

(2019) 02 GUJ CK 0118
In the Gujarat High Court
Case No : R/Criminal Appeal No. 389 Of 2004

Apabhai Gigabhai Kathi & 2 Other(S) APPELLANT
Vs
State Of Gujarat RESPONDENT

Date of Decision : 25-02-2019

Acts Referred:

Indian Penal Code, 1860 — Section 114, 306, 498A
Code Of Criminal Procedure, 1973 — Section 313

Citation : (2019) 02 GUJ CK 0118

Hon'ble Judges : R.P.Dholaria,J

Bench : Single Bench

Advocate : Rr Trivedi, Monali Bhatt

Judgement

1. The present appeal is preferred by the appellants - original accused against the judgment and order dated 1.3.2004 passed by learned 5th Fast Track Judge, Gondal in Sessions Case No.79 of 1998 whereby the appellants accused have been convicted and sentenced to undergo rigorous imprisonment for three years for the offence under sections 498-A and 114 of Indian Penal Code and to pay fine of Rs.3000/-, in default, to undergo rigorous imprisonment for six months.

2. The complaint came to be lodged against the accused for the offences under sections 498-A, 114 and 306 of Indian Penal Code.

3. In pursuance of the complaint, the Investigating Officer carried out the investigation and filed the chargesheet against the accused. The charge was framed against the accused. The accused pleaded not guilty to the charge and claimed to be tried.

3.1 In order to bring home the guilt, the prosecution has examined witnesses and also produced documentary evidences.

3.2 At the end of the trial, after recording the statements of the accused under section 313 of the Criminal Procedure Code, 1973 and hearing the arguments on behalf of the prosecution and the defence, learned trial Court delivered the

judgment and order, as stated above.

4. Being aggrieved by the same, the appellants have preferred the aforesaid Criminal Appeal before this Court.

5. By way of preferring the present appeal, the appellants - original accused have mainly contended that learned trial Court has failed to appreciate the evidence on record and wrongly recorded the order of conviction. It is further contended that learned trial Judge has not appreciated the evidence on record in its proper perspective and in fact, there was no appreciation of evidence so far and hence, the impugned judgment and order of conviction is required to be reversed, as such.

6. Ms.Foram Trivedi, learned advocate for Mr.R.R.Trivedi, learned advocate for the appellants - original accused has taken this Court through the entire judgment and record and argued that learned trial Court placed reliance upon the dying declaration at Exh.26 wherein it is, inter alia, stated that while she was preparing food, at that time, when she was filling kerosene, she got accidental burn over her cloth, due to which, she got burnt. She submitted that at that time, none was present at the house and neighbour doused her and immediately, they took her to the hospital. She submitted that the say of the victim is duly supported by independent witness Rameshbhai Shivrambhai - PW 4 and therefore, learned trial Court has clearly and categorically held that the death was accidental in nature. She submitted that, however, learned trial Court placed reliance upon the evidence of the mother, two maternal aunts and brother which inter alia linking the present appellants and recorded the finding that brother-in-law used to raise illicit demand from the victim and her husband was conniving with them, due to which, the victim was consistently and persistently treated with cruelty and ultimately convicted the appellants for the offence under section 498-A of IPC which is unwarranted in the facts of the present case. She submitted that in the dying declaration, the victim had not stated anything as regards to any sort of cruelty meted out to her or any harassment from her husband or in-laws and the said fact is also not emerging out from the evidence of independent witness - PW 4 neighbour and therefore, solely based upon hearsay evidence of her mother, two maternal aunts and brother, learned trial Court has wrongly isolated the offence under section 498-A of IPC and wrongfully recorded conviction which is not sustainable at law.

7. On the other-hand, Ms.Monali Bhatt, learned APP has supported the judgment rendered by learned trial Court so far as it relates to conviction of the appellants - original accused. She submitted that this is a fit case wherein learned trial Court has considered voluminous evidence in its proper perspective and rightly convicted the accused. She submitted that finding recorded by learned trial Court is based upon the concrete and clinching evidence and therefore, punishment inflicted upon the accused does not call for any interference.

8. This Court has heard Ms.Foram Trivedi, learned advocate for the appellants -

accused and Ms.Bhatt, learned APP for the State.

9. This Court has also gone through the Record and Proceedings. Perused the impugned judgment and oral as well as documentary evidence on record.

10. On overall evaluation of the evidence on record, it can be noticed that Exh.26 came to be recorded by the Head Constable and in the deposition of the victim, it came to be proved wherein victim Hina herself has inter alia stated that while filling kerosene and when she was cooking, she got accidental fire, due to which, she shouted as none was present at the house and therefore, neighbour gathered and they doused her and they also took her to the hospital at Junagadh. The victim also stated that there was no harassment from anybody to her.

11. PW 4 - Rameshbhai Shivrambhai has been examined at Exh.20. The witness has deposed that on 14.3.1998 due to shouting at 10.00 O'clock in the morning, he along with her neighbours Nirmalaben and Lilaben doused her wherein she got burnt. The witness has deposed that when the victim was preparing food, she got accidental burn injuries and there was no quarrel.

12. PW 3 - Minbaiben Jethsurbhai has been examined at Exh.18 - mother of the victim, PW 5 - Hansaben Pratapbhai - maternal aunt has been examined at Exh.21, PW 6 - Ramaben Bhikhubhai - maternal aunt has been examined at Exh.22 and PW 7 - Rajubhai Jethsurbhai - brother of the victim has been examined at Exh.23. All the relatives of the victim have deposed that while the victim was visiting parental home, at that time, she used to apprise that two brothers-in-law i.e. original accused Nos.2 and 3 used to ask for illicit demand and while she made complain to her husband, he was also in connivance with accused Nos.2 and 3 and even slapped her.

13. In view of the aforesaid factual scenario, since nothing is emerging out from the mouth of the victim herself, while her dying declaration is came to be recorded and her dying declaration is getting duly corroboration from the evidence of independent witness PW 4 and the aforesaid evidence which is quite contrary to the dying declaration is hearsay in nature and therefore, so far as hearsay evidence which is not in consonance with the primary evidence, as regards to the legal position, this issue is no more res integra. While dealing with such issue, this Court in the case of State of Gujarat Vs Bharatbhai Balubhai Lad and others, reported in 2006(1) GLR 514, more particularly, in paragraphs 13 and 14 held as under.

"13. The law so far as Sec.498-A I.P.C. is concerned needs to be examined considering the following two decisions of the Supreme Court :

(i) Gananath Patnayak v. State of Orissa, 2002 SCC (Cri.) 461.

(ii) Inderpal v. State of M.P., 2002 Cri.LJ 926.

14. The ratio of both the decisions is to the effect that all the statements made

by the deceased to her family members regarding the alleged harassment and cruelty meted towards her would fall within the purview of hearsay evidence. It is an admitted fact that none of the witnesses examined by the prosecution have said that they have with their eyes seen the accused persons assaulting the deceased or treating her with cruelty. All the witnesses have deposed on the strength of the information which the deceased used to provide when she used to come at her parental home. Such a statement is not admissible in evidence for the offence punishable under section 498A of I.P.C. and has to be termed as being only a hearsay evidence." In the present case, since hearsay evidence is not in consonance with the primary evidence emerging out from the mouth of the victim herself, learned trial Court has wrongfully convicted the appellants accused which is not sustainable at law and deserves to be quashed and set aside.

14. It is also pertinent to note that the cause of harassment shown by the near relatives as regards to demand of illicit favour by two brothers-in-law and making connivance on the part of the husband is not condonable case of cruelty and therefore, no women would condone while she could get opportunity of stating before the authority. Since the victim has not uttered anything as regard to such an act and demand from her brothers-in-law and that dying declaration itself creates doubt as regards to hearsay oral evidence deposed by her near relatives, conviction of the appellants accused is not sustainable at law.

15. For the reasons recorded above, the appeal succeeds. The impugned judgment and order dated 1.3.2004 passed by learned 5th Fast Track Judge, Gondal in Sessions Case No.79 of 1998 is quashed and set aside. The appellants accused are acquitted of the charges levelled against them. The appellants accused be set at liberty if no longer required in any other offence. Bail bond, if any, stands cancelled. Record & Proceedings, if any, be sent back to the trial Court concerned forthwith.