

(2015) 09 GUJ CK 0058

In the Gujarat High Court

Case No : Criminal Appeal Nos. 272 and 433 of 2011

Irfan

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 15-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374
Penal Code, 1860 (IPC) — Section 114, 300, 302, 307, 323

Citation : (2015) 09 GUJ CK 0058

Hon'ble Judges : Anant S. Dave, J; Z.K. Saiyed, J

Bench : Division Bench

Advocate : Rekha H. Kapadia, for the Appellant; Hardik Soni, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Z.K. Saiyed, J—Present appeals, filed under Section 374 of the Code of Criminal Procedure, 1973, are arising from the common judgment and order of conviction dated 29.1.2011 passed by the learned Third Additional Sessions Judge, Morbi, in Sessions Case No. 7 of 2010. Both are decided by this common judgment and order. The said case was registered against the appellant-original accused No. 2 in Criminal Appeal No. 272 of 2011 and appellants - original accused Nos. 1 and 3 in Criminal Appeal No. 433 of 2011, for the offences punishable under Sections 302, 323, 504 and 114 of the Indian Penal Code. The appellants were sentenced for life and to pay fine of Rs. 2,000/- each, in default, rigorous imprisonment for three months for the offence punishable under Sections 302 of the Indian Penal Code and no separate sentence is awarded for the offence punishable under Section 323, 504 and 114 of the Indian Penal Code.

2. According to the prosecution case, the deceased complainant was residing near the house of the accused persons and on 20.11.2009, at about 12:00 Hrs., in the noon, the son of the original accused No. 1 was passing urine in the rickshaw of the complainant, in turn, the complainant asked the accused No. 1 to

clean his rickshaw. Therefore, the accused No. 1 got excited and abused the complainant. Thereafter, after returning to home, the complainant showed the son of the accused, who was passing urine in rickshaw of the complainant and therefore, the complainant again told the accused about the same. At that time the accused No. 1 got excited and all the accused i.e. present appellants gave kick and fist blows to the complainant. The accused No. 3 caught hold of the complainant, the accused No. 2 poured kerosene on the complainant and the accused No. 1 ignited the complainant with matchstick knowing fully well that it may cause death of the complainant. On 20.11.2009, one ASI Mr. Jayendrasinh Zala was on duty at Rajkot Civil Hospital Police chowky on or around 12:00 p.m. to 8:00 p.m. and on the very day, at about 3:30 p.m., one case of burn injury was informed by the Doctor to him and therefore, said Mr. Zala went to burn ward and he prepared one yadi to the Executive Magistrate to record dying declaration and then he made entry and statement of deceased Zinnatben, wife of Husainbhai was recorded and he made entry at Sr. No. 15 on page 75 in MLC register. Said Mr. Zala recorded the statement of said Zinnatben at that time, she was totally conscious and she was able to speak properly. Said Zinnatben has disclosed the incident before the said ASI and said statement was recorded through his writer Jaysukhbhai and signature of said Zinnatben was obtained in the said statement. Then the yadi made to the Executive Magistrate, Mr. Rajnikant Rajguru, Executive Magistrate of Rajkot, and said Executive Magistrate went to the hospital, in burn ward and met to the Doctor and in the presence of Doctor, he recorded dying declaration of said Zinnatben and endorsement regarding consciousness of patient was made by the Doctor. He also found that at the time of recording of dying declaration, the said Zinnatben was found conscious. Thereafter, upon receipt of the information, PSI Mr. Sundarlal Amlani serving at Morbi City Police Station, went Rajkot Civil Hospital, where the deceased was referred from Morbi Hospital and the deceased disclosed entire incident in the form of complaint before said Mr. Amlani and signature of the deceased was also obtained. On 22.11.2009, recovery panchnama of cloths of victim was drawn. Thereafter, investigation was handed over to PSI Mr. Ashokkumar Pandya, Morbi City Police Station. Said Mr. Pandya registered the offence punishable under Sections 307, 323, 504 and 114 of the Indian Penal Code and panchnama - scene of offence, statements of witnesses, panchnama of injured person were drawn by one Head-Constable and the panchnama of arrest of the accused No. 1 and other accused were drawn by said Mr. Amlani and all other papers were tagged with the investigation papers. Thereafter, during the course of medical treatment, the injured had expired and so that inquest panchnama was drawn and the concerned Investigating Officer Mr. Pandya made report to the concerned court for addition of offence under Section 302 of the Indian Penal Code and the dead body was sent for Post Mortum and the recovered muddamal were sent to the FSL for analysis and thereafter, reports were collected. Then, the charge-sheet came to be filed against present appellants - accused before the Additional Chief Judicial Magistrate and as the case was sessions triable, the same was committed to the Court of Sessions.

3. Thereafter, charge came to be framed at Exhibit 10 and explained to the accused persons to which the accused persons pleaded not guilty and claimed to be tried.

4. To prove the case against the accused persons, the prosecution examined following witnesses:

5. The prosecution also produced following documentary evidence.

6. Thereafter, after filing closing pursis by the prosecution, further statements of accused persons under Section 313 of the Code of Criminal Procedure, 1973 were recorded. The accused persons have denied the case of the prosecution and submitted that a false case is filed against them by wrongly implicating in the commission of the alleged offence.

7. At the conclusion of trial and after appreciating the oral as well as documentary evidence and considering the submissions made by the learned advocates for the respective parties, the learned Sessions Judge vide impugned Judgment and order, convicted and sentenced the present appellants - accused by observing that dying declarations given by the deceased herself before the public servants are found to be trustworthy, reliable and acceptable and therefore, the appellants - accused were convicted and sentenced as stated above.

8. Being aggrieved by and dissatisfied with the said judgment and order of conviction dated 29.1.2011 passed by the learned Third Additional Sessions Judge, Morbi in Sessions Case No. 7 of 2010, the present appellants - accused have preferred the present Appeals before this Court.

9. Heard learned advocate Mr. Gondaliya appearing on behalf of the appellant - original accused Nos. 1 and 3 of Criminal Appeal No. 433 of 2011 and learned advocate Ms. Rekha Kapadia on behalf of the appellant of Criminal Appeal No. 272 of 2011 and Mr. H.S. Soni, learned APP for the respondent - State.

10. Learned advocate Mr. Gondaliya and Ms. Kapadia appearing on behalf of the respective appellants - accused submitted that the judgment and order passed by the learned Judge is contrary to law and evidence on record. He contended that the learned Judge has not properly appreciated oral as well as documentary evidence adduced by the parties in its proper perspective.

11. Learned advocate Mr. Gondaliya has contended that alteration as well as contradictions in the deposition of witnesses are not considered as per law. He has contended that the learned Judge has failed to consider that the burden to prove the offence rests on the prosecution and, therefore, it is the duty of the prosecution to prove the case by producing cogent, trustworthy and reliable evidence. He read the charge and submitted that in the present case, the prosecution is totally dependent upon so-called dying declarations recorded by the Executive Magistrate, ASI and PSI and they are not proved by the prosecution beyond reasonable doubt. He further submitted that the learned

Sessions Judge has not properly considered the defence version and the appellants are wrongly convicted for the alleged offence. He also submitted that even the place of offence is not clearly proved by the prosecution through the contents of the panchnama - scene of offence at Exhibit 33. He submitted that as per the panchnama Exhibit 33, the Investigating Officer has not recovered any burn articles and the tin of kerosene from the place of panchnama. He further submitted that as per the panchnama, the scene of offence was shown by one independent witness - Hasinaben but said Hasinaben, neighbour of the deceased, is not examined by the prosecution. He read the panchnama at Exhibit 34 of physical condition of the injured deceased and submitted that at para 1 of said Panchnama, it is disclosed that due to some reason, the deceased received burn injuries and she was referred for further treatment at Rajkot Government Hospital. He submitted that the cloths of the victim was produced by her husband Husainbhai and as per Yadi prepared by ASI, Hospital Police Chawky, Rajkot and the endorsement made by the Executive Magistrate and submitted that it create doubt about the time and date shown. He further submitted that the complaint which is recorded by the Police Sub-Inspector, Morbi city at Exhibit 45, in that case, time of registration made at bottom side creates sufficient doubt. He further submitted that before the Executive Magistrate, in the dying declaration, it is not disclosed by the victim herself that who had set her at fire. He further submitted that say of the complainant herself on the occasion of first incident when in the rickshaw, a child passed urine and that was told to the victim by the accused to wash out rickshaw and at that time, the accused got exited and the appellants accused came there and gave kick and fist blows to the victim and then the victim went to the school and when she came back from the school, again that child passed urine in her rickshaw. Again she told to the main accused to wash out rickshaw and at that time, all the appellants came to her house and the victim was beaten by them and poured kerosene on her and set her at fire and thereby, she received burn injuries, the story narrated by the complainant is not believable at all as in the case, there are two incidents. Learned advocate further submitted that the Executive Magistrate has committed grave error in recording dying declaration and the Executive Magistrate himself recorded the story, which was not given by the deceased at all and therefore, as per the submission of the learned advocate for the appellants, the contents of the dying declaration are concocted and fabricated and therefore, the dying declaration can not be said to be trustworthy and acceptable. He further submitted that the cause of death shown by expert Doctor is disclosed that septicemic shock due to burn found from the body of the deceased.

12. Learned advocate has further submitted that all the dying declarations, which are produced on record, are totally contradictory and they are not corroborated with the version of the witnesses recorded in this case. He also submitted that no independent witness is examined by the prosecution. He draw the attention from the place of panchnama and submitted that in the present case, presence of kerosene was found. He further read evidence of P.W. 1 and 2 and submitted

both the witnesses are relatives witnesses like husband and second is the father of the deceased and they have not disclosed any relevant facts in support of the case of the prosecution and they were declared hostile by the prosecution.

13. Learned advocate Mr. Gondaliya relied upon the decision of Ramilaben Hasmukhbhai Khristi and Another, Suleman Yakubhbhai Khristi Parmar and Dahyabhai Ashabhai Khristi Parmar and Others Vs. State of Gujarat, AIR 2002 SC 2996 : (2002) CriLJ 3917 : (2002) 3 Crimes 206 : (2002) 6 JT 54 : (2002) 5 SCALE 631 : (2002) 7 SCC 56 : (2002) 1 SCR 530 Supp : (2002) 2 UJ 1265 : (2002) AIRSCW 3334 : (2002) 5 Supreme 466 and submitted that in that case, the dying declarations of the deceased were not considered to be reliable and acceptable in absence of any other corroboration. He therefore, submitted that in the present case, the contents recorded in the dying declarations are not given by the deceased as the same are concocted and fabricated and there is no any corroborative evidence to establish dying declarations. Therefore, the principle laid down in the cited case is totally applicable to the case of the present appellants. He lastly submitted that considering the submissions advanced by him and the ratio laid down in the cited case, the impugned judgment and order may kindly be quashed and set aside in the interest of justice.

14. Learned advocate Ms. Kapadia appearing on behalf of the accused No. 2 read the charge and submitted that from the place of offence, no match box or match stick is recovered. She further submitted that the deceased was unable to speak after receiving burn injuries and therefore, the case of the prosecution cannot be said as believable. She also read the contents of panchnama for physical condition of the deceased and submitted that from the place of offence, nothing is recovered in support of the prosecution case. She also submitted that even the motive or intention on the part of the accused is not proved and there was no animosity of the accused with the deceased. The so called dying declarations are not established by the prosecution through any cogent evidence. She also submitted that there is no signature of panch Dayaben in the inquest panchnama and she was also not examined by the prosecution. She also submitted that the submissions advanced by the learned advocate Mr. Gondaliya should be considered for the accused No. 2 also. She therefore, prayed to allow present appeal by quashing and setting aside the impugned judgment and order.

15. As against, learned APP Mr. Soni for the respondent State supported the impugned judgment and order of conviction and sentence passed by the learned Sessions Judge. He submitted that the impugned judgment and order is not required to be interfered with by this Court. He read the charge at Exhibit 10 and submitted that from the contents of the charge, the alleged offence is proved by the prosecution against the accused. He further submitted that the evidence of P.W. 1 Husain Babubhai, husband of the deceased and P.W. 2 Mohammad Noor Mohammad Pinjara, father of deceased were declared hostile by the prosecution. He submitted that both these witnesses are from same locality and they were won over by the accused, but looking to the other evidence of witnesses

examined by the prosecution, the prosecution proved its case beyond reasonable doubt and produced cogent evidence. He drew the attention to the oral evidence of P.W. 3 Dr. Omkarnath Shrikrishnasinh Desai examined at Exhibit 18 and submitted that as per the certificate at Exhibit 19 and endorsement made on case papers at Exhibit 20 and 21, the Doctor has disclosed the injuries of the deceased. He further drew the attention to the evidence of P.W. 4 - Dr. Bipinbhai Jayantibahi Vidja examined at Exhibit 22, who had carried out post mortem and disclosed that the deceased received 36 to 40% burn injuries. He submitted that after receiving the burn injuries, the deceased was conscious and was in a fit condition to give her statement before the public servants. He also submitted that the ASI who was informed by the hospital, had visited the burn ward and after proper verification made by him regarding consciousness of the deceased, he recorded the statement of the victim as a public servant and independent witness at Exhibit 30. He further submitted that the Yadi was sent to the Executive Magistrate and the Executive Magistrate obtained certificate in form of endorsement from the concerned Doctor regarding consciousness of the deceased and in presence of Doctor, dying declaration was recorded by the him. He further submitted that the PSI P.W. 8 Sundarjibhai Chetanbhai Amlani examined at Exhibit 44, who obtained information from the Doctor and he registered the complaint of the deceased at Rajkot Civil Hospital and offence was registered against the accused. He also submitted that recovery of cloth of the accused, was sent to the FSL and on examination of cloth, it is disclosed that from the cloths of victim and accused, kerosene and presence of petroleum hydrocarbon were found. Learned APP further submitted that the deceased herself disclosed sufficient fact of incident before the ASI then PSI as well as before the Executive Magistrate in form of dying declarations and when the learned trial Judge found similar facts of incident from the statements recorded by the different public servants, learned trial Judge rightly considered the dying declarations and also rightly convicted the accused persons for the alleged offence. He further submitted that this is brutal murder in which innocent lady was victimized. He also submitted that on first occasion, the deceased was beaten by the accused with kick and fist blows and then on second incident, the accused entered into the house of the deceased and poured kerosene and set the deceased at fire. Therefore, the intention or motive on the part of the accused to commit brutal murder of the victim, is very clear and the conduct of the accused is very well proved by the prosecution by producing cogent evidence. He also submitted that the dying declarations recorded by the public servants are sufficient to prove the case against the accused. He drew attention to the letter of FSL Mobile and report which is submitted at Exhibit 42 shows that two cans were recovered with blue colour kerosene. Therefore, he submitted that considering his submissions, evidence on record and the impugned judgment and order, no lenient view can be taken in favour of the accused persons and the impugned judgment and order is required to be confirmed by dismissing the appeals.

16. Learned APP further relied on the case of Rakesh and Another Vs. State of Haryana, (2013) 4 AD 165 : (2013) 2 Crimes 250 : (2013) 8 JT 456 : (2013) 3 RCR(Criminal) 568 : (2013) 4 SCALE 607 : (2013) 4 SCC 69 . He therefore, submitted that in the present case, learned Sessions Judge has rightly relied upon the dying declaration as well as the complaint before the public servants and evidence of other independent witnesses and after appreciating the evidence in true perspective, convicted and sentenced the appellants by passing impugned judgment and order. Therefore, as per his submission, the impugned judgment and order is not required to be disturbed in any manner.

17. We have heard the learned counsel for the respective parties and perused the papers. We have gone through the impugned judgment and order passed by the learned Judge and oral as well as documentary evidence produced on the record. We have read the oral evidence of the prosecution witnesses and also perused the charge framed against the appellants. Here in this case, it appears from the record that the accused persons ran away from the place of incident and they were arrested after 3 days. We have also considered the conduct on the part of the accused persons because on the first occasion, the accused gave kick and fist blows to the deceased and then, the accused went to the house of the deceased, where they poured kerosene on her and set her at fire. From the overall evidence produced on record, it is prima facie proved beyond reasonable doubt that from the contents of the dying declarations, the main ingredients of Sections 300 and 302 of the Indian Penal Code are proved and the defence put by the accused therefore, cannot be considered in their favour. The submissions made by the learned advocates for the appellants that the prosecution proved its case on the basis of circumstantial evidence, is not sufficient to club the present appellants in the offence. But from the dying declarations which were recorded by the public servants i.e. ASI, Executive Magistrate and PSI before whom, the deceased disclosed entire occurrence of incident and it, is also proved that the deceased was mentally in fit condition to give her statement/dying declaration as per the endorsement of the concerned Doctor, it can be said that the prosecution has proved the case beyond reasonable doubt against the appellants. Even through the independent witness examined by the prosecution, the prosecution also proved the case against the appellants. Therefore, it cannot be that dying declarations and complaint recorded by the public servants are false and fabricated as the deceased herself disclosed in all three documents the entire incident and the manner in which the accused set her at fire and in result, she received burn injuries. Therefore, we are of the considered opinion that the trial Court has rightly convicted and sentenced the appellants for the offences as alleged considering evidence produced on record. Apart from that, learned advocates for the appellants is not in a position to show any evidence to take a contrary view in the matter or that the approach of the lower Court is vitiated by some manifest illegality or that the decision is perverse or that the lower Court has ignored the material evidence on record. Therefore, the present appeal lacks of merit.

18. In the result, both the appeals are dismissed. The impugned judgment and order of conviction dated 29.1.2011 rendered by the learned Additional Sessions Judge, Morbi, in Sessions Case No. 7 of 2010 convicting the appellants - accused persons is hereby confirmed. Record and proceedings, if any, be sent back to the trial Court concerned, forthwith.

FURTHER ORDER

At the time of pronouncement of the judgment, it was brought to our notice that the accused No. 1 - Rahemat Alias Suneraben, W/o. Samirsa Sahamdar is on bail during the pendency of the appeal and therefore, the said accused is hereby ordered to surrender before the concerned Jail Authority within a period of four weeks from today. Her bail bonds shall stand cancelled.