
(2010) 04 GUJ CK 0115
In the Gujarat High Court
Case No : Criminal Appeal No. 306 of 1989

Jayaben Thakkar	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 26-04-2010

Acts Referred:

Evidence Act, 1872 — Section 113, 32
Penal Code, 1860 (IPC) — Section 304, 304B, 498A

Citation : (2010) 04 GUJ CK 0115

Hon'ble Judges : Rajesh H Shukla, J

Bench : Single Bench

Advocate : A.D. Shah, for the Appellant; K.L. Pandya, Additional Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

H. Shukla, J.—The present application is directed against the judgment and order passed by the learned Additional Sessions Judge, Ahmedabad Rural, Mirzapur, Ahmedabad in Sessions Case No. 121/1988 dated 30.05.1989 regarding the conviction of the appellant accused for offences u/s 304B and 498A and also imposing sentence of simple imprisonment for 7 years for the offences u/s 304B and also simple imprisonment for offences u/s 498A and fine of Rs. 100/= in default and simple imprisonment for 15 days.

2. The case of the prosecution briefly summarised is that the deceased daughter of the complainant had married the son of the accused. As they had an affair, the marriage took place on 23.11.1987. However, as it was a marriage by the couple themselves, the appellant accused mother-in-law had a grievance. It is stated that she had been making demand for dowry and causing harassment and cruelty to the deceased. It is also alleged that the appellant accused is said to have insisted for dowry/jiyanu on the occasion of her delivery as she was pregnant and thereby had driven the accused to commit suicide on 11.08.1988 and the deceased committed suicide because of such harassment and cruelty.

Thus, as reflected in the charge at Exhibit 2, the charge was framed for the offences punishable u/s 304B as well as Section 498A. On the basis of the compliant given by the complainant father, the offence came to be registered as Accident Case No. 16/1988. After the investigation was over, the charge sheet was filed and the offences u/s 498A and 304B was filed and as the offences are triable by the Court of sessions, it was committed to the Court of the learned Additional Sessions Judge (Mirzapur) who framed the charges for the aforesaid offences.

3. In order to bring home the charges levelled the prosecution examined the witness and also produced the documentary evidence which shall be referred to in this judgment as and when necessary. After the recording of the evidence was over, the learned Additional Sessions Judge, Ahmedabad Rural at Mirzapur recorded further statement of the accused.

4. After hearing the learned APP as well as the learned Advocate for the defence, the learned Additional Sessions Judge, Ahmedabad Rural at Mirzapur recorded the conviction of the accused for the offences punishable u/s 304B and 498A and sentenced her as stated above.

5. It is this judgment and order which has been challenged on the ground that the learned Additional Sessions Judge has failed to appreciate the matter and evidence on record. It is also pointed out that there is no iota of evidence with regard to demand of dowry or cruelty. It is also contended that the learned Judge has erred in not considering the evidence of PW-2 Dr. Chatsingh Vajesingh Barad at Exhibit 8, wherein it is stated that the deceased was conscious and her dying declaration was recorded and the learned Judge has failed to appreciate this aspect in the dying declaration, wherein it is stated by the deceased that it was an accident. Therefore, the learned Judge had failed to consider the dying declaration - Exhibit 13 recorded by the Executive Magistrate wherein it is clearly stated that she caught fire while preparing the puri and thus has failed to appreciate the material and evidence on record. It is also contended that the Trial Court has erred in convicting the appellant u/s 304B of IPC inspite of clear and cogent evidence in the form of dying declaration which clearly states about the accidental death absolving the appellant from the charges of the alleged offences. Learned Senior Counsel, Mr. A.D. Shah referred to the testimony of the witnesses and particularly the testimony of the Executive Magistrate - P.W. 3 at Exhibit 11 and submitted that he clearly stated in his testimony that he had confirmed with the medical officer that the deceased was conscious and thereafter he had recorded the dying declaration. Learned Counsel Mr. Shah referred to the dying declaration at Exhibit 13 and submitted that as is evident from the dying declaration - Exhibit 13, the deceased has clearly stated that it was an accident where her saree caught fire when she was alone in the house. Mr. Shah submitted that it rules out the possibility of the suicide or homicidal death and this evidence is very material and reliable evidence which has been disregarded by the learned Additional Sessions Judge without any rime or

reason. Mr. Shah submitted that the testimony of the Executive Magistrate - PW-3 has been corroborated by the testimony of PW-2 Dr. Chatrsingh Vajesingh Barad and he has specifically stated in his testimony that he had opined that the deceased was conscious and in a fit state of condition to give such statement and thus has corroborated the testimony of Executive Magistrate. Therefore, if the deceased was conscious and in a fit condition to give statement then she has stated how the incident has occurred and when it is specifically stated about the accident, there is no reason to discard this evidence. Mr. Shah also referred to the testimony of the panch witness - PW-7 at Exhibit 26 and the panchnama of the scene of offence at Exhibit 27 states that it also corroborates other witnesses about the fact that she was preparing puri when the accident occurred.

6. Learned Counsel Mr. Shah referred to the testimony of PW-5 at Exhibit 24 and submitted that the prosecution has relied upon her testimony and letter at Exhibit 16 which is stated to be written to her has been emphasized by the prosecution and it has been heavily relied upon by the learned Sessions Judge. However, Mr. Shah referred to the testimony of PW-5 at Exhibit 24 and referred to the cross examination. He emphasized that she has admitted that what she has stated in the examination in chief with regard to the demand for dowry and the abuses or the harassment has not been stated by her in her statement before the Police. Learned Counsel Mr. Shah therefore, submitted that when she has admitted that she has not stated in her statement before the Police that on 25.06.1988, the deceased had returned to her parental house with regard to the quarrel for dowry and the fact that the accused is said to have stated that if the son was married in the caste, atleast 8-10 tolas of gold would have been given is not stated in her statement. Similarly, learned Mr. Shah submitted that much reliance which has been placed upon Letter - Exhibit 16 requires closer scrutiny as she has admitted that no other letter except this letter - Exhibit 16 has been received by her. Learned Counsel Mr. Shah also referred to the other two letters at Exhibit 18, 19 and he specifically submitted that as it is evident from letter - Exhibit 18 addressed to the parents, the parents were not happy with the marriage and inspite of that she had married on her own. Thereafter, the letter dated 08.03.1984 at Exhibit 19 addressed to the husband before marriage states about their affair and the involvement had resulted into marriage. He further submitted that in the letter at Exhibit 16 which is relied upon by the prosecution, she has specifically stated that the husband was supporting and it is only because of his support that she would try to bear the tantrums and abuses of the mother-in-law accused herein. Therefore, learned Counsel Mr. Shah submitted that in the background of this evidence, it is required to be considered whether the provisions of Section 304B and 498A would be attracted. He also referred to the judgment and submitted that the learned Judge has failed to appreciate and read the provisions of law when it has been specifically observed referring to the provisions of Section 304B and has observed that even if it is assumed that she has died accidentally then Section 304B provides that "any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her

marriage", the presumption would be attracted". Learned Counsel Mr. Shah therefore submitted that keeping aside this aspect and the evidence in the form of dying declaration, the learned Judge has committed error in interpreting the provisions of Section 304B that any burns or bodily injury caused otherwise in normal circumstances would attract Section 304B. Learned Counsel Mr. Shah therefore, submitted that offences u/s 304B and 498A are required to be established and unless the offences in accordance with law are established with sufficient material on evidence, the conviction cannot be sustained. He emphasized and submitted that in the facts of the present case, the learned Judge has committed error in referring to the presumption on the basis that even if it is an accidental death, but since it is a burn injury within seven years of marriage span, it would attract 304B. He therefore, submitted that the impugned judgment and order deserves to be quashed and set aside. In support of his submissions, learned Counsel Mr. Shah has referred and relied upon the the decision of the Hon"ble Apex Court rendered in Raman Kumar Vs. State of Punjab, and emphasized the observations made in paragraph 16 that the prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the "death occurring otherwise than in normal circumstances". He therefore submitted that this has not been appreciated at all by the lower Court and the judgment and order is erroneous. He also referred to the judgment of the Hon"ble Apex Court reported in Bhairon Singh Vs. State of Madhya Pradesh, and referred to the observations in Paragraph 2 which emphasizes that it is required to be considered that the death was neither homicidal or suicidal but accidental and no other evidence has been taken. He submitted that referring to the discussion about the admissibility of evidence u/s 32 that PW-5 though has stated in her testimony about the cruelty or the harassment and the letter at Exhibit 16 is said to have been written to her by the deceased then it is required to be appreciated that she has admitted in the cross examination and her improvisation is established by such cross examination. Similarly, the testimony of the other two witnesses, the complainant's father at Exhibit 14 as well the testimony of Sursingbhai Solanki PW-6 who is the uncle of the deceased and submitted that he has stated about the letter at Exhibit 16 written by the deceased corroborates the testimony of PW-4 the complainant's father at Exhibit 15. He has not stated with regard to any harassment and he has admitted in the cross examination that the complainant's father had not liked the deceased marrying on her own and in fact it is admitted by PW-4 complainant's father that they had not remained present. Learned Counsel Mr. Shah therefore, submitted that in the background of such circumstances, the possibility of over implication or false implication or abuses cannot be ruled out and therefore, the dying declaration which has been properly recorded could not have been ignored. Lastly he submitted that even if there is some evidence with regard to harassment that by itself would not be sufficient and the dying declaration - Exhibit 13 rules out possibility of suicide or homicidal death which is brushed by the learned Sessions Judge and thereby has committed a grave error. He submitted that the impugned judgment and order recording conviction

deserves to be set aside.

7. Learned APP Mr. K.L. Pandya referred to the testimony of PW-5 at Exhibit 24 and referred to the letter - Exhibit 16 which was addressed by the deceased to her. Referring to this aspect, learned APP submitted that as reflected in this letter and much corroborated by the testimony of this witness clearly suggests that she is close to the deceased and the deceased is said to have disclosed her agony before her. He further submitted that the deceased had married on her own and initially the parents were not happy and in such a situation when she is abused and harassed in the matrimonial house for demand of dowry, she has clearly stated that and it is reflected from testimony of these witnesses. He has further referred to the letter - Exhibit 16 and submitted that the deceased has stated in this letter that even when she is pregnant, the demand was made for the jyanu ceremony and she was under pressure how to comply with the demand. He therefore, submitted that in these circumstances, it cannot be said that the harassment was not caused to her. For that purpose learned APP referred to Section 304B and submitted that it provides that "where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage", it would attract the presumption and therefore the learned Judge was right in arriving at the conclusion as the death has occurred otherwise than the normal circumstances. He also referred to relied upon the other evidences and submitted that the testimony of PW-5 at Exhibit 24 is infact corroborated by PW-6, the uncle at Exhibit 25.

8. Learned APP Mr. Pandya submitted that the learned Additional Sessions Judge has discussed about the dying declaration and has rightly not relied upon the same and therefore, the judgment and order requires to be sustained.

9. In view of the rival submissions, it is required to be considered whether the impugned judgment and order calls for any interference or it could be sustained. From the scrutiny of the evidence as it transpires on one hand there is medical evidence supporting the dying declaration at Exhibit 13 and the testimony of the Executive Magistrate PW-3 at Exhibit 11 clearly states that he had verified with the Doctor / Medical Officer with regard to condition of deceased patient and thereafter had confirmed that the deceased was conscious, he proceeded to record the dying declaration at Exhibit 13. This testimony of PW-3 Executive Magistrate is corroborated by testimony of PW-2 Dr. Chatrsingh Vajesingh Barad at Exhibit 8 who has stated that his opinion was obtained before recording the dying declaration by the Executive Magistrate and he had given the opinion that the deceased was in a fit condition to give the dying declaration. Therefore, this dying declaration at Exhibit 13 suggests about the accidental death when the deceased is stated to have said that the incident occurred by accident.

10. This set of evidences is now required to be considered in the background of the other set of evidences particularly the testimony of PW-4 complainant's father at Exhibit 14, testimony of PW-5 Exhibit 24 - Jyotsanaben and testimony

of PW-6 uncle at Exhibit 25 and the letters at Exhibits 16, 18 and 19. Even this evidence on record is considered and taken at the face value in light of the testimony of the complainant's father at Exhibit 14 it clearly emerges that he has stated that after the marriage, they had invited and completed the formalities of dowry. He specifically stated that he had a doubt that the deceased has been burnt due to demand for dowry. The cross examination referred to the letter at Exhibit 18 addressed to the appellant where the appellant was not happy and whatever has been discussed in the judgment has to be found in the context of her agony that the parents did not like her to meet the man with whom she had an affair and ultimately, she married on her own without the consent of the parents. Thereafter, the fact that she was invited at house and there is further demand is a matter of evidence which is not supported by evidence except by a letter addressed by the deceased to PW-5 Jyotsanaben. The testimony of this witness PW-5 at Exhibit 24 refers to this aspect about the demand and deceased addressing a letter to her. She has stated that on 25.06.1988 she had come to her parental house and the deceased is stated to have said to her the the accused mother-in-law had been harassing for the demand for dowry that she has not brought sufficient dowry. She has also referred to the letter - Exhibit 16 and has stated that after the letter was received, she had gone to the uncle accompanied by her husband. However in the cross examination, she has admitted that in her statement before the Police, she has not stated about the demand by the accused stating that if her son had married in the caste, 8-10 tolas of gold atleast would have been received. She has also stated that she has not stated in her statement before the police about the harassment by the accused over dowry. Therefore, the submissions made by the learned Counsel Mr. Shah referring to the judgment of the Hon"ble Apex Court in Bhairon Singh Vs. State of Madhya Pradesh, is required to be considered on the aspect of admissibility of evidence. The submission made by learned Counsel that such evidence would not be admissible referring to the observations made in this judgment cannot be accepted. The discussion is to be found in Paragraph 11 with regard to the statement attributed to the deceased which could be used as an evidence. It has been discussed in this judgment in context of the facts of the case referring to Section 32 of the Evidence Act. In the present case, this is not the situation as it is to be considered with reference to Evidence Act and material and evidence on record. The facts in the present case are different inasmuch as the dying declaration - Exhibit 13 is recorded when she was in a fit state of condition to make such a statement. Therefore the testimony of the Executive Magistrate - PW-3 is corroborated by medical evidence in the form of testimony of Dr. Barad PW-2. Therefore, it was properly recorded wherein the deceased has stated that an accident had occurred, meaning thereby the accident rules out homicide or suicide. The prosecution has not brought on record even by suggesting to this witness raising doubt about the genuineness of the dying declaration. As it transpires from the evidence, not even a suggestion has been put to any of the witnesses to doubt about the genuineness or the manner of recording of the dying declaration. Therefore, when in such an event,

suggestion raising any doubt about the dying declaration, it could not have been easily brushed aside as the learned Sessions Judge has about the dying declaration merely made one observation that it was hurriedly recorded. It appears that the learned Judge has all throughout discussed the letter and testimony of PW-5 at Exhibit 24 in regard to demand of dowry. At the same time, the demand for dowry or the harassment has to find support from other independent witness and no independent witnesses like neighbours have been examined though the statements were recorded. Further it is also evident that the prosecution has not examined the other independent witness stating that they are not likely to support the prosecution's case as they had relations with the accused. It would suggest that the prosecution has not examined the other independent witness. Had the other independent witness been examined, something with regard to alleged demand and the harassment of the deceased would have been brought on record. The other evidence in the form of dying declaration - Exhibit 13, testimony of Executive Magistrate - PW-3 and corroborated by the medical officer - PW2 cannot be brushed aside. Further the complainant father as well as the uncle in their testimony have not referred to the very aspect on this demand for dowry. Further before the offences can be attracted, the ingredients have to be fulfilled. The provisions of Section 304 clearly provide that necessary ingredients have to be fulfilled and the word "dowry" would have the same meaning under the Dowry Prohibition Act. Therefore, the condition precedent for establishing the offence under this Section are required to be fulfilled:

- (i) the married woman had died otherwise other than normal circumstances;
- (ii) the said death was within seven years of her marriage and;
- (iii) the prosecution has established that there was cruelty and harassment in connection with demand for dowry soon before her death.

One of the main ingredients for such offence is that the deceased must have been subjected to cruelty and harassment in connection with the demand for dowry. In facts of the present case, admittedly the deceased had an affair and they had married voluntarily without the consent of the parents and therefore, there could be no scope for dowry. Assuming that there was the grievance of the accused mother in law which she persisted, then it is also required to be appreciated that when the deceased could marry inspite of the reluctance of the parents and as stated that she had all the support from the husband, can it be believed that she would be driven to commit suicide merely because of such demand or harassment by the accused mother-in-law. Moreover, this aspect would have to be considered in detail provided it was a case of suicide where it could have been appreciated that whether the deceased was driven to commit suicide, then in that case for offences u/s 304B and 498A it could have been relevant. However in facts of the present case, there is cogent evidence with regard to accidental death which rules out homicidal death or suicide. Useful reference can also be made to the judgment of the Hon'ble Apex Court by

learned Counsel Mr. Shah reported in Raman Kumar Vs. State of Punjab, wherein the Hon''ble Apex Court referring to this aspect has made the observations with regard to scope of Section 304 of IPC and the presumption u/s 113 of the Evidence Act in Paragraph 15 and 16 that the "prosecution has to rule out possibility of natural or accidental death so as to bring it within the purview of the "death occurring otherwise than in normal circumstances". Therefore, though the learned APP and the Sessions Judge has referred to Section 304B and has emphasized on this aspect that the death of a woman is caused by burn or bodily injury otherwise than a natural death within a span of seven years would attract presumption is misconceived such a death by itself would not attract the provisions of 304B and 498A unless it established that it is suicide and she was driven to commit suicide because of the harassment and cruelty. Further, it has to be established that such demand was made and the deceased died due to burn or other injuries otherwise under normal circumstances. It does not envisage that death caused by an accident otherwise it would lead to a situation that when the death has occurred even after accident or due to some illness, the presumption could be made that it was not a natural death. That cannot be the purpose and meaning and particularly when there is specific evidence with regard to the accidental death in the form of dying declaration at Exhibit 13 corroborated by other evidences. This evidence could not have been brushed aside. Therefore, from the evidences even when there is evidence or material with regard to accidental death, the theory of the prosecution with regard to alleged offence on the presumption that she was driven to suicide or there was a homicidal death is totally misconceived and cannot be accepted. One more aspect which is required to be considered is that the investigation also has not been proper as there are some lapses. Be that as it may, it would not in any way support or affect the prosecution's case. In the circumstances, the Court is of the opinion that the impugned judgment and order recording conviction of the appellant accused cannot be sustained and deserves to be quashed and set aside. Accordingly, the present appeal stands allowed and the impugned order and judgment of the learned Additional Sessions Judge, Ahmedabad Rural recording conviction of the appellant accused for the offences u/s 304B and 498A is hereby quashed and set aside. The bail bond shall stand cancelled. The accused is hereby set at liberty forthwith, if not required in connection with any other offence. Fine, if any to be refunded.