristi, husband of Ramilaben, were immediately called. PW-4 Jaykarbhai Mohanbhai Mecwan along with one of his relative Lataben took Pragnesh Kumar to the Police Station Matar, where CW-3 I.M. Kumpawat, P.S.I., who was present, advised them to take Pragnesh Kumar to the hospital at Kheda and told that he would record the complaint later on. According to PW-4 Jaykarbhai Mohanbhai Mecwan, his brother, Pragnesh Kumar while on way to Kheda Hospital informed him that while he was passing through the way Pushpaben held him and her relatives surrounded him. Pushpaben sprinkled kerosene oil on his body and somebody from the crowd lighted the match stick. He reached kheda Hospital at about 10.00 a.m., where PW-2 Dr. Sanjay Vasantrao Kolte gave treatment to Pragnesh Kumar and on enquiry made, he is said to have informed the doctor that Dahyabhai Ashabhai

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- A** Khristi, Hasmukhbhai, Rameshbhai, Ramilaben wife of Hasmukhbhai, Pushpaben daughter of Dahyabhai Ashabhai Khristi, Elisaben and Sulemanbhai Daudbhai, (in all named seven persons only) all surrounded him, sprinkled kerosene and somebody from the crowd of the accused persons, put him on flame. Dr. Kolte recorded a history of Medico Legal Case, Exh.46 and sent telephonic information to Kheda town Police Station. Bhimsinh Chaturbhai, Head Constable, noted information in the Telephone Register and the Station Diary and sent Yadi to P.S.I PW-1 Vinodbhai Ramjibhai Toliya of Kheda Police Station. A Yadi had also sent to hospital for recording dying declaration of Pragnesh Kumar. PW-1 Vinodbhai Ramjibhai Toliya, P.S.I. reached the Kheda Hospital and recorded the statement of Pragnesh Kumar, Exh.29:
- B** He took thumb impression of Pragnesh Kumar, since he was unable to put signature due to his injuries. Doctor also made an endorsement to the effect that the patient was conscious.

- In pursuance of the Yadi sent to the Magistrate from Kheda Police Station, PW-3 Ashwinbhai Vasudev Dave, Executive Magistrate, Kheda reached
- D** to Kheda Civil Hospital at 11.05 a.m. and recorded the statement of Pragnesh Kumar. The Magistrate recorded the statement at 11.10 a.m. in question and answer form. The statement was completed at 11.46 a.m., it is Exh.60. Dr. Kolte advised shifting of the patient from Kheda Hospital to Vedilal Sarabhai Hospital or L.G. Hospital, Ahmedabad for better and proper treatment of the patient.
- E** Pragnesh Kumar was, therefore, taken to Ahmedabad at Vedilal Sarabhai Hospital and admitted there at about 1300 hours on the same day i.e. 15.02.1992. An information was sent from the hospital to the Ellisbridge Police Station for recording of the dying declaration of Pragnesh Kumar. Consequently, PW-7 Suryakantbhai Shivrambhai, Executive Magistrate, Ahmedabad, recorded the statement of Pragnesh Kumar at about 3.10 p.m. Initially, Pragnesh Kumar was
- F** conscious and told his name, address, etc. and also narrated that Pushpaben Dahyabhai poured kerosene on him, thereafter he could not speak any further. The half recorded dying declaration is Exh.75. Pragnesh Kumar died at the hospital, thereafter.

- The motive behind the incident is said to be that Pragnesh Kumar and
- G** Pushpaben, who both resided in Khristi Palia in Matar town, had been deeply attached to each other. The intensity of their liking for each other was to the extent that sometime in January 1992 Pushaben climbed up to the house of Pragnesh Kumar in the night and reached to his residence, but father of Pragnesh Kumar and other elders persuaded Pushpaben to return to her
- H** parents but Pushpaben ran away in the darkness of the night, she was

followed by Pragnesh Kumar. Both of them eloped in this manner and stayed A  
 away together for sometime. Father of Pushpaben lodged a complaint against  
 Pragnesh Kumar and his father under Sections 363 and 366 of the IPC.  
 Pushpaben and Pragnesh Kumar were apprehended by the Police and in the  
 course of the investigation Pushpaben was handed back to her parents.  
 Pragnesh Kumar was also granted bail. After the said incident, the occurrence B  
 in question occurred on February 15, 1992.

On receiving the information from Civil Hospital, Kheda, Head Constable  
 Dalpatsinh was sent at 10.30 a.m. on 15.02.1992 to the Kheda hospital for  
 taking necessary steps in the matter. CW-3 Kumpawat, P.S.I. of Matar Police  
 Station, after receiving information reached police station at 10.40 a.m. He C  
 went to the place of incident, where Ramilaben, who was later on examined  
 as CW-1, was present in the house of Pragnesh Kumar. She identified the  
 place of incident in the backyard of the house of Pragnesh Kumar. P.S.I.  
 Kumpawat prepared a panchnama of the scene of incident Exh.35 with two  
 panchas. The panchnama indicated that the place of incident as was shown D  
 by Ramilaben Jaykarbhai. There was a smell of kerosene and two buckets full  
 of water, smelling kerosene oil, were also found kept there. The place where  
 it is indicated that Pragnesh Kumar poured kerosene oil on himself and  
 committed suicide was also shown. He interrogated some other witnesses and  
 at about 12 O'clock he made an entry of accidental death in the Matar Police  
 Station Diary and concluded that no offence was to be registered against any E  
 accused. He prepared a report of accidental i.e. suicidal death and placed it  
 before his superiors. The father of Pragnesh Kumar, Mohanbhai Kalibhai  
 Mecwan, was not satisfied with the investigation of the case and attempted  
 to vent his grievances before the higher authorities to get justice by conducting  
 a proper investigation into the case, since, according to him, it was not an  
 accidental death but death by commission of an offence. The Divisional F  
 Police Superintendent some Mr. Naik ordered one Fatesinh S. Kant, Circle  
 Police Inspector to contact Mohanbhai Kalidas Mecwan and to hear his  
 grievance. Ultimately, on April 27, 1992, First Information Report was recorded  
 by Circle Inspector at Police Station Matar. Shri Fatesinh S. Kant, thereafter,  
 investigated the case and examined the witnesses and obtained a copy of the G  
 dying declaration of the deceased and submitted a charge-sheet under Section  
 302/120-B IPC against eleven persons.

The prosecution examined in all eleven witnesses. PW-1 Vinodbhai  
 Ramjibhai Toliya, is P.S.I. Police Station Kheda, who had recorded the statement  
 of Pragnesh Kumar at the hospital Exh.27. PW-2 Dr. Sanjay Vasanttrao Kolte, H

- A who examined and gave treatment to Pragnesh Kumar at Civil Hospital, Kheda and sent message to the police station and received the statement of Pragnesh Kumar Exh.43. PW-3 Ashwinbhai Vasudev Dave, is Executive Magistrate, who recorded the statement of Pragnesh Kumar at Kheda Hospital. PW-4 Jaykarbhai Mohanbhai Mecwan, is the brother of the deceased Pragnesh Kumar, who took him to the Civil Hospital, Kheda. PW-5 Mohanbhai Kalidas Mecwan, is the father of the deceased Pragnesh Kumar. PW-6 Dr. Ravindra S. Bhise conducted the post-mortem examination of dead body of Pragnesh Kumar. PW-7 Suryankabhai Shivarambhai Patel, Executive Magistrate, recorded statement of Pragnesh Kumar at the Vedilal Hospital in Ahmedabad Exh.75. PW-8 Jakibhai Kalidasbhai Mecwan and PW-9 Bhimsinbhai Chaturbhai, Head Constable, Police Station, Kheda, who recorded the message received from Dr. Kolte, telephonically. PW-10 Kailashben Ambala and PW-11 is Fatesinh S. Khant, Circle Police Inspector, who filed the chargesheet.

- The Court had examined CW-1 Ramilaben Jaykarbhai, CW-2 Lataben Jakhibhai and CW-3 I.M. Kumpawat. The accused persons took the defence of denial and Suleman Daudbhai Khirsti and Dahyabhai Ashabhai Khirsti pleaded alibi that they were on their duty on the fateful day and examined defence witnesses DW-1 Balkrishna Bhailalbai Khadiya and DW-2 Chanubhai Dhulabhai Prajapati to prove alibi of Suleman Daudbhai. DW-3 Nainaben Rathilal Bhrambhatt and DW-4 Bhagawanbhai Kanjibhai Makwana, were examined for Dahyabhai Ashabhai Khirsti.

It is to be noted that there is no eye-witness to the incident, as a matter of fact, case rests on the dying declarations recorded at different stages by the P.S.I. Toliya, Dr. Kolte and two Executive Magistrates.

- We have heard Shri Ranjit Kumar, learned senior counsel appearing for Accused No.5 Ramilaben, wife of Accused No.4 Hasmukhbhai Ashabhai and Accused No.11 Elisaben Yusufbhai For the remaining appellants we have heard Shri Dave who has adopted the arguments made by Shri Ranjit Kumar, on the points common to all appellants generally.

- On behalf of the appellants it has been submitted that the prosecution story sounds improbable in as much as it would be highly doubtful if Pushpaben who has been assigned the role of sprinkling the kerosene oil upon the deceased would do so looking to their relationship and deep love and affection between them. It is further submitted that improbability of the prosecution case is reaffirmed by acquittal of Pushpaben. Shri Ranjit Kumar submits that it is a case of suicidal death. Pragnesh Kumar having frustrated

by the fact that marriage of Pushpaben had been settled by her parents somewhere else he took the extreme step of committing suicide. It is further submitted that there is material on record to show that Pragnesh Kumar had suicidal tendency as on one or two occasions earlier also he had attempted to commit suicide. The occurrence, according to the learned counsel did not take place on the street as alleged by the prosecution and that is the reason why there is no eyewitness to the occurrence. Rather, the incident took place in the house of Pragnesh Kumar. It is vehemently urged by the learned counsel for the appellants that in any case the only evidence against the appellants consisting of four dying declarations is not such that a conviction may be maintained solely on those dying declarations which do not conform to the standards of acceptable dying declarations.

In support of his contention that it was a case of suicidal death, he has referred to Exh. 28 which is a telephonic message recorded at Police Station Kheda Town received from Dr. Kolte of Civil Hospital, Kheda informing that Pragnesh Kumar had sustained burn injuries while warming around the fire, he was admitted in the hospital and that he was conscious and in good condition. Needful was required to be done. Our attention has also been drawn to Entries No.8 and 9 of Exh.31 the Station Diary of Police Station Kheda, in support of telephonic message received from Dr. Kolte and its contents regarding warming up around the fire. On receiving the message, Matar Police Station was also informed. Entry No.9 shows that at 10.20 P.S.I. and Constable Majidkhan left for the civil hospital. The message sent to the Executive Magistrate for recording Dying Declaration from PSO of the police station Kheda town is Exh. 32 which also contains the same information given by Dr. Kolte including the part that Pragnesh Kumar had received burn injuries while warming around the fire. The message was received by the Magistrate at 10.35 a.m. The Panchnama Exh. 35 is said to be prepared by Shri Kumpavat PSI Matar Police Station who went to the spot on receiving information on 15.02.1992 and found Ramilaben, wife of Jaykarbhai Mohanbhai present, who showed him the place of occurrence. It is House No.1763 belonging to Mohanbhai Kalidas Mecwan i.e. house of Pragnesh Kumar. In the open space of the said house he found two buckets of water having a smell of kerosene oil etc. on the spot. The place where Pragnesh Kumar is said to have received burn injuries, according to the Panchnama was indicated by Ramilaben who is the wife of the brother of the deceased. He also found leaves of Mehndi plant burnt and plants was also having the smell of kerosene. Again a reference has been made to Exh. 38, which is a message recorded by Dr. Ramesh Macusana, CHO, V. S Hospital given by Constable Elisbridge, V.S.

- A Hospital on admission of Pragnesh Kumar in V.S. Hospital, Ahmedabad indicating therein inter alia that Pragnesh Kumar had received burn injuries at home. Exh.39 to which also our attention has been drawn is an extract from the diary of the police station Matar dated 15.02.1992 wherein it is noted by I.M. Kampavat Sr. P.S.I. Matar Police Station that at 12.15 p.m. that it is a case of accidental death where the deceased had burnt himself by pouring kerosene oil at the backside of his house. It was further noted that this fact has been disclosed by the father of the deceased and therefore this accidental death case paper may be kept with Station Diary. It may be noted that Ramilaben and I.M. Kumpawat, P.S.I. of Matar Police Station were summoned by the Court and they have been examined as Court witnesses. One Lataben, aunt of the deceased has also been examined by the Court as Court witness. Whereas P.W. Kumpawat sticks to his stand of having gone to the house of the deceased and having prepared the panchnama and the site plan, at the instance of Ramilaben but she in turn namely, Ramilaben denies to have shown any place of alleged incident to any police person nor the police people had met her at her house. She also denies that any panchnama in that regard was prepared by the police. On the other hand, she stated that she was at her house when the incident occurred. After she heard cries of some woman that Pragnesh Kumar is burnt, she went out and found that Pragnesh Kumar was lying burning in front of the house of Chandrakantbhai. In cross-examination she told that she had seen Pragnesh Kumar burning, from the house of Pushpaben where Pushpa and her mother were giving push to Pragnesh. A different picture emerges from this statement. C.W.2, Lataben also says that she found Pragnesh lying on the ground in burning condition who told her that Pushpa and her family members had put him on fire with the matchstick. She gives no explanation as to why she had not stated so in her statement at the police station however she stated in the cross-examination that *Jaykar's* wife had told her that police had come in the noon and had gone away after making some investigation.

- From all that has been indicated in the preceding paragraph, it is sought to be made on behalf of the appellant that the incident occurred at the house of Pragnesh Kumar while he was warming around the fire or he committed suicide pouring kerosene oil upon himself. It may also be noted that Dr. Kolte had stated that he did not give any such information that Pragnesh Kumar had received injuries while warming himself around the fire. But the fact remains that such a mention is made in the entries of the police papers of P.S. Kheda Town and the yadis. Be that as it may, suffice it to say at this juncture that the veracity of the four dying declarations will have to be examined in

any case and in that light this aspect of the matter, as highlighted on behalf of the appellants, may be considered if necessary. A

We may now consider the dying declarations. It appears at the time, the injured was taken to the Civil Hospital, Kheda. Dr. Kolte medically examined him on 15.02.1992 at 10 A.M. Before the medical examination, the doctor seems to have made some enquiries and noted down as follows : B

“O/E :- Pt. Brought by his relative Jaykar.

History of Burn :- I was passing on a public road, at that time, persons living in the lane, Dahyabhai, Ashabhai, Hasmkukhbhai Rameshbhai, Ramilaben Hasmukhbhai, Elisaben, Pushpaben Dahyabhai, Daudbhai Shivabhai, Sulemanbhai Daudbhai rounded up me, and sprinkled kerosene on my body and set ablaze me. Patient conscious. Police station informed for D/D” C

It is Exhibited as Exhibit ‘47’.

The other dying declaration is recorded by , PW-1 Ramjibhai Toliya, PSI Police Station Kheda. On receipt of vardhi (message) at 10.20 A.M. from the PSO, he proceeded to Kheda Civil Hospital. He is said to have asked Dr. Kolte as to whether the injured Pragnesh Kumar was conscious or not and the doctor told that he was conscious whereupon Shri Toliya proceeded to record his statement. It is a long statement given by the injured. He indicates his name, age, occupation as well as the address. He then indicates that the injured has two other brothers, Jaiker is eldest and Vasant is youngest. He also told that he is unmarried. He thereafter tells about the affairs that he had with Pushpa, daughter of Dahyabhai Ashabhai. He then narrates that uncle of Pushpa and her father had quarrels with him on that account. Uncle of Pushpa Gersang had even beaten him and he was on inimical terms with them. Thereafter he named Pushpaben Ashabhai Dahyabhai, Hasmukhbhai Ashabhai, Rameshbhai Ashabhai, Ramilaben Hasmukhbhai, Elisaben, Gersang Yakubbhai, Suleman Daudbhai, Daudbhai Shivabhai and Mariyambhai Ashabhai who surrounded him at about 9 A.M. while he was on the street near his house. He then told that Pushpaben sprinkled kerosene oil on him and someone out of those persons put him on fire by a match stick. He thereafter told that he was conscious and had given that statement. In the last paragraph, he said that the aforesaid persons had conspired to kill him as a result of which kerosene oil was sprinkled and he was set ablaze. There was no other cause except his affairs with Pushpa. In the next line, he stated that whatever was stated by him was true and correct and he had put his thumb impression. H

A The statement was recorded by PW1 Shri Toliya, PSI Kheda and there is an endorsement of Dr. Kolte on it dated 15th February, 1992 at 10.50 a.m. that the statement was recorded in his presence and he was unable to sign as both palms have burnt. During the statement, Pragnesh Kumar was conscious. The statement Exhibited as Ex.29.

B The third statement was recorded by the Executive Magistrate, PW-3, A.V. Dave. He was then as Deputy Engineer cum Executive Magistrate at Kheda. He commenced the recording of the statement at 11.10 A.M. It is in question answer form. It is a very lengthy statement which runs into about four and a half pages. The answer given in reply to the question as to how

C he was brought to the hospital, is very lengthy, narrating the whole story and it runs into more than a page. Similarly, the answer to the last question also runs into more than a page. The whole story is given in detail. He also indicates that Gersombhai Yakubhbhai Khristi, the uncle of Pushpa had beaten him three months ago and he was being harassed at the instance of the members of the family of Pushpa. Amongst those who had surrounded at the

D time of the incident, indicates the names of Dahyabhai Ashabhai, Pushpa, Hasmukhbhai, Rameshbhai Ramilaben, Hasmukhbhai, Elisaben etc. It is then stated that upon the instigation of her father, the kerosene oil was sprinkled by Pushpaben upon his body. In answer to another question as to besides those persons named above, if there was anyone else, he replied that Suleman

E Daud, Daud Shiva, Mariamben Ashabhai and Gersom Yakubhbhai were also there. He was also given a beating by the accused persons.

There are also such statements like 'I declare specifically in the state of consciousness', "Hence, I hereby state you to make the lawful proceedings and to inflict severe punishment upon all the aforesaid persons". He again

F states "I declare all the details on true facts on the basis of (unuttered) knowledge and in the state of full consciousness". Again, he states at one place, "I understand that it is my duty to declare the true details hence I have declared the same in detail. I hereby reiterated as all those facts are true and I pray to inflict severe punishment upon all the guilty persons". He again told

G that he had thoroughly gone through the statement and understood the facts and he was quite satisfied with his statement. He had to put his thumb impression as he was not in a position to sign. The statement was completed at 11.46 as noted by the Executive Magistrate. It is in Exhibit-60.

Yet another statement which had been recorded by Shri Suryakantbhai  
H Shivrambhai, Executive Magistrate, Metropolitan Area Ahmedabad commenced

its recording at the V.S. Hospital, Ahmedabad at 15.10 p.m. It is in the question-answer form. In answer to one of the questions as to who was in the house at the time of the incident, he replied that his brother's wife (Bhabhi) was there. In answer to the question that who set him on fire, he told Pushpaben daughter of Dahyabhai. Thereafter he could only speak "I was going to the market and at that time, Pushpaben Dahyabhai sprinkled kerosene upon me whereafter he could not speak. The statement was closed at 15.30 p.m. The Magistrate in his cross-examination had stated that the deceased was not replying. Therefore, he was made to understand the questions and that he had to explain the questions to the injured about 15 times.

It would also be appropriate to consider the condition of the deceased Pragnesh Kumar at the time when he was taken to Civil Hospital, Kheda. PW-2 Dr. Sanjay Vasant Rao Kolte noted down the injuries found on his person on 15.2.1992 at 10.00 a.m. In all he found eleven injuries on different parts of the body of the Pragnesh Kumar. He noted that he had second degree burn in general. Injuries were on the neck, chest, abdominal and parietal region, etc. PW-2 Dr. Sanjay Vasant Rao Kolte has stated that physical condition of Pragnesh Kumar was not good, therefore, he was advised to be taken to V.S. Hospital or L.G. Hospital, Ahmedabad. He further states that Pragnesh Kumar was conscious. Looking to the Exh.45 which records the treatment given to Pragnesh Kumar, he has stated that due to injuries it was not possible to record his blood pressure and the pulse. However, the pulse was feeble. The post-mortem examination was conducted by PW-6 Dr. Ravindra Shri Krishna Bhise the same day namely on 15.2.1992 at 5.45 p.m. In his opinion the death occurred due to shock on account of burn injuries, which were sufficient to cause death in natural course. It may be noted that Pragnesh Kumar received injuries on 15.02.1992 at about 9.00 a.m. and died on the same day namely 15.02.1992 at around 4.00 p.m. His physical and mental condition can well be visualised from the above facts. Due to burn injuries his blood pressure could not be recorded. Pulse was feeble and at about 3.10 p.m. while his statement was being recorded by the Executive Magistrate at V.S. Hospital, Ahmedabad, he could not speak and his statement remained incomplete.

The four dying declarations, as indicated above, have been recorded between 10.00 a.m. to 3.00 p.m., a mention of which has already been made in the earlier part of this judgment. A perusal of the statement recorded by PW-2 Dr. Sanjay Vasant Rao Kolte on 15.2.1992 at 10.00 a.m. shows that there is no mention that Pushpaben Ashabhai had sprinkled the kerosene oil on

- A Pragnesh Kumar which has been the case of prosecution throughout nor that she had lighted the match stick. Nothing specific has been indicated as to who sprinkled the kerosene oil and who and in what manner set him ablaze. In the statement recorded later by P.S.I., Kheda Shri Vinodbhai Ramjibhai Toliya, Pragnesh Kumar seems to have given a lot of details including as to
- B how many brothers he has got and who is elder and the younger etc. He assigned to Pushpaben the role of sprinkling the kerosene oil on him. It is further added that somebody from among those persons who had surrounded him lighted the matchstick and put the same on his clothes. We then find that the statement recorded by the Executive Magistrate PW-3 Aswinbhai Vasudevbbhai Dave runs into more than four pages indicating all the details
- C and in this statement, it is mentioned that Pushpaben, on the instigation of her father, had poured kerosene oil on his body. Pouring of kerosene oil and lighting of matchstick appears to be central theme of the prosecution case. But it is not to be found in the statement said to be given to Dr. Kolte. The last and incomplete statement was recorded at 3.10 P.M. and he died after sometime thereafter. In this it is indicated that Pushpaben Dahyabhai has
- D sprinkled kerosene oil on him.

- So far the law regarding dying declaration is concerned, on behalf of the appellants, learned counsel for the appellants placed reliance upon some cases. In [2001] 5 SCC 254 *Uka Ram v. State of Rajasthan*, the Court observed
- E "it has always to be kept in mind that though a dying declaration is entitled to great weight, yet it is worthwhile to note that as the maker of the statement is not subjected to cross-examination, it is essential for the court to insist that the dying declaration should be of such nature as to inspire full confidence of the court in its correctness. The court is obliged to rule out the possibility of the statement being the result of either tutoring, prompting or vindictive
- F or a product of imagination. Before relying upon a dying declaration, the court should be satisfied that the deceased was in a fit state of mind to make the statement."

- As reference has then be made to the decision reported in [1999] 7 SCC 695 *Paparambaka Rosamma and Ors. v. State of Andhra Pradesh*. In this
- G case the deceased had received extensive burn injuries to the extent of 90%. The prosecution case solely rested on the dying declaration. It was observed that it was necessary to ensure that the statement was genuine and it was recorded when the injured was in a fit state of mind. The certificate, which was appended by the doctor in the end of the dying declaration, was that the
- H injured was conscious at the time of recording of her statement, but there was

no certificate to the effect that she was "in a fit state of mind to make the statement". It has been held that without medical certificate about mental fitness of the maker of the dying declaration, it would be very risky to accept the said manuscript. The subjective satisfaction of the Magistrate, recording the dying declaration, to the following effect :

"On the basis of answers elicited from the declarant to the above questions I am satisfied that she is in a fit disposing state of mind to make a declaration." was not considered acceptable in absence of certificate by the doctor about mental fitness to make statement who had only indicated that the declarant was conscious while making the statement.

In [2001] 6 SCC 118 *Laxmi (Smt.) v. Om Prakash and Ors.*, this Court deprecated the practice of the police officers recording the dying declarations except where the condition of deceased was so precarious that no other alternative was left. The dying declaration is supposed to be recorded by a Magistrate. It is further observed that number of declarations nor the length of the statement is the factor to be taken into account to rely upon them. The main test is the mental and physical fitness and capability of the declarant to make the statement. In all there were five dying declarations in the case including those recorded by the Magistrate, but it only contained a statement of the declarant in the end to the effect that he had given the statement in his full consciousness and senses.

Yet another case referred to is reported in [2002] 1 SCC 577 *Panchdeo Singh v. State of Bihar*, it has been held that it is necessary to have the certificate of the doctor regarding the fit state of mind of the deceased to make the declaration. The Magistrate recording his own satisfaction about the fit mental condition of the declarant was not acceptable particularly when the doctor was available.

Under the law, dying declaration, can form sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the form of question and answer and the answers be written in the words of the person making the declaration. But Court cannot be too technical and in substance if feels convinced about the trustworthiness of the statement which may

A inspire confidence such a dying declaration can be acted upon, without any corroboration.

In the case in hand the injured Pragnesh Kumar was brought to civil hospital, Kheda on 15.2.1992 at about 10.00 a.m. Before recording the injuries, PW-2 Dr. Kolte noted the history of the burn as indicated earlier. It only says that injured was passing on a public road, when persons living in the lane, who are named, rounded him and sprinkled kerosene on his body and set him ablaze. Thereafter the last line of Exh. 47 reads as under:

“Patient conscious. Police station informed for D/D”

C The doctor thus had already taken steps for recording of the dying declaration yet preferred to record the statement without waiting for the police to arrive or the Magistrate to come for recording the dying declaration. The certificate about the condition of the patient only says that he was conscious. There is nothing about his mental fitness. Thereafter the next dying declaration

D Exh.29 was recorded later by PW-1 V.R. Toliya PSI Kheda Police Station. In his statement in the Court he has deposed that while leaving for civil hospital, Kheda from the Police Station, he had instructed PSO to request the Executive Magistrate Kheda to record dying declaration of Pragnesh Kumar and he had handed over all papers to Head Constable Ganpat Singh of Matar Police Station. Despite the instructions given for getting the dying declaration

E recorded by the Magistrate, he proceeded to record the dying declaration again without waiting for the Executive Magistrate to come and record the same. The statement recorded by PW-1 V.R. Toliya Exh. 29 bears endorsement of Dr. Kolte to the effect “conscious during statement is recorded before me, both palms burnt so unable to sign”. This Certificate is signed by Dr. Kolte

F on 15.2.92 at 10.50 a.m. There is however some over-writing over the figure ‘50’ while recording the time 10.50 a.m. It may however be not very significant to go into further details in respect thereof. About the contents of Exh.29, the dying declaration, it has already been indicated in the earlier part of this judgment that there are some such detail which hardly seem to be related to the incident. It makes repetitions also and also takes due care to make it

G believable by stating that he was conscious while making the statement and whatever has been stated “above” is true and correct and further says that he puts his thumb impression. It is to be found in this statement that the fact has been introduced that Pushpaben had sprinkled kerosene oil on him and he was burnt with some matchstick. In the end the statement sums up by

H stating “Thus the aforesaid persons with conspiracy in relation to my love

affairs with Pushpa rounded up me and sprinkling the kerosene, have set me ablaze with an intent to kill me and there is no other cause". Needless to observe again that this is the statement recorded by a Police Sub-Inspector after having instructed to the PSO for getting the dying declaration recorded by an Executive Magistrate. With passage of time since after the injuries were received by Pragnesh Kumar, the statement becomes more lengthy and detailed. There is no certificate of mental fitness by the doctor.

The statement recorded by P.W.3 Executive Magistrate, A.V. Dave is Exh.58. He received information to record the dying declaration on 15.2.92 at 10.35 a.m. He reached the hospital and met the doctor at 11.05 a.m. He enquired from the doctor whether the patient was conscious or not and on being told that he was conscious he proceeded to record his statement. It is the statement recorded in four and a half pages. It is for the first time indicated that he was beaten by those who surrounded him but no injuries were found either by Dr. Kolte or by the doctor performing the post-mortem examination. Yet another deviation is that Pushpaben on instigation of her father had poured kerosene oil on his body. Initially he had not named Suleman Daud, Daud Shiva Mariamben Ashabhai and Gerson Yakubhai as accused in his statement. Other noticeable things have already been indicated in the earlier part of this judgment. The statement was recorded for more than 35 minutes. No certificate of any doctor about mental fitness of Pragnesh Kumar to make such a statement is appended in the dying declaration. Time and again there is repetition on the part of the injured indicating that he was conscious and he was declaring the truth. It is highly doubtful that he could give such lengthy statements with the language used.

Apart from the above noted three statements, there is one more statement recorded by a Magistrate PW-7 Patel Suryakantbhai. He is an Executive Magistrate at Ahmedabad who recorded the dying declaration at V.S. Hospital, Ahmedabad. But this statement is incomplete as after answering a few questions, Pragnesh Kumar was not able to speak. The time of recording of this statement is 3.30 p.m. The Magistrate in his statement deposed that the injured was not replying the question and he was made to understand the same. He had to explain the questions frequently, sometimes for about 15 times. The mental state of the injured can well be understood by the fact that he had to be explained the question, as many as about 15 times before eliciting any reply. The Magistrate himself noted that the dying declaration was written to the extent the injured dictated and spoke in state of his consciousness. It also does not bear any endorsement or certificate of the

- A doctor about the mental condition of the injured as to whether he was fit or not to make a statement. This statement also a scribes the role of sprinkling of kerosene oil upon his body by Pushpaben. It is also noticeable that he tells that at the time of incident, his Bhabi was at the house. The four dying declarations recorded by the doctor, the police inspector and the two Magistrates have been discussed in some detail above. None of these dying declarations contains any certificate by the doctor about the mental fitness of Pragnesh Kumar to make a statement although doctor was always available. In two dying declarations it is only indicated that he was conscious. No amount of subsequent statement of the doctor can supplement the endorsement of Certificate while recording the dying declaration. The first two statements have been recorded in quick succession without waiting for the Magistrate to arrive even though steps had been taken for recording of the dying declaration by the Magistrate who actually got the message at about 10.30 a.m. and had contacted the doctor at the hospital at 11.05 a.m. There are deviations from statement to statement consistency is conspicuously missing. The first dying declaration recorded by Dr. Kolte does not say about Pushpaben sprinkling the kerosene oil. Eight or nine persons living in the lane are said to have surrounded him but who sprinkled oil and who lighted the matchstick is not stated. In view of the decisions of this Court referred to above, it may not be possible to base the conviction on the sole basis of dying declarations. There is no eyewitness to the incident. In two dying declarations he had stated about being beaten by accused persons but no such injuries are found in any report.

- In view of our conclusion regarding dying declarations, we do not think it would at all be necessary for us to dwell into the controversy about the conduct of the investigation by PW-3 Kumpawat according to whom he was informed that the incident occurred at the house of Pragnesh Kumar. Ramilaben denies that she was ever contacted by the police in connection with the investigation of the case or to have shown the place of occurrence though in her statement in the Court as a Court Witness she says that she had seen Pragnesh Kumar burning from the Verandah of the house of Pushpaben and that Pushpaben and her mother were pushing him out. In the last dying declaration Pragnesh Kumar said about presence of his Bhabi at home. Nor do we find it necessary to go into the question about the yadis and vardhis or telephonic message said to be given by Dr. Kolte to the effect that Pragnesh Kumar received injuries while he was warming himself around the fire. It is also not necessary to refer to the reports and statements given by father of Pushpaben to the authorities and the police where it was indicated

that on some earlier occasions also on account of his affairs with Pushpaben, he tried to commit suicide. Such statements have been placed on record as Exh.67 and 69. It may also be noticed that Pushpaben along with a few others have already been acquitted and she had been assigned a specific role of sprinkling kerosene oil on Pragnesh Kumar although it is not be found in the statement given to Dr. Kolte.

Looking to all the facts and circumstances of the case as indicated above, we are of the view that it is not a case in which conviction can be recorded only on the basis of dying declarations which fail to inspire confidence. No other corroboration is coming forth from any corner. Even the trial court had held that it was satisfied that A-7 Gersombhai Yakubhai and A-9 Mariyamben Ashabhai are falsely implicated in the case. It is also observed that the dying declarations of Pragnesh Kumar are not acceptable regarding their involvement.

In the result the prosecution story as put forward does not inspire confidence on the basis of the material placed on record. All the three appeals are therefore allowed and the conviction and sentence passed against the appellants are set aside. They shall be set free forthwith unless wanted in any other case.

S.K.S.

Appeals allowed.