

(2001) 10 GUJ CK 0043
In the Gujarat High Court
Case No : Criminal Appeal No 202 of 1995

Amrutben Bhaya Ebha

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 30-10-2001

Acts Referred:

Evidence Act, 1872 — Section 8

Penal Code, 1860 (IPC) — Section 100 , 201, 300, 302, 304

Citation : (2002) 22 GLH 197

Hon'ble Judges : R.K. Abichandani, J;D.K. Trivedi, J

Bench : Division Bench

Advocate : H.N. Joshi, for P.M. Thakkar, for the Appellant; K.P. Raval, App, for the Respondent

Final Decision : Partly Allowed

Judgement

R.K.Abichandani, J.—The appellant - Amrutben has challenged the judgement and order of the learned Additional Sessions Judge, Gondal in Sessions Case No. 52 of 1989 convicting her for the offence u/s 302 of the Indian Penal Code and sentencing her to imprisonment for life and also convicting her for the offence u/s 201 of the Indian Penal Code and sentencing her to suffer rigorous imprisonment for a period of one year, on a finding that, during the night between 5th September 1989 and 6th September 1989 at 2.00 a.m., she had after a quarrel with her husband (Bhaya Ebhabhai) who was insisting on her to have illicit relations with unknown persons, caused his death by giving him a blow with a 'dhoka' and strangulating him and thereby committed an offence of murder and since she had hidden the dead body of her husband below the cot in her house, she had committed the offence of causing disappearance of evidence of offence punishable u/s 201 of the Indian Penal Code.

2. As per the Charge exh.1, it was alleged that, on 6-9-1989, the accused quarrelled with her husband over his asking her to have illicit relations with two unknown persons, and at about 2.00 a.m., gave him a blow with a 'dhoka' on his

head and then strangled him, thereby causing his death and committed an offence punishable under section 302 of the Indian Penal Code. It was also alleged that she had hidden the dead body of her husband beneath the cot in her house so that the evidence of the commission of the offence does not come to light and thereby, committed an offence u/s 201 of the Indian Penal Code. It was thus the case of the prosecution itself that the husband of the accused was trying to force her to have illicit relations with two strangers and that there was a quarrel over it since she was not agreeable to such a suggestion. In fact, the prosecution version goes beyond this suggestion by alleging that over a period of time before the occurrence, the husband of the accused had made earnings by inviting strangers to have illicit relations with his wife against her will, and that there used to be quarrels between them over such compulsion, and the accused had about four years prior to the incident, tried to commit suicide by consuming poison, but was saved. According to the prosecution, after the incident occurred, she had hidden the dead body of her husband beneath the cot throughout the day on 6-9-1989. However, in the evening at about 8.30 p.m., she felt uneasy and went to the house of her father-in-law and informed her father-in-law and mother-in-law that her husband was killed. The prosecution version is that thereafter, her FIR mark 'A' was lodged and she was forwarded under a 'yadi' to the hospital for medical examination as she was having injuries. As per the medical evidence, she was having external marks of injury over both her legs. According to the prosecution, in her FIR, the accused had alleged that she had married Bhaya Ebha, who was of a different caste, but after their marriage, Bhaya used to bring strangers to the house and force her to have physical relations with them. Bhaya's hands were burnt about eight years prior to the incident when the stove had burst.

3. As per the complaint of the accused, because of such insistence by her husband who forced her to have illicit relations with strangers, she was fed up and about four years prior to the incident, she had consumed poison as a result of such harassment and was removed to the civil hospital. About a month before the incident also, she had again consumed poison and was removed to the civil hospital. Five months prior to the incident, her husband had beaten her and she had borrowed medicinal tube from a neighbour for applying on the injury. According to the prosecution, the accused alleged in her FIR that, since about a month prior to the incident, she was not keeping good health and was having pain in her chest and feeling breathless, and therefore, she had bluntly refused to have any such relations. However, on 5-9-1989, her husband, after having meals at night, told her that she should entertain two strangers on the next night and be with them during the night. She refused to have such relations and there ensued a quarrel between them which lasted till late night. At about 2.00 a.m., her husband started giving her kick blows and beating her with his hands, causing injuries to her on her legs. Therefore, she got exasperated and picked up a 'dhoka' (used for washing clothes) and hit him on his head, as a result of which he fell down on the cot. She then took the nylon string which was

lying on the sewing machine and tied it around his neck and strangled him. He became unconscious. She then inserted a piece of cloth in his mouth and covered his face with a cloth bag and tied over it a cloth piece so that he may not breathe. When her elder son who was about 8 years of age woke up, she just told him that her father was not well. When on hearing commotion the watchman of the society asked her as to what had happened, she told him that her husband had beaten her and gone away. She had then put the corpse below the cot after tying it. During the day, she washed her clothes and remained in the house. However, in the evening at about 8.00 p.m., she felt restless and went to her father-in-law Ebha Kana's house where she disclosed to the family members about the incident and thereafter, when asked to file the complaint, she had lodged this complaint.

3.1 Since this was a First Information Report lodged by the accused herself, it was rightly held to be inadmissible in evidence in view of the settled legal position that a confession made to a police officer under no circumstances is admissible in evidence against the accused and only the fact of the accused giving the information would be admissible against the accused as evidence of his conduct u/s 8 of the Evidence Act (See *Aghnoo Nagesia Vs. State of Bihar*, and *Bheru Singh s/o Kalyan Singh v. State of Rajasthan* 1994 SCC (Cri.) 555. The prosecution has, therefore, relied upon the FIR only for a limited extent that it was the accused who had gone and lodged the FIR about the murder of her husband whose dead body was lying in their house. The investigation had started on the basis of this FIR.

4. The trial Court, on the basis of the evidence on record, found that the accused had committed murder of her husband by giving him a 'dhoka' blow on his head and strangulating him during the night between 5-9-1989 and 6-9-1969 around 2.30 a.m. and that she had tried to secret the dead body of her husband by hiding it under the cot and committed an offence u/s 201 of the Indian Penal Code.

5. The learned counsel appearing for the appellant contended that since the FIR was not admissible in evidence, as rightly held by the trial Court, there was no basis on which the accused could have been convicted, because, the very substratum of the prosecution story was lost. It was further contended that there was no eye-witness to the incident and the circumstantial evidence was not sufficient to hold the accused guilty of these offences. It was finally contended that the trial Court had not taken into account the background in which the incident had occurred and it did not consider the possible defence that was available to the accused. It was argued that even as per the prosecution case, the accused was being forced to have illicit relations with strangers and therefore, her husband was committing an offence by forcing her to have illicit relations with strangers which would amount to offence of rape and in such circumstances, she had a right of private defence of her body, which extended to even causing death of the assailant. It was submitted that, in any event, even if she is held to have exceeded her right of private defence, there was no justification for

convicting her for the offence u/s 302 of the Indian Penal Code and that her act would fall within the ambit of section 304 of the Indian Penal Code.

6. The learned Additional Public Prosecutor strongly supported the reasoning adopted by the trial Court and contended that the accused had no reasonable apprehension which could have given her a right to defend herself and cause death of her husband. He submitted that the circumstantial evidence, namely, that the accused and Bhaya were the only members residing in the house besides their two young children, and that during the said night, Bhaya was murdered and this fact was not disclosed by the accused till the next day evening, clearly suggested that it was she alone who had committed the offence. It was submitted that the fact that she had gone and lodged the FIR mark 'A' was an important fact about her conduct and admissible u/s 8 of the Evidence Act and it is on the basis of this FIR that the investigation had started and it has been duly established from the evidence that she had killed her husband by giving him a 'dhoka' blow on his head and strangulating him. It is submitted that the accused had in fact acted in a cruel manner by making sure that her husband dies, because, even after giving 'dhoka' blow on his head, when he had fallen on the cot, she strangulated him and then she placed a cloth bag on his face and wrapped his face with a cloth to ensure that he does not breathe. It was submitted that, in this background, the intention of the accused was clearly evident and the prosecution had established that she had intentionally caused his death and was, therefore, rightly convicted u/s 302 of the Indian Penal Code. It was also submitted that the dead body of her husband was found tied, hidden beneath the cot in the house and there was no one else except the accused who could have done this and therefore, the offence u/s 201 of the Indian Penal Code was also established.

7. Witness Tansukhbhai Sarvaiya, in his deposition exh.21, has stated that, during the night of the incident, at about 2.00 to 2.30 a.m., while he was returning from his work place and was near the house of the accused, he heard shouts of Bhayabhai. He along with the watchman and two other persons Kolibhai and Bhanabhai (none of whom are examined) stood near the house of Bhayabhai and had asked the accused about Bhaya and she told them that he had gone away after fighting with her. He has stated that he did not see Bhayabhai at that time and that they had heard the shouts while the door of the house was closed and the lights were off.

7.1 Witness Bhikha Jamanbhai, a neighbour of the accused, in his deposition at exh.18, has stated that he knew Bhayabhai since about 10 to 12 years. During the night of the incident, he had heard shouts from the house of the accused. He and Tansukh stood near that house on the road. The watchman of the society was also there. They felt that Bhaya was being beaten by somebody. They were about fifteen feet away from the house of the accused. The watchman shouted, "Bhaya, what happened?" At that time, the accused said that her husband had quarrelled with her and gone away. According to this witness, since it appeared that it was a

domestic quarrel, they did not pursue or intervene. This part of the evidence that they had asked "Bhaya what happened?", upon which the accused told them that he had quarrelled with her and gone away, does not seem to be a correct version, because, if Bhaya's shouts were heard by them and the witnesses were told by the accused that Bhaya had quarrelled with her and gone away, they would have immediately suspected and would have confronted the accused by telling her that they had not seen Bhaya going away and how is it that she was stating that he had gone away. Therefore, this part of evidence on which reliance was placed to show that the accused was having a guilty mind and she had falsely stated that her husband had quarrelled and gone away while he was lying dead in the house, does not appear to be acceptable. In paragraph 4 of his deposition, this witness has in terms stated that Bhaya was forcing the accused to have illicit relations with others and that she was not liking it.

7.2 The prosecution witness Ebha Kana, father of the deceased, has stated in his deposition exh.13 that his son Bhaya was indulging in black marketing of cinema tickets and was not doing any other business. He has stated that, on the day of the incident, his daughter-in-law had come to his house in the evening and told him that his son was killed. This witness did not go to the house of his son Bhaya and had seen the dead body only in the hospital. After giving telephonic message, he had gone to the police station. His daughter-in-law was also with him at the police station. His deposition shows that his son Bhaya was a black marketer and did not do any other work and that his daughter-in-law had come and informed him about the death of Bhaya.

7.3 Ujiben, mother-in-law of the accused, in her deposition exh.22, has also stated that the accused had, at about 8.30 p.m., come to their house on the day of the incident and informed her that Bhaya was killed. In her cross-examination, Ujiben has in terms stated that her son Bhaya used to torture the accused and she was aware of it. She has also stated that they did not keep any relations with Bhaya, because, he had gone wayward. From the deposition of Ujiben, it is clear that the deceased was not accepted even by his own parents because of his waywardness and that he was torturing the accused.

7.4 Hansaben Girishbhai, a neighbour who has deposed at exh.23, has stated that, about 8 to 10 months prior to the incident, the accused and her husband had quarrelled and on that day in the evening, between 5.00 and 6.00 p.m., the accused was passing from the lane near her house and was weeping. She asked this witness to accompany her to the hospital, but as she was busy, she could not go with her and had given her a medicinal tube. She has stated that, because the accused was injured, she had given the tube to her. This also reflects on the conduct of the husband of the accused and shows that he was ill-treating her.

8. From the depositions of the aforesaid witnesses, it clearly transpires that, during the night of the incident, there was some quarrel between the accused and her husband Bhaya who was in the habit of making his earnings by forcing her to have illicit relations with strangers whom he invited to their house, and that at

the end of the quarrel, Bhaya was killed and his dead body was found hidden beneath the cot on the next day during the investigation which had started on the basis of the FIR lodged by the accused herself. The medical evidence establishes that death of Bhaya was caused due to strangulation.

9. Dr. Harsha, in her deposition exh.25, has stated that she had examined the dead body of Bhaya on 7-9-1989 and had noted down the injuries which are mentioned at item 17 of the post mortem notes exh.26. She had also noted at item 17 of the post mortem notes that the nail of the right ring finger of Bhaya was absent and blood was oozing at that place. She had noted a swelling of 5cm x 5 cm over right frontal region which supports prosecution version that 'dhoka' blow was given on the head of the deceased. Ligature mark was found between chin and larynx below thyroid cartilage. In the post-mortem notes, the cause of death is shown as, "asphyxia due to strangulation". The medical version, therefore, clearly supports prosecution version that Bhaya was strangled. The evidence thus discloses that the accused who alone was present in the house with her husband during the night, caused his death by giving him a 'dhoka' blow on his head and strangulating him with a string and that thereafter, she had tied his body and put it beneath the cot. The evidence also discloses that, after feeling restless, the accused had, in the evening, gone to her father-in-law's house and disclosed about the death of her husband and thereafter, the FIR was lodged by her.

10. One important aspect that emerges from the medical evidence is that the accused who was sent to the medical officer under a police 'yadi' was examined by Dr. Harshaben, who in her deposition exh.25 has proved the medical certificate exh.27 issued by her. In the deposition, the medical expert has stated that when she had examined the accused, she had disclosed to her that she was assaulted by her husband. She was having injuries on both her legs, as noted in the medical certificate exh.27. This part of medical evidence coupled with the fact that Bhaya who made his earnings by forcing his wife to give company to strangers whom he invited at his house at night for over a period of time, shows that there must have taken place some altercation during the night when Bhaya was wanting the accused to entertain, against her will, two strangers who were to visit next night and when she resented she was assaulted by him to bring her into submission and agree to such illegal demand of Bhaya.

11. The worst of all the heinous things that a man can do to his wife is to ask her to entertain other men against her wish. Husband is required to protect his wife from others. She would want to feel secure with him on the strength of the sacred vows. Instead, if a man uses his wife to earn his livelihood by calling strangers at night to exploit her at his instance, then each night that he insists on her to succumb to the lust of outsiders, she would have a right to defend her own body against any offence affecting human body which right would commence as soon as a reasonable apprehension or danger to her body arises from an attempt or threat to commit such offence, though the offence may not have

been committed, and such right would continue as long as such apprehension of danger to her body continues. Such right of private defence of the body, subject to restrictions mentioned in section 99 of the Indian Penal Code, would extend even to the voluntarily causing of death or of any other harm to the assailant, if the offence which occasioned the exercise of a right of private defence be of an assault with the intention of committing rape, as provided by clause 'thirdly' to section 100 of the Indian Penal Code. In that context, any gesture or any preparation intending or knowing it to be likely that such gesture or preparation will cause her to apprehend that he who makes that gesture or preparation is about to use criminal force on her, would be an assault as defined by section 351 of the Indian Penal Code. Thus, it was not necessary for the accused to undergo the torture of being forced to sleep with other men at night at the behest of her husband and whenever there was any reasonable apprehension of such assault with the intention of committing rape on her, or causing rape to be committed on her, she would have been perfectly within her rights to defend her body to ward off such assault, and such right of private defence extended to even causing death of such assailant even if such offence may not have been committed. Nothing is an offence which is done in the exercise of the right of private defence, as laid down in section 96 of the Penal Code.

12. In fact, the charge itself alleges that there was a quarrel between the accused and her husband when he was forcing her to agree to entertain two strangers, and that she resented her husband and caused his death by giving him a 'dhoka' blow on his head and strangulating him. We are somewhat surprised that despite this being the prosecution case, the trial Court did not direct itself to consider the question whether the accused could have been said to have exercised her right of private defence. There cannot be a more glaring set of facts than the present one, which could have directed the attention of all concerned to consider whether the accused who had helplessly surrendered to her husband's torturous wishes and pervert demands of entertaining strangers, was justified or not in showing resentment by exercising her right to defend herself when she was assaulted by her husband, as is evident from her medical examination and her disclosure to the medical expert that her husband had assaulted her during the night in question. We however notice from the nature of injuries caused to her that they were simple injuries. Moreover, from the non-confessional part of the FIR and to the extent that it reflects the conduct of the accused, we note that she had complained that her husband had told her that she should entertain two strangers who will be coming on the next day. If the strangers were to come on that very night and she had resented the assault with intention to rape her and had in defence of her body killed her husband, we would have readily accepted her right of private defence of her body, because, she need not have waited till the strangers invited by her husband entered the house for wanting her to be molested in this manner. However, since on her own say the strangers were to come on the next night, she could not be having 'reasonable apprehension' during the night of the incident and therefore, we are unable to give her the benefit of such right of

private defence as would have entitled her to kill the assailant. However, since the evidence clearly discloses that she was physically assaulted by her husband over her refusing to agree to his demand of sleeping with strangers on the next day, she was justified in using appropriate force against him in trying to defend herself. There is nothing on record to show that Bhaya had used any weapon to assault her, and, having regard to the nature of her injuries which are a simple hurt, while upholding her right to defend her body, it appears to us that she had exceeded her right of private defence by causing death of her husband by giving him a 'dhoka' blow on his head, strangulating him and then muffling him into perpetual inaction. It is obvious that, with a view to prevent more harm being caused to herself and possibly to her children by her perverse husband, she had to act in self-defence which she did in good faith, but in the process, exceeded the right by causing more harm than was necessary for the purpose of such defence. In our opinion, therefore, the offence which has been committed by her falls within the ambit of Exception 2 to Section 300 of the Indian Penal Code which provides that, culpable homicide is not murder if the offender, in the exercise, in good faith, of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence. We, therefore, would set aside the conviction of the accused u/s 302 of the Indian Penal Code and convict her for the offence u/s 304 Part I of the Indian Penal Code.

12. Since it is established that the accused had hidden the dead body of her husband by tying by hiding and putting it below the cot, her conviction for the offence u/s 201 of the Indian Penal Code warrants no interference. We are told that the accused has already undergone five years and seven months of incarceration.

13. In the above view of the matter, the appeal is partly allowed, and the conviction of the accused -Amrutben Bhaya Ebha u/s 302 of the Indian Penal Code and her sentence of life imprisonment are hereby set aside, and instead, she is convicted for the offence under section 304 Part I of the Indian Penal Code and sentenced to suffer rigorous imprisonment for a term of five years. Her conviction and sentence u/s 201 of the Indian Penal Code are maintained. Both the substantive sentences of imprisonment shall run concurrently. The bail bonds of the accused stand cancelled.