

(2013) 12 GUJ CK 0079
In the Gujarat High Court
Case No : Criminal Appeal No. 1190 of 2010

Jayendrasingh Jayubha Gajubha Jadeja	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 13-12-2013

Acts Referred:

Citation : (2013) 12 GUJ CK 0079

Hon'ble Judges : K.S. Jhaveri, J;K.J. Thaker, J

Bench : Division Bench

Advocate : Mihir H. Pathak, for the Appellant; C.M. Shah, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

K.J. Thaker, J.—The appellant was inter alia sentenced to life imprisonment by impugned judgement and order dated 30.07.2008 passed by the Additional Sessions Judge, Rajkot in Sessions Case No. 55 of 2007 for the offence punishable u/s 302 of IPC. Being aggrieved by the said conviction and sentence, the appellant has preferred the present appeal. As per the prosecution case, on 16.03.2007, the complainant and his brother was sleeping in a room adjacent to the one in which his parents (deceased and accused) were sleeping. At around 01.30 am at midnight, the complainant heard a wail by his mother and woke up. He awakened his brother and they both knocked on the door of the room in which their parents were sleeping. It is the case of the prosecution that as the door was not being opened, the complainant's brother tried to climb the roof of the house to peep inside the room but by then the deceased opened the door and walked out of the room pushing the complainant and saying that he is going to die. The complainant went inside the room only to find the deceased lying in a pool of blood with stab wounds over her body. The complainant immediately grabbed the deceased in his arms and asked his younger brother to inform their relatives. Thereafter, the relatives arrived at the scene of offence and the deceased was taken to hospital where she was declared as brought dead.

1.1 It is the say of the complainant that there used to be frequent fights between the deceased and the accused as the accused had returned home after being dismissed from SRP service and he had taken into liquor and gambling. It is the say of the complainant that the deceased used to counsel the accused for improving himself which led to frequent quarrels between them. It is further the say of the complainant that the deceased had gone to her parental house but the accused pacified and had brought her home two days prior to the date of incident.

1.2 Thereafter, panchnamas were drawn and investigation was carried out and during the course of investigation, the appellant was apprehended. A chargesheet was submitted against the appellant. Thereafter, as the case was exclusively triable by the Sessions Court, the same was committed to the Sessions Court.

1.3 The trial was initiated against the appellant and during the course of trial the prosecution examined following witnesses whose evidence have been read before us:

1.4 The prosecution also relied upon the following documents as documentary evidences which have been perused by us:

1.5 At the end of trial after recording the statement of the accused and hearing arguments on behalf of prosecution and the defence, the learned Additional Sessions Judge convicted the appellant of the charges leveled against him by the impugned judgement and order. Being aggrieved by and dissatisfied with the aforesaid judgement and order passed by the Sessions Court the appellant has preferred the present appeal.

2. Mr. Mihir Pathak, learned advocate appearing for the appellant has erred in not appreciating the fact of the case that there was no independent eye witness to the alleged incident who could have proved the case of the complainant as well as prosecution beyond reasonable doubt. He submitted that the sons of the accused did not see him hitting or killing the deceased and that the role of the accused in the incident was not proved by the prosecution beyond reasonable doubt.

2.1 In the alternative, Mr. Pathak further submitted that even if the case of the prosecution is accepted, this Court may consider that the accused had not intention in doing away the deceased and that the entire episode took place in a spur of moment. He submitted that the doctor in his deposition has stated that had the victim been brought to hospital in time, she would have survived the incident and therefore, he has contended that the case of the appellant may be considered u/s 304 (Part I) of Indian Penal Code rather than that u/s 302 of Indian Penal Code.

2.2 Mr. Pathak submitted that it is an admitted position that the appellant was not available at the scene of offence but then he had instructed his children to take the deceased to hospital and therefore the case of the appellant may be

considered u/s 304 (Part I) as a husband would have no intention to do away with his wife.

3. Ms. C.M. Shah, learned APP, however, submitted that the trial court has given cogent reasons for sustaining the conviction u/s 302 of Indian Penal Code and this court may not interfere in this appeal. She stated that the trial court has based the conviction not only on the evidence of witnesses but also considered entire circumstances of the case and the facts which are proved by cogent evidence. She has drawn the attention of this Court to the statements of P.W. 8 & P.W. 10 who have supported the contents of the FIR and the conduct of the accused. She has submitted that in view of the post mortem report and the cause of death, the possibility of accidental death is clearly ruled out. She contended that no benefit of doubt is required to be given to the accused. She submitted that looking to the number of injuries and the brutality in which the deceased was killed, the accused deserves no mercy from this Court.

4. Before adverting the merits of the case, this court is moved by the crude and barbaric action of the accused in giving 27 blows to the deceased who was his wife while she was sleeping at night and then fleeing from the place of offence and now taking the plea that the doctor had in his opinion submitted and opined that had she been taken to hospital in time, she would have survived and that the accused had no intention would not be justified.

5. The post mortem report at Ex. 17 speaks volumes about the nature of injuries sustained by the deceased. Column No. 17 reads as under:

(1) Incised wound, elliptical in shape 5 cm x 1 cm x scalp deep transversely over middle of Rt. frontal region of scalp.

(2) I.W 2 cm x 1 cm x scalp deep over forehead in midline vertically near hair line.

(3) I.W 5 cm x 1 cm x scalp deep over Lt. Cheek.

(4) Superficial I.W 1/2 cm x 1/4 cm obliquely over Rt. side of forehead.

(5) Superficial I.W 1 cm x 1/4 cm obliquely Lt. Side of forehead.

(6) I.W 5 cm x 1/2 cm x cavity deep transversely below external end of Lt. Clavicle in 1st intercostal space.

(7), (8), (9) Three I.Ws over body of sternum area each 1 cm x 1/4 cm x skin deep obliquely

(10) I.W 1 cm x 1/4 cm x skin deep over Rt. infraclavicular region of chest near medial end of clavicle transverse.

(11) I.W 1 cm x 1/4 cm x skin deep obliquely over Rt. upper & medial of breast.

(12) Superficial linear I.W 1 cm long over Rt. breast near injury No. 11.

(13) I.W 1.5 cm x 1/2 cm x skin deep vertically over medial side of Rt. thigh about 6 cm below external genitals.

(14) I.W 1.5 cm x 1/2 cm x skin deep vertically over lower third of lateral side of Rt. upper arm.

(15) I.W 1 cm x 1/2 cm x skin deep over Rt. hand dorsum over head of 3rd metacarpal bone.

(16) Superficial I.W linear 1 cm long transversely over upper part of medial border of Lt. Hand.

(17) (18) Two I.Ws 1 cm x 1/2 cm x skin deep each over Lt gluteal region, upper and outer part 3 cm apart.

(19) I.W 1 cm x 1/2 cm x skin deep each over LT. Gluteal region lower of outer part obliquely.

(20) I.W 1 cm x 1/2 cm x skin deep obliquely over Lt. Scapular region of back of chest.

(21) (22) (23) Three superficial I.Ws 1 cm long each over lower part of back of Lt. Chest wall near each other.

(24) Linear superficial I.W. 7 cm long obliquely over Rt. lower chest on back.

(25) I.W 1/2 cm x 1/2 cm x skin deep vertically over back of chest in midline over 3rd thoracic spine.

(26) I.W 1/2 cm x skin deep over back of Rt. shoulder vertically near axillary fold.

(27) Linear superficial I.W 3 cm long obliquely over back of rt. Upper arm near axilla.

- Clotted blood surrounding above wounds seen.

- Wounds No. (6), (7), (8), (9), (10) & (11) have slight ragged margins or angles all others have sharp cut margins of angles.

5.1 P.W. 1 Dr. Rajendra Pandya is the medical officer who conducted the autopsy of the dead body of deceased. This witness vide his deposition at Ex. 16 has stated that there was a small sharp cut puncture wound on the pericardium of the outer portion of heart. He has stated that there was no fracture of any kind on any part of the body. This witness has mentioned the cause of death to be hemorrhagic shock on account of multiple incise wounds at hemopericardium. He has further stated that the injuries sustained by the deceased were sufficient in normal course to cause death of deceased. He has stated that the death occurred approximately around 12 hours prior to the beginning of post mortem.

5.2 P.W. 3, P.W. 4 & P.W. 5 are the panch witnesses who have supported the panchnama and identified their signatures. P.W. 6 & P.W. 7 are the panch witnesses who have not supported the panchnama. These two witnesses have

been declared hostile by the trial court.

5.3 P.W. 8 - Hardeep Jadeja is the son of deceased and accused and was aged around 19 years during the trial. He is a crucial witness in the present case. This witness has deposed that on the date of incident i.e. on 16.03.2007, when he was asleep at around 01.30 to 02.00 am he heard screams of his mother and that she was shouting his name. This witness has stated that he rushed to the nearby room where his mother was sleeping and saw that the door was closed. By this time his brother also woke up and came there. The door was closed from inside and therefore they could not open it and therefore the brother of this witness tried to climb the roof.

5.4 P.W. 8 has further stated that in the meantime, his father opened the door and pushing him aside ran away. He has further stated that when he went inside the room, he saw his mother lying in a pool of blood. This witness has further stated that he thereafter sent his younger brother to call for his relatives. Thereafter, as soon as the relatives reached there, the deceased was taken to hospital where she was declared brought dead. This witness has categorically stated in his deposition that when he entered the room in which the dead body was lying he saw the mattresses full of blood and two screw drivers lying nearby.

5.5 P.W. 8 has also deposed that during the period when the incident happened his father did not have a regular source of income and that he was in the habit of consuming liquor. This witness has further stated that his father used to frequently quarrel with his mother when she would try to mend his ways. He has stated that his father also used to assault his mother as a result of which she had left the house around six months back and thereafter his father had pacified with her and had brought her home.

5.6 P.W. 10 - Yogirajsingh Jadeja is also the son of the deceased and accused and was around 18 years of age during the trial. This witness has supported the averments made by P.W. 8 in his deposition. This witness has stated that on 16.03.2007, at around 01.30 to 02.00 am he heard his mother screaming from the nearby room in which she was sleeping. He has stated that he reached the room and saw that his brother was already at the door and was trying to bang upon it. He also joined in doing so but to no avail. Thereafter this witness climbed the roof and tried to shift a roof tile. This witness has stated that when he removed a roof tile he saw that his father had a screw driver in his hand and that his mother was lying down in a pool of blood. This witness has further stated that his father opened the door of the room and ran away pushing aside his brother. Thereafter his brother ran into the room and took his mother in his arms and asked this witness to inform the relatives. This witness has stated that thereafter his mother was taken to hospital but she was declared as brought dead by the authorities.

5.7 P.W. 10 has further deposed that his father had been dismissed from S.R.P. service and was unemployed. He has stated that his father was always in the

habit of consuming liquor and fighting with his mother - deceased. This witness has further stated that the accused frequently used to assault his mother. This witness has deposed that he saw two screw drivers in the room and that there was blood spilled over the walls of the room.

6. It goes without saying that love of a child for a parent is far beyond explanation. The sons of the deceased and accused under no circumstances can be imagined to falsely implicate their father as is in the present case. No motive surfaces from the facts and circumstances of the case which establishes that the children have falsely deposed against their own father. In fact they clearly described the way the crime was committed by their father and the turn of events of hearing the screams of the mother, the door being locked, trying to climb up the roof, the father fleeing away from the scene of incidence. The fact that the accused was absconding after the alleged incident also speaks volumes about his conduct.

7. The versions of these witnesses is also supported by the medical evidence which cannot be lost sight of. We are of the opinion that this is clearly a case of culpable homicide. A contention is raised by learned advocate for the appellant that there was no intention or motive for the alleged offence. We are of the view that this contention is not worth much consideration inasmuch as it is clear that the appellant -accused was out of job, was into the habit of consuming liquor and picking up quarrels with his wife - deceased, frequently assaulting his wife. Such a brutal assault resulted into death of the victim on the day of incident.

8. The panchnama of the scene of offence supports the evidence of the witnesses. There were blood stains found from the mattresses, pillow covers, napkin found from the scene of offence. The panchnama states that it is borne out that the roof tile has been tried to be opened up. Broken bangle pieces have also been found from the room. Two screw drivers were also found from the room and they were found to have blood stains on them. Blood stains were also found from the wall between two windows of the room and also beneath a chair which was lying in the room.

9. A reference may be made to the decision of the Apex Court in the case of Raj Kumar Prasad Tamarkar Vs. State of Bihar and Another, Para 38 thereof reads as under:

38. It was argued that if the respondent intended to kill the deceased, he could have done after 17.07.1996, viz., after Bidai ceremony took place. The very fact that the respondent brought a revolver is itself a pointer to the fact that he wanted to kill the deceased at one point of time or the other. He might have thought that Bidai ceremony would be held on 13.07.1996 or 14.07.1996. When it was postponed, he might have found out an occasion to kill her. Under what circumstances, the occurrence took place is not known. Respondent, it would bear repetition to state, did not open his mouth. He was entitled to exercise the right of silence. That he did not offer any explanation itself may not be sufficient

to conclusively hold that he was guilty of commission of the offence, but the legal position that the same would be considered to be a circumstance against him is not in dispute.

9.1 Similarly, in the case of Trimukh Maroti Kirkan Vs. State of Maharashtra, reads as under:

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

10. Even if it is assumed that the assault happened at the spur of moment, the fact that the appellant-accused continued assaulting the victim and inflicted about 27 injuries on her cannot be overlooked or disregarded. Moreover, he did not seek any medical help or take the victim to a hospital after the assault shows that he was not at all interested in safeguarding the health of the victim and had left her on her own. Such a neglect on the part of the appellant-accused cannot be appreciated.

11. The contention of learned advocate for the appellant that the appellant had infact asked his son to take the victim to the hospital cannot be accepted for even a minute inasmuch as the appellant cannot take shelter of this statement made to his son after committing such a brutal act in inflicting 27 injuries on his own wife and then fleeing away from the scene of incidence without showing any remorse.

12. Looking to the evidence of witnesses, the panchnama and the post mortem notes, the injuries sustained by the deceased, we are of the considered view that the offence committed by the appellant-accused is quite brutal in nature and the same can in no way be considered u/s 304(I) or (II) of the IPC. It appears from the record that the learned Sessions Judge noticed the vital aspects of the case while holding that the prosecution had proved the actual assault by the appellant-accused. The prosecution has been able to prove the case against the appellant-accused and therefore we see no reason to interfere.

13. The plain answer to all the submissions made by learned advocate for the appellant is in the negative. Heavy reliance has been placed on the decision of this very Bench in the case of Mansurbhai Rambhai Bhua and Others Vs. State of Gujarat, and Virappa s/o Hanumantappa v. State of Gujarat reported in (2013) 3 GLR 2401 but the same shall not enure for the benefit of the accused.

13.1 This Court in the case of Mansurbhai Bhua (supra) considered the fact that there was a single blow on the victim, no motive surfaced and the fact that the deceased did not die on the spot but after some days of hospitalisation and accordingly converted the conviction of the accused therein from section 302 to section 304 Part-I of Indian Penal Code. Similarly, in the case of Virappa (supra) considered the fact that the accused actuated a grudge and there was a single blow and absence of motive to kill deceased and accordingly converted the conviction from section 302 to section 304 Part-I of Indian Penal Code. In the instant case, leave apart single blow, there are around 27 injuries on the body of the victim which shows the brutality of the offence.

14. In the case of Lashuben Chemabhai Chaudhary v. State of Gujarat reported in 2013(2) GLH 706, this Court has observed as under:

13. We have already discussed above that the action of the accused in pushing the deceased in the fire of a hearth was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record, it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our view, the case cannot be said to be covered under Clause Fourthly of Section 300 IPC, however, the case of the appellant is covered u/s 304, Part-II IPC. Clause (4) to Section 300 reads as under:--

300. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or -

2ndly xxxx

3rdly xxxx

4thly.--If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

This clause covers class of cases which are very dangerous in themselves and the act is done with the knowledge that it must in all probability cause death or such bodily injury as is likely to cause death and despite such knowledge, the act is done without any excuse. In other words, provisions of this clause are required to be attracted only when the offender knows that his act is so imminently dangerous that it would in all probability cause death or atleast such bodily injury which is likely to cause death. Such knowledge on the part of the accused must be of highest degree of probability. It is also a well known fact that the clause 4thly is designed to provide for that class of cases where the acts resulting in death are calculated to put lives of many persons in jeopardy without being aimed at any one in particular and perpetrated with full consciousness of the probable consequence, as can be seen from illustration (d) of Section 300 of the

IPC. Under clause (4) the degree of probability or likelihood of the act resulting in fatal harm is required to be of highest level. This can be gathered from the clear wording of the clause (4), namely, "If the person committing the act knows that it is so imminently dangerous that it must, in all probability cause death...." For applicability of this clause following are the necessary requirements:--

- (1) the act must be imminently dangerous;
- (2) the act must be of extraordinary recklessness;
- (3) the danger to human life must be so imminent; and
- (5) the imminence should be such that it will in all probability cause death or cause such bodily injury as is likely to cause death.

The word "imminently" implies a risk which is both threatening and near. The question whether an act is imminently dangerous depends upon nature of the act and its evident risk to human life. The danger threatened must be to human life. It must be an act in which death of human is certain or almost so, and it would cause surprise if the result was otherwise. Moreover, the danger must not only be of certain or almost certain death, but of a death which is near and may be counted by days or may be hours. Thus, it can be seen that unlike the preceding three clauses of Section 300 clause (4) revolves round the knowledge of the accused and intention of the accused is of no relevance to attract provisions of this clause.

14. We may, therefore, at this juncture refer to the provisions of Section 299 of the IPC and in particular the last part of that section and examine the said provisions vis-?-vis clause (4) of section as both these provisions are totally based on the knowledge of the offender of the consequences of his act. Section 299 of the IPC deals with culpable homicide. It reads as under:--

Whoever causes death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

14.1 In the case of *Sadanad Venkatdri Tumma Vs. State of Gujarat*, this court considering the fact that the accused had inflicted around 11 injuries on the deceased and keeping grudge in mind, sustained the conviction of the accused therein u/s 302 of Indian Penal Code.

15. On the touchstones of the judgments hereinabove we are unable to persuade ourselves that the case of the appellant requires to be dealt with leniently. The motive behind the alleged offence shall fall into insignificance once it is established that the accused was the perpetrator of the murder. It would be relevant for us to revert to the provisions of Section 299 of Indian Penal Code. A comparative table of Section 299 and Section 300 has been aptly given in the book of Indian Penal Code by Ratanlal & Dhirajlal 28th edition -1999 on page

364, which is as follows:--

This comparative table is quite helpful in appreciating the points of distinction between the two offences viz. offence made punishable u/s. 302 of the IPC and offence made punishable u/s. 304 II of the IPC.

Clause (c) of Section 299 and clause (4) of Section 300 in the table given above, as can be seen, are put under the head of knowledge. It is further explained by the learned authors as under:--

Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death.

16. We are unable to be persuaded by the submissions made by learned advocate for the appellant more particularly in view of the evidence of both the sons of the accused, the post mortem report and cause of death certificate, the medical evidence and other records which corroborate the oral evidence. The fact that the accused was absconding for ten days also goes against him. We are of the opinion that the act was motivated and full of intention and with knowledge. The deceased used to try to counsel her husband from getting into bad habits and therefore there used to be frequent fights between them. In the premises aforesaid, appeal is hereby dismissed. The judgement and order dated 30.07.2008 passed by the Additional Sessions Judge, Rajkot in Sessions Case No. 55 of 2007 is confirmed. R & P to be sent back forthwith.