

(2008) 07 GUJ CK 0016
In the Gujarat High Court
Case No : Criminal Appeal No. 702 of 1999

Bhagubhai Thagalabhai Gamit	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 18-07-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 209, 313
Penal Code, 1860 (IPC) — Section 302

Citation : (2008) 07 GUJ CK 0016

Hon'ble Judges : Z.K. Saiyed, J;A.M. Kapadia, J

Bench : Division Bench

Advocate : Sadhana Sagar, for the Appellant; Mukesh Patel, LD. APP for Opponent 1, for the Respondent

Final Decision : Dismissed

Judgement

Z.K. Saiyed, J.—The present appeal is preferred by the appellant ori. Accused of Sessions Case No. 239/1998 against the judgment and order of conviction and sentence for the offence punishable u/s 302 of Indian Penal Code passed by the learned Additional Sessions Judge, Surat, camp at Vyara, through Jail.

2. The facts of the prosecution case is that the complainant Reshmiben, wife of Gurji Chandiya Gamit was staying at Vankal, Sarpanch Faliyu, Tal. Vyara along with her son-in-law Bhagu. That, on 9.8.1998, her son-in-law Bhagu was at home because he was on leave and her daughter Jaliben went to field. When she return from field in the evening at about 5.00pm, Bhagu was at home. Thereafter, Bhagu went towards his own house in the village and after some time, he returned and asked Jali, whether she prepared the meal. Jali replied that she has prepared the meal and told Bhagu to take the meal. He told that he will take meal later on and thereafter he has beaten Jali, his daughter Sumitra and also the complainant. On slapt being given by Bhagu, the complainant fell down on the floor and Bhagu has closed the door and we all remained in the house. Nobody has taken the meal. At about 8.00pm, Bhagu has taken the meal

and he slept in the house. That, thereafter Jali has also slept in the room after taking the meal. Bhagu was sleeping on the cot and Jali was sleeping on the bench, whereas, complainant was sleeping on the floor. At late night, about 2.00a.m., on hearing the shouts of Jali, she awoken and went to Jali and she saw Bhagu throttling Jali. He told her that he did not want any help because Jali was not died. Therefore, when she checked Jali, there was no movements and she was also not speaking and she was died. Bhagu had not permitted us to go out of the house, therefore, they remained in the house. At about 4.00am, early in the morning, Bhagu opened the door and told that he is going to inform his brothers and he went away. After Bhagu left the house, she went out and informed about the incident to her relative Laljibhai and Amrutbhai Ravjibhai Gamit, Sarpanch of the village and when she came back to home, at that time, Bhagu was also came back.

3. That at night when Bhagu was taking his meal, he told Jaliben that why she is drinking liquor, Jaliben replied that since he is drinking, therefore, she is also drinking. At that time, there was a exchange of words. Thereafter, Bhagu went to sleep. For this reason, Bhagu has throttled Jaliben and committed murder of Jaliben and Reshmiben had seen the incident. It is further stated by the complainant that Bhagu was beating Jaliben after drinking liquor and when they intervened, he was beating themus and daily he was quarreling with them. The complainant had also informed about this to the Sarpanch and Sarpanch had also orally persuaded Bhagu but he did not heed to it. Due to his habit, he killed Jaliben. After registering the complaint, Ex. 7, for the offence punishable u/s 302 of IPC, the PSO of Vyara Police Station has handed over the investigation to PSI Shri Sukhdev Shambhulal Barad PW-4, who has drawn the inquest panchnama of the dead-body, Ex. 8, and thereafter sent the dead-body for post-mortem. Thereafter, in presence of the panchas, he drawn the panchnama of the scene of the offence and has recorded the statements of the witnesses. Thereafter, panchnama of body of the accused person was drawn and he was arrested on 10.8.1998. That after the investigation was over, charge-sheet was filed in the Court of Judicial Magistrate First Class, at Vyara.

4. After filing of the charge-sheet, in the present case, as the offence u/s 302 of IPC is exclusively triable by the Court of Sessions, the learned JMFC, Vyara, committed the said case to the Court of Sessions, at Surat u/s 209 of Code of Criminal Procedure.

5. The appellant- accused was not in a position to engage an Advocate to defend his case and hence, he was provided an Advocate by the Legal Aid committee to defend his case. Thereafter, the Charge (Ex. 3) was framed against the present appellant-accused.

6. In order to bring home the charge levelled against the accused, the prosecution has examined, in all, 4 witnesses and relied upon their oral testimonies. They are as under:

PW-1 Reshmiben Gurjibhai, complainant Ex. 6

PW-2 Mukeshbhai Bhagubhai Ex. 12

PW-3 Dr. Shantilal Bhurabhai Chaudhary, Medical Officer, Ex. 13

PW-4 PSI Shri Sukhdev Barad, I.O., Ex. 15.

7. To prove the culpability of the accused, the prosecution has also produced and relied upon the following documentary evidence. They are as under:

Complaint Ex. 7

Inquest Panchnama Ex. 8

Panchnama of scene of offence Ex. 9

Panchnama of the clothes of deceased Jaliben Ex. 10

Panchnama of body of accused person and arrest panchnama Ex. 11

P.M. Note Ex. 14

FSL Report Ex. 16.

8. That, after examining the witnesses, the statement of the accused u/s 313 of Cr.P.C. was recorded, in which, the appellant -accused has relied all the questions in the negative like "I do not know" or "it is a false contention".

9. After considering the oral as well as documentary evidence, the learned Additional Sessions Judge, Surat, camp at Vyara vide impugned judgment and order dated 25.6.1999 in Sessions Case No. 239/1998 held the accused guilty to the offences charged against him. The accused was convicted and sentenced to suffer rigorous imprisonment for life and a fine of Rs. 200/-, in default, to undergo further S/I for month.

10. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence passed by the learned trial Judge, the present appellant- original accused has preferred this Appeal, through jail.

11. Heard Ms. Sadhana Sagar learned advocate appearing for the Appellant and Mr. Mukesh Patel learned APP appearing for the respondent-State and perused the record of the case.

12. Ms. Sadhna Sagar learned advocate for the appellant has read the oral evidence of complainant PW-1 Ex. 6 and argued that she is not eye witness. She was not present at the time of occurrence. She has further argued that Dupatta was present at the neck of the deceased and she was lying on the bench and was fallen down from the bench. It is contended by the learned advocate for the appellant that actually the cause of death is not due to the throttling or strangulation. The present appellant is innocent and he cannot be penalized for the offence of murder. We have gone through the whole evidence of the

complainant PW-1 and also read the complaint. It appears from the oral evidence that the complainant PW-1 has narrated the whole incident in corroboration with the complaint. She has also narrated that her daughter was killed by the present appellant by throttling. Learned advocate for the appellant has argued that post mortem was carried out by Dr. Shantilal Bhurabhai Chaudhary who has been examined as PW-3 Ex. 13. She has read the oral evidence as well as PM Note and argued that doctor has used the word of strangulation and as per the say of the complainant, who is cited as eye-witness, she was throttled by the present appellant. From the oral evidence of medical expert, fracture was found at thyroid bone and nail marks and abrasions were also found on the part of body (neck). It is stated by the medical expert that injury shown in col. No. 17 is possible by nail. He has also gave his opinion that if Dupatta (palav) is fixed in the neck and pulled, yet the injury shown in col. No. 17(1) and (2) cannot be possible. We have gone through the oral evidence of medical expert and read the PM Note also. The word "strangulation" is concerned, it is prescribed in Modi's Medical Jurisprudence & Toxicology, Twenty Second Edition, at page-261, as under:

Strangulation is a violent form of death, which results from constricting the neck by means of a ligature or by any other means without suspending the body. It is called throttling, when constriction is produced by the pressure of the fingers and palms upon the throat. Strangulation may also be brought about by compressing the throat with a foot, knee, bend of elbow, or some other solid substance. This is known as mugging (strangle hold).

13. So, in light of the word strangulation, which is explained as above, the submission of the learned advocate for the appellant cannot be considered. Learned advocate for the appellant has also read the oral evidence of PW-2 Mukeshbhai Bhagubhai Ex. 12 and argued that this witness is a son of the present appellant and he is the only eye witness and from the oral evidence of this witness, it appears that he has not uttered a single word to connect the present appellant in the said offence. We have verified the statement of this witness PW-2 Ex. 12. It is confirmed by us that this witness was suffering from fever and due to illness, he was not aware about the incident. In fact, from the oral evidence of this witness, it appears that he is not an eye witness. We have gone through the oral evidence of I.O. Shri Sukhdev Barad, P.S.I, who has carried out the investigation in a proper and legal manner. He has drawn the inquest panchnama and panchnama of scene of offence. We have compared the oral evidence with the documentary evidence of scene of offence as well as inquest panchnama Ex. 8. It is also mentioned in the inquest panchnama that some injuries were seen by the panch witnesses and it was also observed as an opinion of the panchas that the death of deceased was due to throttling.

14. Learned APP Mr. Mukesh Patel has contended that the learned trial Judge has considered the oral as well as documentary evidence and present appellant is rightly convicted. He has vehemently argued that from the oral evidence as well

as documentary evidence produced by the prosecution and in light of the oral evidence of medical expert, the prosecution has proved its case beyond any reasonable trial before the trial court. The injuries were also proved and opinion of the medical expert regarding cause of death was also corroborated with the oral evidence of the eye witness as PW-1. He has also submitted that the prosecution has established its case beyond reasonable doubt and prayed that the judgment and order passed by the trial court is required to be confirmed.

15. The Hon"ble Apex Court in a number of decisions held that "It is not the duty of the appellate Court when it agrees with the view of Trial Court on the evidence either to restate the effect of the evidence or to reiterate the reasons given by the Trial Court." The said law is laid down by the Hon"ble Apex Court in the case of (1) Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury, , and (2) in the case of State of Karnataka Vs. Hemareddy Alias Vemareddy and Another, . Yet, in the interest of justice and to observe said cause of Appeal in a legal way, we have discussed the evidence as well as the reasons assigned by the trial Court.

16. Learned advocate for the appellant has argued that complainant PW-1 is a mother of the deceased and she is a related witness and her evidence cannot be considered. It is also contended that she is also an interested witness and her evidence cannot be considered as a weightable evidence. It is not the law that the evidence of the interested witness is not entitled to any weight. It is true that her evidence is required to be scrutinised with the case. We have compared the oral evidence of the complainant with the medical evidence and we are of the opinion that evidence of the complainant cannot be considered as an interested witness and her evidence cannot be thrown over-board simply on the ground that her evidence is of the interested party because when the occurrence had taken place inside the house, and that too, at dead night, it would be futile to expect of the prosecution to produce independent outsiders as witnesses. The medical expert is an independent witness and we have looked for corroboration of the said expert witness with the evidence of eye witness and on scrutiny, it is found that the evidence on record is otherwise trustworthy, the question of rejection of the same on the ground of being interested witness would not arise. Interference with the finding of facts upon the merits or appreciation of the evidence is not open to reconsideration in appeal brought by convict prisoner-appellant only flagrant error of law or procedure can be grounds, or that, in arriving at finding of facts any miscarriage of justice had resulted to the accused-appellant. It also appears from the oral evidence of PW-1 complainant that she was present at the time of incident in the same room and on hearing of voice of deceased, she rushed there and at that time, she saw that appellant/accused was throttling her daughter/deceased. So, it cannot be ruled out as being improbable and so the presence of eye witness cannot be characterised as unlikely. So, when complainant was staying with deceased and her son-in-law in her own house, the presence of complainant is natural and she is required to be considered as a natural witness. Therefore, relationship by itself is not a ground

to discredit the testimony of the witness, it is otherwise found to be consistent and true. The complainant PW-1 is a mother of the deceased who has allowed the present appellant, her son-in-law to stay with her, who has explained the whole incident and we have again verified the same and we are of the opinion that the evidence given by the complainant PW-1, it has given trustful version of the whole occurrence and she was present at the place of occurrence and the cause of death also established beyond any reasonable doubt and when the mother-in-law of the appellant is coming before the Court with a particular facts to show the involvement of her own son-in-law, it is not proper to consider that the appellant is falsely implicated in the said offence.

17. We find ourselves in complete agreement with the said finding, ultimate conclusion and resultant order of conviction passed by the trial court and we are of the view that no other conclusion except the one reached by the trial Court is possible in the instant case as the evidence on record stands. Therefore, there is no valid reason or justifiable ground to interfere with the impugned Judgment and order of conviction and sentence.

18. For the foregoing reasons, the Appeal fails and is hereby dismissed. The impugned judgment and order of conviction and sentence dated 25.6.1999 recorded by the trial Court against the appellant-accused in Sessions Case No. 239/1998 is hereby confirmed and maintained. Muddamal be disposed of in terms of directions contained in the impugned judgment and order passed by the trial Court.

19. This Appeal is accordingly dismissed.