

(2010) 03 GUJ CK 0077
In the Gujarat High Court
Case No : Criminal Appeal No. 276 of 2005

Harijan Chamar Becharjibhai Ramjibhai and Another	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 18-03-2010

Acts Referred:

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

Citation : (2010) 51 GLR 2208

Hon'ble Judges : Bankim N. Mehta, J;A.L. Dave, J

Bench : Division Bench

Advocate : B.M. Mangukiya, for the Appellant; M.R. Mengdey, Addl. P.P., for the Respondent

Final Decision : Allowed

Judgement

A.L. Dave, J.—The Appellants were accused in Sessions Case No. 70 of 2000 decided by the Sessions Court, Bhavnagar, on 6-1-2005. They were charged with offences punishable u/s 302 read with Section 114 of the Indian Penal Code ("I.P.C." for short) and Section 498A read with Section 114 of I.P.C, and came to be convicted for the said offences. They were sentenced to imprisonment for life, with a fine of Rs. 500/- each, in default to undergo S.I. for 30 days, for the offence of murder of Hansaben, wife of Appellant No. 1. For the offence punishable u/s 498A I.P.C, they were sentenced to imprisonment for a period of three years with a fine of Rs. 100/- each, in default to undergo imprisonment for 15 days. Both the sentences were ordered to run concurrently and benefit of set-off was given to the Appellants by judgment and order dated 6-1-2005 impugned herein.

2. The brief facts of the prosecution case are that Appellant No. 1, Becharbhai, was married to deceased Hansa about 10 years prior to the incident, which occurred on 22-1-2000. The allegation was that Appellant No. 2, mother of Appellant No. 1 and mother-in-law of deceased Hansaben, used to cause harassment to the deceased on the ground of household work, and Appellant No.

1 used to lend support to her.

2.1. As per the prosecution case, on 22-1-2000 at about 4-00 p.m., Appellant No. 2 poured kerosene on the deceased while she was preparing tea and Appellant No. 1 ignited the deceased. The deceased suffered extensive burns, and ultimately, succumbed to the same. The deceased was taken to hospital by Appellant No. 1 with the help of others and was given treatment. As it was a medico-legal case, police was informed. Police arrived at the hospital and intimated Executive Magistrate for recording dying declaration. The police also recorded F.I.R. On the basis of the F.I.R. offence was registered and was investigated. Ultimately, the police having found sufficient material to connect the Appellants with the crime, filed charge-sheet against the Appellants in the Court of learned J.M.F.C Shihor, who, in turn, committed the case to the Court of Sessions, Bhavnagar, where Sessions Case No. 70 of 2000 came to be registered.

3. The trial Court framed charges against both the Appellants/accused at Exh. 6 to which they both pleaded not guilty and claimed to be tried.

3.1. The Sessions Court, after considering the evidence, found that the charges levelled against the Appellants were proved, and therefore, convicted both of them for the offences punishable u/s 302 as well as Section 498A I.P.C Hence, this appeal by the convicts.

4. Heard learned Advocate Mr. B. M. Mangukiya for the Appellants and learned A.P.P. Mr. Mengdey for the State, at length and in great detail.

5. Learned Advocate Mr. Mangukiya, appearing for the Appellants, submitted that the trial Court has convicted both the Appellants on the basis of two dying declarations, one in the form of the F.I.R. and the other before the Executive Magistrate. There is no other evidence to implicate the Appellants. According to Mr. Mangukiya, neither of the dying declarations would inspire confidence of the Court. According to him, if the dying declaration before the Executive Magistrate (Exh. 15) is seen, there are interpolations in the dying declaration regarding timing and even the language which is purported to have been used by the deceased. He submitted that if the evidence of the Investigating Officer is seen, he has admitted that he filed a wrong charge-sheet. Mr. Mangukiya submitted that the Doctor has, in terms, stated that the burn injuries appear to be suicidal in nature and accidental burns were not possible. He submitted that the trial Court has overlooked the fact that the Appellants themselves took the victim to the hospital. It was a case of either suicide or accident, but not homicide, in any case. Mr. Mangukiya submitted that the documents would go to show that initially accidental death was registered, which was then converted into a murder. He then submitted that all these factors having not been considered by the trial Court, the appeal may be allowed and the conviction may be set aside.

6. Learned A.P.P. Mr. Mengdey has opposed this appeal. According to him, there are some overwritings in the Time Column of the dying declaration before the Executive Magistrate (Exh. 15), but they are genuine mistakes, as can be seen

from other contemporaneous documents. He submitted that overwritings or interpolations would certainly raise a doubt, but the doubt has to be a reasonable one and here that element of doubt being reasonable is absent. He submitted that conjoint reading of other contemporaneous record rules out the possibility of tempering. Mr. Mengdey submitted that there are two dying declarations recorded by independent persons, who have no axe to grind against the Appellants. No animosity, grudge or grievance is alleged either against the Executive Magistrate or against the Police Officer, who recorded the dying declarations. Mr. Mengdey submitted that it is true that the Doctor has opined that the burn injuries appear to be suicidal in nature, but that is only an opinion of the doctor and it would not override or abrogate the evidence in the form of dying declaration recorded by the competent and independent Government officials, who have no interest in either of the parties. The dying declarations are consistent and clearly implicate the Appellants in the offences with which they were charged. Mr. Mengdey, therefore, submitted that the appeal may be dismissed.

7. We have examined the record and proceedings of the case in the context of rival sides submissions.

8. Mr. Mangukiya is right when he says that the prosecution case depends mainly on the dying declarations of the deceased in the form of F.I.R. and one before the Executive Magistrate. It is also revealed from the record that relatives of the deceased have not supported the prosecution case. These pieces of evidence, therefore, will have to be examined very carefully.

8.1. The dying declaration (Exh. 15) was recorded by P.W. 1 Hasmukhrai Shantilal Trivedi, Executive Magistrate, examined at Exh. 13. In his evidence, he has stated that he received yadi (Exh. 14) and had put his initials in the margin of yadi to acknowledge the receipt thereof. He thereafter went to Sir T. Hospital and met the doctor on duty, showed him the yadi received by him from the police. Thereafter, the doctor took him to the Burns Ward where the deceased was being treated. The doctor examined victim Hansaben physically to know whether she was conscious or not, and thereafter, put an endorsement on the form of dying declaration. Thereafter, the doctor went away and the witness remained in the cabin along with the patient. He introduced himself as the Executive Magistrate and asked her to state as to what had happened. He then recorded her dying declaration as stated by the declarant. After recording the declaration, he took thumb impression of Hansaben, as she was not literate and was not in a position to sign. He himself put an endorsement and attested the thumb impression of Hansaben and called the doctor and inquired about the state of health of the deceased and the doctor put endorsement to the effect that Hansaben was conscious when her statement was recorded. That dying declaration was produced at Exh. 15. The recording of dying declaration lasted for about 30 to 35 minutes.

8.2. This witness has been cross-examined at length. During his cross-

examination, it is revealed that the yadi was received by him at his Office at about 8-05 hours in the evening. It also reveals that he reached the hospital within five minutes and within 2-3 minutes he was at the place where the patient was; after consulting the doctor. He admits that in the dying declaration (Exh. 15) there is an overwriting of the time of receipt of yadi i.e. 20-05 hours. He also admits that the time of recording of dying declaration indicated to be 20-05 hours, which is then scored out and in the bracket 20-35 is written. He also admits that he had not put his initial over there. Similarly, questions regarding grill in the kitchen was also put and the witness has explained that initially the deceased spoke about the room and then the kitchen, and therefore, he made necessary changes in the dying declaration in that regard.

8.3. As such, on close scrutiny of the evidence, we do not find anything turning on the cross-examination to render the recording of the dying declaration doubtful. On the contrary, we find that there is no overwriting in the dying declaration (Exh. 15) in respect of time of receipt of yadi. It is, in fact, written, scored out and separately time was indicated as "20-05" hours. What is scored out is "8" and it appears that the Executive Magistrate probably wanted to indicate the time in twelve hours mode and then thought of indicating it in twenty four hours. Fact however is that there is no overwriting. If we see the yadi (Exh. 14), it contains specific endorsement of the Executive Magistrate indicating the time of receipt of yadi to be 20-05 hours. The argument about manipulation of time, therefore, does not survive.

8.4. The dying declaration (Exh. 15), if seen, would indicate that its recording was started at 20-35 hours and was completed at 20-55 hours. There is overwriting in noting the time of commencement of recording of dying declaration and it has immediately been written down in the bracket as "20-35". Though, no initials are made there, at the bottom of the dying declaration it is recorded that the recording was completed at 20-55 hours. During his cross-examination, the Executive Magistrate has indicated that the recording of dying declaration lasted for about 30 to 35 minutes. If we consider this, then the time of commencement of recording of dying declaration would tally and can be said to have been correctly mentioned/noted. Incidentally, there is no correction in the time of completing the recording of declaration.

8.5. The other argument that is advanced is that the evidence of the Investigating Officer, who recorded the F.I.R., would reveal that the time of recording of F.I.R. and the time of recording dying declaration are same, which would mean, either of the two is incorrect and recording of dying declaration by the Executive Magistrate is not genuine. In this context, if the evidence of Investigating Officer Mr. Sahdevsinh Jitubha Gohil recorded at Exh. 29, is seen, he has stated initially that he went to the hospital, inquired about the health of the deceased and recorded her F.I.R., and thereafter, sent yadi (Exh. 14) to the Executive Magistrate. The F.I.R. was concluded at 20-30 hours, and therefore, recording of it must have started prior to 20-30 hours. The evidence of the

Executive Magistrate indicates that he recorded the dying declaration between 20-05 hours and 20-55 hours. It is, therefore, contended that both, the dying declaration and the F.I.R. were recorded simultaneously. Even the Investigating Officer has stated that after recording the F.I.R., he sent yadi to the Executive Magistrate, and therefore, no reliance could have been placed by the trial Court on the dying declarations for convicting the Appellants.

8.6. In this context, it may be recorded that the Investigating Officer has, in his examination-in-chief, initially stated that he recorded the F.I.R., and thereafter, sent yadi (Exh. 14) to the Executive Magistrate for recording dying declaration. However, during his cross-examination, he has stated that it was his mistake to have stated that after recording F.I.R., he sent yadi to the Executive Magistrate. According to the Investigating Officer, he had first sent yadi to the Executive Magistrate for recording dying declaration i.e. prior to recording the F.I.R. We are prepared to accept this explanation in view of the fact that his evidence was recorded on 13-8-2004, practically four years after filing of the charge-sheet. Such mistakes cannot wipe out the effect of contemporaneous record. The yadi was already received by the Executive Magistrate at 20-05 hours and that can be seen from Exh. 14. Therefore, sending yadi by the Investigating Officer after recording F.I.R. which was concluded at 20-30 hours would not be a correct statement of fact, but only a mistake. In fact, if the dying declaration Exh. 15 and F.I.R. Exh. 30 are seen, they would clearly reveal that after recording of the F.I.R. was over at about 20-30 hours, recording of the dying declaration Exh. 15 was commenced from 20-35 hours. If the time of 20-35 hours appearing in the initial part of Exh. 15 was manipulated or changed so as to suit the prosecution case, there would have been manipulation/change at the end of the dying declaration where it was indicated that recording of dying declaration was over at 20-55 hours, but there is no change or alteration or modification or manipulation at the end. This argument, therefore, does not appeal to us much.

9. It was then contended that the evidence of the doctor has been ignored by the trial Court. The doctor, in his evidence, has stated that in his opinion the deceased had not suffered accidental burn injuries, but the injuries were suicidal in nature. Mr. Mangukiya, therefore, vehemently argued that this would rule out the possibility of homicidal burns being caused for death of the deceased.

9.1. The evidence of the doctor is in the form of opinion, which he had formed upon examining the patient. It would not override or abrogate the effect and impact of direct evidence as to the occurrence in the form of dying declaration before the Executive Magistrate and the F.I.R., which are found to be genuine and trustworthy. The situation may be different if the medical evidence (not opinion) runs totally contrary to the version of an eye witness.

9.2. We distinguish the medical opinion and medical evidence. Medical evidence would be what is/was seen or noticed by the doctor while examining the patient or finding of fact on the basis of pathological or other investigations. On the other hand, medical opinion would mean his view or opinion formed on the basis

of what he has medically examined and cause of result/death. Therefore, in the instant case, we have to give a close look at the opinion of the doctor, who has after examining the burn injuries, opined that they were suicidal. It is not the case of either side that the deceased suffered suicidal burns. Therefore, the opinion makes no dent in the prosecution case.

10. It was also argued that the thumb impressions on the dying declaration and the F.I.R. were got-up and fake. In support of this argument, it was contended that it has come in the evidence that the deceased suffered about 95% burns all over her body and that, as her arms were burnt, she could not have put the thumb impression and even if it was put, it would not show ridges of it, which were clearly visible in the dying declaration (Exh. 15). In this context, doctor's evidence is relevant. The doctor has stated that both the upper limbs were burnt and upper limbs would include part of the hand from shoulder upto fingers. It has also come in the evidence of the doctor that if the skin is burnt, it would not show the lining and ridges of the skin. In light of this evidence, it was contended that since both the upper limbs were burnt, the thumb impression of the deceased, which shows the lines and marks of ridges, could not have been obtained. In this context, we may refer to the cross-examination of the doctor, where the doctor, in terms, has stated that the deceased had put thumb impression on the dying declaration Exh. 15 in his presence. We notice that nowhere the doctor has stated that the palms of the deceased were burnt and upper limb would include from shoulder upto fingers. Thus, when the Executive Magistrate has certified that he had obtained thumb impression of the deceased on the dying declaration and when it emerges during the course of cross-examination of the doctor that he saw the thumb impression of the deceased being taken by the Executive Magistrate, we have no reason to doubt their versions. They are independent witnesses and are not shown to have any grievance or prejudice against the Appellants. There is no reason to disbelieve the version of such independent Government officials.

11. It was then contended that the neighbours and the treating doctor have not been examined by the prosecution. In our opinion, non-examination of these witnesses has not caused any prejudice to the Appellants when the prosecution case is duly established by independent, cogent and reliable evidence. It is the quality of evidence which is relevant and not quantity.

12. The next argument was that, initially, the offence was registered as an accidental death. In this context, our attention was drawn to document Exh. 14, which is the yadi written by the police officer to the Executive Magistrate. We rest content only by saying that there is no reference to any accidental death. What is referred to is an occurrence and not accidental death. The argument, therefore, cannot sustain.

13. It was argued that as per the dying declaration, kerosene was removed from a stove in a small bowl, which was then poured on the victim and then the victim was set on fire. It was the case of the defence that such a small quantity of

kerosene could not have caused such extensive burns. It was opined by the doctor that the victim had stated the manner in which the incident had occurred, and once the dying declaration was found to be reliable, it would not be permissible to go into such questions which would call for drawing surmises or inferences and then drawing conclusions.

14. In the light of the foregoing discussion, we are of the view that there is no reason to doubt or suspect the genuineness or correctness of the dying declaration (Exh. 15) and the F.I.R. (Exh. 30), both of which implicate both the Appellants. It is clear that both the Appellants have participated in causing the death of the victim by pouring kerosene on her and setting her to fire.

15. No other contention was raised or judgment was cited by the learned Advocate for the Appellants.

16. However, before we conclude our judgment, we notice that both the Appellants are convicted for the offences of murder of Hansaben punishable u/s 302 I.P.C. and Section 498A I.P.C. for causing harassment to Hansaben. In this context, we may notice that the parents of Hansaben have not supported the case about harassment by the Appellants. Not only that, if the dying declaration is closely examined, it would go to show that the allegations are against Appellant No. 2, mother-in-law, about taunting the deceased on household issues. There are no other attributions even to mother-in-law, and therefore, in our view, in light of the provisions contained in Section 498A I.P.C, it would not fall within the meaning of "cruelty". The conviction of both the Appellants u/s 498A I.P.C, therefore, cannot be sustained.

17. Resultantly, this appeal is partly allowed. The conviction of both the Appellants recorded by the Sessions Court, Bhavnagar, in Sessions Case No. 70 of 2000, by judgment and order dated 6-1-2005, for the offence punishable u/s 498A of the Indian Penal Code is hereby set aside and they are acquitted of the said offence. Fine, if paid in respect of this offence, be refunded to the Appellants.

Conviction recorded and sentence awarded to both the Appellants by the Sessions Court, Bhavnagar, in Sessions Case No. 70 of 2000, by judgment and order dated 6-1-2005, for the offence of murder of Hansaben is hereby confirmed.