
(2009) 09 GUJ CK 0006
In the Gujarat High Court
Case No : Criminal Appeal No. 599 of 2004

Bharatbhai Nagbhai Kothi	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 01-09-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 302, 307

Citation : (2009) 09 GUJ CK 0006

Hon'ble Judges : J.C. Upadhyaya, J; Bhagwati Prasad, J

Bench : Division Bench

Advocate : PS Champaneri, for the Appellant; LB Dabhi, APP, for the Respondent

Final Decision : Dismissed

Judgement

J.C. Upadhyaya, J.—The challenge in this appeal is to the judgment and order rendered by the Addl. Sessions Judge, FTC No. 3, Surendranagar, vide judgment and order dated 15/3/2004 rendered in Sessions Case No. 82 of 2000, whereby the appellant, who was original accused in the said case, came to be convicted for the offence of murder of his elder brother's wife Hansaben, punishable u/s 302 of the Indian Penal Code [for short "IPC"] and was sentenced to undergo rigorous imprisonment for life and fine of Rs. 1,000/-, in default of payment of fine, simple imprisonment for six months. He has challenged the legality and validity of his conviction by preferring this appeal.

2. The prosecution case, in nutshell, is that the appellant is deceased Hansaben's husband's elder brother and deceased Hansaben along with his husband Vanrajbhai and the appellant were residing in a house, which was situated near DNT High School in Joravarnagar, District Surendranagar. The appellant was not doing any work and was not earning anything and, therefore, deceased Hansaben used to tell the appellant to do some job. On 17/3/2000 at about 5.00 p.m., when the deceased told the appellant to do some job, the appellant felt insulted and poured kerosene on Hansaben and she was set to fire

by match stick. Hansaben was immediately shifted to civil hospital and there her FIR came to be recorded. Initially the FIR came to be registered for the offence punishable u/s 307 of the IPC and investigation was commenced. During the course of investigation, Executive Magistrate recorded the dying declaration of Hansaben. However, during the treatment she succumbed to the burn injuries and therefore, the offence of murder punishable u/s 302 of the IPC came to be investigated. Statements of material witnesses were recorded and necessary panchnamas were drawn in presence of panchas. After collecting required material for the purpose of lodgement of charge-sheet, charge-sheet came to be filed in the Court of Ld. Chief Judicial Magistrate, Surendranagar. Since the offence was exclusively triable by the Court of Sessions, the Ld. Magistrate committed the case to the Court of Sessions, Surendranagar, which came to be registered as Sessions Case No. 82/2000.

3. The Ld. Trial Judge framed charge against the appellant at exh. 5, to which he did not plead guilty and claimed to be tried. Thereupon, the prosecution adduced its oral and documentary evidence. The prosecution examined 8 witnesses and one witness, namely Dr. Mansukhbhai Dhanjibhai Patni was examined by the trial Court as Court witness. The prosecution produced necessary documentary evidence. After the conclusion of the oral evidence adduced by the prosecution, the Ld. Trial Judge recorded further statement of the accused u/s 313 of the Criminal Procedure Code [for short "Cr. P.C."] and the accused denied, generally all the allegations levelled against him by the prosecution and submitted that at the time of the incident, he was not in the house, but he had gone to one mosque at Gariyadhar and he was wrongly implicated in this case. After considering the evidence on record and the submissions made on behalf of both the sides, the Ld. Trial Judge relied upon the FIR of the deceased herself, which according to the trial Court, after her death, is her dying declaration before the police and the dying declaration recorded by the Executive Magistrate, came to the conclusion that the prosecution successfully proved its case beyond any reasonable doubt regarding the offence of murder having been committed by the accused punishable under Sections 302 of the IPC and awarded the sentence as hereinbefore referred to in this judgment.

4. We have examined the record and proceedings and the submissions made on behalf of both the sides.

5. On behalf of the appellant, it is submitted that the trial Court erred in relying upon the dying declaration recorded by the Executive Magistrate. Though the Executive Magistrate PW 7 Chandrakantbhai in his evidence states that the dying declaration bears his handwriting and his signature, considering the evidence of Court witness Dr. Patni, examined at exh. 35, states that the dying declaration bears the handwriting of Dr. Priydarshani. That thus, the dying declaration itself is doubtful. It is further submitted that all the witnesses including the husband, brother and sister of the deceased turned hostile and did not support the case of the prosecution. Considering the cross-examination of husband of the deceased,

PW 1 Vanrajbhai made on behalf of the prosecution, after declaring him as hostile witness, his statement u/s 161 of the Cr. P.C recorded by the police is referred. Though PW 1 Vanrajbhai denied having narrated the incident in the manner in which his police statement came to be recorded by the police, but as emerges from his cross-examination and the evidence of the I.O., it transpires that soon after the incident, he went inside the house and found his wife sustaining burn injury, but at that time the appellant, who is his elder brother, was not there in the house and that upon asking, his wife said that whatever happened has happened. It is submitted that together with such evidence of PW 1 Vanrajbhai, if the panchnama of scene of occurrence exh. 16 is considered, it clearly transpires that in the small room where the incident is alleged to have happened, no marks of extensive fire were found though the mattresses, quilt and other household articles were lying in the room and were found intact. That thus, this is a case of suicide and not homicidal death. Therefore, it is submitted that the appeal may be allowed.

6. Per contra, Ld. APP Mr. Dabhi for the State vehemently opposed this appeal and submitted that the trial Court rightly relied upon the two dying declarations, namely the FIR of the deceased and the dying declaration recorded by the Executive Magistrate while recording conviction of the accused for the offence of murder. It is submitted that so far as dying declaration recorded by the Executive Magistrate is concerned, the same came to be exhibited at exh. 14 by the consent of the defence, in the sense that below the list exh. 8, there is an endorsement made by the learned advocate representing the accused in the trial Court to the effect that the document may be exhibited and may be read in evidence. It is submitted that, therefore, now in this appeal, the appellant accused cannot challenge the dying declaration exh. 14. Even otherwise the prosecution examined the Executive Magistrate, who recorded the dying declaration exh. 14 as PW 7 Chandrakantbhai Jayantilal and the contents of the dying declaration and the other formalities regarding the dying declaration has been proved by the prosecution through the evidence of Executive Magistrate and during the course of his evidence, the original dying declaration is produced at exh. 14-A. The dying declaration exh. 14 is copy of the original dying declaration exh. 14-A. That thus, even the fact that the defence admitted the dying declaration recorded by the Executive Magistrate is not taken into consideration, yet the dying declaration is otherwise proved through the evidence of Executive Magistrate. The Executive Magistrate categorically stated that the dying declaration bears his handwriting and signature. If the evidence of Court witness Dr. Patni exh. 35 is considered, in para. 2 of his cross-examination what he admits is that exh. 18 bears handwriting of Dr. Priyadarshani and that he himself was one of the panel doctors of the Post Mortem. Exh. 18 is not the dying declaration, but the post mortem report. Therefore, it cannot be said that the dying declaration exh. 14 bears the handwriting of Dr. Priyadarshani. It is further submitted that considering the panchnama of the scene of occurrence, there does not appear that it was either accidental burn or suicide, but homicidal burn

is revealing in the sense that in the room one plastic can containing some kerosene having its lid open, was found together with one match box and partly burnt match stick. One half burnt mattress was found. Flame marks and soot marks on the flooring were found. All these circumstances emerging from the scene of offence panchnama do not indicate accidental or suicidal burn. Moreover, considering the further statement of the accused recorded u/s 313 of the Cr. P.C, the defence is of total denial. Nothing is explained as to how the deceased sustained burn injury in the house. Even considering the evidence of PW 1 Vanrajbhai, the husband of the deceased, though he did not support case of the prosecution and turned hostile, nothing is suggested by the defence that the deceased sustained burn injury either by accident or that she committed suicide. Therefore, it is submitted that the prosecution successfully proved its case beyond reasonable doubt and the appeal may be dismissed.

7. Considering the evidence on record, it clearly transpires that the case is based solely upon the evidence in the nature of dying declaration. Considering the evidence of PW 1 Varajbhai, the husband of the deceased, PW 2 "Gauriben" sister of the deceased and PW 3 "Bharatbhai" brother of the deceased, they all were declared hostile witnesses and did not support the case of the prosecution. However, they were not projected as eye witnesses by the prosecution. However, from their evidence, it emerges that the deceased was shifted to hospital. In the hospital, her statement came to be recorded by the police while she was under treatment and the same was treated as FIR, which is produced at exh. 26. It further transpires that Yadi was sent to the Executive Magistrate for recording the dying declaration of the deceased and considering the evidence of PW 7 Chandrakantbhai Jayantibhai the Executive Magistrate, it transpires that upon receipt of the Yadi, he immediately went to the hospital and he consulted Dr. Patni to know the physical and mental state of the deceased and he recorded the dying declaration of the deceased, the original of which is produced at exh. 14-A. Considering the dying declaration at exh. 14-A, it transpires that the same was recorded between 19.05 hours and 19.20 hours on 17/3/2000.

7.1. However, it further transpires that the copy of the dying declaration was produced by the prosecution before the trial Court in this case with list exh. 8 and there is endorsement by learned advocate representing the accused to the effect that the document may be exhibited and may be read in evidence. Therefore, the copy of said dying declaration was exhibited at exh. 14. Thus, it is pertinent to note that no dispute was raised on behalf of the accused regarding the dying declaration recorded by the Executive Magistrate, but on the contrary, the same was consented to be read in evidence. However, virtually to admit the dying declaration recorded by the Executive Magistrate would amount to as good as admitting the guilt by the accused. However, the prosecution, despite the fact that the dying declaration was exhibited and was consented to be read in evidence by the defence, fairly examined the Executive Magistrate PW 7 Chandrakantbhai Jayantilal at exh. 29. As stated above, during the course of his evidence, he produced the original dying declaration at exh. 14-A.

7.2. Now if both the dying declarations, namely the dying declaration recorded by the Executive Magistrate and the dying declaration recorded by the police of the deceased, which is FIR, are considered, it clearly transpires that the deceased categorically stated that at the time of incident when she told the accused, who is her husband's elder brother, to do some job and thereupon the accused poured kerosene on her from a can and set her to fire by match stick. We do not find any material contradiction or inconsistency between the two dying declarations. The FIR is recorded first in point of time and thereafter, the Executive Magistrate recorded the dying declaration of the deceased. In the dying declaration recorded by the Executive Magistrate, there is a clear endorsement of the Medical Officer that the patient is conscious and able to give dying declaration. The Executive Magistrate also categorically stated that the deceased was conscious and was able to speak when he recorded the dying declaration. There is nothing that prior to that, when her FIR came to be recorded by the police, she was either unconscious or was not in a position to speak.

7.3. The dying declaration recorded by the Executive Magistrate is assailed by the appellant by drawing our attention to evidence of Dr. Patni exh. 35 stating that Dr. Patni deposed that the dying declaration bears the handwriting of Dr. Priydarshani and, therefore, the dying declaration allegedly recorded by the Executive Magistrate cannot be relied upon. Considering the evidence of Dr. Patni exh. 35, what he stated is that exh. 18 bears the handwriting of Dr. Priydarshani, however he referred dying declaration exh. 18. But considering the evidence of Dr. Patni as a whole, it clearly transpires that as a matter of fact, the P M Report bears the handwriting of Dr. Priydarshani as according to Dr. Patni, Dr. Priydarshani is one of the panel doctors in the P M. Even exh. 18 referred to by Dr. Patni is not the dying declaration recorded by the Executive Magistrate because the copy of the dying declaration recorded by the Executive Magistrate admitted by the accused is exh. 14 and the original dying declaration is exh. 14-A. Exh. 18 is the P M Report. Thus, we do not find any force in the submissions made by the appellant that the dying declaration recorded by the Executive Magistrate bears the handwriting of Dr. Priydarshani.

8. On behalf of the appellant, it is submitted that this is not a case of homicidal death, but this is a case of suicide as scene of offence panchnama does not indicate homicidal death. We have examined the scene of offence panchnama exh. 16, wherein it is stated that in the room a plastic can containing some kerosene was found having its lid open, match box and partly burnt match stick were also found. Merely because no extensive marks of burns and flame were found on the articles lying in the room, it cannot be presumed that the deceased might have committed suicide. Nothing emerges from the evidence of the witnesses examined by prosecution that the deceased was ill-treated by her in-laws, which prompted her to commit suicide. No such suggestion is put to the witnesses that the deceased committed suicide. No such defence is raised by the accused in his further statement u/s 313 of the Cr. P.C that the deceased

committed suicide. As against such defence, there is a clear and cogent evidence adduced by the prosecution in form of dying declarations. The dying declarations recorded by the Executive Magistrate and by the police are independent evidence. The Executive Magistrate or the police has no axe to grind against the accused or no reason to falsely implicate the accused in the crime by concocting the dying declaration of the deceased. During the course of evidence of PW 1 Vanrajbhai, the husband of the deceased, after declaring him as hostile witness, the prosecution confronted him with his statement recorded by the police u/s 161 of the Cr. P.C. However, he denied having given any statement. The prosecution did not examine witness Vanrajbhai in capacity as eye witness. Certain contradiction in his evidence with his previous statement recorded by the police u/s 161 of the Cr. P.C does not amount to create any adverse effect upon the evidence in form of the dying declaration adduced by the prosecution.

9. In the result, we are of the considered opinion that the Ld. Trial Judge rightly relied upon the evidence of dying declaration and rightly recorded conviction of the appellant for the offence punishable u/s 302 of the IPC. The appeal is, therefore, devoid of any merit and deserves dismissal.

10. The appeal is dismissed. The conviction recorded by the Addl. Sessions Judge, FTC No. 3, Surendranagar, vide judgment and order dated 15/3/2004 rendered in Sessions Case No. 82 of 2000 of the appellant for the offence punishable u/s 302 of the IPC and sentence awarded there under are confirmed.