

considered.¹⁷ Where an admission is made of the fact of an adoption having taken place, which the party making the admission had concluded to be valid in law, the party is entitled to set up true facts to show its invalidity and no estoppel operates against him as there is no misrepresentation of facts.¹⁸

Counsel's admission. A counsel's admission of a point of law cannot be binding upon a Court, and the Court is not precluded from deciding the rights of the parties on a true view of law.¹⁹

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

46. *Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.* Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstance of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:-

- (1) *When it relates to cause of death.* When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

- (2) *Or is made in course of business:* When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of

17. 1872 Ind App (Supp Vol) 47 (PC)+AIR 1948 Oudh 125=23 Luck 52.

18. 1872 Ind App (Supp Vol) 131 (PC).

19. AIR 1940 PC 90.

the date of a letter or other document usually dated, written or signed by him.

(3) *Or against interest of maker:* When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose or would have exposed him to a criminal prosecution or to a suit for damages.

(4) *Or gives opinion as to public right or custom, or matters of general interest:* When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter has arisen.

(5) *Or relates to existence of relationship:* When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6) *Or is made in will or deed relating to family affairs:* When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

(7) *Or in document relating to transaction mentioned in Art. 26, paragraph (a):* When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in Article 26, paragraph (a).

(8) *Or is made by several persons and expresses feelings relevant to matter in question.* When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations

(a) The question is, whether A was murdered by B, or

A dies of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by B, or

The question is whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statement made by A as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts.

(b) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon regularly kept in the course of business, stating that, on a given day he attended A's mother and delivered her of a son is a relevant fact.

(c) The question is whether, A was in Peshawar on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended A at a place mentioned, in Peshawar for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Karachi harbour on a given day.

A letter written by a deceased member of a merchant's firm by which she was chartered to their correspondents in London, to whom the cargo was consigned, stating that the ship sailed on a given day from Karachi harbour is a relevant fact.

(e) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A saying that he had received the rent on A's account and held it at A's order, is a relevant fact.

(f) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day is relevant.

(h) The question is, what was the cause of the wreck of a ship.

A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased banyia in the ordinary course of his business, is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son is a relevant fact.

(l) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend announcing the birth of A on a given day, is a relevant fact.

(y) The question is, whether and when, A and B were married.

An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(z) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libelous character. The remarks of a crowd of spectators on these points may be proved.

Evidence Act, 1872. This Article is reproduction of section 32 of Evidence Act.

Synopsis

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60. Statements in pedigree filed in previous suit.
61. Pedigree filed in settlement proceedings.
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64. Books kept by priests, *pundars*, etc.
65. Evidentiary value of pedigree.
66. Statements in wills, deeds and inscriptions, etc.
67. Statements relating to transactions mentioned in Art. 26.
68. Transaction, meaning of.

1. Scope. Eight clauses mentioned in Art. 46 of the Qanun-e-Shahadat, 1984 are exceptions to the general rule of evidence that all oral evidence must be direct viz. if it refers to a fact which could be seen it must be the evidence of the witness who says he saw it; if it refers to a fact which could be heard it must be the evidence of the witness who says he heard it; if it refers to a fact which could be perceived by any other sense it must be the evidence of the witness who says he perceived it by that sense; if it refers to an opinion it must be the evidence of the witness who holds that opinion, as provided by Art. 71 of Qanun-e-Shahadat, 1984. When a person deposes a fact in a Court of law he states under the oath and is liable for prosecution for perjury if he states falsely and his statement can be tested through cross-examination, thus there is some sort of guarantee of truth to the said statement, but in a case covered under any clause of Art. 46, said safeguards are absent, as the maker of the statement is not examined as a witness at all. Article 46 thus relates only to relevancy of evidence and not to the manner of its proof.²⁰

A relevant fact cannot be proved by hearsay. Hearsay evidence can never be admitted unless the Qanun-e-Shahadat permits it. Art. 46 does, subject to conditions therein stated, admit hearsay evidence. Evidence of a statement made to a witness by

²⁰ PLD 2003 Kar. 618 (DB).

¹ AIR 1931 Mad. 689-33 Cr. L. J. 51 (DB)+AIR 1954 Raj. 38.

a person not himself called as witness may or may not be hearsay. Such evidence is hearsay and inadmissible when object of evidence is establishment of what is contained in the statement but it is not hearsay and is admissible in evidence when fact of its being made is proposed to be established and not truth of the statement.¹

The incapacity to give evidence contemplated by Art.46 need not be a permanent incapacity. Incapacity, however, must be proved, and proved strictly. The onus of establishing the circumstances that would bring a statement within any of the exceptions in Art.46 lies on the party wishing to avail itself of the statement. Where a person has become very old and blind and cannot move, he must be held to have become incapable of giving evidence.²

Dying declaration. Evidence of dying declaration is an exception to the general rule that all oral evidence must be direct because when a person states a fact before a Court of Law, he speaks under the sanction of an oath and he can be cross-examined by the other party, but in the case of statement made under Article 46 these types of safeguards are not available because the maker of the statement cannot be examined. The nature of statement and the circumstances under which it is made, make probable the truth of a statement and thus, take the place of oath and cross-examination. Therefore, the evidence of dying declaration cannot be lightly ignored.³

Written statement. Written statement cannot be exhibited in a case without the person filing the same being examined in Court and therefore cannot be treated as evidence in the case under this Article.⁴

Exception to S.353, Cr.P.C. The rule enacted in S. 353, Criminal P.C. that all evidence in any enquiry or trial shall be taken in the presence of the accused is subject to the exceptions contained in Articles 46 and 47.⁵

Evidence not taken in Court. The statement of a witness which a court can rely upon if the witness appears in Court, is the statement made in Court about a relevant fact-in-issue and not a statement made before any other person or authority, unless it be a statement falling under S.288, Criminal P.C., or be a statement taken on commission lawfully issued or be a statement admissible under any other provision of law. A statement not made before the Court may however be admissible, if the law makes such a statement relevant and admissible in evidence.⁶ A dying declaration which para (1) of Art.46 applies, would not be hit by section 162 of the Criminal Procedure Code.⁷

Articles 46 and 47. Article 46 is not controlled by Art. 47.⁸ Arts. 46 and 47, give different instances where evidence is relevant. Art. 46 makes relevant statements

2. PLD 1979 SC 53=NLR 1979 Cr.C. 209.
3. AIR 1961 Patna 21.
4. PLJ 2000 Sh.C. (AI&K) 17.
5. 1991 SCMR 2223.
6. AIR 1951 Punj. (Simla) 178=52 Cr. L.J. 99 (DB).
7. AIR 1950 Lah 167=51 Cr. L.J. 1350.
8. PLD 1961 Dhaka 1 (DB)=12 DLR 537+1969 P. Cr. L.J. 482 (DB).
9. PLD 1950 Sind 152=AIR 1949 Sind 12=ILR 1947 Kar. 224 (DB).

by a deceased person as to the cause of his death; Art. 47 makes relevant evidence given by a witness when the witness is dead or cannot be found, etc. These are two distinct cases. It cannot be said that Art. 47 governs Art. 46.¹⁰

Articles 71 and 46. The framers of Qanun-e-Shahadat regarded the facts referred to in Arts. 46 and 47 as independent indicia of truth and furnishing in themselves direct grounds for legitimate inference and not as exceptions or provisos to Art. 71.¹¹

Evidence of conduct. Where a statement of a deceased person is inadmissible under Art. 46, evidence of it as evidence of a person's conduct and not as the statement of a deceased person, is admissible.¹²

Onus of proof. Provisions of Art. 46 are in the nature of exception. Onus of establishing circumstances that would bring statement within any of the exceptions contemplated by Art. 46 is upon the party who wishes to avail itself of the statement.¹³

2. Illustrations to the Article. In the construction of Art. 46 it is the duty of the Court of law to accept--if that can be done--the illustrations given, as being both of relevance and value in the construction of the text; the illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the Articles deal.¹⁴

3. Conditions precedent to admissibility. Before a statement of a deceased person is admitted under Art. 46 (1), it is necessary for the party seeking to put that statement in evidence to establish the requisites laid down in this Article. The burden of proof lies heavy on the party.¹⁵ A statement which does not relate to any of the matters referred to in the Article, is not admissible in evidence.¹⁶ Thus where in a suit upon a promissory note, one of the attesting witnesses to the execution of the promissory note cannot be called to prove execution, he being dead, his statement in a previous suit not *inter partes* cannot be brought on the record, when the statement does not fall either under Art.46 or under Art. 47.¹⁷ A statement made by a widow in her evidence before the Commissioner for Workmen's Compensation that she had heard from her husband who was then dead as a result of injuries received in an accident while proceeding to the factory that the bicycle on which he met with the accident had been given to him by his employer, because otherwise he might be late in attending the factory, is hearsay, as it does not fall within any of the sub-paragraphs of Art.46 and is therefore, inadmissible.¹⁸

10. AIR 1941 Rang. 301=43 Cr. L.J. 123.
11. 7 All 385 (FB).
12. AIR 1954 Mad. 215.
13. 2003 YLR 3068.
14. AIR 1916 PC 242.
15. PLD 1977 Pesh. 38 (DB).
16. 1955 All L.J. 458.
17. AIR 1960 Punj. 261 (DB).
18. AIR 1950 Cal. 164 (DB).

Non-availability of person whose statement is sought to be admitted. Art.46 requires that there shall be proof that a person cannot be found or cannot be procured without unreasonable amount of delay or expense before his statement is admitted. This proof is a condition precedent to the reception of his statement under this Article.¹⁹ Therefore a statement by a person who could be put in the witness box, but was not, is not admissible under Art. 46 or Art. 47.²⁰ When conditions in Art.46 do not exist, a plaintiff in a previous rent suit is inadmissible to prove a statement made therein by the landlord when the landlord is living and no effective attempt is made to secure him as witness or examine him on commission.¹

Documents, admissibility of. A recital in a document is admissible in evidence as against the persons who are not parties to the document, only when the conditions laid down in Art. 46 are fulfilled. In other words, it must be shown that the parties to the document are dead or cannot be found or have become incapable of giving evidence or their attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable.² Thus where the original document was lost and a copy of the original filed in Court contained a statement signed by a deceased person that the document was a copy of the original, it was held that such statement was admissible in evidence as a statement made by a deceased person in a document relating to a relevant fact.³ Statements (entries in account books) made by a person are not admissible, if the person making the statement is not produced, though alive, or the circumstances which stand in the way of producing him are not disclosed.⁴

Death of person subsequent to time for his examination. Where a person who was alive at the time the plaintiff closed his case and yet had not been examined as a witness, the statements in writing of such person filed before his death in support of the plaintiff's case are inadmissible as statements of a deceased person.⁵

Statement of person examined in Court. Where a witness in a suit has been fully examined and cross-examined, Art.46 has not application and if the witness happens to die before the completion of the suit, it is not open to either party to apply for the admission of a statement made by him in a previous suit.⁶

Person whose identity is not known. A person may be said to have been not found when it is known who he was and if in spite of search he was not found or was found to have been dead. But he may equally be said not to have been found if his identity cannot be traced or he cannot be found.⁷

19. PLD 1957 Kar. 765 (DB)+AIR 1933 Rang. 212 (DB)+AIR 1945 Cal. 360 (DB).
20. AIR 1945 Cal. 360-46 Cr. L.J. 683 (DB)+AIR 1943 Cal. 76 (DB).

1. AIR 1924 Cal. 558 (DB).
2. AIR 1920 Pat. 696.
3. AIR 1929 PC 115.
4. AIR 1935 Oudh 16 (DB).
5. 25 All. 143 (PC).
6. AIR 1920 Pat. 291 (DB).
7. AIR 1944 Lah. 58.

Art.46 Inconvenience and expense must be with respect to individual witnesses and not arising from the number of witnesses cited.⁸

Delay and expense. Inconvenience and expense must be with respect to individual witnesses and not arising from the number of witnesses cited.⁸

The mere fact that a witness was living at a far-off place is no reason for not calling him as a witness.⁹ But where a person is not in the country and is residing in England, his writing can be produced in evidence under this Article.¹⁰

Evidence recorded in other country. Evidence recorded in a foreign country under Fugitive Offenders Act may be admissible under Article 32 or Article 33 in proceedings under the Penal Code against the same accused.¹¹

Statement admitted under this Article. If substantive evidence. A statement admitted as relevant under this Article is substantive evidence.¹² Where the document can be brought under one of the paragraphs of Art. 46 and other conditions of the Article are fulfilled, it can be used not only as corroborative but as independent evidence.¹³

Affidavits. Affidavits admissible under other statutes as admissible under Art. 46 and Art. 47 as this Order does not apply to affidavits.¹⁴ The only basis in which the affidavit of a living person not called into the witness box can be acted upon as admissible evidence is that it should be capable of being regarded as a statement in writing complying with the conditions prescribed in Art. 46.¹⁵

Written or verbal statements. The word "statement" in Art. 46 should be given its primary meaning, viz., that which is stated.¹⁶ It is not necessary that a dying declaration must necessarily have been recorded and much less recorded in accordance with the provisions contained in Chapter XXV of the Code of Criminal Procedure. Dying declarations are admissible even if orally made.¹⁷ A dying declaration could either be oral or written, signed or thumb-impressed but it must be a statement of person telling about circumstances which resulted into his death.¹⁸ A dying declaration by the deceased by signs and gestures, when he could not speak due to injuries on the throat, are verbal statements within the meaning of the Article.¹⁹ All that the Court needs look into is whether if it is in writing, it is

8. AIR 1917 Mad. 809 (DB).
9. AIR 1925 Mad. 444 (DB).

10. AIR 1934 All. 618 (DB).
11. AIR 1928 Sind 161=29 Cr. L.J. 1089 (DB).
12. AIR 1916 Mad. 1211=16 Cr. L.J. 759 (DB) (Dying declaration reduced to writing is substantive evidence of circumstances leading to deceased's death when cause of his death is in question).
13. AIR 1918 Pat. 537 (DB) (Zamindar papers).
14. 4 Sind LR 88 (Affidavit in interlocutory proceeding by deceased stating a particular family custom).
15. AIR 1949 Mad. 689.
16. AIR 1959 SC 356=1959 Cr. L.J. 389.
17. 1906 SCMR 1747=PLJ 1996 SC 1596+1995 P. Cr. L.J. 1479+1993 P. Cr. L.J. 1547 (DB)+PLD 1974 SC 87=PLJ 1974 SC 25+PLD 1951 PC 111=1951 FCR 193=2 DLR 388.
18. 2001 P. Cr. L.J. 1014=PLJ 2001 Cr.C. 626=NLR 2001 Cr. 334 (DB).
19. AIR 1947 PC 24=38 Cr.L.J. 281.

contemporaneous and faithful record of the statement.²⁰ Even where a written dying declaration was made after the oral statement and the oral dying declaration was not mentioned by the deceased in his dying declaration recorded by the doctor, it is not sufficient to reject the statement of the witness who deposed to the earlier oral dying declaration.¹ It must be noted that the veracity of two dying declarations cannot be divisible as a natural consequence. If anything is said in one imparting the integrity of the maker, it is matter for serious consideration whether the other can be treated on better footing. To extend preferential and favourable treatment to any one of them, there must be some strong grounds to eliminate every possibility of doubt.²

7. This Article controls Article 24. Article 24 is generally controlled by Art. 46 where evidence consists of statements of persons who are dead or who cannot be found. Subject to exceptions Art. 46 imposes restrictions upon admissibility of statement made by persons who cannot be brought before the Court to give evidence. The test whether the statement of a person who cannot be found or who is dead is relevant under Art. 24 and admissible under that Article (presuming that in other respects it is within the intention of the Article) although it would not be admissible under Art. 46 is this: It is admissible under Art. 24 when it is altogether immaterial whether what the deceased man said was true or false, but highly material that he did say it. In these circumstances, no amount of cross-examination could alter the fact, if it be a fact, that he did say the thing and if nothing more is needed to bring the thing said under Art. 24 then the case is outside Art. 46.³ It must be remembered that there is a difference between the existence of a fact and a statement as to its existence. Art. 24 makes the existence admissible and not a statement as to such existence unless the fact of making that statement is itself a matter-in-issue. Hence if a statement does not fall within Art. 46 it cannot be admissible even under Art. 24.⁴ It would be absurd to hold that every fact which even if it is inadmissible and irrelevant would be admissible under Art. 24. If a particular deposition could not be admitted under Art. 46 it could not be admissible under Art. 24.⁵

8. **Dying declaration need not be made in expectation of death.** Law does not require that dying declaration should be made under immediate apprehension of death. Any incriminatory statement made when a person is alive and subsequently dies can be legitimately treated as a dying declaration.⁶ Statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, would be relevant even if the person who made it was not at the time of making it under expectation of death.⁷ The law does not insist that for the purpose of being treated as a dying declaration, the statement should have been made

20. PLD 1974 SC 87=PLJ 1974 SC 25.
1. 1968 P. Cr. L.J. 747 (DB)+PLD 1965 Lah. 288 (DB).
2. PLD 1970 Kar. 399 (DB).
3. AIR 1960 All. 339 (DB)+9 Bom LR 1047+AIR 1928 Cal. 893 (DB).
4. AIR 1960 All. 339 (DB)+AIR 1934 All. 406 (FB).
5. AIR 1929 Oudh 113 (DB)+AIR 1935 Oudh 41 (DB)+34 All. 341 (DB).
6. 2001 YLR 1470 (DB).
7. PLJ 2001 Cr.C. 1072 (DB)+PLJ 1998 SC(AJK) 369+PLD 1994 Pesh. 114=NLR 1994 Cr. 63 (DB).

under immediate apprehension of death. The Court cannot import into the statutory provision any such extraneous limitation. In the absence of a statutory requirement in regard, the last incriminating statement made by the deceased could be legitimately treated as a dying declaration.⁸ Statement under S. 161, Cr.P.C. of an injured person is an admissible evidence even though the injured had died much before. Rejection of a statement made by deceased not in expectation of death would offend against the provisions of this Article.⁹ It cannot be said that a dying declaration recorded at a time when deceased was not expecting to die and such statement not bearing signature of deponent nor countersigned by any doctor, could be relied upon.¹⁰ The High Court in not treating the statement of deceased lady recorded under S. 164, Cr.P.C. as a dying declaration on the ground that she was not immediately fearing death nor did her death take place soon after she made the statement ignored the law laid down by Supreme Court.¹² Similarly statement recorded under section 161, Cr.P.C. can be treated as dying declaration if maker of statement dies soon thereafter.¹³ The dying declaration does not cease to be so merely because the declarant lingers for a few days and then dies.¹⁴

The fact that the statement was made not while under apprehension of death may affect its value but not its sufficiency to prove its contents. Where it is scrutinised just as a witness would be cross-examined, and found satisfactory, it is good evidence.¹⁵ Where the deceased expected that he would live on and therefore safeguarded his position in the dying declaration in certain respects, his statement in those matters may not be believed but his declaration regarding other matters may be relied upon.¹⁶

F.I.R. lodged by deceased. Where an F.I.R. is lodged by deceased as dying declaration, non-attestation of report either by Medical Officer or any other person would not render report as false when immediate apprehension of death of deceased was not eminent.¹⁷

9. **Person surviving after making statement.** The facts that death of person making dying declaration was imminent and his condition was so precarious that he was struggling for life were conditions precedent before requisite presumption about truth of such statement could be drawn.¹⁸ Where a person making a dying declaration

8. PLJ 2001 Cr.C. 1072 (DB)+1996 MLD 204=NLR 1996 Cr. 150=PLJ 1996 Cr.C. 713 (DB)+PLD 1995 Quetta 56 (FB)+PLD 1992 SC 211=NLR 1992 Cr. 238+1975 SCMR 289+PLD 1974 Kar. 1=PLJ 1973 Kar. 254 (DB)+1973 P. Cr. L.J. 812+1983 P. Cr. L.J. 2537+PLD 1982 Kar. 881 (DB)+1977 SCMR 477+AIR 1935 Lah. 94 (DB)+1985 SC 1407 (SC Ind).
9. 2001 SCMR 94=2001 AC 207=PLJ 2001 SC 1692+PLD 1992 SC 211=NLR 1992 Cr. 238.
10. NLR 1989 Cr. 705 (DB).
11. 1980 P. Cr. L.J. 1190 (DB).
12. 1990 SCMR 40 (Rd.) 1976 SCMR 4711).
13. PLD 1979 BJ 42.
14. AIR 1930 Punj. 310=AIR 1929 Lah. 64=30 Cr. L.J. 65 (DB).
15. AIR 1950 Kutch 2=51 Cr.L.J. 363.
16. PLD 1971 Pesh. 182 (DB)+AIR 1935 Cal. 580=36 Cr. L.J. 1322 (SB).
17. NLR 2001 Cr. 560=PLJ 2000 SC 1692=2001 AC 207=2001 SCMR 94.
18. 1983 P. Cr. L.J. 823.

survives and does not die and has not been examined in the case, the Court cannot take note of the dying declaration.¹⁹ His statement is not admissible as a dying declaration.²⁰ It could not be used as substantive evidence and was most at par with statement of a prosecution witness, recorded under section 161, Cr.P.C. However, where medical evidence showed that deceased received no head injury but deceased in his statement under section 161, Cr.P.C. talked about receiving injury on his head. No reliance could be placed on statement of deceased recorded under section 161, Cr.P.C. as a dying declaration.² A statement by a person who was wounded and was on the point of death but did not die, and who was made an accused subsequently, cannot be used as a dying declaration.³ His previous statement may be used only to corroborate or contradict him.⁴ But such statement cannot be used or relied upon even for the purpose of corroboration under Art. 153 especially when the person making the declaration is not the complainant.⁵

Confessional statement. A confessional statement by a person cannot be admitted in evidence when it was made as a dying declaration but the maker did not die after making it. Thus where the statement made by an accused is recorded by the Magistrate as a dying declaration wherein the accused incriminates himself by stating that he attacked his wife and then inflicted wounds on himself, such a statement, if it becomes inadmissible in evidence under Art.46-b by reason of the accused surviving the wounds, cannot be admitted in evidence as a confession if it is found that the Magistrate failed to comply with the provisions of section 164, Criminal P.C. and that he was not available for being examined as a witness under the provisions of section 533, Criminal P.C. To such a statement the rule laid down in AIR 1936 P.C. 253(2) applies.⁶

10. Statement must relate to cause or circumstances of death. A dying declaration must relate to the cause of maker's death or the circumstances which resulted in his death⁷ and such details which fall outside this ambit are not strictly within the permissible limits laid down by Art. 46 (1) and unless absolutely necessary to make a statement coherent or complete should not be included in the statement. Those recording such statements would be well advised to keep in view the fact that the object of a dying declaration is to find from the person making the statement, the cause of death or the circumstances of the transaction which resulted in his death.⁸ A man in a dying condition need not give long description of the occurrence. If he just mentions the names of his assailants and states as to how he received the injuries, that

19. AIR 1958 All. 255=1958 Cr. L.J. 424 (DB).
20. 1984 P. Cr. L.J. 1781+AIR 1957 Andh-Pr. 729=1957 Cr. L.J. 1086.
1. 1984 P. Cr. L.J. 1781.
2. 1983 P. Cr. L.J. 2110.
3. AIR 1935 Oudh 477=36 Cr.L.J. 1007.
4. 1968 P. Cr. L.J. 590 (DB).
5. 54 Mys HCR 120 (4 Bom LR 434, *Disinguished*).
6. AIR 1954 All. 633=1954 Cr. L.J. 1341 (DB).
7. 2001 P. Cr. L.J. 1014 (DB)+PLD 1995 Quetta 56 (FB)+PLD 1956 Lah. 300=PLR 1956 904+AIR 1957 SC 904.
8. PLD 1956 Lah. 300=PLR 1956 Lah. 904+AIR 1957 SC 904.

may be deemed sufficient for the purpose of accepting it in evidence.⁹ Where deceased pointed towards the accused, named him and said that he was there. The portion of statement of deceased being directly related to occasion of his death and having approximate relation with actual occurrence, was admissible, in evidence.¹⁰

While it is true that the Court must respect, and keep within the limit prescribed by the Legislature, there seems to be no justification in principle to construe the limit imposed narrowly. Any fact which can reasonably be treated either as a part of the transaction itself or as a circumstance connected with it is admissible under this paragraph.¹¹ A dying declaration is admissible in so far as it points directly to the fact constituting the *res gestae* of the homicide; that is to say to the act of killing and to the circumstances immediately attendant thereon like threats, acts, declarations and incidents which constitute or accompany and explain the fact or transaction in issue and are admissible for or against either party as forming parts or *res gestae*.¹² Therefore in a trial for conspiracy to murder the deceased, a written complaint by him to the S.D.O. apprehending danger to life is admissible under this Article.¹³ Similarly a complaint in writing made to the police by a person who dies some time thereafter, expressing apprehension of death at the hands of a certain person is admissible in evidence when the person whose conduct is the source of the apprehension, is charged with the offence of murder of the person making the complaint. The statement is admissible as relating to "the circumstances of the transaction which resulted in his death", within Art.46 (1).¹⁴ But statements which do not relate to cause or circumstances of the transaction which resulted in death would not be admissible in evidence under this Article. Thus where in a murder case the judge relied on certain evidence as proving motive on the part of the accused to murder the deceased. The motive was derived from statements made by the deceased to his wife and to his wife's sisters to the effect that in relation to a law suit in which the deceased's wife's sister was concerned the accused had accepted a bribe from the plaintiff in the suit against his wife's sister. It was held that these statements were wholly inadmissible as they were not statements made by the deceased as to the cause of his death or to circumstances of the transaction which resulted in his death.¹⁵

Nature and seat of injuries. There would be nothing unusual for deceased to give in his dying declaration, seats as well as number of injuries. This would rather establish that he was in a fit state of mind and could furnish all requisite information.¹⁶

Trial for other matters. Art. 46 (1) refers to statements made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death in cases in which the cause of that person's death comes into

9. 1971 P. Cr. L.J. 275=1970 DLC 634=22 DLR 620 (DB).
10. 1986 P. Cr. L.J. 959 (DB).
11. PLD 1956 Lah 300=PLR 1956 Lah 904.
12. 1959-1 Mad L J 246 (DB).
13. AIR 1938 Cal. 51=39 Cr. L.J. 161 (DB).
14. AIR 1960 Bom. 290 (DB).
15. AIR 1941 Mad. 101=42 Cr.L.J. 308 (DB).
16. NLR 2001 Cr. 560=PLJ 2000 SC 1692=2001 AC 207=2001 SCMR 94.

question. It does not apply where the object of trial is to find out whether certain person were dacoits or not.¹⁷ But in a charge of robbery, when the cause of death of the deceased comes in question because of an assault committed by the accused, his dying declaration as to the circumstances which resulted in his death are admissible even if there is no charge of homicide.¹⁸ Similarly in a trial for robbery, the statement of a person before death regarding the circumstances of robbery is relevant under Art. 46 even though death was caused remotely by the wound received at the robbery.¹⁹

11. Statement as to cause of death. Dying declaration is a statement made by a person as to the cause of death.²⁰ The test of relevancy of statement under Art. 46 (1) is not what the final finding comes into question in the case.¹ Where a person makes the statements comes into question in the case.¹ Where a person commits suicide as a result of ill-treatment received at the hands of the accused and that treatment is the cause though not the direct cause of his death, the whole affair, ill-treatment and subsequent suicide, forms one transaction and therefore the statements made by the deceased as to the cause of his death are admissible under Art.46 (1) against the accused who were charged under section 330, Penal Code.²

Immediate cause of death not necessary. The expression "any of the circumstances of the transaction which resulted in his death" is wider in scope than the expression "the cause of his death"; similarly the words, "resulted in his death" do not mean "caused his death". In other words, the intention of this provision of law clearly is to make admissible not only the statement dealing directly with the cause of death, but also a statement as to any of the circumstances "the transaction resulting in his death" if being of course understood that the circumstances in question must have some proximate relation to the actual occurrence.³

Death not caused by matters stated in dying declaration. The statement of the deceased must relate to the injuries by which his death was caused.⁴ Where a person dies in hospital after being assaulted and hurt, not of the injuries but of a malady independent of such injuries, such for example as pneumonia, the dying statement of such person is not admissible in evidence in a trial of his assailants under section 324, Penal Code.⁵ Where there is nothing to show that the injury to which a statement relates was the cause of death of an injured person or that the circumstances under which it was received resulted in his death, the statement is not admissible.⁶

17. PLD 1956 Lah. 306-PLR 1956 Lah. 904+14 Cr. L.J. 510.
18. AIR 1928 Pat. 162-29 Cr. L.J. 106 (DB).
19. AIR 1935 Rang. 418-37 Cr. L.J. 205.
20. 1995 P. Cr. L.J. 179.
1. AIR 1953 Pat. 354-1953 Cr. L.J. 1751 (DB).
2. AIR 1916 Lah. 106-17 Cr. L.J. 538 (DB).
3. PLD 1978 SC 298+PLD 1970 Lah. 909 (DB)+AIR 1929 Sind 250+AIR 1953 Pat. 354 (DB).
4. AIR 1924 Lah. 253-25 Cr. L.J. 1140 (DB).
5. AIR 1930 Oudh 249-31 Cr. L.J. 1025.
6. 1977 P. Cr. L.J. 608 (DB)+AIR 1964 SC 900+1969 P. Cr. L.J. 145+AIR 1943 Cal. 465+Cr. L.J. 71 (DB).

Art.46] **Failure of charge of murder.** Where the cause of death has come into question, the mere fact that a charge of murder failed and was not brought home to the accused does not make the dying statement inadmissible for the purpose of the other offences which were charged.⁷

Statement as to cause of death of other person. The statement in a dying declaration of one dead person in regard to the death of another is not a relevant fact with respect to the question about the death of the latter and so would not be admissible in evidence with respect to the offence of murder of that person.⁸ A statement by A who died within a few months after the statement, about the cause of death of her sister B and the circumstance which resulted in the death of B, is not admissible in evidence under Art.46 in a trial of the accused for the murder of B.⁹ But where the death of the person making the statement and the other person occurred as a result of the same transaction the statement cannot be excluded from evidence. To exclude from evidence statement made by a deceased person as to incidents which occurred during the course of the transaction which resulted in his death--statements other than those relating to the cause of his death--would be to import a limitation on the words used in the Article which their natural meaning does not warrant. When a limitation like that is intended, the Legislature specially provides for it.¹⁰

12. Statement as to circumstances which resulted in death. A dying declaration is a statement as to the circumstances of the transaction resulting in the maker's death.¹¹ It refers to what took place at the time of the incident between the accused and the deceased, although it may not come under the first part of para (1), which pointedly refers to the cause of death, will come under the category of a statement made by a person who dies subsequently, as to any of the circumstances of the transaction which resulted in his death, within the meaning of Art.46 (1).¹² Thus where deceased who was wife of accused gave statement in hospital before her death to the effect that accused had picked a quarrel with her and he brought some powder from inside the room and after throwing the powder on her, he lit a match and put her on fire and that the accused had burnt her. The statement was held to be a dying declaration.¹³

"Circumstances of the transaction" is a phrase which conveys some limitations. It is not as broad as the phrase "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae". Circumstances must have some proximate relation to the actual occurrence and must be of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that

7. AIR 1940 Nag. 340-42 Cr. L.J. 17 (DB).
8. AIR 1948 All. 170-171 Cr. L.J. 140 (DB).
9. AIR 1959 SC 18-1959 SCR 1336-1959 Cr. L.J. 108.
10. AIR 1955 Trav-Co. 104-1955 Cr. L.J. 852.
11. 1995 P. Cr. L.J. 179.
12. 1998 P. Cr. L.J. 489+AIR 1952 Trav-Co 70-1952 Cr. L.J. 386 (DB).
13. 1998 P. Cr. L.J. 489.

"the cause of the declarant's death comes into question". General expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But, statements made by the deceased that he was proceeding to the spot to meet the wife of the accused, where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be a circumstance of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused.¹⁴

The Article includes oral statements made by a person wounded mortally while pursuing dacoits, during the period commencing from the information given by him to the authorities until the time he was shot down. The dying declaration made by him and recorded by the Magistrate will also be relevant under Art. 46 subject to the rule of law excluding hearsay evidence.¹⁵

Statement sufficient to expose person making it to prosecution as a conspirator for murder is admissible in evidence after his death.¹⁶ A dying declaration made by a dacoit who was wounded in the course of the dacoity as to the circumstances of the dacoity is a statement as to the circumstances of the transaction which resulted in his death and hence is admissible on the question of his participation in the dacoity.¹⁷

Where the fact in issue was whether the accused had committed murder. The facts that the accused had taken money and ornaments from the deceased and that the deceased had, on the day of his murder, gone to the accused to demand money and ornaments are relevant facts showing occasion, cause or effect of the fact in issue within the meaning of Art. 20. The delivery of money and ornaments by the deceased, the demand by the deceased for their return and the promise by the accused to return them on a particular day, leaving by the deceased, of his town of residence for the town of the accused to receive the money and ornaments; visit of the deceased to the house of the accused on the day of murder and the murder of the deceased as alleged are all "circumstances" relating to the same transaction within the meaning of Art. 46 (1). The statements made by the deceased in respect of these circumstances will be relevant facts, and the deceased being dead, the verbal statements could be proved under Art. 71 by the oral evidence of persons who heard them; in other words, by persons to whom they were made.¹⁸ Evidence of a witness that the deceased told her mother that they were going with the accused to effect a miscarriage is admissible because it is a statement made by the deceased that she was proceeding with a certain person for a certain purpose and after that, she died. The statement relates to the circumstance of the transaction which resulted in the death of the deceased. This statement, notwithstanding that it was not made to the police officer under section 162, Cr.P.C., can still be taken into consideration for the simple reason that there was

- 14. PLD 1957 Kar. 824-10 DLR WP 55 (DB)+AIR 1939 PC 47.
- 15. AIR 1933 Oudh 53-34 Cr.L.J. 101 (DB).
- 16. PLD 1978 Lah. 523-PLJ 1978 Cr.C. 234-NLR 1978 Cr. 331 (DB).
- 17. AIR 1923 All. 227-26 Cr.L.J. 547.
- 18. AIR 1949 All. 291-ILR 1949 All. 658-50 Cr.L.J. 498.

Art. 46] STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES
reason alleged as to why the witness should utter this falsehood against the accused. Similarly the statement of the deceased that he was going to the accused to release his cow which the accused had confined, made almost immediately preceding the quarrel over the accused resulting in his death is admissible in evidence under Art. 46 from the circumstances of the transaction which resulted in his death.²⁰ as it relates to the circumstances of the murder, the deceased had made a statement to one of the witnesses for the prosecution that the deceased had been to a jungle in the company where just a day before the murder, the deceased had been to a jungle in the company of the accused in order to procure certain herb to attract the husband of the deceased and that as the accused could not get the medicine on that day, she promised the deceased to procure the same on the next day. On the next day, the deceased was found in the jungle in an injured condition which resulted in her death. It was held that the statement was admissible in evidence under Art. 46 (1), as it disclosed the circumstances under which the deceased was seriously injured ultimately resulting in her death.¹

Statement not relating to circumstances of death. It is very necessary to correct the impression, that as soon as a person is dead, his statement becomes admissible in evidence. Where there is nothing to show that the injury to which that statement related was the cause of death, or the circumstances under which it was received resulted in his death, the statement is not a dying declaration.²

Statement disclosing motive of accused. The expression "motive" has not always been used in its correct sense, namely, the emotion which could have led to the act in question. It has been often confused with intention and design. It is clear that mere emotion, which may or may not have led to the commission of the act in question, cannot be treated as a part of a transaction itself; but there seems to be no reason as to why it should not be treated as one of the circumstances of the transaction provided it is sufficiently proximate in point of time and sequence.³ Statements made by the deceased regarding motive of accused in first information report and in dying declaration, are statements as to circumstances of a transaction resulting in death and so are admissible under Art. 46.⁴ Where liaison between the accused and the wife of the deceased is the alleged motive of murder the statement of the deceased as reproduced by a witness to the effect that the accused had approached the deceased for the release of the latter's wife from marriage is admissible under Art. 46 (1) is not subject to these limitations.⁵ Where it was the case of the prosecution that the accused wanted to do away with the deceased because of her pregnancy through him: the statement of the deceased to the witnesses of her condition and of the person responsible for it would be admissible under Art. 46 (1)

- 19. 68 Mad L.W. 767.
- 20. AIR 1954 Cal 379-1954 Cr.L.J. 1015 (DB).
- 1. AIR 1965 Orissa 33 (DB)+AIR 1939 SC 47.
- 2. PLJ 1978 Cr.C. 45 (DB)+AIR 1955 Cal. 559 (DB).
- 3. PLD 1956 Lah. 300-PLR 1956 Lah. 904 (DB).
- 4. AIR 1938 Pat. 52-39 Cr.L.J. 332 (DB).
- 5. AIR 1954 Him Pra 11-1953 Cr.L.J. 1900.

as it was a circumstance which had some proximate relation to her death.⁶ For the same reasons the diary of the deceased which recited different facts which could serve to prove motive for the crime was held admissible as evidence of motive.⁷

Statement before injury or apprehension of death. A statement admissible under Art. 46 (1) may be made before the cause of death had arisen or before the deceased has any reason to anticipate being killed.⁸ A statement made by the deceased to police some two months before the fatal attack apprehending such attack, is admissible evidence.⁹ Letters written by the deceased wife to her husband are admissible under Art. 46 (1), for the circumstances mentioned therein have approximate relation to the transaction of strained relations between the husband and the wife which later resulted in death of the latter.¹⁰ It is however to be noted that only those circumstances which can be intimately connected with immediate cause of death can be regarded as contemplated in the Article. A statement made by the deceased long before the murder injuries is inadmissible.¹¹

13. Statement, against whom admissible. Statements by the deceased as to the cause of his death are admissible, not only as against the person who actually caused his death but also against other persons concerned in the transaction which resulted in the deponent's death when the cause of that person's death comes into question.¹² But the dying declaration of one cannot be used against member of his own party even if the question was who were the aggressors.¹³

14. Recording of dying declaration. There is no specified forum before whom dying declaration is required to be made.¹⁴ There is no bar that it cannot be made before a private person; there is no legal requirement that the declaration must be read over or it must be signed by its maker.¹⁵ The provision in section 164 of the Code of Criminal Procedure, does not in any way affect the admissibility of a statement made by a person, if it falls within the terms stated in Art.46. To be admissible under that Article it is not necessary that such statements, usually described as dying declarations, must necessarily have been recorded and much less recorded in accordance with the provisions contained in Chapter XXV of the Code of Criminal Procedure. Dying declarations are admissible even if orally made.¹⁶ But where a dying declaration is oral and has not been recorded in the words of the

author the Court has to take precautions of subjecting it to proper scrutiny in the light of all those facts which affect the reliability of such oral evidence, for it is of paramount importance that the actual words of a dying declaration are reproduced before the Court as far as it is practically possible.¹⁷

Fitness to make dying declaration. Person recording dying declaration must be satisfied that person who makes statement is in a fit state of mind and is making statement consciously understanding implication of words he used.¹⁸ No reliance can be placed on a dying declaration unless there is anything on record to indicate that the statement was made by the injured and he remained in his senses.¹⁹ Before a dying declaration is recorded, report of a doctor should be obtained so as to show whether deceased is fit to make a statement or whether he is under immediate apprehension of death.²⁰ But certificate of Doctor on dying declaration about the deceased being in his full senses and capable of making a statement is not necessary for admitting it in evidence. Mere absence of such medical certificate does not affect the credibility of dying declaration if it is otherwise found to be true and genuine.¹

Private person, dying declaration made to. A dying declaration may be made before a private person.²

Magistrate recording statement having no jurisdiction. Where a statement is relevant under the provisions of Art.46 (1), it is not inadmissible by reason of the fact that the Magistrate who recorded it was not competent to record statements of a witness under section 164, Criminal P.C.³

Dying declaration made to police. No mandatory prerequisites of law exist that a dying declaration cannot be made before a police officer.⁴ A dying declaration made to a police officer, during the course of investigation is not subject to the limitations mentioned in the main clause of the Article, if it falls under Art.46.⁵ It is admissible in evidence.⁶ A dying declaration recorded by a police officer in the presence of medical officer and signed by the dependant and medical officer was held to be reliable.⁷ But there is no such law according to which a statement of an injured be recorded in presence of doctor or magistrate or witnesses. Any such statement recorded in absence of any witness may or may not be relied upon by Court in the light of evidence and circumstances of each case but no illegality takes

6. AIR 1955 Trav-Co. 87=1955 Cr.L.J. 847.
7. PLD 1956 Lah. 300=PLR 1956 Lah. 904 (DB).
8. PLD 1957 Kar. 824=10 DLR W.P. 55 (DB)+AIR 1960 Punj. 310+AIR 1939 PC 47.
9. AIR 1960 Bom. 290 (DB).
10. PLD 1957 Kar. 824=10 DLR W.P. Kar. 55 (DB).
11. AIR 1933 Nag. 136=34 Cr.L.J. 505 (DB)+AIR 1938 Cal. 125=39 Cr.L.J. 395 (DB).
12. 1969 SC MR 641+AIR 1936 Rang. 187=37 Cr.L.J. 621 (DB).
13. AIR 1944 Lah. 377 (DB)+AIR 1925 All. 227=26 Cr.L.J. 547.
14. 2001 SC MR 1474=PLJ 2001 SC 722=2001 SD 578+2001 P. Cr. L.J. 1014=PLJ 2001 Cr.C. 68 (DB)+1996 P. Cr. L.J. 1689=PLJ 1996 Cr.C. 997=NLR 1996 Cr. L.J. 442 (DB)+PLD 1997 SC 211=NLR 1992 Cr. 238.
15. 2001 SC MR 1474=PLJ 2001 SC 722=2001 SD 578.
16. 1996 SC MR 1747=PLJ 1996 SC 1596+PLD 1951 FC 111=1951 FCR 193=3 DLR 388+1963 SC MR 646+AIR 1963 Punj. 17 (DB).

17. AIR 1963 Punj. 170 (DB).
18. NLR 2001 Cr. 560=PLJ 2000 SC 1692=2001 AC 207=2001 SC MR 94.
19. KLR 1991 Cr.C. 77.
20. 1989 P. Cr. L.J. 1 (DB).
1. 1990 P. Cr. L.J. 99 (DB) (SH.C. A&K).
2. 1996 P. Cr. L.J. 1689=PLJ 1996 Cr.C. 997=NLR 1996 Cr. L.J. 442 (DB).
3. NLR 1981 Cr.L.J. 172 (SC) (Dying declaration recorded by Magistrate Class III)+AIR 1932 Lah. 14 (DB)+AIR 1930 Lah. 60 (DB).
4. PLD 1995 Quetta 56 (FB).
5. 1969 P. Cr. L.J. 1482 (DB)+PLD 1961 Dacca 1 (DB)=12 DLR 537+PLD 1951 FC 111=1951 FCR 193=3 DLR 388+1886 Pun. Re (Cr) No. 13, p. 32 (DB)+AIR 1932 Lah. 14 (DB)+AIR 1962 SC 1252.
6. PLD 1995 Quetta 56 (FB)+PLD 1984 FSC 3=1984 PSC 1338.
7. 1973 P. Cr. L.J. 1075=PLJ 1973 Lah. 243 (DB).