

(2006) 07 GUJ CK 0023
In the Gujarat High Court
Case No : Criminal Appeal No. 987 of 1998

Jayantibhai Ranchhodbhai Parmar

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 18-07-2006

Acts Referred:

Citation : (2006) 07 GUJ CK 0023

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

Bench : Division Bench

Advocate : R.S. Panjwani, for the Appellant; H.M. Prachchhak, APP, for the Respondent

Final Decision : Allowed

Judgement

A.L. Dave, J.—Present appeal arises out of a judgment and order rendered by learned Additional Sessions Judge, Baroda, in Sessions Case No. 31 of 1997, on 8th September, 1998. The appellant came to be tried and convicted for offence of murder of his wife-Ramila in an incident dated 25th December, 1996, which occurred at his house in Makarpura Zupadpatti, Jashodanagar Chhapra area, Vadodara, between 8.00 and 9.00 P.M. He is sentenced to undergo imprisonment for life and to pay a fine of Rs.500/- and, in default, to undergo rigorous imprisonment for two months.

2. The facts of the case are that the appellant was married to deceased-Ramila. It is alleged that the appellant was in habit of taking liquor, as a result of which, there were disputes between the spouses. It is alleged that on 25th December, 1996, around 8.00 to 9.00 P.M., when the deceased was resting on bed in the house, the appellant poured kerosene over her and set her to fire. The deceased sustained about 65 per cent burns of first and second degree over her body. The deceased ran to her brother-Thakorebhai's house, which is at a distance of about two and a half kilometres. Her brother then called his father-Purshottambhai and then took the deceased to hospital. The deceased was admitted to the hospital and police personnel posted at the hospital sent Yadi to the Police Station, at

about 3.30 A.M. on 26th December, 1996. Pursuant to the Yadi, the Police Officer reached the hospital and summoned the Executive Magistrate for recording dying declaration. Dying declaration of the deceased was recorded by the Executive Magistrate. The Investigating Officer also took the F.I.R. of the deceased and offence came to be registered, initially, for an offence of attempt to murder. The deceased, however, succumbed to the burns injury after six days on 1st January, 1997 and, therefore, the offence was registered for murder. The Investigating Agency collected evidence in the form of statements of witnesses and material from the place of incident and, ultimately, charge sheet came to be filed in the Court of learned Chief Judicial Magistrate, Vadodara. Since the offence was triable by a Court of Sessions, the case was committed to the Court of Sessions and Sessions Case No. 31 of 1997 came to be registered.

2.1 Charge was framed against the accused at Exhibit 2 for offence of murder. The appellant-accused pleaded not guilty to the charge and claimed to be tried.

2.2 The Trial Court, after considering the evidence, came to a conclusion that the prosecution was successful in establishing the charge against the accused-appellant and recorded conviction and awarded sentence as stated in the earlier part of this judgment. Against the conviction, the present appeal is preferred.

3. The appellant is represented by learned Advocate, Mr. Panjwani, and the State is represented by learned Additional Public Prosecutor, Mr. Prachchhak.

4. Learned Advocate, Mr. Panjwani, submitted that the evidence before the Trial Court is in the form of deposition of witnesses, dying declarations, Panchnama and medical evidence. He submitted that all witnesses of the prosecution except the doctors and the police witnesses have not supported the prosecution case and have been declared hostile to the prosecution. Mr. Panjwani submitted that the Trial Court has recorded conviction on the basis of the dying declaration before the Executive Magistrate, the dying declaration in the form of F. I. R. and the circumstances like find of pieces of clothes of the deceased containing kerosene residue from the house of the appellant. Mr. Panjwani submitted that the dying declaration before the Executive Magistrate and the F. I. R. would be rendered doubtful firstly for the reason that, though the deceased was educated, thumb impression is taken on both the dying declaration and the F. I. R. The factum of the deceased being educated is proved through defence witness No. 2, who is a personnel from the bank, with which bank the deceased had an account, which she used to operate herself under her signature. The specimen signature card, etc. are produced on record. Mr. Panjwani submitted that the close relatives, including brother and father of the deceased, have stated that the deceased had become unconscious at their home only and never regained consciousness thereafter till she died. This aspect would render recording of dying declaration by the Executive Magistrate and recording of F. I. R. by the police an impossibility. Mr. Panjwani also submitted that, as per the prosecution case, the deceased, after she was set ablaze, ran to her brother-Thakorbbhai's house. It has come on evidence that the distance is about two and a half

kilometres. Mr. Panjwani submitted that the doctor has opined that a patient with such burns can run upto half a kilometre. Apart from this, Mr. Panjwani submitted that the deceased, for going to her brother's house, was required to pass through populated area, but no witness has ever come who could have noticed the deceased going from her place to her brother's house in a burnt and clotheless condition. It is also pointed out that the deceased reached her brother's place at about 1.30 A.M. on 26th December, 1996. If the incident had occurred at about 8.00 to 9.00 P.M., the question would be where was the deceased till 1.30 A.M. and, therefore, whether the deceased sustained burns, as it is alleged, is also doubtful. Mr. Panjwani submitted further that the history recorded by the doctor also becomes doubtful in light of the fact that the deceased had become unconscious before she was taken to the hospital and remained unconscious till she died, as per the evidence of brother and father of the deceased. It also appears that the case papers do not contain an endorsement that the history was given by the deceased herself. It has come in evidence of Thakorbbhai, the first informant, that he had given the history to the doctor and that history was given on a suspicion. He also says that the details were given by him only on the basis of suspicion. There are conflicting versions emerging from the evidence as to the time of the incident, which has not been explained by the prosecution.

4.1 Mr. Panjwani submitted that all the above defects have not been properly appreciated by the Trial Court and conviction is founded in neglect of these defects in the prosecution case. He, therefore, submitted that the appeal may be allowed.

5. The appeal is opposed to by learned Additional Public Prosecutor, Mr. Prachchhak. According to him, a dying declaration can be the sole basis of conviction, as per the law settled by the Apex Court in several decisions. Mr. Prachchhak submitted that the Executive Magistrate is an independent person. He has no reason to falsely implicate the appellant by manipulating the dying declaration and the Trial Court was, therefore, justified in founding the conviction on dying declaration.

6. Mr. Prachchhak submitted that the F.S.L. report, if examined, would indicate that the pieces of clothes of the deceased found from the place of incident did contain residue of kerosene and, therefore, it is a strong circumstance which would go to show that the incident occurred at the place of the appellant. Mr. Prachchhak submitted that the appeal, therefore, may be dismissed.

7. We have considered rival side contentions and have examined the record and proceedings in light of these contentions. We notice that the prosecution has examined Purshottam Madhavanbhai, at Exhibit 8. He is the father of the deceased. He has turned hostile to the prosecution. During cross-examination, he states that his daughter came to his son's house and was almost unconscious. He says that when she was taken to hospital, she was unconscious. The police has not recorded any statement of the deceased in his presence. He

says that, he remained with his daughter till she passed away.

7.1 Next witness is Parvatiben Purshottambhai, mother of he deceased. She also does not support the prosecution case and has been declared hostile.

7.2 Witness-Thakorbhai Purshottambhai is examined at Exhibit 10. He is the brother of the deceased and he also does not support the prosecution case and he is declared hostile. He says that, he suspected his brother-in-law, i.e. the appellant, because his sister had sustained burns. Otherwise, the relations between his sister (deceased) and his brother-in-law (the appellant) were good. During cross-examination, he states that his sister had an account with Makarpura Industrial Estate Co-operative Bank Limited. She was serving with the bank for some time and then she left the job. He says that his sister was educated and used to put her signature. He also says that when his sister was taken to hospital, she was unconscious. He had taken out the medical case papers. He also says that the history was given by him, on the basis of suspicion. He says that his sister remained unconscious till she died.

7.3 Witness-Ushaben Anilbhai is examined at Exhibit 13. She is the neighbour of the appellant and we find that she does not support the prosecution case and is declared hostile. Similar is the case with witness, Nathabhai Ishwarbhai Vasava (Exhibit 14), who is the Panch Witness of the place of incident. Incidentally, the second witness has not been examined by the prosecution. P.W.8-Gordhanbhai Ranchhodbhai (Exhibit 20) has also chosen not to support the prosecution case and is declared hostile to the prosecution case. Likewise, Shantaben Natubhai Ishwarbhai (Exhibit 22) has also been declared hostile. Shantaben is a Panch Witness.

7.4 It is, thus, clear that the deposition of these witnesses does not support the prosecution version. On the contrary, the deposition of Purshottambhai and Thakorbhai damages the prosecution case to the extent that they say that the deceased was educated and used to operate bank account. The Executive Magistrate and the Police Officer both have taken thumb impression of the deceased in the dying declaration and the F.I.R., respectively. Deposition of these witnesses also indicates that the deceased had become unconscious before she went to the hospital and remained unconscious till she died. These witnesses are none else than close relatives of the deceased. They remained with the deceased constantly till she passed away. This version of these witnesses would render the recording of dying declaration by the Executive Magistrate as well as recording of F. I. R. by the Investigating Officer doubtful.

8. However, before rejecting the dying declaration recorded by the Executive Magistrate on account of this evidence, it would be better to examine the other pieces of evidence.

8.1 The Executive Magistrate-Ratnabhai Dahyabhai is examined at Exhibit 16. It transpires from his deposition that he received a Yadi containing an endorsement that the patient was conscious. He went to the hospital and inquired from the

doctor as to whether the deceased was conscious or not and the doctor said that she was conscious. Then he recorded the dying declaration. He gives the details of the contents of the dying declaration and then states that, as her right hand was badly burnt, he took left hand thumb impression of the deceased.

8.1.1 During cross-examination, the witness asserts that he had inquired of the deceased as to whether she is educated or not and he was told that she is illiterate and then he took the thumb impression. He states during cross-examination further that, when he went to record the dying declaration, he noticed that the deceased was surrounded by her relatives.

8.2 Deposition of this witness will have to be seen in light of deposition of P.W.3-Thakorbhai Purshottambhai, brother of the deceased. He, in terms, says that his sister was educated, she had a bank account and she used to operate the said account. This aspect is proved by the defence by examining defence witness No. 2-Hemendrakumar Satischandra Purohit, who is an employee of the bank. He says that the deceased had an account with the bank and produces specimen signature card and other documents in support of his say.

8.3 If this is the position, the Court has to respect a contemporaneous material maintained by a bank in ordinary course of business, at a point of time when nobody could have anticipated such an incident. The deceased would have no reason to tell a falsehood that she is illiterate. The version of the Executive Magistrate that he had asked the deceased about her educational status and that she told him that she is uneducated, therefore, reels under the weight of doubt.

8.4 The First Information Report also would suffer from the doubt from which the dying declaration suffers.

9. The prosecution case suffers from several other lacunae.

9.1 It has emerged from medical evidence that the deceased sustained about 65% burns of first and second degree. The doctor says that the deceased, in such a condition, could have run for about half a kilometre. It has also come on evidence that the house of Thakorbhai, brother of the deceased, is located at a distance of about two and a half kilometres from the place of incident and it is the case of the prosecution that the deceased ran from her place to the house of Thakorbhai after sustaining burns injury. This theory becomes doubtful not only from what is stated by the doctor, as discussed above, but also from the fact that, as per the prosecution case, when the deceased reached the house of Thakorbhai, she was in a clotheless condition and the prosecution has not been able to bring any independent witness who would vouch about this aspect. This situation, in a city like Vadodara, is difficult to be accepted.

9.2 There is another aspect which affects the prosecution case. It is regarding the time of the incident. At various stages, the time of the incident fluctuates from 8.00 P.M. on 25th December, 1996 to 0.30 hours on 26th December, 1996.

9.3 It has come on evidence that the deceased reached the house of Thakorbhai

at about 1.30 hours 26th December, 1996. If the incident occurred around 8.00 and 9.00 P.M., where was the deceased for three and a half hours and that too without being noticed by any independent person is a question that has remained unanswered and unexplained.

9.4 After the deceased reached the place of Thakorbhai, she was taken to hospital after Purshottambhai was summoned. But it has come on evidence that the deceased reached the hospital at 3.30 A.M. on 26th December, 1996. The time lag between 1.30 A.M. and 3.30 A.M. is also not explained.

9.5 The prosecution has relied on the history given to the doctor, which is recorded in the case paper, which is at Exhibit 26. The doctor has recorded history of burns by kerosene and flame by her husband. According to the doctor, the history was given by the deceased, but that version of the doctor is founded only on his memory, as the case paper does not contain any note to indicate that the history was given by the deceased. Against that, brother and father of the deceased have said that the deceased was unconscious when she was taken to hospital. The brother has gone to the length of saying that because he saw his sister in a burnt condition, he suspected his brother-in-law, i.e. the appellant, because he was in the habit of taking liquor, resulting into quarrels between the spouses. He, in terms, has stated that he gave history to the doctor and gave this version only out of suspicion.

10. From the above evidence, it is clear that the prosecution case suffers from large number of defects. We also notice that, apart from the above defects, even the trial is founded on a charge which is vague and not specific, which would certainly cause prejudice to the accused.

11. In light of above discussion, we are of the view that the prosecution case against the appellant suffers from a large number of defects. It is true that, as per settled proposition of law, conviction can be founded solely on the basis of dying declaration, but it is also settled proposition of law that the dying declaration is like any other piece of evidence and the court has to examine it like any other piece of evidence. Since the maker of dying declaration would not be available for cross-examination, this evidence would call for a closer scrutiny and only if it inspires confidence after such scrutiny, the Court may found conviction on the basis of such a dying declaration. But for doing that, the Court will have to test the dying declaration on surrounding circumstances and by applying this test. We find that the dying declaration in the form of F. I. R. as well as dying declaration before the Executive Magistrate suffer from vital defects which would be fatal to the prosecution case. The Trial Court appears to have overlooked these aspects while recording conviction. We are, therefore, of the view that the appeal merits acceptance. The conviction cannot be sustained and deserves to be set aside.

12. In the result, the appeal is allowed. The judgment and order of conviction and sentence rendered by the Trial Court is set aside. The appellant is acquitted

of all the charges framed against him and is ordered to be set at liberty forthwith, if not required in any other case. Fine, if paid, shall be refunded to the appellant.