(1996) 10 GUJ CK 0016

In the Gujarat High Court

Vishnubhai Nanalal Suthar and Another — APPELLANT

Vs

State of Gujarat — RESPONDENT

Date of Decision : 28-10-1996

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 427
Penal Code, 1860 (IPC) — Section 120B, 201, 302, 34

Citation : (1997) 2 GLR 1018

Hon'ble Judges : Rajesh Balia, J;N.J. Pandya, J

Bench : Division Bench

Judgement

N.J. Pandya, J.—The incident leading to the filing of the appeal happened on 30-11-1989 at about 8-00 p.m. The manner of its starting is peculiar. The case of the prosecution is that it was accused No. 2 himself who informed the police about the injured person having been thrown into his hospital. However, the police was informed immediately by 8-00 p.m. Before police was informed, accused No. 2 had contacted his friend Dr. Kantibhai Mohanlal Patel, P.W. 3, Exh. 20, an Orthopedist, who in turn, according to his deposition, contacted Dr. Dave, Superintendent of Sarvajanik Hospital, Modasa. The common advice of both these doctors to accused No. 2 was that he should inform the appellants and thereafter should start the treatment.

2. Accused No. 2 is an Orthopaedic Surgeon and is running a hospital in the name and style of Navdeep Hospital at Modasa, District: Sabarkantha, Himmatnagar. The deceased Tarachand was eventually brought to the said trust hospital and his treatment commenced. The hospital record shows that he was brought to that hospital by 11-00 p.m. as per case paper Exh. 17. He was found in a critical condition and immediate treatment was started. On 14-11-1989, he was referred to Ahmedabad Civil Hospital from where he was brought to V.S. Hospital and on 16-11-1989 he succumbed to injuries.

3. The case put forth against both the accused-appellants is to the effect that On 13-11-1989 at about 8-00 p.m., deceased Tarachand visited the hospital of

accused No. 2. The purpose of this visit was to demand an amount of Rs. 8,000/- which was due to him from accused No. 2. At that time, accused No. 1 who was working as compounder of accused No. 2, at the instance of said accused No. 2 gave hammer blows to the deceased and also brought a wire with the help of which an attempt of strangulating the deceased was made. Again hammer blows were given by accused No. 1 and accused No. 2 gave an injection into the right arm of the deceased.

4. After doing so the victim of the crime was brought to the said Sarvajanik Hospital at the aforesaid time and eventually as stated earlier he succumbed to the injuries.

5. The post-mortem note produced in the deposition of Dr. Shripal Chinubhai Shah, Exh. 295 reveals that serious intracranial injuries and haemorrhage was found. There was diffuse subdural and subarachnoid haemorrhages over both parieto-temporal and occipital region. There was brain laceration too. So far as injury to the neck is concerned, bruises were found as per the said post-mortem note.

6. On police being informed by the accused an entry was made in the concerned police station of an incident having occurred in relation to the said deceased Tarachand but name of the accused and other details of the incident were obviously missing. These details came to be filed in after dying declaration was recorded by

Deputy Mamlatdar Shri Sureshbhai Limbabhai as Executive Magistrate. His deposition is at Exh. 64, P.W. 16 and the dying declaration itself which came to be proved through its witness is at Exh. 66. The details as to the deceased having visited the place of accused No. 2 for the aforesaid purpose and that he was beaten by the accused-appellant No. 1 with hammer etc. were set out in great length in the said dying declaration. This resulted into of course lodging of first information report and arrest of the said two accused and the eventual trial.

7. The trial was initially conducted in the Sessions Court of Sabarkantha at Himmatnagar as Sessions Case No. 19 of 1990. Subsequently, the case came to be transferred to the said Sessions Court, Ahmedabad and concluded as Sessions Case No. 309 of 1991. The learned Principal and City Sessions Judge of the said Court of Ahmedabad by his judgment dated 27-5-1992 held both the accused guilty for offence punishable u/s 302 read with 34 of the I.P.C. as also for offence u/s 120-B of I.P.C. and for offence u/s 201 of I.P.C.

8. As the details of the incident were obtained only through dying declaration it is obvious, that dying declaration has assumed far greater importance in this case, than ordinarily would be the position in any Sessions case. In most of the cases there might be circumstantial evidence or even direct evidence. In the instant case, except that injured was found in a very bad shape with blood and injuries over head and some injury on his throat, nothing else was available till he opened his mouth on 14-11-1989. Dying declaration came to be made not only

in the form of a written one as stated above but the dying declaration thus written down between 10-45 a.m. to 11-15 a.m. by the said Executive Magistrate was preceded by an oral dying declaration by about 8-00 a.m. on 14-11-1989. This oral dying declaration was made in the presence of his relatives. The relatives present were elder brother of the deceased, one Raichand, his own son Rajeshkumar Tarachand, the wife of the deceased and other family members.

9. Raichand has died before his evidence could be recorded and therefore, so far as prosecution is concerned, only Rajeshkumar was left for proving the oral dying declaration and this has been done during his deposition as P.W. 12, Exh. 49.

10. Exh. 17 is a case paper along with the details of treatment meted out by the doctors to the deceased during his stay at Modasa Hospital and these papers assumed great importance while appreciating the case of the prosecution as to the dying declaration and so far as the defence is concerned, it is of greater importance because naturally as per the say of the defence, the dying declaration are totally unreliable. They did not inspire any confidence and looking to the nature of injuries and the state of health of the deceased during the time when oral declaration came to be made and the written one came to be given to the said Executive Magistrate, the condition of the deceased was such that he could not have given either of these statements.

11. In the aforesaid background, we would certainly concentrate on the material on record in the form of deposition of doctors and the case papers as well as the deposition of Rajeshkumar Tarachand and the said Executive Magistrate Sureshbhai Limbabhai. To the extent necessary that evidence on record which was oral and documentary will certainly be considered.

12. Dr. Nitin Somalal Shah, P.W. 2. Exh. 15 is one who has proved case papers Exh. 17. He is not. only the proper person to do so but his evidence is of great importance because he had treated the deceased right from the time when he was brought to the said Sarvajanik Hospital. In para 2 of his deposition, he describes the condition of the deceased that when at 11-00 p.m. on 13-11-1989 the deceased was brought to the hospital he was not conscious. There was no pulse, no blood pressure which could be recorded. His pupils were found constricted on both the sides. There was a very sluggish reaction to light and respiration was found irregular and shallow. The patient was found covered with clots of blood almost all over the body. Then he proceeds to describe the injuries which are as many as 7. So far as head injuries are concerned, he describes them to be multiple C.L.W.s on the head with active bleeding, and multiple C.L.W.s over the face and left ear was found partially abrasive. There was C.L.W.s over both the lips in the inner surface and over left angle of mouth also. There was wire mark of blackish brown colour round the neck. By the morning of 14-11-1989, the patient was reacting and responding to the treatment. However, the reaction of the patient and his recovery is recorded in the said bunch of papers Exh. 17 that the patient was responding to verbal and painful stimuli. He was able to move all the four limbs. This would indicate that to painful stimuli the

patient was reacting as ordinary to be expected of any person when pain is administered. Movement of limbs may be in response to verbal stimuli as well as to the painful stimuli otherwise administered. This is recorded in the said case papers with a timing of about 7-15 a.m. on 14-11-1989.

13. The oral deposition of the doctor in this regard is at paragraph 4 where he records that the pulse was running fast and was 116 per minute while blood pressure was 140/80. Right side pupil was still dilated and the left side pupil was found normal. The right side pupil was till sluggish towards light. The provisional diagnosis was extra dural hemorrhage. The doctor, therefore, felt that as the patient was responding to the treatment burr hole procedure was thought of. Then the patient was sent to a Neuro Surgeon, Ahmedabad.

14. So far as recording of dying declaration is concerned, in para 5, the doctor says that at about 10-30 a.m. on 14-11-1989, P.S.I. of Modasa Police Station had come to the hospital and had enquired of the doctor about Tarachand being conscious and whether his statement could be recorded. A yadi to that effect was given to the witness and he had mentioned in the office copy of the yadi that the patient is conscious. Except for these, the doctor does not recollect whether he had permitted the P.S.I. to record the statement of the injured or not. At this stage case papers are produced at Exh. 17 with X-Rays at Exh. 18.

15. The cross-examination made on behalf of accused No. 1 reveals very little except that at the time when the deceased was brought to the hospital he was found in a sinking condition. For the accused No. 2, the very first sentence made in the cross-examination by doctor is that the patient when admitted was unconscious. Doctor says that he treated the patient till he was transferred to Ahmedabad right from the moment that he was admitted to the hospital. He knew the accused being of the medical fraternity and he also saw accused No. 2 amongst the persons who had gathered at the time when the patient was brought to the hospital. While this witness was treating the injured Tarachand, accused No. 2 was found standing by his side.

16. The doctor admits that external clinical findings led him to infer that the patient was in a serious condition on account of the overall injuries that he had seen. At the time of admission dilation of right pupil was not there. However, on the next day morning at about 7-15 a.m. when the patient was examined, right pupil was dilated which was an indication that there was intracranial hemorrhage. The doctor has visited the injured on 14-11-1989 between 9-30 to 10-00 a.m. and that was his last visit for the day and he has not made any record of the patient''s condition.

17. During further cross-examination the doctor admits that in the injuries leading to extracranial hemorrhage presumed to be congestion of brain and that may lead to unconscious. He further agrees that in such cases, patient may become conscious and again becomes unconscious till death. He admits of a possibility that if the injuries that Tarachand sustained particularly the subdural

and sub-alconet hemorrhage associated with brain lacerated may or may not get conscious.

18. He agrees that to adjudge the level of consciousness, some clinical tests have to be applied and he agrees that there are three tests of adjudging the level of consciousness and those are examination of the pupils responding to oral questions and movements of the limbs. In the instant case, there was difference between two pupils, one was bigger and the other was smaller.

19. Another doctor on the point will be Shripal Chinubhai Shah who performed the post-mortem examination. His deposition is recorded as P.W. 1, Exh. 11, and the post-mortem note is at Exh. 14. As per his deposition, on 16-11-1989, he received a request for performing the post- mortem examination which is commenced on the same day at 1-15 p.m. and completed at 4-15 p.m. and the examination thus lasted almost for three hours. Apart from the tracheostomy and venesection marks which was the result of treatment so far as the incident is concerned, relevant injuries are to be found from item 3 onwards in para 4 of his deposition. Of importance is injury No. 7 at page 3 of his deposition. In the said paragraph where on the head as many as 9 different suture wounds were found of different damages starting with left ear and going upto left parieto temporal region upto left eye brow. It proceeds further left to occipital region, left cheek, right parieto temporal region and upper lip also. These injuries were ante-mortem.

20. Internal examination reveals as per para 5 of the deposition diffused haematoma under scalp over both the parieto temporal and occipital region. There was fracture of left temporal bone at its upper border just near to parietal bone of 6 cms. size; linear fracture of left temporal bone of 4 cms. size. There was fracture of left temporal parietal bone on posterior aspect. Brain mater was lacerated and protruded from the fracture site at right temporal bone. Diffused subdural and subarachnoid hemorrhages present over both parieto temporal and occipital region. The doctor primarily came to the conclusion that the deceased died as a result of intracranial injuries.

21. Looking to the aforesaid injuries, in the opinion of the doctor at least five to six blows must have been given on the head of the deceased. In his opinion it could have been so done by a blunt object like the muddamal hammer or any other hard and blunt substance.

22. The doctor candidly admits in cross-examination para 8 that he did not have any record of the Modasa hospital or of Ahmedabad Civil Hospital papers at the time of his deposition. He has not even seen the deceased when he was alive. When his attention was drawn to laceration of brain mater and the aforesaid subdural and subarachnoid hemorrhages, in the opinion of the doctor taking overall view of the injuries, if the patient had become unconscious, he could not have regained consciousness till he died.

23. In fairness to the prosecution it must be stated that this part of the cross-

examination occurs only (sic. when) eye witness being recalled on 20-1-1992 at the request of the defence when they obtained orders in this regard from Court in Criminal Revision Application No. 476 of 1991.

24. The relevant paragraph is 11. This led the prosecution to give application Exh. 115 before the trial Court where the learned trial Judge after recording reasons at length permitted the prosecution to put certain question to the doctor and that is why further cross-examination on behalf of the prosecution has commenced from paragraph 13 onwards.

25. The very first question put to the doctor was that the medical personnel who treated the injured would be a better judge to say whether the patient would regain consciousness or not. When his attention was drawn to Exh. 17, the aforesaid bunch of case papers, the said doctor Shripal agreed that looking to the treatment given at the initial stage, the patient may be conscious for sometime. After the cross-examination of the prosecution had concluded at para 16, as to be expected, defence were also permitted to put questions to this very doctor. This has been done on behalf of accused No. 2 from paragraph 17 onwards. The very first answer given by the witness in para 17 is "according to the history of the patient received by me, the patient was unconscious all throughout". Looking to those papers again the doctor has clearly opined that when the deceased was brought to Modasa Hospital he was in serious condition. This had been also stated by the said doctor of Modasa - Dr. Nitin Shah.

26. The attention of this doctor Shripal was drawn to that portion of Exh. 17 where against the timing of 7-15 a.m. consciousness is said to have been regained and noted as such therein. It was got ascertained from this doctor that right side pupil was large and left side pupil was small. This was the result of pressure on the right side of the brain. In the opinion of the doctor, the said note in Exh. 17 as to the consciousness is on the assumption that the patient had extradural hemorrhage as indicated by the note. In case of extradural hemorrhage, the patient may regain consciousness for some time, however, as noted above, the post- mortem examination has revealed greater damage and damage was not confined only to extradural area and it was found in subdural region as well as subarachnoid region also. Coupled with this there was brain laceration. In this background, the doctor has opined that the patient may regain or may not regain consciousness.

27. Attention of the doctor was drawn to a medical treatise, namely, The Manual on Clinical Surgery by Dr. K. Das as well as Bailey and Love''s Practice of Surgery, the doctor agreed that the proposition set out at page 176 that in extradural hemorrhage after a period of initial consciousness there will be a stage of consciousness in which the patient behave normally. During this lucid interval the dura mater is slowly stripped off the skull by the accumulating blood, but the intracranial pressure continues to be normal by displacement of the cerebrospinal fluid into the spinal canal. When this compensation fails, intracranial pressure increases and the medial aspect of the temporal lobe herniates through the

tinctorial hiatus to compress on the mid-brain. This damages the activating reticular system in the brain stem with deterioration in the level of consciousness. Gradually the patient passes into deep coma. Now this would be the position where injury has resulted into extradural hemorrhage. Doctor rightly agreed that in subdural hemorrhage, on the other hand, blood accumulates more quickly and does not allow much ksks time for compensation to take place. By this compensation what is meant is flowing of the cerebrospinal fluid into the spinal canal. As a result the lucid interval is much less and even absent in subdural hemorrhages.

28. While agreeing with Bailey and Love''s work which is a standard book on the subject he agrees that the proposition contained at page 393 of that work "these changes produce a deterioration in the level of consciousness, dilation of the pupils on the side of the compressing mass and a hemiparesis on the same side as the mass.'' Doctor agrees that the case of deceased Tarachand was not the one of extradural hemorrhage.

29. The importance of medical evidence set out in detail will now be understood if one turns to the deposition of the said Executive Magistrate Shri Suresh Limbabhai, P.W. 16. He received the note from the P.S.I., Modasa Exh. 65 at about 10-40 a.m. He has put his initial at the time of receipt of the said note on the backside of Exh. 16 in its margin. On the front part of Exh. 65 in the margin there is a remark "patient is conscious", then initials are to be found and then time is noted, which is 10-30 a.m. This has been established by the prosecution to have been done by the said Dr. Nitin Shah, P.W. 2 Exh. 15. This would mean that the patient is shown to have regained consciousness at about 7-15 a.m., was to be brought by the authorities for the purpose of recording dying declaration after 10-30 a.m. only. As in the above, the fact of recording dying declaration started at 10-45 a.m. and concluded at 11-15 a.m., that is about half an hour time. According to the Executive Magistrate, Suresh Limbabhai, Exh. 16, the patient was conscious all throughout.

30. The situation that emerges is that in cases of extradural hemorrhage also on account of collection of blood in the cranial cavity but above dura mater, once the compensatory factor of increased fluid passing into the cerebrospinal channel comes to an end, the pressure starts building up on the dura mater which as a result is likely to tear and thereafter the result will be hemorrhage as stated above. In case of subdural hemorrhage as well as subarachnoid hemorrhage combined effect would be the same but it will be far more quicker than what would be the position if it were a case of extradural hemorrhage only.

31. It is true that no one has drawn the attention of Dr. Shripal to the time factor of roughly about four hours starting from 7-15 a.m. Because by 7-15 a.m. he was noted in Exh. 17 to be conscious and by 11-15, the said dying declaration, Exh. 66 has been recorded. However, the fact remains that if the case of the prosecution is to be accepted that after the deceased regained consciousness at about 7-15 a.m. and continued to be conscious till the dying declaration came to

be recorded, obviously, that will be the length of time that he was conscious for.

32. In this background, let us see from other material on record what are the developments that have taken place. The first and foremost development from prosecution point of view the oral dying declaration said to have been made in presence of Rajeshkumar Tarachand, P.W. 12, Exh. 49 and his uncle, i.e., brother of the deceased, Raichand who died before his evidence could be recorded. By about 8-00 a.m. or so, they heard the deceased saying about the incident. The details gathered are that he received hammer blows at the clinic of accused No. 2. In that dying declaration he clearly involves both the accused. Curiously enough both Rajeshkumar and Raichand were inductive and silent about it. They were definitely present at about 10-30 a.m. when the opinion of the doctor Nitinkumar Shah was obtained as to the conscious state of the deceased or otherwise for the purpose of recording the dying declaration and this was obtained by the police. At that time also, police is not informed that the deceased has already revealed important details as to the incident.

33. Raichand is not a small person so far as Modasa town is concerned. During his life-time he is shown to have acquired quite an importance in the area. It is available from the cross-examination according to almost all the witnesses. He is also the trustee of the hospital where the deceased Tarachand was being treated during his life-time. Police had already brought the deceased from the clinic of the accused and for that purpose one may read the deposition of Dr. Kantibhai, friend of accused No. 2, who was by the side of accused No. 2 in virtually all times of crisis during his life. Dr. Kantibhai is examined at Exh. 20. He is P.W. No. 3. According to the prosecution case, after the deceased was dealt with in the aforesaid manner by both the accused, just to cover up himself, accused No. 2 called Kantibhai and took his advice. The said witness Kantibhai on the contrary suggested that police should be informed but before that he preferred to contact Dr. Dave who was the Superintendent of the said trust Hospital of Modasa. Dr. Dave advised on the same line and that is how police came and Tarachand was taken to Modasa Hospital and put in a special room right from the beginning. His identity could be ascertained only from the search carried of his box and from one of the chits the details were disclosed. Naturally, as per the prosecution case accused No. 2 knew the deceased and according to the prosecution case, Dr. Kantibhai knew him. Dr. Kantibhai admits as such, however, he explains he was unable to identify the deceased as Tarachand because his face was blathered with blood.

34. The position, therefore, is that till the chit was found out from the bag of the deceased, his identity was not known. Till he regained consciousness, all details of the incident were a mystery. Naturally, his family members were worried and were by the side of Tarachand till he regained consciousness and even thereafter. In other words, they were with him almost all throughout. Inspite of this, when the details of the incident are revealed and in no uncertain terms when they involve both the accused, Rajeshbhai, the son of the deceased as well as

Raichand, brother of the deceased and they remained inductive and waited for things to develop for themselves. At this juncture, it will be proper to refer to the contents of the oral dying declaration as revealed by P.W. 12, Exh. 49, Rajeshkumar Tarachand. In para 5 of examination-in-chief he says that about 7-00 a.m. his father regained consciousness. At that time he, his mother, his uncle, and son of his uncle were all by the side of said Tarachand. The deceased revealed that yesterday evening he had gone to the clinic of Dr. Suthar, accused No. 2. There accused No. 2 and accused No. 1 were present in the consulting room. Tarachand asked for money and accused No. 2 got enraged. Accused No. 2 questioned as to what money is to be given and why? Thereafter accused No. 1 gave one hammer blow on the head of the deceased, and as a result he fell down. Accused No. 1 continued to give hammer blows and gave two or three blows after the deceased had fallen down. Thereafter Dr. Suthar accused No. 2 gave injection into the right arm of the deceased. After the injection was given accused No. 1 came with a wire and tried to strangulate Tarachand. The deceased started shouting but the doors and windows were closed. This is what has been stated in the F.I.R. by the witness with regard to the contents of the oral dying declaration.

35. The age of this witness at the time of deposition in the year 1990 is shown to be about 20 years. He was already working with his father in the kerosene business. In the cross-examination of this witness P.W. 15 it has been revealed by this witness that the deceased had told him that he will be going to the clinic of the accused for demanding the outstanding amount. In para 21 questions have been put to the witness as to whether he got the details about the incident from the deceased. According to the witness, on learning from his father about the question he came out of the special room. Thereafter he went to the place of incident. The police took him to the place for drawing up panchnama. When he went for preparation of panchnama along with police at that time he did not inform the police about the information that he had with him relating to the incident. He has been specifically asked whether the details he had gathered from his father was revealed by him to the police or not and his answer is in the negative. He admits that when he refers to the police personnel he refers to one P.S.I. Shrimali who was investigating the incident. The panchnama of the scene of offence Exh. 33 has been drawn between 1-15 p.m. to 3-45 p.m. Further in paragraph 21 the witness says that after his father regained consciousness and after learning about the details of the incident when this witness came out of the special room where his father was kept he did not reveal the details of his after having regained consciousness to any one. He did not meet Dr. Nitin Shah. He admits that his father complained of not being able to say and inspite of that he did not meet Dr. Nitin Shah to make complaint about. According to this witness, his father could identify the witness by voice only.

36. He was not aware of the fact that Executive Magistrate has come to record the statement of his father. This he has stated in para 22 of the cross-examination. The statement of this witness has been recorded subsequently

where according to this witness for the first time he came to know that Executive Magistrate has recorded dying declaration.

37. The dying declaration taken down by the Executive Magistrate is at Exh. 66. It has much greater details than the short oral dying declaration deposed to by the said witness Rajeshkumar, P.W. 12. It is a handwritten foolscap paper covering both sides and the handwriting proved 10 be that of the Executive Magistrate and at the end there is a thumb-mark of the deceased. Original it was said to be thumb-mark of Raichand in presence of the Executive Magistrate. Thereafter the name of Raichand has been scored of and in its place what is written is Tarachand - the name of the deceased. The time when the recording of the dying declaration commenced has been stated more than once. It may be repeated because its significance is that the commencement is shown to be 10-45 which is a overwriting so far as second digit of the minute is concerned. Second digit of the minute clearly reads to be 3 overwritten and corrected as 4 in Gujarati. That would mean that originally the time written was 10-45. It could not have commenced at 10-35 because the yadi was received by 10-30 by the Executive Magistrate.

38. The statement starts with the deceased revealing the place where he is, namely, Modasa Sarvajanik Hospital, then he says he had gone to the house of accused No. 2, for getting his money. At that time Vishnubhai accused No. 1 had beaten him. Then he reveals that about 8-00 p.m., the incident occurred and that the iron hammer blows were given to him and then by use of wire he was strangulated. At that time accused No. 2 was also present. The doors and windows were already shut and he raised the shouts. He was given an injection after blows were delivered on him. Injection was given on his right hand. After injection was given he had fallen down. On his falling down two hammer blows were given again.

39. After thus narrating the incident he refers to the monetary transaction to the tune of Rs. 8,000/- which he is said to have given about eight months before. Then he narrates that for the purpose of recovery of this money, he has visited the clinic of the accused where he was asked to come to the home of the accused and on going to the home he was asked to come to the hospital again. Then he refers to the use of a wire about his throat. Again he refers to raising of shouts and closure of doors and windows of the clinic. Thus, the incident according to the maker of the statement had happened in the office of the doctor, that is, accused No. 2.

40. Now comes the startling revelation in detail from the prosecution case. The doors and the windows that were closed from which one window was open and he got up and went to his shop. Before stating the fact of his getting up and going to his shop he has disclosed that he is in total consciousness presumably while making the statement. Further, he says that as he came back to his shop he was saved. At about 10-00 O''clock in the night his brother Raichand approached him in the Sarvajanik Hospital.

41. Now the injured gives details about his family and reveals that he has four children and the name of the elder uncle (sic. son) is Rajeshbhai aged 16 and he gave the names of other children also. He also gave names of his daughters who are three in number.

42. Then he says that the entire aforesaid incident has happened because he had gone to demand back the amount due to him from accused No. 2. He has studied upto S.S.C. He is doing kerosene business and that of the sum of Rs. 8,000 that are due from Dr. Suthar, accused No. 2, he has not received any amount. Again he repeats that what he has stated is true and that he is conscious and because of that only he has been able to dictate these answers. He admits that he is able to sign and further he has nothing to reveal and then he says that as he is not able to see with his eyes, he has put his thumb-mark at Modasa Sarvajanik Hospital.

43. The Executive Magistrate during his cross-examination had stated that it was the deceased who had revealed in his statement that the injection was given by the accused No. 2 which he was squarely confronted with and contradicted through dying declaration, Exh. 66. Nowhere, the name of the accused No. 2 is mentioned in the said declaration with regard to his administering injection to the deceased. The fact that the deceased came out of the clinic and went to his shop and from there Raichand brought him into the hospital as noted above is altogether a new angle and totally in contrast with the case of the prosecution.

44. The oral dying declaration on the one hand and the written dying declaration on the other hand are, therefore, definitely on different lines but at the same time, it must be mentioned that they do coincide and converge so far as the material aspect is concerned, namely, accused No. 1 gave blows in the clinic of accused No. 2 when both of them were present. It also conforms to the story of outstanding sum of Rs. 8,000/-.

45. The Executive Magistrate in his examination-in-chief has come out with a story that on receipt of the yadi Exh. 65 which he received at 10-30 a.m. he went to the hospital, he contacted the doctor who took him to the patient and there on his finding that relatives of the deceased surrounding him he asked all of them to vacate the room. The doctor confirmed that the patient is conscious. This would mean that the statement dying declaration Exh. 66 has been recorded by 10-45 that is the time when it commenced within five minutes of receipt of yadi, the Executive Magistrate came down to the hospital and during that interval everything happened and the work of recording dying declaration could be commenced.

46. When the deposition of Dr. Nitin Shah with regard to the recording of dying declaration is referred to he does not at all say that he had met anyone and so far as recording of dying declaration is concerned, he pleads total ignorance. Except confirming that he has put the said remark as to the patient being conscious in the yadi Exh. 65, he knows about arrival of the Executive Magistrate

and the recording of the statement.

47. All these circumstances taken together, pertaining to the said so -called dying declaration oral and written, coupled with the aforesaid medical evidence, about the injury of the deceased and its likely effect on his conscious, level of consciousness and period for which he could not remain conscious, in our opinion, the prosecution case as to the declaration having been given does not inspire confidence.

48. The story of the deceased having left the clinic on his own is set out in the dying declaration Exh. 66 and reaching his shop, then his brother Raichand taking him to hospital runs counter to the case of the prosecution itself. Silence maintained by Raichand as well as Rajesh on and after 8-00 a.m. when oral declaration came to be made before them would further make the whole story as to declaration very doubtful.

49. The net result, therefore, is that the dying declaration upon which the matter hinges fails to inspire confidence and when that credibility itself is to be seriously doubted, in our opinion, no conviction could be based on it The result, therefore, is that the appeal succeeds.

50. The accused are acquitted of the charges levelled against them. They are ordered to be set at liberty forthwith if not required for any other purpose. Fine if any paid is ordered to be refunded to them.

51. In connection with appellant-accused No. 2. it may be noted here that during the pendency of this appeal he had moved a Criminal Application bearing No. 262 of 1994 for getting temporary bail. While dealing with the matter, this Court found out that the certificate pressed into service for getting orders in that application was forged and therefore, by its order dated 15-2-1994, the Court awarded two years rigorous imprisonment and a sentence of fine of Rs. 1,500/- and in default to undergo six months rigorous imprisonment.

In view of the provisions of Section 427 of the Criminal Procedure Code, the sentence thus awarded, that is a substantive one was ordered to run concurrently. The sentence is, therefore, run its course starting from 15-2-1994. However, as the fine of Rs. 1,500/- is not paid so far, a request is made by the learned Advocate Shri K.J. Shethna on behalf of appellant No. 2 that he be permitted to pay that amount in the office of Nazir of this Court and obtain receipt thereof so that the benefit of the order passed in the appeal can be availed of by appellant-accused No. 2 today. The request is granted. Direct service permitted.

