
(1994) 10 GUJ CK 0021
In the Gujarat High Court

Aher Lakhman Bhura

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 19-10-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374

Evidence Act, 1872 — Section 158

Penal Code, 1860 (IPC) — Section 302, 302

Citation : (1995) 2 GLR 1285

Hon'ble Judges : S.K. Bhatt, J; J.N. Bhatt, J

Bench : Division Bench

Judgement

J.N. Bhatt, J.—In this appeal u/s 374 of the Code of Criminal Procedure, we hear the echo of a murder of a young wife aged about 22 years as alleged to have been done to death by her husband, who is the appellant before us and who is the original accused in the trial Court.

2. The spectrum of material facts leading to the rise of the present appeal may be stated at the outset.

3. The appellant who is the husband of the deceased Bai Dhani was charged for having committed murder of his wife, before the learned Additional Sessions Judge at Gondal in Sessions case No. 37 of 1986, in that, the prosecution alleged that the accused on the unfateful day of 18-5-1986 at about 12 noon in the house in Chhadvavadar in Dhoraji taluka of Rajkot district, after pouring kerosene on the person of the deceased Bai Dhani put her on fire with the help of a match stick, with an intention to kill her as there was a bad relation between the spouses on account of the accused having illicit intimacy and relationship with one lady Valu Devayat. The accused was, therefore, charged for having committed an offence punishable u/s 302 of the I.P. Code in the trial Court on 1-1-1987.

4. As the prosecution story runs, on the day of the incident, there was a quarrel between the accused and the deceased and at that time, the father of the

accused Bhura Jetha was sitting in the front of the house known as Falia. The deceased had seriously objected to the intimate association of her husband-accused with Bai Valu Devayat. It is the prosecution case that on account of such motive, the accused after hot discussion and exchange of words, on the day of the incident, around 12 noon, put the deceased on fire by pouring kerosene on her body.

5. The deceased in a seriously burnt condition firstly was taken at the clinic at Dhoraji in an autorickshaw. From there, she was shifted to Junagadh hospital. Her dying declaration was also recorded by the Executive Magistrate. Unfortunately, she succumbed to the said burn-injuries almost within eight hours after the incident. The case was registered against the accused for having committed murder of his wife and the charge-sheet followed and subsequently, as noted hereinabove, a charge u/s 302 was framed in the District Court to which the accused denied and claimed to be tried raising defence that deceased Bai Dhani, his wife, had died on account of suicide.

6. The prosecution relied on as many as 19 prosecution witnesses and also the documentary evidence to substantiate the charge against the accused. The defence did not examine any witness for defence of the accused. After having examined the facts and circumstances and analysis of the evidence on record, the learned Additional Sessions Judge at Gondal reached the conclusion that the deceased Bai Dhani had died a homicidal death and the author of the crime in question is the accused - the appellant herein. After hearing the accused on the quantum of sentence, the trial Court sentenced the accused to suffer R.I. for life and to pay fine of Rs. 100/-, in default, to suffer further R.I. for two months.

7. Being aggrieved by the said judgment and order of conviction and sentence, the original accused has now come up before this Court challenging its legality and validity.

8. We have been taken through excursion of the entire testimonial collection and the relevant documentary evidence. The learned Counsel for the appellant has seriously criticised the approach of the trial Court in finding him guilty for the offence punishable u/s 302 of the I.P. Code. Reliance is placed on the dying declaration made by the deceased before the father-in-law Bhura Jetha and one Kanji Govind, who is the cousin-brother of the accused. The third circumstance relied on by the defence is the history recorded by the medical officer Dr. V.C. Doga at Dhoraji. Relying upon the aforesaid three circumstances, it has been contended that the trial Court has committed serious illegality in passing the impugned order holding the accused guilty for the offence punishable u/s 302.

9. Incidentally, reliance is also placed on the provisions of Section 32 read with Section 158 of the Indian Evidence Act.

10. Prosecution witness No. 2 Bhurabhai Jethabhai is examined at Ex. 18. He is the father of the accused. Prosecution witness No. 3 Kanji Govind is examined at Ex. 20 who is the cousin-brother of the accused. Prosecution witness Kanji is

declared hostile. An attempt was made to declare prosecution witness Bhura Jetha hostile but no order was passed below the application submitted by the prosecution. Be that as it may, we have dispassionately gone through the entire testimony of these two witnesses and we are convinced that both these witnesses are not only not reliable but have resorted to falsehood to support and protect the accused who is a close relative and also to substantiate the defence version of suicide. In order to substantiate the version of suicide, prosecution witness Bhura Jetha, the father of the accused, has stated in his evidence that deceased Bai Dhani immediately after the incident came out in burning condition from the room and thereafter one Puriben poured water on her body to extinguish fire. At the very first sight, ordinarily a lady who is out to burn herself and commit suicide would not run here and there after putting her body on fire. Apart from that, witness Bhura Jetha is the father of the accused and his evidence is required to be screened and analysed with full of circumspection. It is stated by this witness that Bai Dhani made an oral dying declaration in which she stated to have admitted that she committed suicide. The father of the accused would obviously try to save his son who is facing from a serious and capital charge. Having regard to the facts and circumstances and over-all picture emerging from the record of the present case, we are extremely unable to place any reliance on such a witness who has no respect for truth. The circumstances coming in direct conflict with such version coming out from his testimony will be elaborately highlighted by us hereinafter.

11. Same is the case with prosecution witness No. 3 Kanji Govind who is examined at Ex. 20. He is the cousin brother of the accused and who drives a rickshaw. He has reiterated what prosecution witness Bhura Jetha has stated in his evidence at Ex. 18. Apart from the fact that this witness is declared hostile, it is extremely difficult to consider the evidence of this witness as reliable. The evidence of this witness also does not have defence to show and substantiate the defence story of suicide allegedly committed by the deceased Bai Dhani. No doubt, we are in complete agreement with the learned Counsel for the appellant that the trial Court ought to have considered the evidence of those two witnesses in the impugned judgment and order.

12. The third circumstance relied on by the defence is that the deceased had not given history of killing by her husband before Dr. Doga at Dhoraji. It is true. Prosecution witness Dr. Doga, prosecution witness No. 5 is examined at Ex. 22. He had examined Bai Dhani at 2-15 p.m. The incident in question had occurred around 12 noon on 18-5-1986. So, within two and half hours of the incident, Dr. Doga had examined Bai Dhani who had sustained 70% burns on her body. It is found from the evidence of Dr. Doga and the case papers that she had not given history of killing or attempt to burn her, by her husband. However, we cannot be oblivious of the fact that it is clearly mentioned by Dr. Doga that it was not possible for deceased Dhani to narrate the history at that point of time on account of excruciating pain. She had sustained 70% burns on her body. No effective medical aid or treatment was afforded before she came to Dhoraji and

she came to be examined by Dr. Doga. Therefore, the mere fact that history of attempt to commit murder was not given by the deceased Dhani before Dr. Doga is not a pointer or indicator going in the direction of the theory of suicide.

13. No doubt, we are conscious of the fact that it is for the prosecution to establish the guilt and complicity beyond reasonable doubt. But since it was contended for the appellant at the outset that the aforesaid three circumstances are not seriously considered by the trial Court and are very material tilting the balance in favour of the accused and the defence version, we have dealt and discussed them at the outset. It is for the prosecution to prove without any shadow of doubt culpability of the accused. Such a celebrated principle needs no elaboration.

14. The trial Court has placed reliance on the history given by Bai Dhani before Dr. R.N. Tania, medical officer of the Junagadh Hospital. He is examined as prosecution witness No. 8 at Ex. 31. Case papers prepared after his examination are produced at Exs. 32, 33 and 34. It is clearly mentioned in the case papers itself at Ex. 32 that deceased Bai Dhani had unequivocally narrated the history of the incident wherein she positively stated that the accused had poured kerosene on her body and thereafter with the help of match stick, put her on fire and that was at about 12 noon. It would be interesting to mention the exact version narrated by the deceased before the doctor who had examined at Junagadh after she was given some treatment at Dhoraji and came to be shifted to Junagadh hospital. The history narrated by Bai Dhani runs into vernacular exactly as follows, as per the case papers:

The English version of the aforesaid statement and history narrated by deceased Dhani would read as under:

Laxman Bhura (the appellant-accused) has burnt his wife alive by pouring kerosene on her body today at 12 noon.

15. The aforesaid history and the statement made by deceased Dhani before Dr. Tania is fully reinforced by his evidence at Ex. 31. Reliance of the prosecution on such history recorded by Dr. R.N. Tania, P.W. No. 8 Ex. 31, medical officer of Junagadh Hospital, as narrated by the deceased Bai Dhani, is rightly relied on by the learned Additional Sessions Judge. Despite searching cross-examination of Dr. Tania, he has remained unshaken. It is clearly testified by Dr. Tania that deceased Bai Dhani had sustained serious injuries and her statement and history came to be recorded by him at 3-10 p.m. on the same day and at that time, she was in a position to make statement. Therefore, in our opinion, the contention that the trial Court has committed serious error in placing reliance on the history given by deceased Dhani before Dr. Tania is not sustainable. It is further submitted that no history was given by deceased Dhani before Dr. Doga at Dhoraji who had examined her at 2-15 p.m. We have examined this aspect earlier. She was not given medical aid before-hand. She was not in a position to make any rational statement then. She had sustained 70% burns on her body. In

such circumstances, it is apparent and obvious that one would not be able to give rational statement more so, when one suffers from excruciating pain. It also cannot be contended that as no history was given before Dr. Doga at 2-15 p.m. the history given by deceased Dhani before Dr. Tania at 3-15 p.m. becomes unreliable. It is explained that deceased Bai Dhani was given treatment as per the case papers by Dr. Doga and almost after an hour. Dr. Tania had examined her at Junagadh where she was in a position to make her rational statement. In view of the aforesaid factual scenario and the medical aids given by two doctors to the deceased at Dhoraji and Junagadh, it cannot be contended that the statement or history given by deceased Dhani before Dr. Tania is either tutored or unreliable. Such a contention cannot be accepted. Apart from that, the observations made by the Apex Court in connection with such a case and situation would be appropriate to mention. In *Dharam Pal Vs. State of Punjab*, it was observed:

XXXXX The mere fact that when she had occasion to mention about the appellant to the two doctors attending on her and before whom she had merely blamed her fate to be responsible for her agony is no reason to term the dying declaration as made up or tutored. It remains unquestioned that the immediate family of the deceased were residents of Kaithal, a town in the adjoining State of Haryana and by the time the dying declaration had been recorded none of them had reached Ludhiana. Suggestion was put that one Anju, a friend of the deceased who was also married at Ludhiana had coerced in the meantime the deceased to name her husband as the culprit. We cannot accept such a suggestion even for a moment. Substitution of the culprit is almost unknown; addition is known to be possible. We cannot be led to believe that the deceased substituted her husband as the culprit of the crime in place of another. As said before, the deceased had completely left out the other members of the family of her husband who could possibly have been added as instigators or participators if the dying declaration was a tutored one. These arguments are accordingly repelled.

16. In the aforesaid case, it was also the case of bride burning and conviction was founded upon the dying declaration and the dying declaration was positively accusing the husband. There, the defence had raised a story of suicide. The theory of suicide was totally left out in the circumstances of the case. So is the factual scenario of the case on hand. In the circumstances, the contention raised on behalf of the appellant-accused that the history narrated by deceased Dhani before Dr. Tania cannot be accepted as true, as no such history was narrated by her before Dr. Doga, cannot be accepted. Therefore, we reject this contention being totally meritless.

17. Apart from that, there is clear evidence of the Executive Magistrate Chhotalal Jethalal Joshi, who is examined as prosecution witness No. 6 at Ex. 24. He was summoned at Junagadh Hospital after deceased Dhani came to be admitted in the Civil Hospital at Junagadh. The dying declaration came to be recorded at

4-20 p.m. on the same day within short time after admission of deceased Dhani in the Civil Hospital at Junagadh. Having carefully and cautiously examined the dying declaration recorded by the Executive Magistrate Mr. Joshi and produced at Ex. 26 coupled with the evidence of the Executive Magistrate at Ex. 24 and the evidence of Dr. Tania at Ex. 31 and we have not the slightest hesitation in our mind that the version given in the dying declaration by the deceased Dhani is quite natural, untutored, unprompted, spontaneous, reliable and acceptable. There is no reason or any material worth the candle on record which would thwart away the dying declaration given by deceased Dhani in which she has clearly involved her husband. It is undoubtedly stated in the said dying declaration by Dhani that her husband after pouring kerosene on her body, she was put on fire with the help of match stick at about 12 noon. This version given by deceased Bai Dhani before the Executive Magistrate has remained totally invulnerable and unshaken. There is no reason to disbelieve or discard this version of deceased Bai Dhani given in the form of a dying declaration.

18. The Executive Magistrate has in clear terms testified at Ex. 24 that the medical officer Dr. Tania who was on duty at the relevant point of time was consulted by him. Dr. Tania gave him his opinion that Bai Dhani though she had sustained severe burns, was mentally and physically competent to make her rational statement. Prosecution witness Mr. Joshi's evidence is also supported by Dr. Tania at Ex. 31. It becomes very evident on the conjoint reading of the evidence of the Executive Magistrate Mr. Joshi at Ex. 24 and the medical officer who was on duty in Junagadh Hospital Dr. Tania Ex. 31 and the dying declaration which is at Ex. 26, that the real culprit, real offender and the real person who put Bai Dhani on fire after pouring kerosene on the person of the deceased is none else but the accused and accused only. This finding reached by the learned Additional Sessions Judge is quite justified and we are satisfied that it needs to be confirmed.

19. The learned Counsel for the appellant has contended lastly that provisions of Section 32 of the Indian Evidence Act, 1872 ("the Evidence Act" for short) must be read in conjunction with provisions of Section 158 and relying on the said provisions, it is contended that the dying declaration Ex. 26 must be discarded in view of the earlier two oral dying declarations. This is nothing but an attempt like a drowning man who catches a straw. Provision of Section 32(1) provides that a statement of the deceased written or verbal becomes relevant and admissible making an exception for hearsay evidence. It would be, therefore, interesting to refer to the provisions of Section 32(1):

32. 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 circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) 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.

20. It is contended that provisions of Section 158 of the Evidence Act are not considered not only by the trial Court but many Courts in the reported decisions. We do not want to enter into this contention whether provisions of Section 158 are considered or not in other reported decisions. But we are embarking upon the examination and the consideration of the said provisions. Section 158 of the Evidence Act read as under:

158. Whenever any statement, relevant u/s 32 or 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

21. A conjoint reading of the provisions of Sections 32 and 158 of the Evidence Act does not mean that the latter statement-cum-dying declaration made by the deceased should not be accepted in all cases in view of the inconsistent former statement or dying declaration. On the contrary, in our opinion, the statements and dying declarations even if they are conflicting or contradictory, it is open for the Court to rely on the statement or dying declaration which is natural, rational and truthful. The dying declaration made earlier in the present case before two witnesses was verbal. Secondly, it was made before the close relatives of the accused. Bhura Jetha is the father of the accused and Kanji Govind is the cousin brother of the accused. They will be interested in helping the accused and substantiating the alleged defence version of suicide. As against that, the dying declaration given before the Executive Magistrate is in writing after taking medical opinion about the physical and mental condition of the deceased. In the circumstances, the learned Additional Sessions Judge has rightly placed reliance on such dying declaration. Putting all the dying declarations in the balance in our opinion, the dying declaration which is recorded by the Executive Magistrate in the Civil Hospital at Junagadh is preferable as it is highly reliable.

22. Having regard to the facts and circumstances emerging from the record of the present case while viewed in the legal background of the provisions of Sections 32 and 158 of the Evidence Act, we are of the opinion that the dying declaration recorded by the Executive Magistrate in the Civil Hospital at Junagadh is quite weighty and reliable. It is the settled proposition of law that conviction can be founded upon even on a sole dying declaration. As such, by catena of judicial pronouncements, the Apex Court has made this position of law abundantly clear. u/s 32 of the Evidence Act, a dying declaration if it is found and

the Court is satisfied about the truth of the said statement, then without any corroboration, the sole dying declaration may form the basis of conviction. In the present case, though it is in the question and answer form, it lends more authenticity to the version of the deceased and the prosecution, even if the same is not in question and answer form, in proper cases, may rest upon it. In the case of Padmaben Shamalbhai Patel Vs. State of Gujarat, , decided by the Apex Court, this proposition is very well explored, examined and settled.

23. Therefore, according to the settled proposition of law, conviction can be founded upon even on the sole dying declaration. In the present case, the history recorded by Dr. Tania undoubtedly speaks that the author of the crime in question is none else but the accused-appellant. There is again a third circumstance, the motive, which is succinctly established by the prosecution without any shadow of doubt. It is clearly found from the record of the present case that deceased Bai Dhani had strained relationship with her husband as the accused has been in illegitimate intimate relationship with one Bai Valu Devayat. This aspect is not controverted. On the contrary, relying upon this aspect, the theory of suicide is propounded by the defence. Therefore, there was strong motive for the accused to finish his dejected and rejected wife.

24. Moreover, the evidence of the brother of the deceased Arjan Jagmal also lends material re-enforcement to the version of the prosecution. P.W. No. 4 Arjan is examined at Ex. 21. He is the brother of the deceased Bai Dhani and the deceased had made an unequivocal dying declaration before this witness involving the accused in the crime in question. There is no reason to discard the testimony of Arjan. It cannot be contended that his evidence should be rejected merely because he is the brother of the deceased. On the contrary, evidence of a relation in the case like one on hand, would lead more authenticity to the version than an outsider. It is rightly said by the Apex Court that a lady in the Indian society would never be interested to substitute the real offender. She would not be interested to falsely implicate her husband more so when she saw the death approaching. Had the dying declaration or the version of the prosecution been tutored or prompted as alleged, the dying declaration would not have spared other relatives, though they were very much present at the time of the incident. This circumstance also unequivocally supports the prosecution case.

Having regard to the facts and circumstances emerging from the record of the present case and narrated hereinabove and in the light of proposition of law propounded herein, we are of the clear opinion that the ghastly killing is done only and only by the original accused-the appellant before us and consequently, the present appeal merits dismissal and only dismissal. We, therefore, dismiss the appeal.