
(2009) 02 GUJ CK 0074
In the Gujarat High Court
Case No : Criminal Appeal No. 817 of 2001

Harubha Jilubha Jhala and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 11-02-2009

Acts Referred:

Dowry Prohibition Act, 1961 — Section 3, 7
Penal Code, 1860 (IPC) — Section 114, 302, 304B, 34, 498A

Citation : (2009) 02 GUJ CK 0074

Hon'ble Judges : J.C. Upadhyaya, J;A.L. Dave, J

Bench : Division Bench

Advocate : M.H.M. Shaikh, for the Appellant; M.R. Mengdey, APP, for the Respondent

Final Decision : Dismissed

Judgement

A.L. Dave, J.—The appellants came to be tried by City Sessions Court for offences punishable under Sections 302, 498A read with Section 34 and 114 of the Indian Penal Code ("I.P.C." for short) and Section 304B of the I.P.C., so also Sections 3 and 7 of the Dowry Prohibition Act along with two other accused persons, namely, Yogesh Harubha Jhala and Beenaben Mahendrabhai Jadeja, in Sessions Case No. 354 of 2000. The Trial Court acquitted co-accused, Yogesh Harubha Jhala and Beenaben Mahendrabhai Jadeja, of all the charges whereas convicted the appellants for offences punishable under Sections 302 read with Section 34 of the I.P.C., Section 304B read with Section 114 of the I.P.C. and Section 498A of the I.P.C. For the offence punishable u/s 302 read with Section 34 of the I.P.C., all the three appellants are sentenced to undergo imprisonment for life. For the offence punishable u/s 304B read with Section 114 of the I.P.C., they are sentenced to undergo rigorous imprisonment for seven years and for the offence punishable u/s 498A of the I.P.C., they are sentenced to undergo rigorous imprisonment for three years. All the sentences are ordered to run concurrently. The convicts have, therefore, preferred this appeal. They were original accused Nos. 1, 2 and 3, respectively, before the Trial Court and the

acquitted accused were original accused Nos. 4 and 5.

2. The facts of the case, in brief, are that appellant No. 3 married one Neelamben, daughter of Dilipsinh Bhavsinh Vaghela, on 11th February, 2000. It is the case of the prosecution that the appellants were not satisfied with the dowry given to Neelamben at the time of the marriage and, they were demanding a colour television set and a Hero Honda motorcycle. Their demand was persistent and resulted into their causing physical and mental torture on the deceased soon after the marriage. The incident occurred on 9.5.2000 around 16.00 hours in the residence of the appellants located at Nobel Nagar Tenaments, at Naroda, Ahmedabad. As per the prosecution case, at the time of the incident, the three accused persons sprinkled kerosene on the deceased and set her to fire, as a result of which she sustained severe burns injuries to the extent of about 50 to 60 per cent. She was, however, taken to Heena Surgical Hospital of Dr. Amit Patel in an auto-rickshaw by appellants No. 1 and 3. The doctor, after recording the history given to him by the patient, i.e. deceased-Neelamben, gave treatment and then informed police on telephone. On the basis of the telephone intimation, P.S.I., Pandya, came to the Hospital and recorded statement of Neelamben. Thereafter, a Yadi was sent to the Executive Magistrate for recording dying declaration of Neelamben, who came to the hospital around 11.00 P.M. and recorded dying declaration of Neelamben. In the meanwhile, around 9.30 P.M., father of Neelamben arrived at the hospital. On the next day, another statement of Neelamben was recorded by Police Inspector, Vachchani.

2.1 At the end of the investigation, the police having found sufficient material to implicate the appellants and the two acquitted accused persons, filed charge sheet in the Court of Metropolitan Magistrate, Court No. 17, Ahmedabad, who, in turn, committed the case to the City Sessions Court and Sessions Case No. 354 of 2000 came to be registered.

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

2.3 On the basis of the evidence led by the prosecution, the Trial Court found that the prosecution was not successful in proving the case against original accused Nos. 4 and 5 and recorded their acquittal, whereas the evidence was found to be sufficient to prove the charges against the appellants and the Court recorded their conviction and sentenced them, as stated in the earlier part of this judgment.

3. We have heard learned Advocate, Mr. MHM Shaikh, and learned Additional Public Prosecutor, Mr. Mengdey.

4. Learned Advocate, Mr. Shaikh submitted that the prosecution case depends mainly on dying declarations. These dying declarations are inconsistent with each other and, therefore, the Trial Court erred in convicting the appellants. He submitted that dying declaration in the form of history before doctor, dying declaration recorded by the Executive Magistrate, statement recorded by Police

Inspector, Vachchani, and oral dying declaration before the father of the deceased implicate the appellants for murder, but a telephone vardhi given to the police by the treating doctor, Dr. Amit Patel, discloses the case to be that of accidental burns, so also the statement of the deceased recorded by P.S.I., Pandya, soon thereafter. Mr. Shaikh, therefore, submitted that there are two sets of evidence running contrary to each other and, therefore, the one which is favourable to the accused ought to have been accepted by the Trial Court and this Court may accept the same.

4.1 Mr. Shaikh submitted that other circumstances like the situation at the place of incident recorded in the Panchnama would be inconsistent with the theory of murder. He submitted that, if it was a case of murder, there would have been some resistance and the things would not have been found lying in an orderly manner as it has been recorded in the Panchnama of the place of incident (Exhibit 35). He submitted further that, as per the prosecution case, kerosene was sprinkled over the body of the deceased and then she was set to fire. However, there were no traces of kerosene found on the floor at the place where the incident allegedly occurred. Mr. Shaikh also submitted that the plastic container containing kerosene was found to contain 4.750 litres of kerosene whereas the maximum capacity of the container was 5 litres. Therefore, the theory that kerosene was sprinkled from that container cannot be believed.

4.2 It was then submitted that the conduct of the accused would go to show that they were innocent. Mr. Shaikh submitted that soon after the incident, the accused persons have informed the parents of the deceased. He also submitted that the accused persons themselves took the deceased to the hospital immediately after the incident in an auto-rickshaw. This conduct on the part of the accused persons would reflect their innocence. Mr. Shaikh submitted that the contents of the dying declaration recorded by the Executive Magistrate need not always be taken as correct. There has to be some material to support that version and for that purpose also, much reliance ought not to have been given to the dying declarations by the Trial Court.

4.3 Mr. Shaikh submitted that the incident occurred within a few months of the marriage and, ordinarily, demand of dowry would not assume such a degree so soon coupled with the fact that the articles, which were brought by the deceased at the time of marriage, have been returned by the accused persons to the parents of the deceased. Mr. Shaikh submitted that none of the neighbours have been examined by the prosecution to support its case. He, therefore, submitted that the appeal may be allowed.

5. Learned Additional Public Prosecutor, Mr. Mengdey, has opposed this appeal. According to him, although there is some inconsistency in the prosecution evidence, the same cannot be considered as fatal to the prosecution case. The statement recorded by P.S.I., Pandya, and the telephone vardhi, as given by Dr. Patel, run contrary to the prosecution theory and propagate accidental burns, but they would not be fatal to the case of the prosecution for the reason that even if

those pieces of evidence are removed from the prosecution case, there are other pieces of evidence which would prove the case against the accused persons. According to Mr. Mengdey, the telephone vardhi was given by the doctor on account of persuasion by the relatives of the deceased and those relatives would be the accused persons and not the parents of the deceased because the parents of the deceased arrived much later than the time of telephone vardhi. Mr. Mengdey then submitted that the death occurred within four months of the marriage. The facts which the deceased disclosed before her parents would go to show that she was subjected to cruelty and harassment on account of dowry and there is also evidence to show that in the recent past of the incident, in proximity of time, the deceased was subjected to harassment and cruelty and, therefore, the conviction is rightly recorded. He, therefore, submitted that the Court may not interfere with the judgment and order impugned in this appeal.

6. We have examined the record and proceedings of the case in the context of what is submitted by rival sides.

7. It is true that there is no eye-witness to the incident and the prosecution case depends on dying declaration and other circumstantial evidence like Panchnama of place of incident, etc. In the instant case, following dying declarations have emerged in the sequence recorded below:

(1) Case history given to the doctor by the deceased herself, as recorded in medical case papers (Exhibit 22), which clearly implicate the appellants for murder by sprinkling kerosene and setting the deceased to fire.

(2) Statement of the deceased recorded by P.S.I., Pandya, which exculpates the appellants and records the cause of death to be accidental burns while preparing tea.

(3) Oral dying declaration before Dilipsinh Bhavsinh Vaghela, father of the deceased, on his arrival at the hospital, as disclosed by him in his deposition (Exhibit 17) and the F.I.R. (Exhibit 18) implicate the accused persons.

(4) The dying declaration, as recorded by P.W.2-Savdanji Vajaji Darbar (Exhibit 19), and the dying declaration (Exhibit 20) implicate the appellants of murder.

(5) The statement of the deceased, as recorded by Police Inspector, Vachchani, on 10th May, 2000 also inculcates the appellants for murder and physical and mental torture, so also demand of dowry.

8. It is, thus, clear that except the dying declaration recorded by P.S.I., Pandya, all other dying declarations inculcate the appellants. The dying declaration recorded by P.S.I., Pandya, gets some support from a vardhi given by Dr. Amit Patel, as recorded at Exhibit 23, which speaks of accidental burns suffered by the deceased.

8.1 It was vehemently argued that although in the medical case history recorded by the doctor offence of murder is made out, the same doctor sends a vardhi of

accidental burns to the police. This inconsistency in the evidence of the prosecution should render the prosecution case untrustworthy and unreliable.

9. The argument is quite attractive, but difficult to accept. The reason being that what has led to this discrepancy emerges from the evidence of the Investigating Officer, Mr. Vachchani, examined at Exhibit 32. It emerges from his cross-examination that he had interrogated Dr. Amit Patel and sought explanation of Dr. Amit Patel about the discrepancy between the history recorded by him and the information given by him to the police. He states that the doctor explained this discrepancy by stating that he had given different information to the police at the behest of the relatives of the deceased. Now, the question, therefore, would be who could be those relatives who could have persuaded the doctor to give an information dehors the history given by the deceased. In this regard, it emerges on record that the deceased was taken to the hospital by her father-in-law and mother-in-law and, on arrival of the patient, history was recorded by the doctor and around 8.00 P.M., the information was given to police, which was reduced into writing at the Police Station, copy of which is produced at Exhibit 23. It also comes on record that the father of the deceased, the first informant, arrived at the hospital, for the first time, at about 9.30 P.M. Obviously, therefore, the relatives who persuaded the doctor to give an information contrary to the case history were the appellants and rightly so, because they would be the beneficiaries. The father, on arrival, was informed by the deceased orally on the same lines as the case history given by her to the doctor. The resultant effect is that the inconsistency which is highlighted in the dying declaration recorded by P.S.I., Pandya, and supported by Exhibit 23 gets explained. It is true that this may render the doctor's evidence susceptible to doubt. But what is recorded by him in the case paper is certified to be true by him although it runs contrary to what he informed the police. The doctor that way has been honest to the core in giving and admitting correct facts. Further, the case history as recorded by the doctor is consistent with the dying declaration recorded by Executive Magistrate. The Executive Magistrate is an independent person and has no axe to grind against anyone. It is nobody's case that he had any bias against the accused-appellants. Therefore, the cumulative effect is that the very first version which comes from the deceased gets a consistent support from her own version before the Executive Magistrate, who is an independent and responsible officer. Further, the statement recorded by Police Inspector, Vachchani, on 10th May, 2000 also runs in consonance with the version given by the deceased by way of case history to the doctor and dying declaration before the Executive Magistrate. All these three documents run in consonance with the oral dying declaration claimed to have been made by the deceased before her father, the first informant.

9.1 It would be appropriate to record here that, upon receiving the telephonic message from the doctor, P.S.I., Pandya, immediately went to the hospital and recorded the statement of the deceased. But, soon thereafter, when the father arrives, the deceased gives her former version, as given by her in the medical case history.

10. The effect, therefore is that, in a consistent version given by the victim, a dent is made by giving of false information to the police by the doctor and by the recording of statement by police immediately thereafter. Whether that dent would destroy or abrogate the effect of the other pieces of evidence which have come into existence prior to such dent and subsequent to the dent is a question required to be answered and the answer would be, emphatically, in the negative. A subsequent piece of evidence which has come into existence at the instance of the accused favourable to them by persuading a witness would not destroy the effect of the earlier piece of evidence which had come into existence and which is accepted to be true by the witness recording it, namely, the case history recorded by Dr. Amit Patel, because he admits that the history was given by the deceased to him and that he recorded the same as stated by her. Similarly, subsequent evidence also would not be affected for the reason that dying declaration was recorded by an independent officer like Executive Magistrate. It is nobody's case that there were any lapse on the part of the Executive Magistrate in following the procedure for recording the evidence. We find that he had obtained certificate from the doctor to the effect that the patient was conscious at the time of recording the dying declaration. Similarly, Police Inspector, Vachchani, also had obtained such a certificate when he recorded the statement of the deceased. The resultant effect is that the dying declaration in the form of case history recorded by the doctor (Exhibit 22), the dying declaration recorded by the Executive Magistrate (Exhibit 20), the statement of the deceased recorded by Police Inspector, Vachchani, (Exhibit 34), the oral dying declaration given by the deceased to her father, as emerging from his deposition (Exhibit 17) and the F.I.R. (Exhibit 18) will have to be accepted as truthful. Recording of statement exculpating the accused persons by P.S.I., Pandya, in no manner would abrogate the effect of these dying declarations nor would it render these dying declarations untruthful or doubtful in any manner.

11. So far as the arguments regarding the place of incident is concerned, a young lady recently married was attacked by three persons at a time and, after sprinkling kerosene, burnt her to death. What resistance could she have offered? Finding of things more or less in an orderly manner, therefore, would not render the prosecution case untruthful. If she had suffered accidental burns, she would have run helter skelter and that may have affected the orderly situation at the place of incident. But that also does not seem to be true and, in any event, the deceased having suffered burns at the place of incident is not in dispute and, therefore, that argument cannot help the appellant in any manner. Absence of traces of kerosene on the floor will have to be seen along with the fact that only a small quantity of kerosene was sprinkled over the deceased, as can be seen from the contents of the container. The container with a 5 litre capacity had in it kerosene of about 4.750 litres, meaning thereby that only 250 ML. was sprinkled. Another factor that goes against the theory of accidental burns is that the filler cap of the stove was found open, which would rule out that the deceased suffered burns while she was preparing tea. Ordinarily, the lid would be closed

when the stove is on.

12. Another contention that was raised was non-examination of neighbours. In our view non-examination of neighbours would not be fatal to the prosecution case in the instant case as the case is mainly founded on the basis of various dying declarations.

13. The contention that the marriage span was so short that for demand of dowry the in-laws would have waited for some more time is purely hypothetical. It emerges from the evidence that the articles which were given to the deceased at the time of marriage have been returned to her father would be of no consequence as it is a subsequent development.

14. Last but not the least, we may refer to the evidence of Dr. Jayantilal Satapara, at Exhibit 25, who has, in terms, opined that the injuries found on the dead body were of homicidal nature and not accidental burns. In this regard, the doctors opinion is merely challenged and he has denied the fact and stuck to his original version. This would, ultimately, conclude the case against the accused-appellants.

15. Learned Advocate, Mr. Shaikh, relied on certain judgments. He first relied on decision in the case of *Mehiboobsab Abbasabi Nadaf v. State of Karnataka* 2007(3) Crimes 291 (SC), where it was held that conviction can undisputably based on dying declaration, but before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. Consistency in dying declaration is the relevant factor for placing full reliance thereupon. In the case before the Supreme Court, the deceased had taken contradictory and inconsistent stand in different dying declarations and, therefore, they could not have been acted upon on their face value. In that case, we find that the deceased had given four dying declarations, two before the Medical Officer, one before the Executive Magistrate and one before the Police Officer. In the statement before the Medical Officer, she had alleged that while she had been cooking in her house in the morning at 11.00 hours on 29.05.2005, accidentally, the stove burst and she sustained burn injuries. In the dying declaration before ASI, Doddawada Police Station, she gave a different version implicating her husband and in-laws. In that case, it was also found that her sisters, brothers and parents did not support her allegation against the accused persons. In the instant case, the dying declarations are consistent except one, which is recorded by PSI, Pandya. The doctor has explained the inconsistency in his conduct by stating that he had given incorrect information to the police at the behest of the relatives of the deceased who, ultimately, are found to be the appellants. In the instant case, the very first version of the deceased was that she was set to fire by the appellants whereas in the case before the Apex Court, the first version of the deceased was of accidental burns. The inconsistency found in the prosecution case is not found to be sufficient to abrogate other dying declarations and their effect. The decision, therefore, cannot be of any help to the appellants.

15.1 In State of M.P. v. Rajbahadur and Ors. 2008(4) Crimes 166 (M.P.), there were four dying declarations, one was in the form of F.I.R., second before the doctor, third before the Magistrate and, lastly, the statement recorded by the doctor. Each of them were found to be inconsistent with each other and the dying declarations did not carry any endorsement that it was read over to the victim. There was evidence to show that the deceased was encircled by people of her family and it was difficult to conclude that the deceased was not tutored. Under this set of circumstances, the dying declarations were not believed for sustaining conviction. The facts of the present case are altogether different as discussed hereinabove and the decision cannot be of any help to the appellants.

15.2 Lastly, learned Advocate, Mr. Shaikh, relied on the decision in the case of Prakash Baburao Shelar v. State of Maharashtra 2005(2) Claims & Acquittal Criminal Cases 1153. In that case, there were two dying declarations inconsistent with each other and on appreciation of evidence, it was found that the case would be rendered suspicious and benefit must go to the accused. The first dying declaration was made before the doctor, which indicated accidental burns, and the second dying declaration indicated homicidal burns. The Court, therefore, refused to confirm the conviction by the Trial Court. In the instant case, as discussed above, the fact-situation is different and, therefore, the decision cannot be of any help to the appellants.

16. The foregoing discussion would to go show that, although there is a dying declaration exculpating the appellants, there are other dying declarations, which have stood the test of their authenticity and reliability. Therefore, they will have to be accepted by accepting the prosecution case against the appellants. We, therefore, do not find any error said to have been committed by the Trial Court in convicting the appellants for causing murder of the deceased by sprinkling kerosene and setting her to fire.

17. So far as conviction u/s 304B read with Section 114 of the I.P.C. is concerned, that would also be covered by the foregoing discussion.

18. So far as conviction u/s 498A of the I.P.C. is concerned, we may rely on the evidence of the first informant, the father of the deceased, and the dying declaration as recorded by Police Inspector, Vachchani, which in detail deal with the aspect of demand of dowry and physical and mental harassment caused to the deceased by the appellants. We are of the view that the Trial Court cannot be said to have committed any error in convicting the appellants for this offence also. We do not find any reason to interfere with the judgment and order of the Trial Court in exercise of our appellate powers. The appeal, therefore, must fail and stands dismissed.