

(2016) 03 GUJ CK 0016
In the Gujarat High Court
Case No : Criminal Appeal No. 694 of 2006

Bharwad Haribhai Saktabhai and Others	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 02-03-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 114, Section 176, Section 201, Section 302, Section 376, Section 498(A)

Citation : (2016) 03 GUJ CK 0016

Hon'ble Judges : K.S. Jhaveri and G.B. Shah, JJ.

Bench : Division Bench

Advocate : Y.M. Thakkar, Advocate, for the Appellant; C.M. Shah, Addl. Public Prosecutor, for the Respondent

Final Decision : Partly Allowed

Judgement

K.S. Jhaveri, J.—1. This appeal is directed against the judgment and order passed by the learned Addl. Sessions Judge, Fast Track Court No. 4, Patan in Sessions Case No. 300/2002 dated 17.03.2006 whereby, the appellants, original accused, have been convicted for the offences punishable u/s. 302, 498(A), 201, 176 r/w. Section 114 IPC.

For conviction u/s. 302 r/w. Section 114 IPC, the appellants were sentenced to undergo imprisonment for life and fine of Rs. 25,000/- each and in default, RI for five years.

For conviction u/s. 498(A) IPC, the appellants were sentenced to undergo RI for three years and fine of Rs. 5,000/- each and in default, RI for two years.

For conviction u/s. 201 IPC, the appellants were sentenced to undergo RI for three years and fine of Rs. 5,000/- each and in default, RI for one year.

For conviction u/s. 176 IPC, the appellants were sentenced to undergo SI for six months and fine of Rs. 1,000/- each and in default, SI for one month.

All the sentences were ordered to run concurrently. Out of the total fine that may be received from the accused, an amount of Rs. 1.00 Lac was ordered to be paid as compensation to the mother of deceased.

2. The facts in brief are as under;

The complainant herein, Jijiben Bharwad, was residing at Radhanpur and was earning her livelihood by doing labour work. Vasiben, the daughter of the complainant, was married to accused No. 1 before about nine years from the date of alleged incident. Original accused No. 1 was serving in the Central Reserve Police Force and therefore, used to stay for fewer period at his home. It is the case of prosecution that the accused persons used to torture Vasiben both mentally as well as physically.

2.1 On 23.04.1999 the complainant went to the matrimonial home of Vasiben to know her whereabouts. However, to her utter shock, she came to know that her daughter, Vasiben, passed away before about seven days. When the complainant inquired about the reason, she did not receive any satisfactory reply. Therefore, a complaint was filed against the accused persons before Harij Police Station vide I-C.R. No. 44/1999. Necessary investigation was done and the accused came to be arrested. At the end of investigation, charge-sheet was filed against the accused before the trial Court. However, since it was a sessions triable offence, the case was committed to Sessions Court and ultimately, trial was initiated.

3. During the trial, the prosecution examined the following witnesses;

4. The prosecution had produced and relied upon several documentary evidence, particularly, the complaint at Exh.30, panchnama of scene of offence at Exh.36, panchnama where the last rites were performed at Exh.39, FSL Report at Exh.55 and the Letter-pads of Jani Maternity Nursing Home at Exhs.61 to 64.

5. At the end of trial, the Court below recorded further statement of accused u/s. 313 of Cr.P.C. and thereafter, passed the impugned judgment and order, which has led to the filing of present appeal.

6. On 29.02.2016 the following order was passed by this Court;

"In view of the instructions received by Mr. Thakkar, learned advocate for the appellant from his counterpart, it is borne out that accused Nos. 1, 5 and 6 have expired. In that view of the matter, appeal stands disposed of qua accused Nos. 1, 5 and 6 as having been abated. Death certificates of accused Nos. 1 and 5 are placed on record.

So far as the remaining accused are concerned, Mr. Thakkar states that he has received paper book only today and therefore he requests for time. Accordingly, matter is adjourned to 02.03.2016."

7. Today, Mr. Y.M. Thakkar, learned counsel appearing for the appellants, original accused, was heard at length. It was submitted that the husband and in-laws of deceased have passed away and that there is nothing incriminating on record

against accused No. 2 to 4. None of the ingredients of the offence alleged against accused No. 2 to 4 have been made out. It was submitted that neither in the complaint nor in her evidence, the complainant has explained delay in filing the complaint. It was, therefore, submitted that the accused may be acquitted by granting them benefit of doubt.

7.1 In support of his submissions, learned counsel Mr. Thakkar placed reliance upon the following decisions;

(A) *Indrajit Sureshprasad Bind v. State of Gujarat*, 2013 (4) Scale 569 : In that case, the prosecution alleged that accused had subjected deceased to cruelty and harassment and placed reliance on one letter alleged to have been written by deceased. However, the letter was found to be doubtful. Further, the record showed that deceased was living happily at her husband's house and that there was no misbehavior with her. On these facts, it was held that prosecution has not led dependable and believable evidence to prove that accused abetted deceased to commit suicide.

(B) *Md. Ali @ Guddu v. State of U.P.*, 2015 (7) SCC 272 : In paras - 20 & 21, it has been observed as under;

"20. The obtaining factual matrix has to be appreciated on the touchstone of the aforesaid parameters. Be it clearly stated here delay in lodging FIR in cases under Section 376 IPC would depend upon facts of each case and this Court has given immense allowance to such delay, regard being had to the trauma suffered by the prosecutrix and various other factors, but a significant one, in the present case, it has to be appreciated from a different perspective. The prosecutrix was missing from home. In such a situation, it was a normal expectation that either the mother or the brother would have lodged a missing report at the police station. The same was not done. This action of PW-2 really throws a great challenge to common sense. No explanation has been offered for such delay. The learned trial Judge has adverted to this facet on an unacceptable backdrop by referring to the principle that prosecutrix suffered from trauma and the constraint of the social stigma. The prosecutrix at that time was nowhere on the scene. It is the mother who was required to inform the police about missing of her grown up daughter. In the absence of any explanation, it gives rise to a sense of doubt. That apart, the factum that the appellant informed the mother of the victim that he had left the prosecutrix at the door of her house also does not command acceptance. The recovery of the prosecutrix by the brother and her friends also creates a cloud of suspicion. We are not inclined to believe the prosecution version as has been projected that one Arif had informed the brother of the prosecutrix that his sister was at his place but for reasons best known to the prosecution, Arif has not been examined. That apart, the persons who were accompanying the brother have also not been examined by the prosecution. Thus, the manner of recovery of the prosecutrix from the house of Arif remains a mystery.

21. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon. True it is, the grammar of law permits the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a Court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unimpeachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely do not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the accused-appellants for the alleged offences and the High Court has fallen into error, without re-appreciating the material on record, by giving the stamp of approval to the same."

(C) In *Monju Roy v. State of West Bengal*, , 2015(5) Scale 288, the Apex Court observed in Para-8 as under;

"8. While we do not find any ground to interfere with the view taken by the courts below that the deceased was subjected to harassment on account of non-fulfillment of dowry demand, we do find merit in the submission that possibility of naming all the family members by way of exaggeration is not ruled out. In *Kans Raj*, this Court observed:

"5. A tendency has, however, developed for roping in all relations of the in-laws of the deceased wives in the matters of dowry deaths which, if not discouraged, is likely to affect the case of the prosecution even against the real culprits. In their over enthusiasm and anxiety to seek conviction for maximum people, the

parents of the deceased have been found to be making efforts for involving other relations which ultimately weaken the case of the prosecution even against the real accused as appears to have happened in the instant case." The Court has, thus, to be careful in summoning distant relatives without there being specific material. Only the husband, his parents or at best close family members may be expected to demand dowry or to harass the wife but not distant relations, unless there is tangible material to support allegations made against such distant relations. Mere naming of distant relations is not enough to summon them in absence of any specific role and material to support such role."

(D) In *Rajiv Singh v. State of Bihar*, , JT 2015 (12) SC 305, the Apex Court observed in Para-71 as under;

"71. Distraught though one would be, by the calamitous incident, judicial adjudication has to be assuredly guided by the recognized legal dicta and cannot be swayed by emotional or sentimental surges. Justice has to be administered essentially in accordance with law and uninfluenced by individual predilections, notions and prejudices. Be that as it may, judged on the touch stone of the acknowledged and time tested fundamental principles of criminal jurisprudence, we cannot, but have to conclude that the charge against the appellant has remained unproved."

8. Ms. C.M. Shah, learned APP, supported the impugned judgment and order and submitted that the evidence of complainant (PW-1), who is the mother of deceased, proves the guilt of accused beyond reasonable doubt. The deceased was cremated without any examination by any Doctor or without performing autopsy, which speaks volumes about the conduct of accused. It was, therefore, submitted that the Court may not interfere with the impugned judgment and order of conviction.

8.1 Learned APP further submitted that the husband of deceased was into some extra-marital relationship on account of which the deceased had to even leave her matrimonial house. The fact that deceased had even informed about her plight to the local Women Cell proves the extent of torture and harassment that was meted out by the accused persons. She, therefore, submitted that the present appeal deserves to be dismissed.

8.2 In support of her submissions, learned APP placed reliance upon the following decisions;

(A) *Mohd. Aslam v. State of Maharashtra*, , (2001) 9 SCC 362 : It has been held that evidence of police officer effecting recovery could not stand vitiated by reason of panch witnesses supporting the evidence turning hostile.

(B) *Vahaji Ravaji Thakore and Another v. State of Gujarat*, , 2004(1) GLR 777 : It has been held that merely because the panch witnesses do not support the case of prosecution, the case of prosecution need not be thrown over-board as unreliable. If the decision of the case were to depend solely on the testimony of

panch witnesses regardless of the evidence of independent witnesses, in theory, it would be giving a right of veto to the panchas so far as the question of culpability of an accused is concerned. If the evidence of police officer is otherwise found to be true and dependable, judicial pragmatism requires that merely because the panchas do not support, it should not be made a ground to discard his evidence.

(C) Trimukh Maroti Kirkan v. State of Maharashtra, , (2006) 10 SCC 681 : It has been held that where the prosecution succeeds in leading evidence to show that either the husband and wife were last seen together or that the offence was committed in the dwelling house where the husband also resided and if the accused husband offers no explanation as to the injuries received by his wife or if the explanation is false, then there is strong circumstance which indicates that the husband committed the crime.

(D) Kanhaiya Lal & Others v. State of Rajasthan, , AIR 2013 SC 1940 : It has been held that delay in lodging the FIR is not always a ground to disbelieve the prosecution case and that whether the delay creates dent in the prosecution story is to be decided by scrutinizing the explanation offered in light of the facts and circumstances of the case.

9. We have heard learned counsel for both the sides and perused the oral as well as documentary evidence on record. The prosecution has examined Jijiben Bharwad, who is the mother of deceased, as PW-1. From her evidence, it is established that while her daughter (deceased) was staying back at her matrimonial home when her husband-accused No. 1 used to stay at his workplace at Hyderabad (Andhra Pradesh), her in-laws and other accused persons used to torture her mentally as well as physically. She has also deposed that accused No. 1 had entered into an illicit relationship with a lady at Hyderabad and that a baby-boy was also born out of that relationship. Since the deceased was illiterate, had given birth to two girl-child and had a village background, accused No. 1 wanted to divorce her, for which purpose, the deceased was tortured mentally as well as physically.

10. It has also come out from the evidence of PW-1 that before about 14 days from the date of death of deceased, the deceased had visited her parental house and during that time also, the deceased had informed this witness (PW-1) about the torture and harassment meted out to her by the accused persons. It has also come out that after the deceased was done to death, her cremation was performed without informing anybody from her parental side and that this witness came to know about it at a much later point of time. Thus, the evidence of this witness proves that the deceased was meted out mental as well as physical cruelty at the hands of accused persons and that the deceased died under suspicious circumstances. The evidence led by the complainant is corroborated by the complaint (Exh.30).

11. The prosecution case also gets support from the evidence of Rayaben

Sureshbhai (PW-2), who happens to be the sister of deceased. This witness was married in the same village where the deceased got married and incidentally, was residing in her neighborhood. It transpires from her evidence that on the day just prior to her death, the deceased visited her house and had informed her that her husband-accused No. 1 tortured her physically on the earlier night. On the very next day, when this witness visited the matrimonial house of deceased, she noticed that the dead body of deceased was lying on the cot and that the tongue had come out and eyes were wide open. When she inquired about the condition of deceased, the accused gave vague reply and thereafter, took her to the adjacent room of their house. This witness could not immediately inform her parental house about the death of deceased and that it was only after 4 days that she could inform her parental home about her death when she had the occasion to visit her parental house.

12. The evidence of this witness supports the evidence of complainant (PW-1) in all respects. In fact, the evidence of PW-2 proves that she was a witness to the dead body of deceased that was lying on the cot in an unnatural condition. Both these witnesses, viz. PW-1 and PW-2, have been cross-examined at length. However, nothing contrary has come out, as would render their evidence unreliable or non-trustworthy.

13. The prosecution has examined Dr. Asmitaben Parimal Jani as PW-4. She is the Doctor who had given treatment to deceased while she was brought to her Clinic on 12.04.1999. From her deposition, it is established that when the deceased was brought to her Clinic, she was bleeding profusely and it was necessary to infuse blood. However, at around 15:00 hrs., accused No. 1 shifted her out of the Hospital and took her to their house contrary to medical advice and before blood could be infused. She has also deposed that none of the in-laws had donated blood for the deceased during that time.

14. The evidence of PW-4 proves that though the deceased was in a very bad condition and required urgent infusion of blood, accused No. 1 shifted her to their house contrary to medical advice. It is to be noted that none of the accused resisted the action of accused No. 1 of shifting the deceased out of the Hospital though her condition was very critical. This speaks about the conduct and role played by the accused persons. Therefore, it was not that only accused No. 1 was guilty of the crime. The deposition of PW-1, PW-2 and PW-4 establish the guilt of all the accused persons.

15. The evidence of these three witnesses is corroborated by the evidence of PW-9, Ranjanben Kalola, who was running an institution engaged in the activity of welfare of women. It is established from her evidence that the deceased had approached her Institution with a complaint regarding the cruelty meted out to her by her husband and in-laws. In that complaint, the deceased also narrated about the illicit relationship that accused No. 1 had with a lady in Hyderabad and for which purpose, accused No. 1 used to ill-treat her in order to get her divorced.

16. The evidence led by the aforesaid witnesses establish that the deceased was meted mental as well as physical torture by the accused persons. Even if we believe that the main culprits were the husband-accused No. 1 and in-laws, viz. accused Nos. 5 & 6, who all have expired, the fact remains that deceased was ill-treated in front of the eyes of other accused persons, viz. accused No. 2 to 4. All the three accused persons, if not the real culprits, acted as spectators to the events of harassment and torture to the deceased. They ought to have taken appropriate action for stopping the cruel treatment meted out to the deceased by accused No. 1 and his parents. They also remained mute spectators to the incident when the dead body of deceased was lying in their house and also of the subsequent cremation of the deceased, which was done in complete darkness. Accused No. 2 to 4 have not denied the fact that they were residing in joint family. Even in their statement u/s. 313 Cr.P.C., they have not denied the said fact. Hence, it is proved that all the accused persons were staying together at the time when the offence in question was committed.

17. However, the fact remains that no autopsy of the dead body was performed. Under the circumstances, the accused persons could not be convicted for the offence u/s. 302 IPC since the cause of death could not be ascertained. Witnessing of dead body by PW-2 could not be a ground for convicting the accused u/s. 302 IPC in the absence of cogent evidence on record to that effect. Hence, the conviction of accused u/s. 302 IPC deserves to be quashed and set aside.

18. In view of the above discussion, it is established that accused No. 2 to 4 played a key role, if not an active role, in the commission of offence u/s. 498(A), 201 and 176 r/w. Section 114 IPC. We are in complete agreement with the reasonings given by and the findings arrived at in the impugned judgment and hence, find no reasons to entertain this appeal insofar as conviction qua said offence is concerned.

19. For the foregoing reasons, the appeal is partly allowed. The impugned judgment and order is modified to the extent that conviction of original accused No. 2 to 4 u/s. 302 r/w. Section 114 IPC is quashed and set aside. However, their conviction and sentence u/s. 498(A), 201 and 176 IPC stands confirmed. Insofar as the order regarding fine is concerned, the same is reduced to Rs. 5000/- each for every offence and the default sentence is reduced to one month. All the three sentences shall run concurrently and the period of sentence already undergone by the accused shall be given set-off. The impugned judgment and order stands modified to the aforesaid extent. The accused persons are on bail and hence, their bail bonds stand cancelled. All the three accused persons, viz. accused No. 2 to 4, are directed to surrender to custody on or before 08th July 2016 failing which the investigating agency shall take necessary action in accordance with law.