
(1994) 10 GUJ CK 0020
In the Gujarat High Court

Jogsingh Bhanvarsingh Rajput (Parmar)	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 21-10-1994

Acts Referred:

Evidence Act, 1872 — Section 32(1)
Penal Code, 1860 (IPC) — Section 302, 302

Citation : (1995) 2 GLR 1054

Hon'ble Judges : S.K. Bhatt, J;J.N. Bhatt, J

Bench : Division Bench

Judgement

J.N. Bhatt, J.—A young woman of 25 years Bai Laxmi unfortunately met with a gruesome and ghastly death in Dhundhiawadi in Palanpur. Deceased Laxmi succumbed to the injuries caused by first degree burns sustained by her around midnight of 2nd July 1986. The incident occurred in her matrimonial house which was rented by the accused two days prior to the unfortunate incident. She had two sons at the relevant time aged about 7 and 5 years.

2. On hearing shouts and screams, the neighbours got collected near the house in which Bai Laxmi received serious burn injuries. Smokes and flames were coming out of the house. Therefore, neighbours collected there, broke open the doors of the house. At that time, they found that unfortunate Bai Laxmi was burning. Neighbours tried to extinguish fire on her body by pouring water on her body. At that time, the appellant, who is the original accused Jogsingh-husband of the deceased Bai Laxmi was standing alongwith the two sons in the adjoining room.

3. One Dr. Ramkrishna Joshi informed the police about the incident. The police came to spot and also helped the local people in extinguishing fire. The accused and the two sons came out after the police came. The room in which Laxmi sustained serious burn injuries was smelling of kerosene. Laxmi was taken into police van immediately for medical aids at the dispensary of Dr. Sutaria. Since the physical condition of Laxmi was serious and deteriorating, the executive

Magistrate was summoned for statement of Bai Laxmi.

4. The executive Magistrate came to the venue of the offence and recorded the statement as narrated by Bai Laxmi. In her statement, she positively stated that her husband (accused) had burnt her after pouring kerosene on her body. She also stated before the executive Magistrate that she was severely beaten by her husband and thereafter she was set on fire and subsequently also, he had inflicted injuries with hand on her body. The accused was working as a salesman in Novino Company (manufacturing batteries). In her statement, it was also clearly mentioned that her husband is an extravagant and indulging in alcoholism and in beating her. This statement came to be recorded by the Executive Magistrate Mr. Joshi within few minutes after the unfortunate incident.

5. Deceased Bai Laxmi was sinking and ultimately succumbed to the burn injuries at about 2 a.m. on 3rd July 1986. Thus, the survival after the burn injuries was only for two hours and during that period, she made one dying declaration before the Executive Magistrate and two oral dying declarations. In view of the dying declarations, an offence was registered against the accused u/s 302 of the I.P. Code. The accused was tried before the Sessions Court of Banaskantha at Palanpur in Sessions Case No. 74 of 1986 wherein he was charged that he had intentionally committed murder of his wife by pouring kerosene and putting her on fire on 2nd July 1986 at 12 midnight. It was thus alleged by the prosecution that the accused has committed an offence punishable u/s 302 of the I.P. Code and accordingly he was charged by the learned Sessions Judge on 14th May 1987 to which he pleaded not guilty and claimed to be tried.

6. In order to substantiate the charge of gruesome killing of wife, against the accused, the prosecution examined as many as 19 witnesses. The accused also led evidence of four defence witnesses. Reliance was also placed on the documentary evidence to which a reference will be made by us as and when required, at an appropriate stage.

7. On appreciation of the evidence on record, the learned Sessions Judge reached the conclusion that the accused has committed murder of his wife, rejecting the plea of suicidal death. It was held by the trial Court that the deceased Bai Laxmi was done away with by the accused after pouring kerosene on her body and putting her on fire. Therefore, the trial Court found the accused guilty for the offence punishable u/s 302, I.P. Code and considering the facts and circumstances sentenced him to suffer R.I. for life.

8. Being aggrieved by the said judgment of conviction and sentence, the accused of that sessions trial, the husband of the deceased, has now come up before this Court challenging the legality and validity of the conviction and sentence order.

9. We have exhaustively gone through the entire testimonial collection of the documentary evidence on record during the course of marathon hearing before us. The impugned order of conviction and sentence is seriously criticised by the learned Counsel for the appellant-accused. It is also submitted that the evidence

of defence witnesses ought to have been believed by the trial Court.

10. The death of Bai Laxmi may be suicidal, accidental or homicidal. The trial Court reached the conclusion that the death was only homicidal. This finding of the trial Court is vehemently criticised. Obviously, in order to succeed in a charge u/s 302, the prosecution is firstly obliged to established homicidal death. A question thereafter would arise as to who is the author thereof. The version of the prosecution is that Bai Laxmi met a gruesome homicidal death. In order to substantiate the charge, the prosecution has placed strong reliance on as many as 19 prosecution witnesses and several documents.

11. It is, therefore, necessary for us to look into the factual scenario emerging from the testimonial collection. It is clear from the evidence that deceased Bai Laxmi, the accused alongwith their two sons came to stay in the rented house only two days before the unfortunate incident, the topography of which is elaborately mentioned in the map Ex. 24. The incident occurred at about 12 midnight and the deceased died within two hours on the next morning. The accused was present in the house at the time of the incident. The version of the defence is that he was in the adjoining room with two minor sons. This version is disbelieved by the trial Court. Having regard to the facts and circumstances emerging from the record of the present case, we are in agreement with the finding of the trial Court.

12. Immediately after the incident, the neighbours who had collected there and helped in extinguishing the fire on the body of the deceased and in the house, went to Dr. Sutaria for medical treatment. Thus, firstly, the deceased was examined by Dr. Sutaria within 44 minutes after the occurrence of the incident in question. He found that the condition of Bai Laxmi was serious and deteriorating. Therefore, services of the Executive Magistrate were summoned for recording the dying declaration of Bai Laxmi. Dr. Sutaria, medical officer on duty at the relevant time in the Civil Hospital, is examined as prosecution witness No. 1 at Ex. 9. According to the evidence of Dr. Sutaria, he firstly examined Bai Laxmi around 12-30 a.m., that means, within 30 minutes after the incident. He had brought medical case papers. He had not produced the same in Court. The prosecution has not been able to explain as to why such medical papers were not produced.

13. Dr. Sutaria has admitted that he had not inquired of Bai Laxmi as to what had happened. However, he has stated that she had sustained injuries due to burns. It appears that Dr. Sutaria has put questions to Bai Laxmi and he got engrossed in giving medical aids with promptitude. He ought to have ascertained history being a medico-legal case. Why she sustained injuries due to burns is neither here nor there. The anxiety of Dr. Sutaria was to expedite medical treatment to Bai Laxmi who had sustained serious burn injuries and it can be appreciated and his not taking full history and not producing case papers during the course of his evidence does not affect the veracity of the prosecution version. The defence is not in a position to make any profit out of non-production of the

case papers and non-asking detailed history to Bai Laxmi. The case papers were brought by him and in his candid evidence, he has also admitted that deceased Bai Laxmi of her own stated that she had sustained burn injuries. This aspect does not create any advantageous position for the accused. It is also not fatal to the prosecution story. Therefore, the contention in this behalf that the accused should be given benefit of doubt cannot be sustained.

14. Apart from that, Dr. Sutaria had immediately sent a Yadi to the Executive Magistrate for recording dying declaration of Bai Laxmi. He had also testified that Bai Laxmi was mentally in a position to make her rational statement. The endorsement on the dying declaration shows that the patient was conscious. It is true that there is no clear endorsement of Dr. Sutaria that she was able to speak. Therefore, it is contended on behalf of the appellant-accused that this is a lacuna in the prosecution case and the dying declaration should not be relied on. Having regard to the over-all picture emerging from the record of the case, we have no hesitation in rejecting this submission. Medical officer Dr. Sutaria is examined and he has categorically stated in his evidence that Bai Laxmi was in a position to speak though she was suffering from excruciating pain. Mere non-mention of such a specific endorsement on the dying declaration by the medical officer can never be branded as fatal blow on the prosecution version. Therefore, the contention that the accused can earn benefit of doubt as such a dying declaration cannot be relied on, is required to be thrown overboard. Having examined the entire evidence of Dr. Sutaria, we are satisfied that the observations of the trial Court placing reliance on the dying declaration recorded by the Executive Magistrate and the evidence of Dr. Sutaria are justified.

15. Executive Magistrate came to the hospital at about 12-44 a.m. He is examined as prosecution witness No. 2 at Ex. 13. His evidence is clear and convincing. He had recorded the dying declaration of Bai Laxmi as narrated by her and that too in the absence of any relative. It is found from the evidence on record that no relative had reached till then at the hospital. Parents of Bai Laxmi had also not reached. Executive Magistrate Mr. Joshi had ascertained from her as well as from the medical officer with regard to the mental fitness for making a rational statement. Dying declaration recorded by Mr. Joshi is produced at Ex. 15. We have examined the dying declaration recorded by Mr. Joshi and his testimony and we are satisfied that the statement made by Bai Laxmi is voluntary, spontaneous, truthful, natural and reliable. No infirmity is successfully pointed out which would affect the authenticity of the dying declaration made by Bai Laxmi before the Executive Magistrate Mr. Joshi. The trial Court has rightly placed reliance on this written dying declaration that too from an independent officer of the Government against whom there is not a slightest allegation. Therefore, we are not prepared to accept the contention that the dying declaration recorded by the Executive Magistrate and produced at Ex. 15 should be excluded from the consideration of the evidence.

16. Prosecution witness No. 3 Roopchand Khetam is examined at Ex. 18. He was

working in the city police station at Palanpur and after the dying declaration made by Bai Laxmi before the Executive Magistrate, he lodged the FIR against the accused for an offence u/s 302. Investigation was started, several statements of the witnesses were recorded on the basis of the said FIR and thereafter the accused was charge-sheeted and tried for the offence u/s 302. The trial Court, as stated earlier, found him guilty.

17. Prosecution witness No. 4 Ramkrishna Joshi is examined at Ex. 19. He is the immediate neighbour of the accused. He is doing private medical practice in the same village who informed the police on phone about the incident.

18. Neighbour Karsandas Mohandas Kapdi is examined as P.W. No. 5 at Ex. 20. It is clear from his evidence that he had heard shouts and screams and thereafter he alongwith other neighbours went to the venue of the offence and broke open the doors. It is also very clear from his evidence that they found Bai Laxmi burning and the accused alongwith his two minor sons was in the adjoining room. After the door was broken open by the neighbours, the accused came out. Similarly, prosecution witness No. 7 Amarsing Chelaji Thakore examined at Ex. 22 has also testified that there were screams of a lady before he went to the venue. Not only that, but he had also stated in his testimony that the lady was shouting saying "save me, save me".

19. It is also submitted on behalf of the defence that deceased Bai Laxmi in a bid to commit suicide had poured kerosene on her body of her own and set herself on fire by chaining doors of her room. It is, therefore, contended that there was suicidal death. This submission prima facie may appear captivating but not convincing in light of the evidence on record. We have gone through the entire evidence and the relevant documents and we find no justification in such contention. On the contrary, there is evidence of one neighbour P.W. No. 6 Hiralal Maganbhai Thakore who is examined at Ex. 21, to the effect that the back door of the room was not in a closed condition. Otherwise also, the accused has exhibited a conduct which is not befitting of an innocent husband. On the contrary, his conduct leads to an unerring inference that he was having guilty conscious. What normally an innocent husband would do or how a natural reaction would come from an innocent husband in such a situation? The anxiety of an innocent husband would be immediately to break open the door even if it is chained from inside and to see that the beloved one is helped by extinguishing the fire, taking her to the hospital. Nothing has been done by the appellant-accused. The entire conduct of the appellant-husband of the unfortunate wife has remained not only unnatural, not only unreasonable but full of guilty mind and guilty conscious. He has sustained two burn injuries and that too of the first degree. The explanation tendered by the husband for having sustained burn injuries is even farthest from truth. Probably, such an explanation is tendered so as to obviate the criminal liability for a gruesome offence. Be that as it may, the prosecution has successfully explained the injuries on the body of accused which is consistent with the prosecution version.

20. Dr. Chandrakant Motibhai Thakkar, P.W. No. 17 is examined at Ex. 42. He had examined the accused at the earliest point of time after the incident. The medical certificate in respect of the injuries sustained by the accused is produced at Ex. 44. The following two burn injuries were noticed by Dr. Thakkar on the person of the accused:

1. On the right ear : Of first degree.
2. On the tip of the nose : Of the first degree.

Taking into account all the facts and circumstances including unnatural conduct of the husband, we have no hesitation in finding that the nature and number of injuries sustained by the accused were not due to alleged attempt of extinguishing fire on the person of Bai Laxmi. On the contrary, the evidence of the prosecution has convinced us that in order to cherish his evil design and motive, while committing macabre offence, he must have sustained such injuries.

21. Deceased Bai Laxmi had categorically stated in her dying declaration that the accused is a drunkard and indulging in beating her, quarrelling with her, harassing her after consuming alcohol. There is no reason to discard this version made in the dying declaration which is found truthful and natural. Moreover, this aspect is subsequently re-enforced by the evidence of P.W. 18 Jadavben Nansing Chauhan examined at Ex. 45. She is the mother of deceased Bai Laxmi. Her evidence supports the version mentioned in the dying declaration of Bai Laxmi and we find no reason to disbelieve this version of the deceased which is supported by the evidence of the mother. Thus, it becomes very clear that the accused was extravagant, he was harassing, beating, drinking and giving cruel treatment to the deceased. Thus, there was deep-rooted motive for the accused to do away with his own wife having two minor sons.

22. It has been seriously canvassed before us that the plea of suicidal death advanced by the accused from the beginning is materially supported by the four defence witnesses. Defence witness No. 1 Shyam Chaturvedi is examined at Ex. 51; D.W. No. 2 Mafatlal D. Joshi is examined at Ex. 53; D.W. No. 3 Mangusing Devsing is examined at Ex. 54 and D.W. No. 4 Arjunsing Tulsising is examined at Ex. 55. We have carefully examined defence evidence and we find that the evidence of the defence witnesses is not acceptable and reliable. By examining four defence witnesses, it is sought to be contended that the accused had made a statement before these four defence witnesses that his wife had committed suicide. So, the entire thrust of the defence evidence is the statement made by the accused before them. Apart from the evidentiary value of such evidence, we have unhesitatingly found not only material contradictions in their evidence but an element of untrustworthiness. Either they are relatives or friends of the accused. No doubt, they are also neighbours. They are out to help the accused for making a defence with a view to get him excluded from the capital culpability.

23. The evidence of the defence witnesses is to the effect that the accused made a statement that he is innocent and his wife met with a suicidal death. No

provision is pointed out before us or no case law is presented before us, by virtue of which, statement of the accused before the defence witnesses can form a substantive piece of evidence. We are at loss to understand how such type of evidence would come to the rescue of the accused in the present case. It is not a case that the accused is examined and in order to corroborate his version that his wife had committed suicide, further witnesses are examined. Statement of a person before other person under the Evidence Act can be used either to contradict or corroborate the evidence. Therefore, the entire defence evidence, as it is led, does not in any way assist the plea of the accused that Bai Laxmi had met a suicidal death. In fact, we feel that with the aids of associates or friends, the accused tried to polish the brass when the whole ship was sinking. This is nothing but an afterthought to avoid criminal liability. We, therefore, reject the contention that the defence evidence creates a doubt about the veracity of the prosecution version.

24. The trial Court rightly placed strong reliance on the dying declaration of Bai Laxmi made before the Executive Magistrate and produced at Ex. 15. The dying declaration stands on a different footing than a mere statement and it is to be judged in the surrounding circumstances and with reference to the principles governing weighing of evidence. It is a substantive piece of evidence and conviction can be founded upon the sole dying declaration if it is found to be natural, voluntary, truthful and representing cause of the death or as to any of the circumstances or transactions which resulted in the death. It is, therefore, relevant and admissible u/s 32(1) of the Indian Evidence Act, 1872 ("the Evidence Act" for short) though it is not like a deposition in Court subjected to cross-examination nor a statement on oath. Therefore, according to the settled proposition of law, it is an exception to the general rule against admissibility of hearsay evidence on the principle of necessity. Such a crime, as it is in the focus in the present case, is normally not done in public or in a place where independent witnesses can see it. Therefore, a special provision is incorporated in Section 32(1) of the Evidence Act.

25. Statement made by the deceased is related to the cause of her death. Thus, according to the provision of Section 32(1), such a statement of the deceased must relate to the cause of the death of the declarant. The dying declaration in the present case made by Bai Laxmi has shown the circumstances leading to her untimely, unfortunate and ghastly death.

26. In *Sharad v. State of Maharashtra* AIR 1984 SC 1922, the Apex Court has formulated the following propositions on a review of cases on such point:

1. Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies whether the death is a homicide or a suicide, provided the statement relates to the cause of death or exhibits circumstances leading to the death. In this respect.... The Indian Evidence Act.... Though it is necessary to widen the sphere of Section 32....

2. The test of proximity cannot be too literally construed and practically reduced to a cut and dried formula of universal application so as to be confined in a straight jacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time.

27. The mode of recording dying declaration is not statutorily prescribed though it is grave and solemn proceeding. A contention is raised on behalf of the accused -appellant that the dying declaration was not recorded in question and answer form and, therefore, the efficacy of the dying declaration is lost resulting into benefit to the accused. This contention ought to be thrown overboard. The mode of recording dying declaration is not prescribed. It would be advisable and preferable to record dying declaration in question and answer form. However, non-recording of dying declaration in question and answer form does not operate as a hindrance or hurdle in accepting the dying declaration if otherwise, it is found quite truthful, voluntary and natural. Unauthorised persons should not be permitted to crowd round when the declaration is being made. It is also true that it is the bounden duty of the Executive Magistrate or a person recording such statement to take every possible step to ensure that no influence is brought from any quarter to bear on the declarant and that he or she is not prompted or assisted in any way in making his or her statement. The proceeding should be so conducted and concluded that the declarant should be as free from personal influence in emitting his or her statement as he or she would be if he were giving evidence in a Court of law. In *Rabi Chandra Padhan and Others Vs. State of Orissa*, it is held that when a Magistrate records a dying declaration, preferably, it should be in question and answer form. However, the mere fact of non-recording in such a fashion does not in any way weaken the statement made by the deceased on seeing the approaching death, provided other circumstances prove that it was made free from any influence without any assistance from any quarter and natural. In short, if a statement is found voluntary, natural and trustworthy, it substitutes substantive evidence and can form the sole basis for conviction. We have noticed, without any shadow of doubt from the record of the present case that the dying declaration of Bai Laxmi recorded by the Executive Magistrate though in a narrative form, instead of question and answer form, it is natural, voluntary, unaided, reliable and representating the cause and circumstances leading to her death. Therefore, we have no hesitation in rejecting the contention that it should not be relied on merely on the ground of non-recording of such a dying declaration in a question and answer form by the

Executive Magistrate.

28. In fact, in the case of Khushal Rao Vs. The State of Bombay, the Supreme Court has made valuable observations and has laid down the test for recording a dying declaration. We would like to refer to the test laid down by the Supreme Court in that case. It has held as under:

1. That it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;
2. That each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;
3. That it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence;
4. That a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;
5. That a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and as far as practicable, in the words of the maker of the declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character; and
6. That in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying person for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

29. There are several circumstances which led substantial, strong and material assurance to the dying declaration made by Bai Laxmi produced at Ex. 15 that (i) it was recorded by the Executive Magistrate after taking all necessary precautions; (ii) it was taken down by him as narrated by the declarant, that means - in the exact words and version of the deceased; (iii) it was made very shortly (within 44 minutes after the incident); (iv) nobody was present at the time when the dying declaration was recorded; (v) no relative had reached the hospital until the dying declaration was made and recorded by the Executive Magistrate. Thus, it was unaided, unprompted, free from any influence, voluntary and natural; (vi) the deceased had ample opportunity to identify the accused. It was none else but her husband, if not better-half. The deceased had made consistent version supported by other evidence on record though the dying declaration is not required to be corroborated.

Taking into account the entire testimonial collection and the documentary evidence in the backdrop of relevant legal proposition enumerated hereinabove by us, we have not the slightest hesitation in finding that the accused and none else is the author of the ghastly killing of the young wife aged 25 years having two kids who had motive to commit it. The prosecution evidence has succinctly established the culpability of the accused and it is rightly relied on by the trial Court.

30. Therefore, in the net result, the present appeal filed by the original accused who is held guilty for the offence punishable u/s 302 and sentenced to suffer R.I. for life is absolutely meritless and is required to be dismissed. It is dismissed.