

(2010) 02 GUJ CK 0132
In the Gujarat High Court
Case No : Criminal Appeal No. 1178 of 2004

Chandrakant Fatumal Luhana	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 09-02-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 27, 302, 498A

Citation : (2010) CriLJ 1381

Hon'ble Judges : Harsha Devani, J;A.L. Dave, J

Bench : Division Bench

Advocate : M.C. Barot, for the Appellant; Maulik G. Nanavati, Assistant Public Prosecutor, for the Respondent

Judgement

A.L. Dave, J.—The appellant Chandrakant Fatumal Luhana came to be tried by the Sessions Court, Kheda at Anand along with his mother Sitaben Fatumal Luhana for the offences punishable u/s 498-A read with Section 114 of the Indian Penal Code and Section 302 of the Indian Penal Code in Sessions Case No. 170 of 2003. The appellant came to be convicted for the offence punishable u/s 302 of the Indian Penal Code and sentenced to undergo Imprisonment for Life with fine of Rs. 20,000/-, in default, to undergo Rigorous Imprisonment for three years. However, the Trial Court acquitted him as well as co-accused Sitaben of the charges for offences punishable u/s 498-A read with Section 114 of the Indian Penal Code. The appellant has, therefore, preferred this appeal against conviction. Against acquittal of co-accused as well as the present accused for offences punishable u/s 498-A read with Section 114 of the Indian Penal Code, there is no appeal preferred by the State.

2. The brief facts of the case are that the appellant was married to Lilaben, daughter of Sumitraben Thavardas on 25th May, 1995. From the wedlock, deceased Lilaben had delivered a daughter Bharti, aged about 4 at the time of the incident. They were staying at Guru Nanak Society around 23rd March, 2003. As per the prosecution case, the incident occurred at about 19 : 30 hours in the

house occupied by the appellant and his family in Guru Nanak Society. It was charged that the appellant inflicted multiple blows on the head of his wife - deceased Lilaben with the help of wooden "Paatli" resulting into her death.

2.1 The prosecution case depends on circumstantial evidence and there is no direct evidence. The first person who noticed the deceased having suffered injuries is witness Nandu staying in the house opposite to the house of the appellant who, upon hearing the hubbub, came out of the house, noticed the deceased lying at the bottom of the staircase leading to her house on the first floor. She was bleeding from the injury on her head. This witness took her upstairs to her house, initially put her on the ground and then on the cot in the room. He then called the brother of the accused who was in the vicinity, brought a rickshaw and the deceased was then taken to the hospital. Around the time when the rickshaw started, the appellant came to the place and boarded the rickshaw. On being taken to hospital, the deceased was declared dead. The mother of the victim Sumitraben was informed. She came and lodged an F.I.R. with the police, on the basis of which an offence was registered and investigation started. The investigating agency, having found sufficient material, filed charge-sheet in the Court of Judicial Magistrate First Class, Anand who, in turn, committed the case to the Court of Sessions and Sessions Case No. 170 of 2003 came to be registered.

2.2 Charge was framed against both the accused persons at Exh.2 to which they pleaded not guilty and came to be tried.

2.3 The Trial Court, considering the evidence led by the prosecution, came to the conclusion that the charges against accused No. 2 Sitaben Fatumal Luhana were not proved and, therefore, recorded her acquittal. The Trial Court, however, found that there was evidence against accused No. 1 of having committed murder of his wife and, therefore, convicted him for the said offence and sentenced him, as stated in the earlier part of this judgment.

3. Learned advocate Mr. Barot appearing for the appellant submitted that the important link in the form of evidence to show presence of the appellant at the place of incident when the incident occurred is missing. The prosecution has not been able to prove beyond reasonable doubt the factum of the presence of the appellant at the place of the incident. He also submitted that the evidence of the prosecution is inconsistent and the Trial Court has recorded conviction on hypothesis which does not prove involvement of the appellant and appellant alone in the incident. Mr. Barot submitted that nobody has seen the occurrence. Witness Nandubhai notices the incident when he finds the victim lying at the bottom of the staircase. He then takes her to her house where the accused appellant was not present. Much reliance is placed on the evidence of daughter Bharti who says that she had gone to the temple along with accused No. 2 her grandmother and when she came back, she saw her mother lying in an injured condition. She says that she saw her father viewing cricket match. The Trial Court has overlooked the aspect that this evidence is inconsistent with the

evidence of Nandu. Mr. Barot, therefore, submitted that no reliance could have been placed on this evidence.

3.1 Mr. Barot submitted that bloodstains are found on the wall and the mirror of the room on the first floor admeasuring 8 feet x 14 feet. Bloodstains are also found on steps No. 6, 7 and 8 as one goes upwards on the staircase. These blood marks cannot be attributed only to the alleged act of the appellant of hitting the deceased with the wooden "Paatli" on her head. Mr. Barot submitted that the prosecution has failed to bring on record as to how the deceased was found at the bottom of the staircase, if the incident has occurred as alleged.

3.2 Mr. Barot submitted further that the prosecution evidence of discovery of "Paatli" is disproved by the evidence of the witnesses including the police officer who investigated the case initially as an accidental death case. It has come on evidence in that the "Paatli" was shown to the witnesses by the officer as the "Paatli" used for hitting the deceased but that officer has taken no steps for registering the offence. Additionally there is no material to know whether at that point of time any blood was noticed on the "Paatli". The investigating agency does not do anything till the offence is registered and thereafter, after the arrest, a discovery panchnama is drawn which would get falsified because of the earlier evidence. Mr. Barot, therefore, submitted that the prosecution case is weak and does not complete the chain of circumstances to connect the appellant with the offence. These aspects have not been considered by the Trial Court while recording conviction and the appeal may, therefore, be allowed.

4. On the other hand, learned Additional Public Prosecutor Mr. Nanavati has opposed this appeal. According to him, prosecution witness Bharti is a child witness. Innocence goes with her age. She states that she was told by someone that her mother had fallen down but she had not seen the incident but she firmly says that when she came back from the temple with her grandmother, the appellant was viewing cricket match. Around that time, cricket was being telecasted which is a fact established through the evidence of Nandu who also says that the cricket match was being telecasted. The situation that emerges from this evidence is that the appellant was present in the house and was viewing the television, unperturbed and undisturbed by the incident that occurred in the house namely, death of his wife. It would now be for the appellant to explain as to how and why was he viewing the T.V. and/or that he was not aware about the incident or lastly that he was not in the house at all. Mr. Nanavati, therefore, submitted that the defence has failed to discharge its onus. The incident has occurred in the house where the appellant along with his family consisting of the victim, the daughter and the appellant's mother resided. The appellant was not engaged in any particular work and, therefore, his presence around the time of the incident can safely be inferred and it would be for him to rebut the inference which he has failed to do.

4.1 Mr. Nanavati submitted that the blood marks on the wall of the room on the upper storey would support the prosecution case that the deceased was hit on

the head with the wooden "Paatli". The deceased has succumbed to that injury and, therefore, it may be considered as responsible for the cause of death. Mr. Nanavati submitted that presence of the appellant, therefore, is established or at least can be inferred and the cause of death is also established. The "Paatli" is discovered by the appellant though the witnesses have stated otherwise and may be a mistake. The injuries on the person of the victim would not be commensurate with the story of fall from the staircase and, therefore, the conviction recorded by the Trial Court is justified and may be upheld by dismissing the appeal.

5. We have examined the record and proceedings in context of rival side submissions.

6. At the outset, it may be recorded that there is no eye-witness to the incident but there are witnesses to the incident who have reached the place immediately after the incident. The star witness is Nandubhai who is examined at Exh. 15. His house is located just opposite the house of the accused-appellant. He pleads total ignorance about the inter se relation between the victim and the accused. He says that the incident occurred around 7.30 to 8.00 in the evening. On hearing some hubbub, he rushed to the spot to find that Lilaben had fallen from the staircase and had suffered head injuries. She was bleeding from the said head injuries. He tried to put his handkerchief to stop the bleeding but it did not work. There was no one in the house. He, therefore, took the victim to her house on the upper storey. He initially put the victim on the floor and then put her on the cot. Thereafter, Kailash and Chandrakant i.e. the appellant took her to the hospital. The witness went to the hospital on his motorcycle. The doctor declared Lilaben to be dead. The witness has been declared hostile to the prosecution and has been cross-examined by the Prosecutor. He has also been cross-examined by the learned advocate for the defence. It emerges from his cross-examination that when he took the victim to her house on the upper storey, the neighbours had arrived. However, no family member of the victim was present. The members of the society put a word to the appellant's brother-Kailash who was sitting at the entrance of the Society and they took the victim to the hospital. What emerges from this evidence, therefore, is that he comes to the spot immediately after the incident and notices the victim lying at the bottom of the staircase, takes her to her home and then sends her to the hospital. He specifically states that there was no one in the house at the relevant time.

7. The next important witness is child witness Bharti who is examined at Exh.14. Her age is indicated to be 5 years and she was not administered oath after testing whether she realises the seriousness of oath or not. In her evidence, she has stated that she and her grandmother accused No. 2 had gone to the temple and when they came back, she found that her mother had fallen from the staircase. The accused No. 2, therefore, started crying. The girl says that she did not cry nor did anybody else cry. She says that her father was in the home and was viewing match. She says that her mother was conscious though she was

bleeding and she talked to her as well but she did not remember as to what did she talk about. She says that she was enquired of by the police if her mother had fallen down from the staircase. However, she asserts that her mother has been taken to hospital and, therefore, she has not come back. She denies any assault by the appellant on the victim at any time prior to the incident.

8. Girdharilal Hosumal is examined at Exh.11. He says that there was dispute between the appellant and his wife Lilaben and there used to be some quarrel about household work between original accused No. 2 and the victim - Lilaben. He says that he had seen the victim and had noticed that the victim had suffered injuries on her fingers. He has been cross-examined at length but nothing much turns on it.

9. The panchnama of place of incident is at Exh.17. The house of the accused is located on the first floor where there is a wooden door for entry to the house. There are blood spots in the middle of the door. There are some blood marks on the frame of the door. The edge of the cot also had stains of blood on it. There are stains of blood on the northern wall. The panchnama noticed blood marks on the staircase on steps No. 6, 7 and 8 as one goes upwards.

10. We also notice that there were blood marks on the clothes of the appellant. The prosecution wants this Court to believe that the clothes got blood stains in the occurrence while the appellant hit the deceased with the wooden "Paatli". However, the prosecution evidence itself reveals that the appellant had boarded the rickshaw while the deceased was being taken to hospital and was instrumental in her shifting. It has also come in evidence that the deceased had bled profusely and, therefore, no weightage can be given to the fact that the clothes of the appellant were stained with blood.

11. The evidence discussed above would go to show that when Nandubhai, who was incidentally the first person to notice the incident, went to the house of the victim, there was no one in the house. He does not speak of arrival of accused No. 2 mother of the appellant or even Bharti for that matter till the deceased is taken to the hospital. Against this, there is evidence of Bharti who says that when she came home with her grandmother, she found the deceased lying in an injured condition out of her fall from the staircase and she noticed her father viewing cricket match on the television. The child witness says that her mother is in hospital and may not come because of the injury. She does not know, even after lapse of some time, that her mother had expired. How much weightage can be given to such evidence of a child witness which is in conflict with the evidence of other prosecution witnesses? In our view, when there is no other cogent evidence to connect the appellant with the offence, no reliance can be placed on such testimony to connect the appellant with the crime.

12. The prosecution has totally failed to bring on record any material which would show as to how the deceased came out of the house if the incident of giving blow by a wooden "Paatli" had occurred in the house. This would be

relevant for the reason that much reliance is placed on find of blood on the walls and minor of the room on the upper storey. We cannot ignore the fact that as per the evidence of Nandubhai, the deceased was taken to her house, was placed on the ground and then placed on the cot. The width of the room is just 8 feet. Taking the size of the cot at 6 feet, it would leave only 1 feet passage on either side and from the cot, the deceased was again brought down and taken in rickshaw to the hospital. The possibility of the walls having been stained with blood in these transactions cannot be ruled out. If the incident had occurred as alleged, there would have been blood spots and not stains, as has been found while drawing the panchnama.

13. The quality of investigation is also a matter to be considered. Police Officer Deepsinh Arjunsinh (Exh.51) had investigated the accidental death and he has admitted that he had shown the wooden "Paatli" to the sister and brother-in-law of the victim while drawing the panchnama whereas it is the case of the prosecution that the said "Paatli" was then discovered by the appellant and a panchnama u/s 27 was also drawn. There is, therefore, inconsistency in the evidence of the prosecution. The evidence also indicates that witness Deepsinh knew that the said "Paatli" was used for causing injury to the victim while he showed it to the brother-in-law and sister of the victim. Still, he has not taken any steps to lodge an F.I.R. in respect of a cognizable offence.

14. The resultant effect is that the prosecution cannot be said to have proved its case of the appellant having hit the victim with a wooden "Paatli" on her head and caused her death thereby. There is no direct evidence nor is there circumstantial evidence to complete the chain. These aspects seem to have been overlooked by the Trial Court. The conviction, therefore, cannot be sustained.

15. The appeal is, therefore, allowed. The conviction and sentence recorded by the learned Additional Sessions Judge, Camp Anand vide judgment and order dated 17th May, 2004 in Sessions Case No. 170 of 2003 of the appellant - Chandrakant Fatumal Luhana is hereby set aside. He be set at liberty forthwith, if not required in any other case. Fine, if paid, be refunded to him.