Supreme Court of India
Tanviben Pankajkumar Divetia vs State Of Gujarat on 6 May, 1997
Bench: G.N. Ray, G.T. Nanavati

PETITIONER:
TANVIBEN PANKAJKUMAR DIVETIA

Vs.

RESPONDENT:
STATE OF GUJARAT

DATE OF JUDGMENT: 06/05/1997

BENCH:
G.N. RAY, G.T. NANAVATI

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T Present:

Hon'ble Mr. Justice G.N.Ray Hon'ble Mr. Justice G.T. Nanavati Ram Jethmalani, Sr. Adv., Ms. Lata Krishnamurthi, Ms. Sunita Sharma, P.H. Parekh, Advs. with him for the appellant S.K. Dhokakia, Sr. Adv., Ms. S. Hazarika and Mrs. H. Wahi, Advs. with him for the Respondent J U D G M E N T The following Judgment of the Court was delivered: G.N.RAY.J., This appeal unfolds a very sad incident where on account of murder of her mother-in-law, the appellant has been convicted for such murder under Section 302 read with Section 34 IPC not on the basis of my direct evidence but on the basis of circumstantial evidence led by the prosecution. It may be indicated here that although the appellant was also charged under Section 302 read with 120B IPC and under Section 302 IPC, the trial court acquitted the appellant of such offences but convicted her for offence under Section 302 read with Section 34 IPC. Against such decision of the learned Sessions Judge, the appellant preferred an appeal before the Gujarat High Court. The State also preferred an appeal against acquittal of the charges under Section 302 read with 120 B IPC and Section 302 IPC. The Division Bench of the High Court dismissed the appeal preferred by the State. So far as conviction under Section 302 read with 34 IPC is concerned, the Judges of the Division Bench differed. One of the Judge constituting the Division Bench upheld the conviction of the appellant under Section 302/34 IPC but the other Judge of the Division Bench held that the case against the appellant was not established beyond reasonable doubt and the conviction was based on surmise and conjecture

and the accused was entitled to be acquitted. In view of such difference of opinion, the appeal was referred to a third Judge of the High Court under Section 392 of the Code of Criminal Procedure. The third Judge has upheld the conviction of the appellant under Section 302/34 IPC and the appeal of the appellant was, therefore, dismissed by the High Court.

Before the third Judge of the High Court reliance was made in Empress Vs. Debi Singh (1986 Allahabad Weekly Notes

275) since reproduced in the decision In ReNarsiah (AIR 1959 A.P. 313) that "as a matter of judicial etiquette, when one Judge differs from his brother Judge on a pure question of the weights of evidence as to the propriety of a conviction, the opinion of the Judge who is in favour of acquittal should prevail at least, as a general rule". It was contended that in view of finding by one of the members of the Division Bench that the appellant was entitled to be acquitted, such view in favour of acquittal, as a rule of prudence, should be accepted by the third Judge hearing the appeal under Section 392 Cr. P.C. The third Judge, however, by referring to several decisions of this court has discarded such contention and has considered the appeal on merits. We feel that it will be appropriate to consider the scope and ambit of Section 392 of the Code of Criminal Procedure and the question of acceptance of the view in favour of acquittal, as a rule of prudence or on the score of judicial etiquette by the third Judge.

The procedure to be adopted suo moto by the court in the vent of difference of opinion between the two judges, comprising the Division Bench of the High Court was first introduced in Section 429 of the Code of Criminal Procedure 1898. Section 429 of the Code of Criminal Procedure 1898 is to following effect:

> "When the Judges comprising the court of appeal are equally divided in opinion, the case with their opinions thereon, shall be laid before another Judge of the same court, and such Judge after such hearing (if any) as he thinks fit shall deliver his opinion, and the judgment or order shall follow such opinion."

The Law Commission in the 41st Report had observed that if either of the Judges first hearing the appeal so requires or if after reference, the third Judge so requires, the case should be reheard and decided by a Bench of three or more Judges. This was incorporated in Clause 402 of the Bill. The Joint Select committee however substituted the words "larger Bench of Judges" for the words "Bench of three or more Judges" occurring in clause 402. Section 392 reproduces the proviso as amended by the Committee. Section 392 of the Code of Criminal Procedure as enacted is to the following effect:-

> 392. "Procedure where Judges or Court of Appeal are equally divided
>
> - when an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal, with their opinions, shall be laid before another Judge of that Court, and that Judge after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion:

> Provided that if one of the Judges constituting the Bench, or, where the appeal is laid before another Judge under this Section, that Judge, so requires, the appeal shall be re-heard and decided by a larger Bench of Judges."

The plain regarding of Section 392 clearly indicates that it is for the third Judge to decide on what points he shall hear arguments, if any, and it necessarily postulates that the third Judge is free to decide the appeal by resolving the difference in the manner, he thinks proper. In Baby and Other versus State of Uttar Pradesh (AIR 1965 SC 1467) it has been held by Constitution Bench of this Court that where the third Judge did not consider it necessary to decide a particular point on which there had been difference of opinion between the two Judges, but simply indicated that if at all it was necessary for him to come to a decision on the point, he agreed with all that had been said about by one of the two Judges, such decision was in conformity with law. That the third Judge is free to decide the appeal in the manner he thinks fit, has been reiterated in Hathuba Vs. State of Gujarat (AIR 1970 SC 1266) and Union of India Vs. B.N. Ananthapadmanabhiah (AIR 1971 SC 1836). In State of A.P. Vs. P.T. Appaih (1981 SC 365), it has been held by this Court that even in a case when both the Judges had held that the accused was guilty but there was difference of opinion as to the nature of offence committed by the accused, it was open to the third Judge to decide the appeal by holding that the accused was not guilty by considering the case on merit.

Where a case is referred to a third Judge under Section 392 Cr. P.C., such Judge is not only entitled to decide on what points he shall hear the arguments, if any, but his decision will be final and the judgment in the appeal will follow his decision. Precisely for the said reason, it has been held by the Allahabad High Court that if one of the Judges, who had given a different opinion ceases to be Judge, the Judgment may be pronounced by another Bench of the High Court, the reason being that the ultimate decision in the appeal is to abide by the decision of the third Judge and pronouncement of the decision in conformity with the decision of the third Judge is only a formality (AIR 1948 All 237).

Section 392 Cr.P.C. clearly contemplates that on a difference of opinion between the two judges of the Division Bench, the matter is to be referred to the third Judge for his opinion so that the appeal is finally disposed of on the basis of such opinion of the third Judge. In the scheme of Section 392 Cr.P.C., the view that third Judge, as a rule of prudence or on the question of judicial etiquette, will lean in favour of the view of one of the Judges in favour of acquittal of the accused, cannot be sustained. The Calcutta High Court has held in Nemai Mandal Vs. State of West Bengal (AIR 1966 Cal 194) that the third Judge need not as a matter of fact, lean in favour of acquittal even if one of the judges had taken such view. It has been held that benefit of doubt may be given only if third Judge holds that it is a case where accused is to be given benefit of doubt. There is no manner of doubt that the Judge has a statutory duty under Section 392 Cr.P.C. to consider the opinions of the two Judges whose opinions are to be laid before the third Judge for giving his own opinion on consideration of the facts and circumstances of the case. In Dharam Singh Vs. State of U.P. (1964 (1) Crl.L.J. 78) this court has indicated that it is the duty of the third Judge to consider the opinion of his two colleagues and to give his opinion. Therefore the learned third Judge has rightly discarded the contention that as a rule of prudence or on the score of judicial etiquette, he was under any obligation to accept the view of one of the Judges holding in favour of acquittal of the accused

appellant.

Coming to the broad facts of the case, it may be indicated that on October 24, 1979, the deceased Shashivandanaben was living in bungalow No.33 of Swastik Society in Navrangpura locality in the city of Ahmedabad. The appellant and the deceased were the only adult female members who had been residing in the said bungalow besides a six months old infant Anuja. The appellant's husband Dr. pankajkumar Divetia was in Western Germany on the date of the incident and the brother of Dr Divetia was living with his family in Baroda. Except the deceased and the appellant and the infant child, no other adult member had been living in the bungalow at the relevant point of time. The incident of murder of the deceased is stated to have taken place after 8.30 P.M. on October 24, 1979. PW 13 Ripunjay Rajendrarai and his wife had paid a courtesy visit to the deceased and the appellant at about 8.00 P.M. on that night and stayed in the house of the appellant for about half an hour. The incident of murder, therefore, must have taken place after they had left at 8.30 P.M. It may be stated here that just behind the bungalow, three servants used to reside in the garage of the bungalow.

It has already been indicated that there is no direct evidence in the instant case and the conviction has been based on the basis of circumstantial evidence. The following circumstances have been relied by he prosecution for the purpose of conviction of the appellant for the offence of murder:-

i) The appellant and the deceased were the only two adult members in the bungalow on the night of the incident.

ii) The appellant and the deceased were occupying the first floor two rooms connected with a communicating door as their respective bed-rooms.

iii) The appellant was in her bed-room when the crime was committed in the adjoining room.

iv) The deceased had put up a fight before she overpowered.

She sustained as many as 17 wounds ut of which five are defence wounds,

v) Two weapons (a) a hard and blunt one and (b) a sharp edged one, were used in the commission of the crime indicating the involvement of more than one person.

vi) The conduct of the appellant during and after the incident was unnatural inasmuch as (a) she must have known of the incident taking place in the adjoining room and yet she did not raise shouts to call the neighbours all of whom belonged to her caste and some her relatives nor did she go to help the victim; (b) she telephoned her father but not a single relative from her husband's side was informed and (c) even after the intruder left, she did not shout or ask the servants in the garage to catch him nor did she go to comfort the deceased.

vii) The nature of the injuries inflicted on the deceased clearly indicates that the sole purpose for the commission of the crime was to do away with the deceased and not theft or robbery.

viii) The cupboards were emptied and valuable ornaments were scattered to make a show of theft with a view to misleading the investigation.

ix) Even though the victim had succumbed to the injuries, her dead body was removed to the Vadilal Sarabhai Hospital and only thereafter Inspector Brahmbhatt was informed by Shri Megha about the commission of the crime.

x) The injuries to the appellant are minor and do not appear to have been caused by a hostile assailant but appear to have been caused carefully with the co- operation of the appellant as is manifest from the nature of the injuries and the total absence of defence wounds.

xi) There was an attempt to screen the appellant from the police when Inspector Brahmbhatt tried to interrogate her.

xii) The entry and exit of the intruder to the bungalow could not have been possible unless the same was facilitated by one of the inmates of the bungalow.

xiii) The clothes of the appellant were extensively bloodstained.

So far as the first five circumstances are concerned, the evidence has been laid that inside the bungalow only the deceased and the appellant with the infant child used to reside. It has also been established that the appellant and the deceased were occupying two rooms in the first floor which were connected with a communicating door in the respective bed room. It has also come out in the evidence that the appellant was in her bed room when the crime had been committed in the adjoining room. The circumstances 4 and 5 have also been established from the nature of injuries sustained by the deceased. So far as the sixth circumstance is concerned, it has been very strongly contended at the hearing of this appeal that the conduct of the appellant during and after the incident was not at all unnatural. It has been submitted that from the statement made under Section 313 of the Code of Criminal Procedure by the appellant, it is revealed that the appellant was asleep with her infant child in the adjoining room and she woke up from the sleep by hearing the groaning sound coming from the adjoining room where the deceased was staying. When she switched on the light for the purpose of ascertaining as to what had been happening, the appellant was attacked and several blows were given on the head of the appellant in parietal and occipital regions. Even the infant child was not spared and the child was also hurt. The appellant was also threatened with dire consequences by the assailant. It has, therefore, been submitted by Mr. Ram Jethmalani, learned senior counsel appearing for the appellant, that in such circumstances, there was hardly any occasion to raise shouts to call the neighbours and she also could not go to help the victim being herself, assaulted and being threatened with dire consequences and the child also being hurt. The appellant was completely dazed and just sat dumb founded in her own room. After the intruder had left, it is the case of the appellant that she immediately telephoned her father informing that her brother-in-law had been seriously injured and her father should immediately come. Mr. Jethmalani has submitted that in a given situation, how one will react cannot be precisely predicted and the response to such a shocking situation could not have been uniform for everyone. Having noticed that the mother-in-law had been seriously injured, the appellant, for good reasons did not dare

coming out and shouting for help for the fear of being attacked but immediately she telephoned to her father so that father could come with the car and could take proper steps. Mr. Jethmalani has submitted that for no good reason it can be held that the conduct of the appellant was, in any way, unnatural. Hence, the sixth circumstance cannot be held to be a circumstance from which any adverse inference can be drawn against the appellant.

Mr. Jethamalani has submitted that so far as 7th circumstance is concerned, the nature of injuries sustained by the deceased only suggest that serious injuries were caused to the deceased but from such injuries it cannot be held that the sole purpose for the commission of crime was to do away with the deceased and not burglary after silencing her. Mr. Jethmalani has submitted that from the terrace side if anybody enters the first floor rooms, the bed room occupied by the deceased would be the first one. Similarly, if from the ground floor any one comes to the first floor, and intends to enter the bed room in the first floor, the bed room occupied by the deceased would be the first bed room. He has also submitted that it has come out from the evidence of a close neighbour and friend of the family that it was the usual habit of the deceased who was suffering from Asthma to go to the terrace for some time and to take rest in cot which was placed in the terrace outside the bed room before retiring to first floor bed room. The appellant under Section 313 of the Code of Criminal Procedure has also stated that her mother-in-law, namely, the deceased had also gone to the terrace as usual on the fateful night. Mr. Jethmalani has submitted that it is not unlikely that the appellant and the deceased has failed to notice that the entrance through the ground floor had not been properly secured from inside before going to the first floor for retiring at night. Mr. Jethmalani submitted that until and less it can be clearly established by clinching evidence that there was no possibility of anybody entering the bed room of the deceased unless the appellant had not opened the door for the intruder, it cannot be held by any stretch of imagination that it was the appellant who had actively participated with common intention with the unknown assailant and allowed such assailant to enter the first floor room to commit the murder of the deceased and that too without being noticed by the deceased. It has not been proved by any convincing evidence that the entry to the ground floor rooms was properly closed before the ladies had gone to retire in the rooms in the first floor and the door leading to the terrace from the first floor room occupied by the deceased was closed when the deceased and the appellant had retired to their respective room for rest or there was no possibility of anyone from the ground floor to come to the first floor rooms because entry doors were closed and properly secured at the time when the appellant and the deceased had gone to their respective room for resting.

So far as the circumstance No.8 is concerned, Mr. Jethmalani has contended that it was found that the cupboard in the bed rooms had been ransacked and valuable ornaments in the bed room of the appellant had been scattered. From such fact, no inference can be reasonably drawn that such things were scattered for the purpose of making a show of theft. The appellant, in her statement under Section 313 Code of Criminal Procedure, has stated that when cupboard were ransacked after taking key from her and the ornaments were thrown, the sound of a motor car was heard on the road in front of the house and some voice was also heard. Immediately, the assailant hurriedly left the place of occurrence. It is, therefore, not unlikely that the assailant being apprehensive of being noticed by others had hurriedly left without taking the ornaments and other valuables. Simply because it had not been accounted for precisely that any ornament or valuable had been lost, no inference can

reasonably be drawn that the cupboard had been ransacked and the ornaments and valuables had been scattered only to make a show of theft. Such inference is absolutely without any clinching evidence and squarely lies in the realm of surmise and conjecture.

So far as the circumstance No.9 is concerned, Mr. Jethmalani has submitted that there is sufficient evidence to indicate that the victim had not succumbed to her injuries, before she was removed from the house for being taken to the Vadilal Hospital. One of the police constable who was present in the bungalow at the time of removal of the deceased to the hospital, had stated before the investigating officer that the deceased was gasping at the time of removal. The learned third Judge in view of contradictory statement made to the police and in the deposition given in court, therefore, did not place any reliance on the deposition of constable Ranjit Singh that before she had been removed to the hospital the deceased had passed away. Mr. Jethmalani has submitted that it has come out from the evidence of Dr. Utkarsh Medh who come to the bungalow almost simultaneously with the father of the appellant and the police constables and the said doctor immediately examined the deceased, and at the instance of the said doctor the deceased was removed to the hospital. It has also come out from the evidence that the doctor was living behind the bungalow of the appellant and the deceased. Therefore, the doctor's coming to the place of occurrence had taken place almost simultaneously with the arrival of the father of the appellant and the police constables and there is nothing unusual in it. It is also not disputed that Dr. Medh was at the relevant point of time was an Assistant Physician in the Vadilal Sarabhai Hospital where the deceased had been removed. Instead of taking the deceased to the casualty ward, Dr. Medh had taken the deceased to the emergency ward and had told to the senior Registrar Dr. Philip Shah that the patient required immediate treatment. Dr. Shah P.W. 4 has, however, deposed that when he examined the patient he found that the patient was dead by that time. He, therefore, caused an enquiry with the casualty ward Medical Officer Dr. Yatin Patel as to why the deceased had been sent to the emergency ward to which Dr. Patel informed him that he had not sent the patient to the emergency ward. Dr. Shah has also conceded that in emergency, the patient may be brought directly to the emergency ward without being routed through the casualty ward. In the instant case, Dr. Medh being a doctor of the hospital, had accompanied the deceased. Therefore, instead of being routed through the casualty ward, the deceased was taken directly to the emergency ward because according to Dr. Medh, there was grave emergency for giving immediate treatment to the deceased who was seriously injured. Mr. Jethmalani has submitted that there is no manner of doubt that the deceased had sustained serious injuries and was in a very critical condition when she was removed from the house. It is therefore not unlikely that before she was examined by Dr. Shah, as requested by Dr. Medh that the patient required immediate treatment, the victim might have succumbed to injuries. Simply because Dr. Shah had found the patient was dead when he had examined the victim, it cannot be convincingly held that the deceased had died in the house itself but even then she was removed to the hospital and was taken to the emergency ward knowing fully well that the patient was dead and there was no necessity of taking her to the emergency ward. Mr. Jethmalani has submitted that the learned third Judge has discarded the opinion of the doctor who held the post mortem examination and has placed reliance on the opinion of the doctor even though the said doctor had not held the post mortem examination. Placing such reliance on the opinion of the other doctor who had not held the post mortem examination, the third Judge came to the finding that the deceased being seriously injured must have died almost immediately or shortly after sustaining the injuries in the house

itself. Such finding is not based on any clinching evidence but founded on the expert opinion and reference to some observation made on text books on medical jurisprudence. Mr. Jethmalani has submitted that even if it is assumed that the deceased had died before she could be removed to the hospital, it was not improper for Dr. Medh and also for the father of the appellant to take the victim to the hospital so that the victim could be properly examined by the hospital doctors. In the facts of the case, the step taken was only appropriate and proper. Mr. Jethmalani has also submitted that the appellant herself was injured. Having received a number of injuries on the head in parietal and occipital region, she had been removed to the hospital for treatment in a different car. In such circumstances, she had no role to play in the matter of removal of the deceased to the hospital. Hence, even if it is assumed for the argument's sake that before removal to the hospital, the deceased had passed away, there is no occasion to entertain any suspicion against the appellant for taking the victim to the hospital more so when the appellant had not played any role in removing the victim to the hospital.

Coming to circumstance No. 10, Mr. Jethmalani has submitted that the appellant was admitted in Vadilal Hospital. Dr. Manek had noted the injuries suffered by the appellant. He has deposed that seven injuries had been suffered by the appellant and such injuries were on the head and all the injuries were in parietal and occipital regions. In addition to the said injuries, a sub-conjunctival haemorrhage was found on the left eye of the appellant by the doctor. Dr. Manek has deposed that there was bleeding from the occipital region when he had first examined the injury and to facilitate the treatment the head of the appellant was shaven. Dr. Manek has categorically stated that the injuries suffered by the appellant could not be self inflicted. He has stated that such injuries could not be caused by a person on one's own self. Dr. Manek has also deposed that the skull has five layers and when an injury is stated to be bone deep, it means it has penetrated all the five layers. Mr. Jethmalani has submitted that Dr. Manek was not declared as a hostile witness. From the evidence of Dr. Manek, it appears that conjunctival haemorrhage was also likely to take place on account of fracture of anterior cranial fossa, and such injury could also be caused by a serious blow on the back of the head. Since there was a sub conjunctival haemorrhage on the left eye and the patient was found bleeding from the parietal region, the head of the appellant was shaven for proper treatment and she was kept in the hospital as an indoor patient for close observation. Mr. Jethmalani has submitted that admittedly the appellant was a young lady at the time of the incident. Unless the doctor had reason to suspect that the appellant might have sustained serious injuries on the head, the head would not have been hastily shaven. Mr. Jethmalani has submitted that even if ultimately no fracture in the skull had been found, there is no occasion to hold that appellant did not suffer injuries on the head which according to doctor could not be caused by herself. Mr. Jethmalani has submitted that it does not stand to any reason that all the seven injuries in the occipital and parietal regions including bone deep bleeding injury in the parietal region would be caused by a friendly had when inherently such head injuries were likely to be potentially dangerous. It has also been submitted by Mr. Jethmalani that the injuries sustained by the appellant clearly reveal that she was also attacked by the assailant and in that process received as many as seven injuries on the head itself. Mr. Jethmalani has very strongly contended that the learned third Judge has clearly gone wrong by holding that surprisingly the injuries caused to the appellant are minor. There is no reasonable basis for such finding and the deposition of Dr. Manek and also the injury report of the appellant do not support such finding made by the learned third Judge.

Coming to the circumstance no. 11 as indicated by the learned third Judge, Mr. Jethmalani has submitted that there was no material on the basis of which one can reasonably come to the finding that there was an attempt to screen the appellant from the police when Inspector Brahmbhatt had tried to interrogate the appellant. Mr. Jethmalani has submitted that the appellant had been removed to the hospital immediately after the incident along with the deceased. She was found suffering from a number of injuries on the head besides sub-conjunctival haemorrhage on the left eye. Dr. Manek had noted that there was bleeding injury in the skull which was bone deep. The doctor apprehended that the sub-conjunctival haemorrhage might have occurred on account of fracture of skull. The doctor was of the opinion that the patient should be kept in close observation for the purpose of treatment. Even the head of the young lady had to be shaven. That apart, a brutal assault had taken place shortly before in which the mother-in-law of the appellant was found in a serious injured condition. The infant child of the appellant was also not spared and the child also got hurt. Mr. Jethmalani has submitted a deep trauma. In such circumstances, particularly apprehending a serious injury in the head, if the police Inspector was not allowed to interrogate the appellant on medical ground, it cannot be held that such step was taken only to screen the appellant from the interrogation to be made by the police. Dr. Manek was a responsible person being a doctor in the hospital. Before he could get any radiological finding about the extend of injury in the skull, he could not be sure as to the extent of the injury suffered by the appellant. On the contrary, sub-conjunctival haemorrhage led the doctor to think that the patient might have suffered some serious injuries in the head. The bona fide of Dr. Manek, therefore, cannot be questioned. There was therefore no reasonable basis to hold that there had been an attempt to screen the appellant from the interrogation to be made by the police. Mr. Jethmalani has also submitted that there was no immediate report from any other expert doctor about the nature of the injuries sustained by the appellant and declaring her quite fit to be interrogated by the police immediately.

Coming to circumstance No. 12, Mr. Jethmalani has submitted that an intruder can enter the ground floor and also can come to the first floor from the ground floor and also from the terrace. Such intruder can also enter the bed room of the deceased if the door from the ground floor leading to the first floor is not properly secured and if the door leading to the terrace is kept open. No evidence is forthcoming to indicate that all entries either from the ground floor or from the terrace had been secured properly before the deceased had retired to her bed room at the first floor. On the contrary, there is clear evidence from the disinterested neighbour who has been accepted to be the family friend for long that it was the usual habit of the deceased who was a patient suffering from Asthma to enjoy fresh air in the terrace for some time before retiring to bed. The appellant in her statement under Section 313 Code of Criminal Procedure has also specifically stated that she had seen the deceased going to the open terrace of the first floor. Therefore, it is not at all unlikely that through oversight or for want of proper checking entry to the ground floor and to the first floor through ground floor had not been secured on the date of incident. It has also been established who used to check up and close the entry doors. In the aforesaid circumstances, it cannot be definitely held that someone had deliberately kept such entry door open in order to facilitate the intrusion of the assailant.

So far as the circumstance No. 13 is concerned, Mr. Jethmalani has submitted that mother-in-law of the appellant had suffered serious injuries and had bled profusely. It is only natural that the

appellant would come and see the condition of the injured mother-in-law and it is a fact that having noticed her condition, she telephoned her father. In such circumstances, her clothes were likely to be blood stained, if the appellant sits near the injured mother-in- law to ascertain her condition. She had also suffered bleeding injuring on her head. Hence, there was no occasion to draw any adverse inference against the appellant because her clothes were found blood stained. Mr. Jethmalani has, therefore, submitted that the said circumstances have not been established by any clinching and reliable evidence. In the absence of circumstances clearly established forming such chain of events which unmistakably point out the guilt of the accused and leaving no room for any other inference, the prosecution case based on circumstantial evidence is bound to fail.

Mr. Jethmalani has submitted that in a case of murder, motive assumes greater significance. In the instant case, it has not come out from any evidence whatsoever that the appellant and the deceased mother-in-law were having strained relations. Admittedly, at the relevant time, the husband of the appellant being the son of the deceased was in West Germany. At the relevant time, the other son of the deceased had been living with his wife at Baroda in connection with his service. It can be reasonably inferred that because there was peace and harmony in the family both the husband of the appellant and his brother had thought it fit to keep the deceased in the company of the appellant. It has not been alleged that the relation of the appellant with the deceased was so strained that there might have been an occasion to entertain a desire to get rid of the mother-in- law. Simply because, the appellant was living with her mother-in-law in two separate bed rooms in the first floor and no other adult member was residing inside the bungalow on the date of occurrence, it can be reasonably presumed that it was the appellant and none else who had acted in connivance with some unknown assailant with the common intention to cause the murder of the deceased. Mr. Jethmalani has submitted that in this case, the co-accused had been acquitted by the trial court for want of any reliable evidence and no appeal has been preferred against such acquittal of the co-accused. Mr. Jethmalani has submitted that who is the accused then with whom the appellant had shared the common intention for murdering the deceased. He has submitted that in this case, the prosecution has glaringly demonstrated a pre-conceived view and bias against the appellant. It was for such bias and a zeal to persecute the appellant as a murderer, that she was charged for the substantive offence of murder under Section 302 IPC and she was also charged for hatching a conspiracy for committing such murder. The prosecution miserably failed to bring home such charges by leading any convincing evidence and trial court had no hesitation in acquitting the appellant of the charges for the offence under Section 302 and under Section 120B IPC. Mr. Jethmalani has submitted that even if circumstantial evidence unless all the circumstances are established by clinching evidences and such incriminating circumstances, fully established by clinching and reliable evidence, form a chain of events from which the only irresistible conclusion can be drawn about the guilt of the accused and no other hypothesis is possible. In the instant case, there is no such chain of events established by clinching evidences from which such irresistible conclusion about the complicity of the appellant in committing the offence of murder even with aid of Section 34 IPC can be drawn.

Mr. Jethmalani has also referred to a decision of this Court in Ramnath Madhav Prasad Vs. State of Madhya Pradesh (AIR 1953 SC 420). It has been held in the said decision that once evidence as to the conspiracy under Article 120B is rejected, such evidence cannot be used for the finding as to the

existence of common intention under Section 34 IPC. Mr. Jethmalani has also submitted that circumstances Nos. 4,5,7,8,9 and 12 had not been specifically put to the accused appellant for making statement under Section 313 Code of Criminal Procedure. The law is well settled that the incriminating circumstances must be put to the accused so as to give the accused an opportunity to explain them. Mr. Jethmalani has also submitted that circumstances Nos. 4,6 and 10 have also not been put in the form in which such circumstances have been considered by the Judge for basing the conviction against the appellant. Such failure to put the incriminating circumstances to the accused has occasioned a complete miscarriage of justice and on that score alone the conviction is liable to be set aside. Mr. Jethmalani has submitted that the third Judge has referred to the Statement made by the appellant under Section 313 Code of Criminal Procedure for coming to the conclusion that there was falsity in her statement and such falsity has supplied additional chain of events on which the prosecution relies. Mr. Jethmalani has submitted that law is well settled that the statement of the accused by itself is not evidence and the prosecution case is got to be proved by the evidence to be led. The statement of the accused may only add strength to the evidence adduced by the prosecution establishing the prosecution case. In this connection, he has referred to the decision of the Privy Council in Tumaahole Bereng an Ors. Versus The King (AIR 1949 PC 172) and in Sharad Birdhichand Sarda Vs. State of Maharashtra (1984 (4) SCC 166). He has, therefore, submitted that the appeal should be allowed by setting aside an improper and unjust conviction.

Mr. Dholakia, learned senior counsel appearing for the State of Gujarat, has submitted that although in this case the prosecution depends on circumstantial evidence, such circumstantial evidence pointing out the complicity of the appellant in the offence of murder under Section 302 read with Section 34 IPC are quite clinching and have been accepted to be fully reliable by the learned Judge by upholding the conviction of the appellant. He has submitted that the facts which have been established beyond doubt are:-

i) the deceased died a homicidal death.

ii) the injuries on the deceased were 21 in number of which 5 were defence wounds. One of the injuries on her was a cut of the size of 5 cms x 6 cms i.e. 2" x 1" x 2 1/4" on her carotid artery.

iii) At the time of incident in the bungalow, besides the accused appellant and the deceased, there were no other adult person residing inside the bungalow. Servants however, were residing in the garage within the compound of the bungalow

iv) Unless the entry door from outside to the ground floor and from ground floor to the first floor and then to the bed rooms or the entry doors from the terrace to the first floor room are not kept open, it is not possible for any one coming from outside to enter the house unless the entry doors are forcibly opened. After the incident, it has been found that no door was forcibly opened.

v) Although the appellant suffered some injuries on the head, the wounds appeared to be in a formation and were minor in nature. There was no defence would on the person of the accused. The accused was fully conscious when she was examined in the hospital and she answered all the questions put to her

vi) During the incident or immediately thereafter, the accused did not raise any shout for help either to the servants residing in the garage or to the neighbours.

vii) There were cupboards in the bed room of the deceased but the intruder made no attempt to open them. Although the cupboard in the bed room of the accused was opened and ornaments and valuable were found scattered in the bedroom, it is not reported that any such ornament or valuable was found missing.

viii) In the site plan and in the panchnama, no not placed in the terrace of the first floor had been noted.

ix) The telephone of the bungalow was found in the ground floor when local inspection of the site was made next morning.

x) The deceased was critically injured and it was quite likely, in view of the nature of injuries as revealed from the expert opinion of the doctor, that she had died within 10-15 minutes after sustaining injuries.

xi) When Dr. Shah was asked to examine the deceased in emergency ward of the hospital, she was found dead by Dr. Shah for which the doctor took exception and called for explanation from the doctor in the casualty ward. Dr. Dholakia has submitted that when only two adult ladies had been residing inside the bungalow, it can be reasonably expected that the accused being the housewife must have ensured that the entry doors had been properly secured before the deceased and the appellant had gone to their respective room in the first floor for sleeping. The deceased was admittedly aged and was suffering from asthma. It is therefore, not expected of her that she should take upon herself the duty to secure the doors both in the ground floor and in the first floor. The question of taking rest by the deceased for some time on the cot kept in the terrace of the first floor does not arise because such cot was not found at the time of the inspection, otherwise the position of the cot would have been mentioned in the Panchnama and in the sketch map of the site. In the aforesaid circumstances, the deceased had no occasion to take rest in the terrace as sought to be suggested on behalf of the appellant. No foot prints could be noticed which may suggest that the intruder had come on the terrace of the first floor by scaling or had left through the terrace by scaling down. Mr. Dholakia has also submitted that it has not been explained satisfactorily as to how Dr. Medh had come to the bungalow immediately after the incident. Mr. Dholakia has further submitted that it has also been found that the close neighbours and relations of the deceased had not been informed but the father of the deceased being informed had taken the initiative with the help if Mr. Medh to remove the deceased to Vadilal Hospital. One of the police constables present at the time of the removal of the deceased to the hospital has stated in his deposition that it appeared to him that the deceased had passed away when she was being removed to the hospital. Only because in his statement before the police, he had indicated that the deceased was then gasping, the learned third Judge has not placed reliance on his deposition. The extensive cut injury on the carotid artery of the deceased clearly indicates that the deceased had profusely bled and could not have remained alive more than 10 to 15 minutes. Hence, expert opinion of the doctor that on account of such injuries, there was no likelihood of the deceased to remain alive at the time she had been

removed from the house, must be accepted to be correct.

Mr Dholakia has submitted that if the deceased had died in the bungalow itself before she could be removed to the hospital, the fact that she had still been removed to the hospital and then also she was not referred to the casualty ward in the usual manner, is inexplicable and mysterious. Such conduct in bringing the deceased to the hospital although she had died long back in the bungalow itself, also raises a very strong suspicion against the conduct of the accused and her father. Mr. Dholakia has also submitted that there had been no attempt to open the cupboard in the room of the deceased and although the cupboard in the room of the accused was opened and the ornaments and the valuables were taken out and scattered, it has not been reported that any ornament or valuable article was missing. Such fact only indicates that there was no intention to enter the house with a motive for gain. The serious multiple injuries caused on the person of the deceased and the number of defence wounds which the deceased had suffered in the hands of the assailant also suggest that there was a clear intention to ensure that the deceased was done to death. Such fact runs counter to any theory of robbery. Mr. Dholakia has submitted that although telephone to her father was made by the accused, the telephone was found in the ground floor when the Panchnama and site plan were prepared in the next morning. It can, therefore, be reasonably expected that the telephone itself was in the ground floor at the time of the incident and the accused had come to the ground floor and had contacted her father over the telephone. Mr. Dholakia has submitted that it is therefore quite strange and unusual that the accused thought fit to come down and make telephonic call to her father, would not shout for help or even seek for assistance for the critically injured mother- in-law from the servants who were living in the garage. Mr. Dholakia has submitted that such conduct only points out that she did not want that the incident was to be seen by anybody except by her father or persons of her like so that necessary measures to hide the real position of the site of the incident could be taken in the meantime.

Mr. Dholakia has also submitted that the doctor who had examined the accused in the hospital has clearly deposed that at the time of examination of the accused, she was in her senses and she could answer the question and could also move her limbs. It has been found that she did not suffer any fracture in the skull and had not suffered any serious injury. In the aforesaid circumstances, even if it is accepted that the doctor had felt that she should be kept under observation, there was no difficulty in getting her examined by the police when such examination of the only eye witness of the incident was essentially necessary for proper investigation. Mr. Dholakia has submitted that in view of such facts the Court has come to the finding that she had been deliberately screened from being interrogated by the police immediately after the incident. It therefore cannot be held that such finding was made without any factual basis.

Mr. Dholakia has also submitted that clothes of the accused were found profusely stained with blood. The injuries sustained by the accused, could not have caused excessive bleeding required for such wide staining of the clothes of the accused. It is not the case of the accused that she had tried to lift the deceased who was then lying critically injured so that there had been some occasion to get her clothes profusely stained with blood. The accused has failed to give any explanation as to how her clothes were found profusely stained with blood. Such circumstance must be held to very intriguing.

Mr. Dholakia has submitted that the nature of injuries suffered by the deceased point out that more than one assailant had taken part in causing injuries on the person of the deceased and both sharp cutting weapon and blunt object had been used for causing different types of injuries. The accused in her statement has not stated that there was more than one assailant. Mr. Dholakia has submitted that even though the co-accused has been acquitted because sufficient evidence for his conviction could not be held, it cannot be reasonably contended that on that account, the appellant is liable to be acquitted.

Mr. Dholakia has also submitted that the charge of conspiracy could not be established beyond reasonable doubt for which the accused has been given benefit of doubt and has been acquitted of such charge of conspiracy. The evidence which was germane for consideration of the charge of conspiracy is not necessarily germane for considering the common object for murder. In this case, the common object under Section 34 IPC has been clearly established by independent evidences against the accused. Hence, it is not a case that evidences not found to be reliable have been taken into consideration for the purpose of convicting the appellant for murdering the deceased with the aid of Section 34 IPC. Mr. Dholakia has submitted that in a case to be established on the basis of circumstantial evidences, the Court is required to scrutinise the evidences very carefully so as to avoid conviction based on surmise and conjecture. But if the incriminating circumstances are clearly established and such incriminating circumstances only point out the guilt of the accused and does not permit any other hypothesis to be drawn, conviction on account of circumstantial evidences is fully justified. In the instant case, the learned third Judge has taken pains in analysing each incriminating circumstance which had been established by convincing evidences and such incriminating circumstances have revealed a chain of events from which the guilt of the accused has been clearly established. Not only the learned Sessions Judge and one of the Judges of the High Court had held that accused was guilty of the offence under Section 302 read with Section 34 IPC., the learned third Judge has again on independent consideration of the facts and circumstances of the case come to the finding that the prosecution case about the offence under Section 302/34 IPC has been clearly established. The finding made by the learned third Judge is based on facts proved and does not remain in the realm of surmise and conjecture. There is, therefore, no reason to interfere with the judgment of the learned third Judge and this appeal, therefore, should be dismissed.

After giving our careful consideration to the facts and circumstances of the case, the material on record and evidences adduced in the case and the judgment passed by the learned Sessions Judge and the impugned judgment passed by the learned third Judge and also the differing judgments passed by the two Judges constituting the Division Bench of the High Court, through which we have been taken by the learned counsel appearing for the parties, it appears to us that the most important question that requires consideration in this appeal is whether the accused appellant did not suffer any injuries in the hands of the assailants who had committed the murder of the deceased Shashivandanaben but such injuries had been suffered by the accused appellant either on account of self inflicted injuries or on account of injuries caused by a friendly hand. For basing the conviction, the learned third Judge and the Sessions Judge have held that the appellant did not suffer injuries on her head or on the eye by the assailants who had committed the murder of the deceased. But such injuries were either by way of self inflicted injury or by a friendly hand in an attempt to give an

appearance that the appellant was also attacked by the assailants who had committed the murder of the deceased. It is not in dispute that the accused was removed to Vadilal Hospital along with the deceased and the accused was admitted as an indoor patient in the said hospital. The accused was examined by the doctor in the hospital, namely, Dr. Virendra S. Manek (PW 3) at about 12.25 midnight on October 25, 1979 in the Emergency Ward of the hospital and the following injuries were noted on the person of the accused:-

1. C.L.W. 1 1/2 "x 1/2" x 1/4" curved shape on the left parietal occipital region

2. C.L.W. size 1" x 1/2" x 1/4" on the left parietal region posterior to above injury

3. C.L.W. 1" x 1/2" x 1/4" curved shape on the left parietal occipital region.

4. C.L.W. 1" x 1/2" x 1/4" on the right parietal region posterially

5. C.L.W. 1/2 "x 1/2" x 1/2" over occipital region irregular in shape. Bone deep.

6. C.L.W. 1" x 1/2" x 1/2" over occipital region anterior to above injury No.5.

7. C.L.W. 1/2" 1/2" 1/4" over right parietal region anterior part.

8. There was sub conjectival haemorrhage on the left eye.

Dr. Manek has indicated that all the said injuries were possible by a blunt object. There was no fracture of the scalp bone. The doctor also noted that there was also bleeding at the occipital region when he had first seen the injury. The accused was kept as an indoor patient in the same hospital and was discharged from the hospital on October 31, 1979. It may be stated here that the infant child of the accused aged about six months was also examined in the hospital and the following were noted on the person of the infant:-

1. One abrasion 1/2" x 1/4" over right side of forehead

2. There was diffused round swelling size 1/2" x 1" over right forehead

3. There was soft tissue swelling on frontal region which was found on X-ray.

The doctor has stated that the abrasion found on the forehead of the infant child was possible by contact with a blunt object and the same could also be caused by a fall. So far as the swelling injury of the child was concerned, the doctor has stated that such swelling might be the manifestation of the internal injury.

Dr. Manek has categorically stated that the injuries sustained by the accused could not be self inflicted. In this connection, Dr, Manek has stated that there are five layers over the head of the skull and if the injury is bone deep, it can be said that the five layers have been penetrated. The doctor has

further stated that he apprehended that the said injury on the eye was likely to be on account of injury on the anterior cranial fossa which was part of the base of the skull. No fracture of the skull, however, was found after X-ray was taken. Dr. Manek has also stated that skull wounds normally bleed very freely. For the purpose of giving treatment to the accused, her hairs were shaved and at that time, bleeding of about 20 or 25 cc of blood had taken place. It has also come out in the evidence of PW 4 DR. Dilip Hargovandas Shah that the accused was brought in the emergency ward and thereafter Dr. Desai had given stitched on the wounds of the head of the accused.

In this case, the expert opinion of Dr. Shariff as to the nature of the injuries suffered by the accused was sought for by the prosecution. Opinion as to the probable time of death of deceased after receiving injuries was also sought. The said Dr. Shariff was requested by letter (Ex 24) by the Superintendent of Police Force (Crime Branch) to give his expert opinion on the following points:-

> 1. Please scrutinise the P.M. Notes and state as to at about what time the deceased might have died.
>
> 2. Whether a deceased would have died on the spot looking to 21 injuries on her person as mentioned in P.M. Note.
>
> 3. What is your expert interpretation about the term "Defence incised wound".
>
> 4. Kindly refer to the medical certificate of Smt. Tanviben P. Divetia
>
> 5. and state whether these injuries could be self-inflicted.
>
> 6. Looking to the injuries on the person of Tanviben whether it was necessary to admit her as an indoor patient.
>
> 7. Whether the injuries found on the head of Smt. Tanvi Divetia could be inflicted by giving blows with the hammer.

Dr. Shariff by his letter dated March 17, 1980, gave his opinion on the said queries after going through the injury report of the accused and the Post mortem report of the deceased and also in-patient record of accused Smt. Tanviben and out-patient record of the accused. Although Dr. Shariff has given his opinion that the injuries suffered by the accused were simple in nature, he has submitted that since the injuries were found on the head of the accused, the hospitalisation of the patient was desirable for observation and treatment. Dr. Shariff has also opined that the injuries on the head of the accused were not consistent with the injuries usually caused by hammer but he has also stated when cross examined by the learned counsel for the accused, that he had not seen any hammer before giving any opinion and without seeing the hammer, definite opinion could not be given. He has also stated that by the expression `hammer', he meant hammer of considerable size and he admitted that he did not understand the difference between `hathodi' and `hathoda'. He has also stated that it was dangerous for a person to cause injury by himself or herself on the head and he agreed that in respect of some injuries of the accused little more force might have resulted in

fracture of skull. Dr. Shariff has also stated that Modi's Medical Jurisprudence is one of the standard books but he disagreed with the view expressed by Dr. Modi in Modi's Medical jurisprudence and Toxicology that contusions and lacerations on the head could rarely be self inflicted. But Dr. Shariff has agreed with the view that contused or lacerated wounds could rarely be caused on account of the pain they are likely to cause and the force required to produce them as indicated in the Text Book of Medical Jurisprudence and Toxicology by Dr. C.K. Parikh. Dr. Shariff has also stated that superficial injury means the injury situated on or near the surface. When his attention was drawn that injury No.5 suffered by the accused is extended upto bone and whether such injury can be stated to be superficial injury, Dr. Shariff has stated that such injury has not been stated to be superficial by any authority and he may have to find out some authority in support of his view that such injury is superficial and he has also added that the opinion was given by him on the basis of his own experience. He has also admitted that he has not seen the report of the Radiologist and also the X-ray plate of the accused.

So far as the sub-conjectival haemorrhage on the eye of the accused is concerned, Dr. Shariff has stated that sub- conjectival haemorrhage was likely to be the result of direct blow in or around the eye and he has agreed that normally a person could not cause an injury on the eye by oneself and he has also not come across any case of self inflicted injury on the eye. He has also agreed that the injury on the eye was not on account of self inflicted in injury. He has also admitted that from the case papers of the accused there was nothing to suggest that haemorrhage was an old one. Dr. Shariff has also stated that severe blow by hard and blunt substance had resulted in such injury. Dr, Shariff has also stated that injury found on Tanvi could be caused by hard blunt substance.

In our considered view, the expert opinion of Dr. Shariff that the injuries of the accused wee self inflicted or caused by a friendly hand should not be accepted. It is quite evident that the accused had sustained multiple injuries on her head and one of such injuries was bone deep and if a little more force was used in causing the said bone deep injury, the skull might have fractured. Dr. Manek who had examined the accused, has clearly stated that such injuries could not be self inflicted. It is the specific case of the accused that she was hit on the head by `hathodi' meaning thereby a small hammer like object. Dr. Shariff has specifically stated that he had given his opinion that the injuries could not be caused by a hammer on the footing that a heavy and big hammer had been used. It is also quite clear that the accused had suffered the eye injury on account of severe blow by a blunt object and it has been stated by Dr. Manek that such injury cannot be self inflicted injury. Such view has also been expressed by Dr. Shariff. It may be stated here that Dr. Manek had actually examined the accused and had noted the injuries himself but Dr. Shariff gave his opinion only on the basis of the injury report and the X-ray report without even looking to the X- ray plate. In such circumstances, we are inclined to rely more on the opinion of Dr. Manek than on the opinion of Dr. Shariff. We are also of the view that the injuries caused on the eye of the accused and also one of the injuries on the head were quite serious and it was highly improbable that the accused would invite such injuries to be caused by a friendly hand. We may also indicate here that the infant baby aged only six months had also suffered injuries and the doctor has given opinion that the abrasion suffered by the infant was possible by contact with a blunt object and could be caused by a fall and the diffused swelling found on the infant reflected the manifestation of some internal injury. In our opinion, it is also highly improbable that such injuries could be caused on the infant of six months

either by the accused herself who was mother of the child or she would allow anybody to cause such injury voluntarily to give a show that infant along with herself had been attacked. On the contrary, the nature of the injuries suffered by the infant fits with the statement made by the accused indicating the manner in which the infant was dealt with by the assailant thereby causing the injuries on the child. On a careful consideration of expert opinion and the evidences adduced regarding the injuries suffered by the accused and the infant child, we have no hesitation to hold that such injuries suffered by the accused and the infant were neither self inflicted nor caused by any friendly hand.

So far as to the probable time of death of the deceased after receiving injuries is concerned, Dr. Shariff has given expert opinion that the time of the death of the deceased was 10 or 12 hours prior to the time of the post mortem examination which was held from 730 to 9.30 A.M. next day. If the deceased had been attacked some time after 8.30 P.M. on the previous night then according to the opinion of Dr. Shariff, the probable time of death of the deceased was about 6.30-9.30 P.M. being 10 to 12 hours prior to the post mortem examination. Dr. Shariff has based his opinion only on the basis of post mortem report and notes on post mortem report and also taking into consideration the presence of rigor mortise, lividity, coolness and the report of injuries found on the person of the deceased. Dr. Shariff has stated that common carotid bifurcates into internal and external carotid and he has indicated that he had presumed that common carotid was cut looking to the words `carotid artery' used in post mortem report. The doctor who actually held the post mortem examination, has specifically stated that carotid was not completely cut and injury was situated on the posterior aspect of the carotid but Dr. Shariff did not agree with such view by noting to the words 'carotid artery' in the post mortem report. Dr. Shariff has also deposed that in the out patient case papers, it was mentioned that the body of the deceased was cool when she was examined in the hospital but he has submitted that there was no mention of body temperature of the deceased in the case paper and he has also deposed that the mention of `coolness' must have been made by touching the body. Dr. Shariff has also stated that in the post mortem report, there was no mention of atmospheric temperature, humidity and movement of air. He has admitted that without assessment of these factors, proper estimate of the time for setting of rigor mortise can be given. He has also stated that rigor mortise was only a rough guide for determining the time of the death and he has also agreed that onset of rigor mortise will be quicker if the muscles are feeble and exhausted and that in case of cut throat injury, rigor mortise sets in early. It is, therefore, quite apparent that in the absence of various factors which had not been noted by any doctor considering which the probable time for onset of rigor mortise and estimation of probable time of death with reference to the state of rigor mortise and coolness of the body can be fairly estimated, any opinion as to the time of death therefore cannot be held to be wholly reliable. We may also indicate here that the doctor who had held the post mortem examination had occasion to see the injuries of the deceased quite closely. In the absence of any convincing evidence that the doctor holding post mortem examination had deliberately given a wrong report, his evidence is not reliable to be discarded and in our view, in the facts of the case, the opinion of the doctor holding post mortem examination is to be preferred to the expert opinion of Dr. Shariff.

We may also indicate that apart from post mortem report and the deposition of the doctor holding post mortem and the said expert opinion of Dr. Shariff there are other materials on record which

throw light on the question of probable time of death of Sahsivandanaben. The prosecution case is that immediately on receipt of the information from the father of the accused, Jitendra Joshi at Navrangpura Police Station, the police Jamadar Dilubha Pratapsingh (PW 15) had immediately sent Head Constable Motiji, Police Constable Ranjit Singh and other policeman with said Jitendra. At about 1.00 A.M. on October 25, 1979, the police constable Samuel informed on telephone that some goonda had beaten three persons, namely, the deceased, the accused and the infant child and the treatment was being given to the accused and the child but Shashivandanaben aged about 65 had died in the Casualty Ward at 0.35 hours. Such information was noted on the telephone notebook of the police station. The police Jamadar has also stated that Inspector Brahmbhatt had recorded the statement of Jitendra that in bungalow NO.33 of Swastik Society, goondas had given serious blows on the deceased and Jitendra had informed that her condition was serious and she was likely to die. Initially, the police constables who first rushed to the bungalow were not shown as witness in the charge sheet and the prosecution did not examine them. The accused then made application before the learned Sessions Judge that such constables having reached the place of occurrence immediately after the incident, should be examined. The court allowed such prayer and the police constable Ranjit Singh was examined as Court witness No.1. The police inspector Brahambhatt has stated that police constable Ranjit Singh had stated before him that Shashivandanaben was struggling for survival. In his deposition, Ranjit Singh has, however, stated that when Shashivandanaben was being removed, it appeared to him that she had died. Ranjit Singh has deposed that he and the other police constable Motiji had gone to the bungalow. He found Dr. Medh was present there and Jitendra who had gone to the police station was also present. Ranjit Singh and other police constable had gone to the upper storey of the bungalow. He had found that an old lady was lying in a pool of blood in a room, and Dr. Medh was examining the old lady. The said doctor asked the police constables to take the lady to the hospital and therefore they had brought the old lady in a car to the hospital. Ranjit Singh has also deposed that normally when they go to the place of offence and notice that a person is lying dead, they do not do anything till the investigation officer comes. But in this case, they had not informed the police station about the death but had taken the victim to the hospital. In paragraph 6 of the deposition, Ranjit Singh has stated that he cannot say wither the old lady was alive when they had brought her down stairs. Dr. Shah examined the deceased when brought to the emergency ward and found her dead for which he caused an enquiry with the doctor-in-charge of the casualty ward as to why a dead patient had been sent. It has also come out in the evidence that Dr. Medh was also a doctor attached to the hospital. She had accompanied the deceased and had told the doctor of the casualty ward that the case being serious, should be immediately referred to the emergency ward. The victim was sent to Emergency Ward. Dr. Shah found Shashivandanaben dead when he had examined her but from such fact it cannot be held that Shashivandanaben had expired in the bungalow itself but knowing fully well that she was dead, she was brought to the hospital and a dead person was presented before Dr. Shah for being examined in the Emergency Ward. There is no material on record on the basis of which Court can reasonably hold that Dr. Medh, a respectable doctor, was acting in collusion with the accused or with the father of the accused and though she had noted that the lady had died she had asked the police constable to take the said dead person to the hospital and then brought the dead body to the Emergency Ward for being examined by Dr. Shah. It has been stated by Dr. Shah that although normally the patient is routed to the Emergency Ward through casualty ward but if it is referred by a doctor of the hospital, such patient can come straight to the Emergency Ward without being routed through the Casualty

Ward. Hence, there was nothing unusual in taking the deceased to the Emergency Ward. Apart from the fact that there is no convincing material on the basis of which it can be held that Shashivandanaben had died within 10-15 minutes after receiving the injuries and a dead person was brought to the hospital at the instance of Dr. Medh, we fail to appreciate why Dr. Medh will take a dead person to the Emergency ward for being examined by Dr. Shah. She could very well report to the casualty ward that the patient had expired on the way or before being examined, she had died in the casualty ward itself. It is highly improbable that if a person had died long before she was removed to the hospital, a doctor with any sense of responsibility will take such dead person to the hospital for being produced for examination by another doctor only for being pronounced as brought dead more so, when the doctor bringing such patient is also attached to the same hospital. In the aforesaid circumstances, we are of the view that the finding made by the Court that Shashivandanaben died in the bungalow itself shortly after the injuries sustained by her and though she was dead, she had been brought to the hospital long after death is absolutely without any convincing evidence and such finding, therefore, cannot be sustained.

If both the findings, namely, the accused had suffered injuries either on account of self infliction or the accused and the child had suffered injuries by the friendly hand and the deceased must have died shortly after receiving injuries and the dead body was deliberately brought to the hospital at the instance of Dr. Medh, are not accepted for the reasons indicated hereinbefore, the basis for the conviction of the accused on circumstantial evidence suffers a serious jolt. Though motive for murder may not be revealed in many cases but if evidences of murder are very clinching and reliable, conviction can be based even if the motive is not established. In a case of circumstantial evidence, motive assumed greater importance than in the case where direct evidences for murder are available. In he instant case, no motive has been ascribed as to why the accused would cause the murder of her mother-in-law along with some unknown assailant by sharing common intention with such assailant or assailants. There is no evidence that there was bitter relation between the deceased and the accused. On the contrary, it is apparent that the members of the family had decided that the deceased would be kept under the care of the accused.

Strong adverse inference has been drawn against the accused by noting the fact that although the cupboards in the bed room of the accused were opened and the ornaments and valuables were taken out and scattered, it was not reported that anything valuable was missing. In this connection, it would be pertinent to note that it is the specific case of the accused that when after injuring her and the infant child and taking key from her, the cupboards were opened and ornaments and valuables were taken out and scattered, the horn of a car was heard and the sound of stopping the car near the bungalow was heard and some voices were also heard. Hearing such sounds, the assailants hurriedly left the place without taking anything. The incident had taken place after 8.30 P.M. and some time before the mid night. There are admittedly residential houses in the locality and the bungalow of the accused was not situated in a lonely place. It was, therefore, not unlikely that apprehending the risk of being found out, the assailants had hurriedly left without caring for ornaments and valuables when they had heard sound of car and some voice near the bungalow. One of the incriminating circumstances against the accused has been held to be non- appearance of any defence wound on the person of the accused. The case of the accused is that when hearing the cries of her mother-in-law, she woke up from sleep and opened the door connecting her bed room and the bed

room of mother-in-law, she found the mother-in-law lying seriously injured in a pool of blood and immediately she was attacked by the assailant who pushed her with force and also gave injuries on her head and the child was also hurt. It is not possible to precisely indicate how a person will react in a situation. If the accused having awaken from sleep, had noticed the ghastly scene that the mother-in-law had been seriously injured and she and her child had also been attacked suddenly by the intruder, it is not unlikely that being completely taken aback and being out of nerve, the accused had lost the initiative for resistance. Hence, on account of non-existence of any defence wound on the person of the accused, no adverse inference can be reasonably drawn against the accused.

So far as the stained clothes of the accused are concerned, it may be indicated here that the clothes of the accused were attached under the Panchnama (Ex.29). In the Panchnama, PW 27 has referred to one saree, petticoat and blouse and frock of the baby. In the panchnama, it is mentioned that there were stray big and small blood stains on the saree and a mark of chappal or shoe near the fall portion of the saree. There were two blood stains on the white petticoat in the front side and stain on the lower side was like the mark of a chappal or shoe. There were blood stain on the back side of the petticoat. There were blood stains on the back portion of the blouse. It has come out in the evidence that from the injury suffered on the head, the accused was likely to suffer bleeding injuries. As a matter of fact, when her hair was shaved for giving treatment, she had profusely bled to the extent of 20 to 25 cc of blood. Dr. Manek has also stated that in case of contused wound, normally bleeding occurs. He has also stated that skull wound normally bleeds very freely. In such circumstances, staining of her clothes with blood can be reasonably explained. It cannot be convincingly held that such staining of her clothes with blood had occurred because the accused actively participated with other assailants in causing the murder of the deceased.

No evidence is available as to whether on the fateful night, the doors leading to the bed room of the deceased had been fully secured. In basing the conviction, the Court has proceeded on the footing that the doors must have been secured but the same had been opened by the accused because she was the only adult person then living inside the bungalow. It should be borne in mind that it has come in the evidence that the deceased was in the habit of enjoying fresh air in the terrace. It is not unlikely that the deceased had gone out for enjoying fresh air and she might have failed to secure the door. It is the case of the accused that the deceased had gone to the terrace to enjoy fresh air. After feeding her child, she had fallen asleep and woke up only after hearing the groaning sound coming from the room of the deceased. It is also not unlikely that entry doors through the ground floor might have been secured on account of inadvertence. There is no evidence that the same was found to have been secured before the two ladies had gone to their respective bed room for night's rest. There is also no evidence that it was the accused who used to close entry door or as a routine measure, used to ensure that such doors were closed. Blood marks were found on the door leading to the terrace but the police did not notice any blood mark on the ground floor. According to the investigating officer, no footprints could be noticed indicating that the assailants had come to the terrace by scaling or had gone down through the terrace. It may, therefore, be reasonably presumed that through the ground floor, the assailants had come. As blood marks were not found in the ground floor, the exact manner in which assailants had come to the bed room of the deceased and had also gone out of the house can not be precisely held. Even if it is assumed that the assailant had come through the entry door which was kept open because no violence on such entry door had been

noticed, it cannot be held that it is the accused who had deliberately opened such entry door to facilitate the entry of the assailant. In view of our specific finding that the accused herself and her infant child had also been assaulted by the intruders and the accused suffered some injuries which were likely to be quite serious if little more force would have been applied, it cannot be reasonably held that the accused had invited the intruder to enter the bungalow for being assaulted.

In the aforesaid circumstances, no conviction can be based on circumstantial evidence since adduced in the case. In our view, such conviction is based more on surmise and conjecture than on any reliable evidences from which an irresistible conclusion about the complicity of the accused in causing the murder, can at all be drawn.

The learned Judge who had held in favour of the acquittal of the accused has very strongly observed that in this case, the accused was unfortunately persecuted by the prosecution and not prosecuted in a fair manner. Even if the prosecution does not deserve such strong observation, it appears to us that in this case, the prosecution had acted with little over-zealousness thereby failing to maintain the dispassionate approach in a criminal trial which is expected from the prosecution to ensure a fair trial.

We may also indicate here that the finding that although the accused did suffer only minor injuries, a deliberate attempt was made to prevent interrogation of the accused by the police officer immediately after the incident cannot be sustained. The accused herself having been injured was admitted in the hospital as an indoor patient. She had to be taken to the hospital for immediate treatment. It, therefore, cannot be reasonably held that the accused herself lying as an indoor patient in the hospital prevented the police from interrogating her. It has come out from the evidence of Dr. Manek that the accused had suffered a number of injuries on parietal and occipital region in the head and she had also suffered a bone deep injury. There was considerable bleeding from such injuries when her hair was shaved for giving treatment. In view of the injuries suffered by the accused on her head and also noticing the sub-conjectival haemorrhage on one of the eyes of the accused, Dr. Manek had thought it fit to keep the accused for close observation and a a matter of fact, the accused remained as an indoor patient in the hospital for few days. Dr. Desai had stitched the wounds on the head of the accused. Even Dr. Shariff who was examined as an expert by the prosecution has also agreed that person suffering from head injuries should be admitted as an indoor patient for close observation. It does not require any imagination to hold that the accused had undergone a great trauma on being attacked by intruders and by suffering bleeding injuries and also seeing the infant child being hurt by intruders. The accused had also witnessed a very brutal assault made on her mother-in-law who being critically injured was lying in a pool of blood. If under these circumstances, the doctor in the hospital, was of the view that the accused should not be interrogated by the police immediately after her admission but she should be allowed to remain in complete rest, no exception can be taken on such decision of the doctor. That apart, there is no material to warrant that the doctors in the hospital had connived either with the accused or the relations of the accused so as to prevent the police from interrogating the accused. We, therefore, do not find any good reason for coming to such finding.

The court has drawn adverse inference against the accused for making false statement as recorded under Section 313 of the Code of the Criminal Procedure. In view of out findings, it cannot be held that the accused made false statements. Even if it is assumed that the accused had made false statements when examined under Section 313 of the Code of Criminal Procedure, the law is well settled that the falsity of the defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea may be considered as an additional circumstance if other circumstances proved and established point out the guilt of the accused. In this connection, reference may be made to the decision of this Court in Shankerlal Gyarasilal Versus State of Maharashtra (AIR 1981 SC 761).

The principle for basing a conviction on the basis of circumstantial evidences has been indicated in a number of decisions of this Court and the law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. This Court was clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the Court has to be watchful and avoid the danger of allowing the suspicion to make the place of legal proof for some times, unconsciously it may happen to be a short step between moral certainty and legal proof. It has been indicated by this Court that there is a long mental distance between `may be true' and `must be true' and the same divides conjectures from sure conclusions. (Jaharlal Das Vs. State of Orissa 1991 (3) SCC 27).

We may indicate here that more the suspicious circumstances, more care and caution are required to be taken otherwise the suspicious circumstances may unwittingly enter the adjudicating thought process of the Court even though the suspicious circumstances had not been clearly established by clinching and reliable evidences. It appears to us that in this case, the decision of the Court in convicting the appellant has been the result of the suspicious circumstances entering the adjudicating thought process of the Court.

Mr. Jethmalani has contended that a number of incriminating circumstances alleged by the prosecution witnesses have been taken into consideration by the Court for convicting the accused but such incriminating facts had not been put to the accused specifically to explain them when she had been examined under Section 313 of the Code of Criminal Procedure. The conviction of the accused is vitiated on account of not drawing the attention of the accused specifically to the incriminating facts alleged by the prosecution witnesses. In view of the finding made by us that for want of reliable and convincing circumstantial evidences, the appellant could not have been convicted for the offence under Section 302 read with Section 34 IPC, we do not think it necessary to consider as to whether in the facts of the case, reasonable opportunity to explain the incriminating circumstances established by evidence was given to the accused at the time of making statement

under Section 313 of the Code of Criminal Procedure by pointedly drawing the attention of the accused to the specific evidence led in the case.

It has also been contended by Mr. Jethmalani that since the appellant has been acquitted of the offence of murder read with Section 120B of the Code of Criminal Procedure, her conviction for the offence under Section 302 read with Section 35 IPC by relying on the same set of evidences was not warranted. Such contention of Mr. Jethmalani was disputed by Mr. Dholakia by contending that the consideration of evidence which was germane for convicting the accused for murder with the aid of Section 34 IPC. Mr. Dholakia has also contended that apart from evidences led for conviction under Section 302 read with Section 34 IPC. In view of our specific finding that in the instant case, the circumstantial evidences were not sufficient for conviction of the appellant for the offence under Section 302 read with Section 34 IPC, it is not necessary to consider the respective contentions of the learned counsel for the parties in this regard.

In the result, this appeal is allowed and the conviction and consequential sentence passed against the appellant is set aside and the appellant is acquitted. The bail bonds furnished by the appellant stands discharged. Before we part with this appeal, we may only indicate that it is very unfortunate that the appellant stood convicted for the offence of murder of her mother-in-law both by the learned Sessions Judge and also by the High Court even though there is no clear and clinching evidence for sustaining such conviction. It is a pity that the appellant had to suffer a great mental trauma and social stigma for all these years on account of accusation of murdering her mother-in-law and ultimately for being convicted for such offence since upheld by the High Court in appeal. We reasonably expect that her acquittal on the findings made by this Court will remove the social stigma and accusation of a heinous crime which she had to silently bear for such a long time.