

(2014) 07 GUJ CK 0034
In the Gujarat High Court
Case No : Criminal Appeal No. 974 of 2009

Avatarsinh Laxmanbhai Vasava

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 01-07-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 300, 302, 304, 304(1), 326

Citation : (2014) 3 DMC 296

Hon'ble Judges : K.S. Jhaveri, J; Abdullah Gulamahmed Uraizee, J

Bench : Division Bench

Advocate : Harnish V. Darji, Advocate for the Appellant; Nisha Thakore, Addl. Public Prosecutor, Advocate for the Respondent

Judgement

@

K.S. Jhaveri, J.—The appellant has been found guilty of commission of offence under Sections 498A and 302 of Indian Penal Code and has been awarded simple imprisonment for three years and ordered to pay fine of Rs. 500, in default, to undergo additional imprisonment for thirty days under Section 498A and life imprisonment and fine of Rs. 500, in default, to undergo additional imprisonment for thirty days under Section 302 by learned 4th District Judge and Additional Sessions Judge, Vyara vide judgment and order dated 24.4.2009 passed in Sessions Case No. 53 of 2008. It is the case of the prosecution in short that on 7.5.2008, at about 0600 hours, when the deceased questioned the relationship of the appellant with some other lady and asked him as to why he came home after three months, the appellant poured kerosene on her and set her on fire. She was thereafter taken to hospital but she succumbed to burn injuries on 31.5.2008.

1.1 The appellant was apprehended and after investigation charge-sheet was submitted. The case was committed to the Court of Session at Vyara. The trial was initiated against the accused and during the course of trial the prosecution

examined the following witnesses whose evidences have been read before us by learned Advocates for both the sides:

- "(i) P.W. 1 - Dr. Amitbhai Bhabhor Ex. 9,
- (ii) P.W. 2 - Niranjanbhai Padvi Ex. 20,
- (iii) P.W. 3 - Sulabhaben Nai Ex. 22,
- (iv) P.W. 4 - Dasubhai Nayak Ex. 24,
- (v) P.W. 5 - Anilbhai Padvi Ex. 25,
- (vi) P.W. 6 - Laljibhai Gamit Ex. 26,
- (vii) P.W. 7 -Mohanbhai Valvi Ex. 29,
- (viii)P.W. 8 - Kishanbhai Vasava Ex. 33,
- (ix) P.W. 9 -Dhuljibhai Gamit Ex. 35,
- (x) P.W. 10 - Rajubhai Desai Ex. 38,
- (xi) P.W. 11 -Manharbhai Patel Ex. 43,
- (xii) P.W. 12 - Khumajibhai Devjibhai Ex. 46,
- (xiii) P.W. 13 - Hudiyabhai Vasava Ex. 48."

1.2 The prosecution also exhibited the following documents which have been perused by us during the course of hearing:

- "(i) Yadi for treatment of deceased Exs. 10 and 11,
- (ii) Case papers of deceased Ex. 12,
- (iii) Medical certificate of PHC, Uchhal Ex. 13,
- (iv) Case papers Ex. 14,
- (v) Yadi for post-mortem,
- (vi) Dying declaration Ex. 28,
- (vii) Complaint Ex. 29,
- (viii) Panchnama of body condition of accused Ex. 30,
- (ix) Inquest Panchnama Ex. 31,
- (x) Treatment certificate of accused Ex. 32,
- (xi) Panchnama of scene of offence Ex. 34,
- (xii) Muddamal dispatch note Ex. 39,
- (xiii) FSL receipt Ex. 40,

- (xiv) FSL letter Ex. 41,
- (xv) FSL report Ex. 42,
- (xvi) Dying declaration Ex. 44,
- (xvii) Copy of FIR Ex. 45,
- (xviii) Extract of station diary entry."

1.3 At the end of the trial and after recording the statement of the accused under Section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Additional Sessions Judge convicted the appellant as mentioned aforesaid. Being aggrieved by and dissatisfied with the aforesaid judgment and order passed by the Sessions Court the appellant has preferred the present appeal.

2. Mr. Harnish Darji, learned Advocate appearing for the appellant submitted that the prosecution failed to prove the case against the appellant beyond reasonable doubt. He submitted that therefore there is no reason to believe that the appellant had committed the alleged offence. Mr. Darji submitted that the alleged offence occurred on 7.5.2008 whereas the deceased had expired on 31.5.2008 i.e. after about 24 days of the alleged incident. He submitted that in fact the deceased had died due to septicemia and considering around 50% burns sustained by the deceased, it cannot be said that the burns proved to be fatal to the deceased. He submitted that, therefore, the appellant deserves to be acquitted of the offence charged against him.

2.1 Mr. Darji submitted that if the first part of the arguments is not accepted by this Court, in the alternative, without prejudice to the submissions made hereinabove, considering the medical evidence and the fact that the deceased had survived for around 24 days after the incident, the Court may consider the case of the appellant under Section 304 (Part I) or (Part II) of Indian Penal Code. He submitted that in fact the deceased was taken home after preliminary treatment and not treated in hospital.

2.2 in support of his submissions, Mr. Darji has relied upon the decisions of the Apex Court in the case of B.N. Kavatakar and Another v. State of Karnataka, reported in 1994 Supp (1) SCC 304 and in the case of Maniben Vs. State of Gujarat, .

3. Ms. Nisha Thakore, learned APP appearing for the respondent/State has supported the order of the Trial Court and has submitted that the Trial Court has gone into the evidence in detail and has come to the conclusion that the appellant is guilty of the offence so convicted of. She has submitted that considering the barbaric act committed by the appellant, the Trial Court has rightly convicted the appellant. She also submitted that the sentence imposed upon the appellant is just and proper and does not deserve to be reduced or quashed.

3.1 Ms. Thakore submitted that going by the contents in the dying declaration and the complaint, it is amply clear that the accused-appellant is guilty of the offence charged against him. She further submitted that the dying declaration of the deceased recorded by the Executive Magistrate is in accordance with law and in fact does not need any corroboration. She has relied upon a decision of the Apex Court in the case of Krishan Vs. State of Haryana, . She has drawn the attention of this Court to Ex. 45 which is the earlier complaint under Sections 498A and 504 of Indian Penal Code lodged by the deceased with regard to harassment and physical cruelty meted out by the accused.

4. It has neither been disputed before this Court or before the Trial Court that deceased had met with her death on account of septicemia following 50% burn injuries sustained at the house of appellant. This even otherwise stands proved from her post-mortem report Ex. 18 which mentions the cause of death as due to cardio-respiratory arrest as a result of septic shock having burns received over the body.

4.1 The post-mortem report gives details about the burn injuries sustained by the deceased and the same reads as under:

"17. Superficial deep infection burns present over face extending to both ears, both sides of neck--front part whole over chest, abdomen extending upper part of symphysis pubic and both sides laterally, whole and lumbar regions both upper limbs up to both wrists except hands over body shoulder regions having foul smelling and slough and backer of burnt tissues at different sites and whiteness to yellow coloured--Burnt tissues about 50-55% burns."

4.2 Now the question that arises for consideration is whether the present appellant-husband of the deceased was the perpetrator of the crime or it was an accidental or suicidal death.

5. In the present case there are dying declarations of the deceased in the form of dying declaration recorded by the deceased before the Executive Magistrate, Ex. 28, complaint given by the deceased at Ex. 44 and the history before the doctor (sic)t Ex. 13. As far as the dying declaration Ex. 28 is concerned, the same was recorded by P.W. 6, Laljibhai Gamit. The evidence of P.W. 6 is on record.

5.1 P.W. 6, Mr. Laljibhai Gamit is the Executive Magistrate who had recorded the dying declaration of the victim on 7.5.2008. He has deposed that pursuant to the Yadi received by him from Uchhal Police Station he went to Primary Health Centre, Uchhal to record the statement of the victim. He has deposed that after verifying the mental and physical fitness of the victim which was conscious and oriented, he started recording the dying declaration. He has stated that she had mentioned that the appellant used to quarrel with her for the last six months. He has stated that she had stated that on the date of incident, the appellant who used to live with another lady in a fit of rage poured kerosene over her and set her on fire.

5.2 in the case of Gopal Vs. State of M.P., , the Apex Court in para 13 has observed as under:

"13. Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. Accordingly, it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there is more than one dying declaration they should be consistent. However, if some inconsistencies are noticed between one dying declaration and the other, the Court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinising the contents of various dying declarations, in such a situation, the Court has to examine the same in the light of the various surrounding facts and circumstances."

5.3 in the case of Shudhakar Vs. State of M.P., , the Apex Court has held that a "dying declaration" is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth and that normally in such situations, Courts attach intrinsic value of truthfulness to such statement. It is also held that once such statement has been made voluntarily, it is reliable and is not an attempt by deceased to cover up truth or falsely implicate a person, then Courts can safely rely on such dying declaration and it can form the basis of conviction, more so where version given by other prosecution evidence, there is no reason for Courts to doubt truthfulness of such dying declaration.

6. As far as the veracity of the dying declaration before the Executive Magistrate is concerned, it is required to be noted that the Executive Magistrate in his deposition has clearly mentioned that the deceased was conscious while recording the declaration. He stated that the deceased answered his questions and also appended her signatures after the procedure was over at around 2.46 p.m. and that she was conscious after the recording of dying declaration.

7. It shall not be out of place to mention that the Courts have to be on guard to see that the dying declaration is not the result of either tutoring or prompting or a product of imagination and that due care and caution must be exercised in considering weight to be given to the dying declaration.

8. Now we shall take up the second dying declaration of the deceased which was recorded in the form of history before the doctor. The history of the patient was recorded by P.W. 1 - Dr. Amit Bhabhor when she was brought to Primary Health Centre for treatment. This witness has stated that the deceased had mentioned that her husband had poured kerosene on her and set her on fire by igniting match stick. This witness has stated that the deceased had received burn injuries

on body and upper limbs, back and shoulder, chest and abdomen. This witness has stated that the burn injuries sustained by the deceased were to the extent of 45-50%.

8.1 This witness has further stated that the deceased was referred to Civil Hospital, Surat for further treatment on 7.5.2008 but the relative of deceased having denied the same, she was discharged from the hospital and sent home. Going by the medical case papers at Ex. 13, it is borne out that there is an endorsement made by the doctor that the patient shall recover within three to four weeks if no complication arises. P.W. 1 is the medical officer who also performed the autopsy of the deceased on 1.6.2008. This witness has stated that the injuries sustained by the deceased were not possible if one pours kerosene on self to commit suicide.

9. In the complaint given by the deceased at Ex. 44, the deceased has stated that the appellant used to frequently fight with the deceased. She has stated that for the last three to four months he had not been home and was living with another lady and therefore on the date of incident, when the appellant returned home she asked as to why he had come and this enraged the appellant who poured kerosene on her and set her ablaze. She has stated that thereafter, her brother and relatives reached there and took her to hospital for treatment. The deceased in her complaint has further stated that the appellant used to torture and harass her often and legal proceedings had earlier been initiated by her but considering the future of her children the same was compromised between the parties.

10. The crux of the incident that the appellant had poured kerosene over the deceased and had set her on fire is borne out from the dying declarations of the deceased. The fact that the appellant used to harass and torture the deceased is also borne out from the records more particularly Ex. 45 which is the FIR lodged earlier by deceased under Sections 498A and 504 of Indian Penal Code.

11. P.W. 2-Niranjanbhai Padvi is the complainant and brother of deceased who vide his deposition at Ex. 20 has stated that on the date of incident while he was at his home, he received a phone call that his sister had met with an accident. Thereafter, this witness and other relatives went to the matrimonial house of deceased and saw her on fire. This witness has stated that the deceased was immediately taken to hospital and after preliminary treatment when this witness asked the deceased about the reason behind the incident, she informed him that the appellant had poured kerosene on her and set her ablaze. This witness has stated that the deceased was referred to Civil Hospital, Surat but as they were short of funds, she could not be taken to Surat and instead they took her home. P.W. 3, P.W. 4 and P.W. 5 have also supported the case of the prosecution.

12. From the Panchnama of scene of offence at Ex. 34, it is borne out that there was a can of kerosene found from the scene of offence which suggests the fact that the can was used for pouring kerosene. This corroborates the say of the

victim in her dying declaration. The presence of the appellant at the scene of offence is also proved from the medical records which suggest that he had sustained burns and the trouser of the appellant had sustained holes due to fire.

13. In fact, in the case of *Krishan v. State of Haryana* (supra), the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the Court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the Court to look for corroboration of the same.

14. However, the complaint, the dying declaration recorded by the Executive Magistrate of the deceased is duly corroborated with the medical reports as well as Panchnama and it is clear that the deceased died a homicidal death due to the act of the appellant in pouring kerosene over and setting her ablaze. We do find that the dying declaration is trustworthy.

14.1 However, we have also not lost sight of the fact that the deceased had died after 24 days of treatment. From the medical reports, it is clear that the deceased suffered from septicemia which happened due to extensive burns. Moreover, the deceased was not given further treatment but instead was taken home the same day and had she been taken to Civil Hospital, Surat she might have been treated considering 50% burns sustained by her. The medical records at Ex. 13 suggests that the deceased could recover within three to four weeks.

15. In the case of the *B.N. Kavatakar and Another* (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under Section 302 to under Section 326 and modified the sentence accordingly.

15.1 Similarly., in the case of *Maniben* (supra), the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was

living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tinsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tinsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under Clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

16. In the present case, we have come to the irresistible conclusion that the role of the appellant is clear from the dying declaration and other records. However, the point which has also weighed with this Court are that the deceased had survived for around 24 days at home and ultimately died of septicemia. In fact she had sustained about 50% burns. In that view of the matter, we are of the opinion that the conviction of the appellant under Section 302 of Indian Penal Code is required to be converted to that under Section 304(1) of Indian Penal Code. The conviction of the appellant under Section 498A is however, upheld. Accordingly, the conviction of the appellant-original accused under Section 302 of the Indian Penal Code vide judgment and order dated 24.4.2009 passed by the 4th District Judge and Additional Sessions Judge, Vyara in Sessions Case No. 53 of 2008 is converted to conviction under Section 304 (Part I) of Indian Penal Code. The conviction of the appellant under Section 498A of the Indian Penal Code is upheld. The appellant - original accused is ordered to undergo rigorous imprisonment for a period of ten years under Section 304 (Part I) of Indian Penal Code instead of life imprisonment as awarded by the Trial Court under Section 302, IPC. The sentence awarded under Section 498A, IPC is confirmed. The sentence awarded by the Court below stands altered accordingly. Both the sentences shall run concurrently. However, since the appellant-accused is absconding, the benefit of remission and set off of sentence shall not be provided to him. The judgment and order dated 24.4.2009 is modified accordingly. Appeal is allowed to the aforesaid extent. R and P, if lying with this Court, to be sent back forthwith.