

Paresh Kalyandas Bhavsar vs Sadiq Yakubbbhai Jamadar And Others on 24 March, 1993

Equivalent citations: AIR1993SC1544, 1993CRILJ1857, 1994(1)CRIMES20(SC), (1994)1GLR186, JT1993(2)SC435, 1993(2)SCALE200, (1993)3SCC95, AIR 1993 SUPREME COURT 1544, 1993 (3) SCC 95, 1993 AIR SCW 1529, (1993) 2 JT 435 (SC), 1993 (2) JT 435, 1993 SCC(CRI) 612, (1993) SC CR R 406, (1993) MAD LJ(CRI) 632, (1993) 3 CURCRIR 244, (1993) 2 CHANDCRIC 9, (1993) 1 ALLCRILR 844, (1994) 1 CRIMES 20

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Bench: G.N. Ray

ORDER

K. Jayachandra Reddy, J.

1. These two appeals filed under Section 19(1) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 ('TADA Act' for short) arise out of the same judgment of the Designated Court, Vadodara in TADA Case No. 12/90. Criminal appeal No. 247/92 is filed by the five convicted accused who figured as original accused Nos. 5 to 9. The other four accused (original accused Nos. 1 to 4) were acquitted. Challenging the said acquittal, the complainant Paresh Kalyandas Bhavsar (P.W.4) who gave the First Information Report, has filed Criminal Appeal No. 560/92. Both the appeals are being disposed of here by a common judgment. First we shall take up Criminal Appeal No. 247 of 1992. CRIMINAL APPEAL NO. 247 OF 1992

2. The facts of the case as put forward by the prosecution are as follows:

3. Moti Chhipwad is an area in Vadodara City. In one locality in that area Hindus are predominantly the occupants and in another locality called Bhaishwada the Muslims are predominantly the occupants. Since 1985 there have been communal disturbances resulting in rioting between the two communities. Narendrabhai Ramanlal Bhavsar, P.W. 5 residing in Moti Chhipwad was serving in a private firm at Ahmedabad and he used to go to Ahmedabad and come back in the evening to his house where he used to reside with his wife Nishita alias Dipika, his two daughters namely Nainisha aged 6 years and Komal aged 1-1/2 years. His Younger sister Bharati, P.W. 6, aged about 18 or 19 years was also residing with him in the same house. His house is situated at the end at the Naka of Bhaishwada and near Sanyas Ashram. Rikshaw garage belonging to Kadarbhai, A-6 is situated

opposite his house. The house of Gabubhai, A-4 is situated near the house of A-6. A-4 was residing in his house alongwith his son Yakubbbhai, A-9. A-4 was running a Pan Galla near Sanyas Ashram. All other accused are the residents of Bhaiswada. P.W. 4, the complainant in the case is also a resident of Moti Chhipwad. Some of the other witnesses also belong to the same locality. On 7.4.90 Curfew was imposed in those areas and on that day P.W. 5 returned to Vadodara from Ahmedabad at about 8.15 P.M. by train and he learnt at the Station that communal disturbances have started in the city. He was worried about his house and hurriedly reached his house at about 8.30 P.M. and he found his sister, his wife and daughters in the house. They had their meals and P.W. 5 was sitting on the otta of the house. At about 9.15 P.M. he heard some shootings from the side of Moti Chhipwad and he noticed that stones hurled were coming towards Moti Chhipwad from the corner of Haji Ramjan. Immediately after five minutes stone throwing started in his area. People in their locality were crying for help. P.W. 5 went inside his house and closed the doors by means of a chain. Within five minutes a mob consisting of about 10 to 15 persons belonging to Muslim community rushed towards his house from Bhaiswada Street and Dudhwala Street and they were shouting "Kill, Bum, Beat". They were armed with deadly weapons and were carrying burning rags. Through the rift on the window of the door of his house, P.W. 5 saw the mob. In the meanwhile, the mob climbed up the otta of the house of P.W. 5. They broke open the door of the house by means of pushes. At that time P.Ws 5 and 6 and other family members were sitting inside the house and a light was burning. After breaking open the door A-4 to A-9 rushed into his house while the remaining persons of the mob were standing outside. A-6 Kadarbhai had steel pipe in his hands, A-9, Yakubbbhai had a knife with him, A-8, Isaq Mansuri had a kerosene tin in his hands. A-6 rushed towards Bharati, P.W. 6. At that time Nishita, who was pregnant, was sitting with her daughter Komal in her lap. A-5, Sabaskhan and A-7 Iqbal Hussain caught hold of her by her hairs and did not allow her to stand up. A-8 brought the kerosene tin and sprinkled the same on Nishita and Komal. In the meanwhile A-9 stabbed P.W. 5 and his intestines came out. A-8 lit a match stick and threw it on the clothes of Nishita and there was a fire. P.Ws 5 and 6 tried to go out but A-9 stabbed P.W. 6 also on her left hand. A-6 gave a blow on the head of P.W. 5 with a steel pipe. During this time Nainisha, elder daughter of P.W. 5 escaped from the house. Thereafter the accused who came into the house and others standing outside started running towards Bhaiswada. The persons who entered the house threw away the cycle belonging to Nainisha and other household articles and they were also burnt. P.W. 5 managed to come outside. The Police arrived there. P.W. 5 came out of the house and saw P.W. 4 and other boys of the locality who took care of him. P.W. 5 was removed to the hospital in a painful condition and he was treated there. Nishita, his wife and Komal, his daughter were burnt alive and they died. During the course of rioting, P.W. 4 also received injuries because of acid throwing. P.W. 7 Melasingh, P.W. 8 Mukesh and P.W. 9 Dilipbbhai were some of the persons who reached the spot and saw the household articles of P.W. 5 burning. The Police Inspector Manilal Damor, P.W.19 who reached the place of occurrence also received injuries by acid. The Police Inspector Mandansinh Rana, P.W. 15, who also reached the place of occurrence, chased some of the persons in the crowd and he caught hold of A-1 to A-3. Nishita and Komai were taken to the hospital and were declared to be dead. Dr. Babulal Patidar, P.W.14 sent information to the police regarding the incident The officer in the said Police Station made an entry to this effect and handed over the investigation to Police Sub Inspector Bhimjibhai Barai, P.W. 20 who reached the hospital. Before him P.W. 4 lodged his complaint at about 9.45 P.M. and the same was sent to the Police Station for registration of the crime. Meanwhile Police Inspector Shri Bhugukumar Pathak, P.W. 22 reached there and investigation was handed over to him and he

started the investigation. He sent a yadi (request) to record the dying declaration of the injured. From the scene of occurrence he recovered one kerosene tin and one steel pipe under a panchnama. He came to know that Nishita and Komal died. He sent Police Sub Inspector Narendrakumar Babulal Jani, P.W.17 to hold inquest. Meanwhile the three arrested accused were produced and they were taken into custody and later sent to judicial custody. Thereafter P.W. 202 recorded the statements of the witnesses.

4. Dr. Rakesh Tandon, P.W. 10 conducted the post-mortem on the bodies of the deceased Nishita and Komal and he found extensive burn injuries on them and opined that both of them died because of the burn injuries and that the injuries were sufficient in the ordinary course of nature to cause death. Dr. Virendra Thakkar, P.W. 12 examined some of the other witnesses. Dr. Babulal Patidar, P.W.14 examined Bharati, P.W. 6 on 7.4.90 at about 10.50 P.M. and he found a stab wound on the left forearm and he issued a medical certificate and admitted her as an indoor patient and she was discharged on 16.4.90. The same Doctor examined P.W. 5 on the same night who came with a requisition. The Doctor found stab wound over the right side of the abdomen and small intestines were perforated. It was felt that an operation was necessary and by applying general anesthesia P.W. 5 was operated for Laprotomy and he was discharged on 16.4.90. The Doctor opined that the injury was of a grievous nature. The same Doctor examined P.W. 4 also at 11.30 P.M. and found on him acid burns. The accused were arrested on various dates and at their instances some recoveries are said to have been effected. After completion of the investigation, the chargesheet was laid against nine accused.

5. The prosecution examined 22 witnesses. When examined under Section 313 Cr.P.C. the accused pleaded not guilty. They however gave an application to examine the Executive Magistrate, C.W.I who recorded the dying declaration of P.W. 5 in the hospital. The Executive Magistrate Shri Manharbhai Savailal Galiyara was examined as Court witness and he produced the copy of the dying declaration Ex. P. 166, the contents of which will be referred to later. Before the trial court as well as before us the contentions advanced are more or less the same. It is submitted that P.Ws 5 and 6 as well as other witnesses are all highly interested in as much as admittedly there have been such communal riots since 1985 and that these witnesses who belong to Hindu community were deadly inimical towards Muslims who were living in that area and that apart they had something to do with earlier cases having figured either as P.Ws or as accused. This criticism is specifically directed against the evidence of P.W. 4 who gave the report and it is further contended that he, being a highly interested witness, has falsely implicated these accused and that non-examination of any independent witness belonging to the locality is fatal to the prosecution case. The next submission is that there were number of telephone messages about the incident constituting the FIR in the case and as the investigation was already commenced, therefore the information given by P.W. 4 ought not to be treated as FIR in the case as it is hit by Section 162 Cr.P.C.

6. The next and most important submission, according to the learned Counsel appearing for the appellants, is that the Executive Magistrate Manharbhai Savailal Galiyara examined as C.W.1 recorded the dying declaration of P.W. 5 on 7.4.90 the day of occurrence and in the said statement no names have been mentioned and that the said statement was suppressed by the prosecution and the fact that P.W.S in his deposition denied any knowledge about such statement, makes his

evidence highly suspicious and untrustworthy. Coming to the occurrence as such, it is submitted that the version that kerosene oil was sprinkled on the two deceased is belied by the fact that the panchas or doctors did not find any kerosene smell emanating from the dead bodies. Finally it is submitted that the investigation had been highly unfair and not objective and that in such a situation the evidence of the witnesses who are under the influence of the police can not be given any credence. In this context it is submitted that at every step the investigation has been questionable and the deliberate delay and lapses in recording the statements of the alleged witnesses and in not getting the dying declaration recorded in time vitally affect the prosecution case.

7. It is not in dispute that on the night of 7.4.90 communal riots took place in that area and that a crowd consisting of Muslims unlawfully went around and damaged the houses and properties belonging to some of the Hindus in that locality and also attacked some of them. In this case we are mainly concerned with the occurrence that took place inside the house of P.W. 5. To prove that the deaths of the deceased Nishitaben and Komalben, wife and daughter of P.W. 5 respectively were homicidal the prosecution has examined Dr. Rakesh Tandon, P.W.10 who conducted the post-mortem and his evidence establishes beyond all reasonable doubt that the deaths of these two deceased were due to shock as a result of burn injuries found on their persons. In the course of the rioting P.W. 5 and some others also received injuries. The evidence of Dr. Praveen Thakkar proves the injuries found on them and there cannot be any doubt that they received these injuries during the same rioting. Now the question is whether the evidence of these witnesses can be relied upon. The learned Counsel in this context submitted that all these witnesses are interested and therefore they are Likely to speak falsehood and it is not possible to separate truth from falsehood. It is needless to say that mere interestedness is not a ground to reject the evidence of the eye witnesses particularly those who were injured. Firstly their presence during the occurrence can not be doubted. Secondly the injured witnesses would be the last persons to leave out the real culprits and implicate others falsely. However, it becomes necessary to scrutinise their evidence with great care and caution. Normally in a case of this nature the evidence of such witnesses is scrutinised in the light of the medical evidence, their previous statements, the earliest version put forward and other circumstances like the investigation being defective and also the effect of omissions or discrepancies, if any. First we shall briefly refer to the evidence given by these witnesses. The material witnesses are P.Ws 4 to 9. P.W. 4 is the complainant in the case and is also injured. He lives in Moti Chhipwad. He knows P.W. 5 and his family members. He deposed that in Bhaishwada the residents mainly belong to Muslim community. He was serving in P.W.D. as Wireman. On 7.4.90 curfew was imposed in that area. Therefore he came home at about 2 P.M. His house is about 100 ft. away from the house of P.W. 5. On the day of occurrence at night after taking meal he went to the house of his brother Ashwanibhai Kalyanbhai Bhavsar at about 9 P.M. which is closer to the house of P.W.S. He heard the shouts coming from Moti Chhipwad and also saw the stones being hurled upon their locality. There was no police at that time and the people were shouting for help. Then at about 10 or 10.30 P.M. a mob consisting of 10 to 15 Muslims persons came into that locality being armed with deadly weapons and sharp instruments shouting "Beat, Cut and Bum" and by raising such shouts they rushed towards the house of his brother. In that mob he saw all these nine accused. Some of them were also having bottles of acid and one of them threw acid bottle as a result of which P.W. 4 received injuries. Just then the accused entered the house of P.W.S by breaking open the door and threw away the household articles and started burning them. He and others who were

standing outside heard the shrieks of the members of the family of P.W. 5. They also saw smoke emanating and felt smell of kerosene. The persons who entered the house, came out and the mob ran away as soon as the police came and tried to chase them. It is in his evidence that after the arrival of the police, the residents of the locality collected and all of them went inside the house of P.W. 5 and found Nishita and Komal burnt and lying on the ground. They also found P.W. 5 injured on the right side of his abdomen and the wound was bleeding. They also found P.W. 6 Bharati having been injured. An Ambulance van came and P.W. 4 took the two injured deceased to the hospital where the Doctor pronounced Komal to be dead. Then the Police came and he gave a report to them which was signed by him. This witness is cross-examined at length. The first part of the cross-examination is about the location of the houses. Then the next part of the cross-examination is regarding the identification of the accused. He has clearly stated that he knew all the accused. One of the suggestion is that his evidence that he went to his brother's house which is near to P.W. 5's house is false and that he has introduced the same to make himself to be present at the scene of occurrence near P.W. 5's house which he denied. The presence of acid injuries on him also is assailed. But having regard to the medical evidence it has to be accepted that he received acid injuries during the said occurrence. Therefore his presence can not be doubted at the scene of occurrence. Yet another criticism against the evidence of this witness is that his brother Ashwanibhai figured as a panch witness and that some of his relations figured either as accused or witnesses in the earlier cases. Merely because his brother figured as a panch witnesses or even accepting that his brother and some relations were accused in the earlier cases, it could not be a valid ground to doubt his veracity and on the suggestion that P.W. 4 was chosen as a complainant purposely and deliberately also has no force since his presence at the scene of occurrence can not be doubted.

8. Yet another criticism in respect of the evidence of this witness is that the earliest report claimed to have been given on that night itself was in fact given much later. It is submitted that the FIR reached the Magistrate after some days namely on 17.4.90 and it would go to show that the same must have been brought into existence at a later stage. Having regard to the nature of occurrence, even if there has been some delay in sending the FIR that by itself is not a ground to hold that the same must have been brought into existence at a later stage and assuming there is delay what the court has to see is whether there are indications in the report to show that it was a result of subsequent deliberations. In the FIR the name of the informant P.W. 4 is mentioned and the time of the report is mentioned as 0030 hrs. on 8.4.90 i.e. early hours of 8.4.90. Only the names of nine accused are mentioned. In the actual report P.W. 4 has stated as to how he went to his brother's house and about the crowd coming shouting and he saw some of the persons in the crowd armed and has given further movements of the crowd upto the point of accused entering into the house of P.W. 5. He has further stated that he saw smoke emanating from the house of P.W. 5 and the smell was like kerosene and the persons in the crowd burning the household articles of P.W. 5. He has also stated that after the crowd left being chased away by the police, he, his brother and others went inside the house of P.W. 5 and found the two deceased lying with burn injuries. Earlier he has also mentioned that acid was thrown on him and he received burn injuries. He gave this report to the police as stated earlier. The particulars mentioned in that report do not in any manner give any indication of any exaggeration or a wholesale roping of the Muslims of the locality as accused. Only the names of the nine accused are mentioned and the other details of the occurrence inside the house of P.W. 5 are

not mentioned. If P.W. 4 was bent upon giving a false report after due deliberations one would expect him incorporating many such other details. A plain reading of the report shows that P.W. 4 has particularly stated that part of the occurrence which he has only seen. After having gone through the same we are satisfied that the report is a true one and even accepting that there was some delay in sending the same to the Magistrate that is not a ground to doubt the genuineness of the report. P.W. 4's evidence clearly proves that he saw the nine accused persons in the mob moving about actively armed with weapons.

9. P.Ws 5 and 6 are the main witnesses for the purpose of this case. In his chief examination, P.W. 5 has given all the details of the occurrence which we have already mentioned while stating the prosecution case. He has clearly deposed that A-4 to A-9 rushed inside the house after breaking open the door. He further deposed that A-6 had a steel pipe in his hands, A-9 had a knife with him and A-8 had a kerosene tin in his hands and he has also given the details of the overt acts committed by these accused. He deposed that A-5 and A-7 caught hold of his wife Nishita and A-8 poured kerosene on her and on Komal and in the meanwhile A-9 stabbed him in the abdomen and A-8 lit the match stick and set fire to the clothes of Nishita and Komal and A-6 dealt a blow on the head of P.W. 6 Bharati. P.W. 5 has identified all the nine accused in the court and he has also deposed that he has known them. This witness was cross-examined at length. A part of it is about his job. He was asked whether he requested for any police help etc. Since the occurrence is not in doubt, it is not necessary to refer to this part of the cross-examination. Some part of the cross-examination is about the particulars of the locality. Now coming to the occurrence this witness was confronted with some of his earlier statements. It appears that in his earlier statement he stated that he had closed the door of his house and that he had seen from the side of the door. The contradiction is that in his present statement he has deposed that he had seen from the side of the door through the rift of the window which is next to the door. That is not at all a discrepancy worth mentioning particularly having regard to the fact that in his own presence the rest of the occurrence took place inside the house. In his further cross-examination he admitted that he has stated before the police that after receiving the injury on the abdomen he ran out and there was profuse bleeding and he further admitted that he could not say as to whether any blood drops had fallen out on the ground. When the injury itself is not in doubt, even assuming that there was no positive evidence whether the blood was found on the ground, that by itself does not introduce any infirmity into his evidence nor could his presence be doubted. In the further cross-examination, he stated that when he reached the hospital he was in severe pain and was also unconscious. He denied the suggestion that he was conscious. He denied a further submission that since he was conscious and could speak, the Executive Magistrate recorded his dying declaration. The witness was shown the carbon copy of his statement which was recorded by the Executive Magistrate. He further stated that it bears his signature but he has put the same in state of dozing. At that stage a copy of the statement marked Ex. 105 was produced and the witness was further cross-examined with the said statement. He denied the suggestion that Ex. 105 was duly recorded and that he is saying that it was not his statement duly recorded since the same goes against the prosecution case. learned Counsel for the appellants strongly relied on the contents of this document and contended that since no names of the assailants are mentioned in this statement, the present case of the prosecution based on the evidence of those witnesses against the appellants can not be accepted at all and that the only conclusion is that these witnesses have later deliberately implicated these accused at the instance of

some interested persons and the police. We may point out at this stage that this was the main rather the important submission made by the learned Counsel. We would like to deal with the same in some detail.

10. As already mentioned the Executive Magistrate was examined as a Court witness. He deposed that on 8.4.90 he was discharging his duty as an Executive Magistrate in the City of Vadodara and he was at home. He received a yadi from the City Police Station for recording the dying declarations of P.Ws 5 and 6 at about 6 A.M. and he went to the hospital. He enquired from the Doctor and came to know that P.W. 5 was in his cot in the hospital. He was in Room No. 13 in the hospital. The Magistrate further deposed that he went to P.W. 5 and interrogated him and recorded the answers given by him. The statement was marked as Ex.P.166. In the cross-examination by the accused C.W.I stated that when he recorded the statement, P.W. 5 was conscious and could reply properly and could understand what he asked. He completed the statement at 6.30 A.M., read over the same to P.W. 5 and obtained his signature and he himself signed. The whole statement with the signature was marked as Ex.P.105. When cross examined by the public prosecutor, C.W.I clearly admitted that the Doctor had not examined P.W. 5 in his presence but he simply told him that he was conscious. He further admitted that he had not obtained any certificate from the Doctor to the effect that P.W. 5 was conscious and was able to give answers. He further admitted that he did not know whether the patient was brought from the operation theatre. One important admission made by him is that the patient was giving answers in piecemeal and he did not know whether the patient was under the influence of anesthesia. He also admitted that at the time of questions and patient's replies, the latter closed his eyes and opened the same and that because of the injuries, the face of the patient appeared to be painful. It is also pertinent to note that it is not even suggested to C.W.I that he asked about the assailants and yet the P.W. 5 did not give the names or there is ever a whisper in his evidence that he made any enquiry whatsoever about the alleged assailants. It can therefore be seen that C.W.I, the Executive Magistrate did not obtain any endorsement from the Doctor to the effect whether the patient was conscious and further mentally sound to make the statement. The Executive Magistrate admitted that the patient was giving answers in piecemeal thereby indicating that he was not fully coherent, In this context the evidence of the Doctor who was attending on P.W. 5 becomes very important

11. P.W.14 Dr. Babulal Patidar was the Medical Officer who admitted and treated P.W. 5. He deposed that at about 10.50 P.M. on 7.4.90 he examined P.W. 5 who came without a yadi. He found one incised wound on the right side of abdomen from which intestines had come out and it was cavity deep. On examination he found that there were 8 holes in the small intestine and the patient was operated for Laprotomy on the same night after giving general anesthesia. The Doctor added that the effect of anesthesia generally remains for 8 to 10 hours on the patient. In the cross-examination P.W.14 admitted that P.W. 5 told him that he was injured with a knife and at that time he was conscious. He further admitted that P.W. 5 had not given the names of the assailants. This witness asserted that he had no personal knowledge as to when the Executive Magistrate, C.W.I recorded the dying declaration of P.W. 5. The above evidence of C.W.I coupled with the evidence of P.W.14 would go to show that P.W. 5 was operated after given general anesthesia on that very night, the effect of which would remain for 8 to 10 hours on the patient and that C.W.I interrogated P.W. 5 without even knowing that the patient was under the influence of anesthesia having been operated

and that at any rate C.W.1 did not make any enquiry from the Doctor at the time of recording the statement whether the patient was in a fit condition to make the statement. The evidence of C.W. 1 itself shows that the patient was giving answers in piecemeal. learned Counsel for the appellants further submitted that P.W. 5 did not give the names of the assailants either to the Doctor or at any rate did not mention them in the dying declaration Ex. 105 and that this circumstances itself is very important and would be sufficient to discard his evidence as well as that of P.W. 6 who gave the same version. We seen no force in this submission. As stated above the condition of the patient was such that he could not have been mentally sound to make a dying declaration as such. No doubt the Doctor has stated that he was conscious but the surrounding circumstances that he was operated and that he was under the influence of general anesthesia and that he was not coherent are some of the important aspects that have to be kept in mind in considering this contention. Neither P.W.14 the Doctor nor C.A.1 the Executive Magistrate have stated that they enquired P.W. 5 about the alleged assailants. In this background now we shall examine the contents of Ex.P. 166 the alleged dying declaration, which reads thus:

Shri Narendra Ramanlal Bhavsar who is under medical treatment in Ward No. C/2 of S S G Hospital, is conscious and according to medical opinion, he is able to give his statement, I went to the hospital for recording D.D. of the patient and after an inquiry from the doctor/staff nurse on duty, as to where the said patient is kept under treatment, I went there personally and I gave my identification to the patient that I am an Executive Magistrate and commenced to record the dying declaration of the aforesaid patient. Its proceedings:

Its proceedings :

(1) Starting time of recording dying declaration 6.10 a.m. Date 8-4-90 Place : S.S.G. hospital Ward No. C/2 Room No. 13, Bed No. (2) What is your full name. Narendra Ramanlal Bhavsar (3) What is your age? 29 years (4) Where are you residing: Moti Chhipvada Naka. (5) What are you doing? Service (6) What has happened to you? I am injured (7) How has the incident happened?

On 7.4.90 between 10.00 to 10.15, there was stone throwing on my house from front side and from rear side. At that time, I was sitting on the otta of my house after having my meals, but because of stone throwing, I had gone inside the house. Thereafter, a mob of about 50 persons who were Muslims had entered into my house and gave me a blow by a weapon like a sword on my abdomen and also give pipe and stick blows on my back side. Therefore, I am injured on the back side. Further, by sprinkling kerosene on my wife and my daughter, they have burnt them alive.

(8) Do want to say any further?

During the aforesaid proceedings, except me and the Magistrate, nobody was present.

I am read over the aforesaid statement which is admitted by me.

Sd/- Narendra R. Bhavsar (9) Date and time of completion of D.D. proceedings. 8.4.90 6.30 a.m. Before me Sd/- M.S. Ghaliara Executive Magistrate, Vadodara c/o Office of City Mamlatdar, Vadodara.

In the above statement, we find that P.W. 5 has given a bare outline of the incident that happened inside the house. The statement does not show that there was any effort made by the Executive Magistrate to ascertain the names of the assailants. It is not stated in the statement that the injured could not identify the assailants nor it is stated that some unknown persons entered his house. One could understand if the injured had not mentioned the assailants or any of their particulars in spite of being asked specifically. P.W.5 witnessed a ghastly occurrence in the house. He himself received a serious injury and he was rushed to the hospital immediately. Since the injury was serious he was operated and was under the effect of general anesthesia. The nature of the occurrence was such that would have dazed him and the uppermost thing that was in his mind would have been that a communal rioting took place and that Muslims entered his house and caused the death of his wife and daughter and also caused injuries to his sister Bharati, P.W.6 and that is what he stated and when he made the statement he was not fully conscious and in sound mind to give further details from the point of view of a specific crime having been perpetrated and the consequent investigation thereupon. At any rate there is nothing to indicate in his statement that he was asked about these assailants and could not say nor that he was unaware or did not know some of the actual assailants. On the basis of such a vague statement and particularly having regard to the circumstances in which it was made, we find extremely difficult to discard the evidence of P.Ws 5 and 6 the two injured eye-witnesses. Moreover, with regard to the presence of these accused, there is no question of any mistaken identity since P.Ws 4 to 9 knew them well and they have given all the particulars in this context.

12. The evidence of P.W.6 Bharati is also to the same effect as that of P.W.5. She has also given all the details of the crime. P.W.14 examined her on that very night and found two incised wounds on the left hand and on the left wrist and a swelling on the left of the head. She was admitted in the hospital as indoor patient and was treated for the injuries and was discharged on 16.4.90. P.W.14 further deposed that he found P.W.6 very much frightened and she was in acute distressed reaction and she was given Psychiatric treatment and during the treatment she was given psychotropic drugs. The same criticism namely that she has also not given the names of the assailants to the Doctor, is levelled against her. The Doctor clearly stated that he did not ask her about the assailants. Further her mental condition, as spoken to by the Doctor, itself shows that at that stage she could not have been in a position to give the particulars of the assailants inasmuch as she was not even asked about the same. learned Counsel submitted that her statement as well as the statement of Nishita who was also admitted in the hospital and who died later, could have been recorded and that the investigating officers deliberately omitted to record their statements with a view to build up a case at a later stage. We may at this stage point out that there is nothing on record to show that any requests were issued to the Executive Magistrate to record their statements and the question of recording the statement of Nishita, deceased could not have arisen at all as she died that very night. Therefore the evidence of P.Ws 5 and 6 by itself would be sufficient to establish the guilt of the appellants. The learned Counsel for the appellants also pointed out that the presence of P.W.6 in the house when the occurrence took place is not specifically mentioned by P.W.5 in his dying

declaration and therefore her presence is doubtful. We see absolutely no force in this submission. The injuries on P.W.6 themselves establish her presence and there is absolutely no doubt whatsoever that she received the said injuries during that riot and she must have received them inside the house. Being a lady, she could not have gone out. In any event the evidence of P.W.5 clearly shows that his sister P.W.6 aged about 20 years was living with him and P.W.6 confirms the same. There is nothing in the cross-examination of P.W.6 which even remotely indicates that she could not have been present in the house of her elder brother P.W.5. Further their evidence is corroborated by the evidence of P.W.4 as well as by the evidence of the other witnesses namely P.Ws 7,8 and 9. P.W.7 Melsingh is a neighbour of P.W.5. He deposed that on that very night he heard the shouts and saw about 15 persons who came in a crowd and in that crowd he identified A-4 Gabubhai Hajibhai, A-6 Ayubkadar Malangbhai Dudhwala, armed with deadly weapons, A-9, Yakubhai Babubhai Jumliwala, A-8 Isaq Abdulmajid Mansuri, A-5 Sabaskhan Nurkhan Pathan and A-7 Iqbal Husain Abdulmajid Mansuri. He saw them entering into the house of P.W.5 and he also saw them causing damage to the household articles. A little later police came and the crowd dispersed. Subsequently he was injured when he was near the petrol pump. He was cross examined and we do not find anything significant which affects his veracity. P.W.8 Mukesh is another witness who saw the accused in the crowd. He identified these appellants in the crowd and some of them were armed with deadly weapons. He further deposed that these accused entered into the house of P.W.5 and he saw the household articles being thrown away and he also noticed smoke coming from the house of P.W.5. Just then police came and the accused ran away. He came to know that Nishita and Komal died. He identified all the accused in the court also. He was also injured because of acid thrown on him during that rioting and he was treated by the Doctor and the medical evidence confirms the same. He also speaks about the presence of P.W.4. He was cross-examined with reference to his earlier statement but the so-called contradictions are not at all material. Then we have the evidence of P.W.9 Dilipbhai. He deposed that he resides in a house on the main road of Moti Chhipwad. On the day of occurrence he saw a mob of about 10 to 15 persons coming from Bhaiswada armed with deadly weapons and throwing acid bulbs. Among them he identified, A-5 Sabaskhan, A-8, Isaq, A-7 Iqbal, A-9 Yakub, A-6 Kadar and A-4 Gububhai. He stated that the crowd entered the house of P.W.5 and after 5 or 7 minutes he heard the shrieks of Nishitaben and meanwhile the police came and the crowd dispersed. Thereafter he went to the house of P.W.5 and in front of his house he found P.Ws 4,5 and others. He came to know that they were also injured. In the cross-examination it is elicited that one incident took place in 1985 and it was a communal riot during which the garage of Kadarbhai was set on fire and in that case he was involved and later he was acquitted. The criticism against him is that he is an interested witness but as already discussed that by itself is not a ground to discard his evidence when he is a natural witness. The trial court which had the opportunity of watching the demeanour of these witnesses has considered their evidence in great detail and has accepted the evidence of P.Ws 7, 8 and 9 which fully corroborates the evidence of P.Ws 5 and 6.

13. learned Counsel for the appellants severely criticised the manner in which the investigation was carried on. We shall briefly refer to the evidence of the witnesses connected with the investigation part of the case and then refer to the various points of attack.

14. Circle Inspector Rameshbhai Baria, P.W.11 deposed that he was serving in Vadodara Circle as Inspector and he received a yadi from City Mamlatdar and prepared a map of the scene of

occurrence and has deposed about the location of the houses in that area. Virendra Thakkar, P.W. 12 as a panch witness, alongwith Ashwinibhai another panch witness not examined, speaks about the panchnama prepared at the house of P.W.5 and at other houses. He also deposed about the articles that were seized including a tin and a steel pipe. Madansinh Rana, P.W.15 is a Police. Inspector. He deposed that he was working as Police Inspector in D.C.B. Police Station, Vadodara and that on 6.4.90 communal riots spread in Baroda and he was patrolling with the staff. On 7.4.90 at about 8 P.M. he received a message from the Control Room asking him to reach Chhipwad area as early as possible. Accordingly he reached Chipward and found a crowd of Hindus and Muslims quarreling. He found one woman and child burnt alive lying in the house. He also saw three persons escaping and he chased them and caught hold of them. At that time Police Inspector Manilal Damor, P.W.19 and other police officers came there. The persons who were arrested were found to be from the Muslim community and he sent them to the police station. P.S.O. Shantaben P.W.16 who was present in the Police Station made some entries in the record and registered the crime. On the same night P.S.I. Bhimjibhai Barai, P.W.20 recorded the complaint of P.W.4 and sent it to the Police Station for registering the crime. P.S.O. P.W.16 made an entry and the investigation was handed over to Police Inspector Bhugukumar Pathak, P.W. 22 at the instance of the Police Commissioner. P.S.I Narendrakumar Babulal Jam P.W. 17 held the inquest on the dead bodies of Nishita and Komal. P.W.19 also deposed about his going to the place of occurrence and about arresting of the three accused A-1 to A-3. P.W.20 P.S.I. Barai deposed that at about 10.30 P.M. P.S.O . Shantaben P.W. 16 gave a written information that communal riots started in Chhipwad area and that some persons were injured. He further deposed that at the hospital P.W.4 met him and lodged the complaint and after recording he sent the same to the Police Station for registration. Meanwhile Police Inspector Pathak, P.W.22 came there and took over the investigation and he handed over all the papers to him. P.W.22 deposed about the rest of the investigation. He deposed that as directed he went to the place of occurrence, inspected the house of P.W.5 and recovered a kerosene tin and a steel pipe under a panchnama. He recorded the statements of some of the witnesses in the locality and he continued the investigation. On 9.4.90 he recorded the statements of the witnesses Mukesh and others who had also received injuries by acid. He sent them to the hospital. On the same day he recorded the statements of witnesses Jesinghbhai, Melsingh, Dilip and others and on 12.4.90 he again went to the hospital and recorded the statements of P.Ws 5 and 6 etc. and also seized some articles.

15. learned Counsel for the appellants firstly submitted that the police had information already before the complaint of P.W.4 was recorded and therefore the complaint which is treated as F.I.R. is hit by Section 162 Cr.P.C. In this context the evidence of P.S.O. P.W.16 and other police officers is relied upon. P.W.16 deposed that on 7.4.90 at about 8 P.M. she received a complaint from P.W.4 recorded by Shri Barai, P.W.20, registered the offence, made some entries in the station diary and sent the record to Police Inspector Shri Pathak, P.W.22. In the cross-examination she deposed that a telephone information book was kept in the police station and on that night Jesingh Jalam gave the information and it was recorded by her. She deposed that she only made an entry in the diary and also an entry in the telephone information book. She admitted that the information pertained to cognizable offence. She also deposed that the copy of the report was received by the court on 17.4.90. Relying on this evidence, the learned Counsel submitted that there was already information about the commission of a cognizable offence and any statement recorded thereafter particularly the

complaint given by P.W.4 is hit by Section 162 Cr.P.C. There can not be any dispute that any statement recorded during the investigation is covered by Section 162 Cr.P.C. In the instant case the vague information was about the communal riots and violence. Even if entry to that effect is made, the question is whether the investigation commenced in the strict sense. In our view we need not seriously consider this submission inasmuch as even assuming that the complaint is hit by Section 162 Cr.P.C. that by itself does not make any difference. A statement of that nature can be used to contradict the witness and if any material discrepancies are there they can be taken note of. We have already referred to the contents of the complaint and P.W.4 was cross-examined with reference to the contents therein. P.W.4 is not an eye witness to the occurrence inside the house of P.W.5. Therefore even assuming that there are some omissions and discrepancies in the evidence of P.W.4 they would not affect the evidence of P.Ws 5 and 6, the most material witnesses in the case. In any event P.W.4's evidence discloses that he mentioned the names of those accused who were active in the crowd and participated in the violence. P.W.4's evidence only corroborates the evidence of P.Ws 5 and 6 to that extent

16. learned Counsel vehemently contended that the investigating officers including P.Ws 20 and 22 had ample opportunity to record the statements of P.W.6 as well as that of Nishita, the deceased who was alive for some time and they did not make any effort to get their dying declarations recorded. This circumstance, according to the learned Counsel, would indicate that either the police officials deliberately" delayed to get their dying declarations recorded or having got them recorded suppressed the same. We find no force in this submission. The evidence of P.Ws 20 and 22, the police officers as well as that of P.W.19 will go to show that there was a large scale violence and their immediate duty was to control the same and also to see that immediate medical help is provided to the victims. That apart we have already noticed that Nishita died on that very night and P.W.6 Bharati was in a dazed condition and psychiatric treatment was being given to her. In that condition it would not have been possible to record their statements. In this context it is also necessary to refer to some portions of the evidence of P.W.22. He deposed that on the night of 7.4.90 he was asked to take over the investigation at about 11.45 P.M. He learnt from the Police Inspector Barai, P.W.20 that P.W.4 has given a complaint and having ascertained from his about the injured, he came to know that P.W.20 has prepared yadis for recording the dying declarations of Nishita and others. P.W.22 instructed P.W.20 to write yadis for recording the dying declarations of P.Ws 5 and 6 and the yadis were sent In the morning of 8th April he went to the Police Station and prepared some panchnamas and recorded the statements of the witnesses. He continued the investigation and recorded some more statements of other witnesses on 9th and 11th April, 1990. On 12.4.90 he went to the hospital and recorded the statements of P.Ws 5 and 6. This witness was cross-examined at length. He admitted that he reached the hospital at about 12 midnight and he also admitted that yadis were prepared for recording the dying declarations of P.Ws 5 and 6. He further admitted that he came to know that Executive Magistrate, C.W.I recorded the dying declaration of P.W.5. Neither in his chief examination nor in his cross-examination there is anything to indicate that any dying declaration was recorded from either P.W.6 or Nishita, the deceased. The Doctors who were present also do not say anything to the effect that any attempt was made by the police or by the Executive Magistrate to record the statement of Nishita or Bharati, P.W.6. What all we find from the record is that the Executive Magistrate, C.W.I came to the hospital and recorded the dying declaration of P.W.5 all alone by himself and we have already considered the various submissions regarding

various aspects of the statement. Therefore the submission that some other statements must have been recorded either from Nishita, the deceased or Bharati, P.W.6 or for that matter P.W.5 is devoid of substance. learned Counsel also commented upon the delay in recording the statements of P.Ws 5 and 6. P.W.22 has given all the details of the investigation that was carried on 12.4.90 on which day he recorded the statements of P.Ws 5 and 6. The evidence of P.W.22 coupled with the evidence of the Doctors would show that P.Ws 5 and 6 were undergoing treatment. No doubt the Doctor admitted that they were conscious but that by itself is not a ground to infer they that the police deliberately avoided recording their statements. At any rate the delay in recording their statements by itself does not render their evidence suspicious and untrustworthy. Their presence at the scene of occurrence is not in dispute and they were victims who suffered serious injuries. Even if there are some lapses on the part of the investigating officer it can not affect their evidence provided we are satisfied that they are reliable witnesses. We have already referred to their evidence in detail and at the risk of repetition we must say that they have given a clear, cogent and convincing version which is undoubtedly a truthful one. The main attack against their evidence is that they have fallen in line with P.W.4 and implicated these accused. This submission is based again mainly on the basis of the dying declaration of P.W.5 recorded by the Executive Magistrate, C.W.I in which no names of the assailants were mentioned. This aspect, we have already considered and explained. Another aspect pointed out in their evidence is that their version namely that kerosene was poured and the deceased were set on fire, is not supported by the medical evidence or panch witnesses inasmuch as they did not say that there was smell of kerosene on the dead bodies. This again is a minor thing. It may be that neither the Doctors nor the panch witnesses particularly noticed this detail. At any rate even in the earliest report given by P.W.4 it is mentioned that kerosene was poured on Nishita and Komal and they were set on fire. The medical evidence fully establishes that they died because of burns. Therefore it can not be said that there is any infirmity in the evidence of P.Ws 5 and 6 in this regard.

17. Lastly it is contended that persons belonging to political parties have interfered and the investigation was carried on to their dictation. This submission is rather vague and having scrutinised the evidence of the material witnesses, we do not find any trace of false implication. The evidence of P.Ws 5 and 6 is amply corroborated by the evidence of P.Ws 4, 7, 8 and 9 and also by the medical evidence. Their evidence fully establishes the guilt of the appellants beyond all reasonable doubt. Therefore Criminal Appeal No.247 of 1992 is dismissed.

CRIMINAL APPEAL NO. 560 OF 1992

18. This appeal is filed by the complainant P.W.4 in the case against the acquittal of A-1 to A-4. Shri Jaitley, learned Counsel appearing for the appellant submitted that the presence of these four accused in the crowd is not in doubt as spoken to by P.Ws. 4, 7, 8 and 9 further A-1 to A-3 who were in the crowd were chased and arrested by the police and therefore there is enough evidence to show that they were members of the unlawful assembly. So far A-4 is concerned, he submitted that his name was also mentioned by P.Ws 4, 7, 8 and 9 and further evidence of P.Ws 5 and 6 would show that he entered the house alongwith A-5 to A-9 who are convicted and therefore at any rate A-4 could not have been acquitted under any circumstances. This is a case where communal riots took place at a large scale. The evidence of police officials would shows that by the time they reached the

place of occurrence there were a number of people and among them some Hindus also were there and seeing the police the persons in the crowd started running away and A-1 to A-3 while running away were chased and caught. The trial court felt that it may not be safe to hold that they were also members of the unlawful assembly. We can ; not say that this reasoning is unsound as to warrant interference in this appeal against acquittal that too filed by the complainant. Now coming to A-4, no doubt there is evidence of P.Ws 5 and 6 that he also entered the house but he did not participate in the occurrence that took place inside the house of P.W.5 and no overt act has been attributed to him. The trial court in this context referred to the evidence of P.Ws 5 and 6. So far as A-4 is concerned the trial court noticed that P.W.6 saw A-4 in the crowd outside but did not say that from the crowd he rushed inside the house and neither of these two witnesses say that he has taken any part in the occurrence inside the house. Taking the evidence of these two witnesses as a whole, the trial court gave the benefit of doubt to A-4 also. We do not think that there is a strong case against A-4 which warrants interference and. it is difficult to say that the reasons given by the trial court are wholly unsound. In the result, Criminal Appeal No. 560 of 1992 is also dismissed.