
(2013) 10 GUJ CK 0123
In the Gujarat High Court
Case No : Criminal Appeal No. 793 of 2009

Laxmanbhai Gabhabhai Ajra

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 08-10-2013

Acts Referred:

Citation : (2013) 10 GUJ CK 0123

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

Bench : Division Bench

Advocate : Pratik B. Barot, No. 1, for the Appellant; K.P. Rawal, Assistant Public Prosecutor for the Opponent No. 1, for the Respondent

Final Decision : Allowed

Judgement

K.S. Jhaveri, J.—Present appeal is preferred by the original accused against the judgment and order of conviction and sentence dated 27.03.2009 passed by the 7th Additional Sessions Judge, Surat in Sessions Case No. 76 of 2008 for the offences punishable under sections 302 and 188(1) of Indian Penal Code. The original accused was ordered to undergo life imprisonment & was ordered to pay fine of Rs. 500/-, in default to undergo rigorous imprisonment for one month for offence u/s 302 of Indian Penal Code and simple imprisonment for one month and was ordered to pay fine of Rs. 200/-, in default, simple imprisonment for five days for offence u/s 188(1) of Indian Penal Code. The case of the prosecution is based upon a complaint given by the complainant - one Hamirbhai Popatbhai wherein it is stated that on 15.12.2007 at around 10.00 pm when the complainant after having supper was asleep, he heard someone calling his name near the main gate. He has stated that when the gate was opened an autorickshaw came inside and the appellant - accused - Laxmanbhai got out of the autorickshaw and asked the complainant to accompany him to the hospital. When the complainant asked the reason, the appellant - accused told him that his wife had sustained burn injuries as their hut had caught fire. The complainant has stated that in the autorickshaw the appellant, his wife and four children, an

adult and the autorickshaw driver were present and therefore the complainant gave the appellant - accused Rs. 400/- to meet with the treatment expenses and told him to leave his two daughters with the complainant. It is the case of the complainant that the appellant - accused thereafter took his wife to hospital in the autorickshaw. The minor daughter of the appellant - accused had also sustained burn injuries on her head and she was also taken to hospital.

1.1 It is further the case of the complainant that on the next day when the complainant and his wife were present at their house along with the daughters of the appellant and when they were having tea, the complainant asked them as to how their mother and younger sister had sustained burn injuries. The elder daughter of the appellant - accused who was around 7 years old informed him that on the date of incident, the appellant - accused had quarreled with the deceased as to why she had gone to unload bricks from the tempo and assaulted her with a wooden bat. It is the case of the complainant that thereafter when the deceased was breastfeeding her two year daughter, the appellant poured kerosene from a bottle and set her on fire. The complainant therefore lodged a complaint in this regard.

1.2 The deceased passed away during the course of her treatment. Post mortem was carried out. After completing the inquest panchnama, the offence was registered against the accused. He was arrested and after necessary investigation, chargesheet was submitted against the accused. Ultimately, 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 accused and during the course of trial the prosecution examined the following witnesses as oral evidences whose evidence was read out before us:

1.4 The prosecution also exhibited 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 Sessions Judge convicted the appellant of the charges leveled against him by judgment and order dated 27.03.2009. Being aggrieved by and dissatisfied with the aforesaid judgment and order passed by the Sessions Court the appellant has preferred the present appeal.

2. Mr. Pratik Barot, learned advocate appearing for the appellant submitted that the prosecution failed to prove the case against the appellant beyond reasonable doubt. He submitted that there are no eye witnesses to the present incident other than the evidence of minor daughter of the deceased and that the case is based on circumstantial evidence. He submitted that nothing is brought on record to show that the accused is involved in the alleged offence.

2.1 Mr. Barot submitted that even if everything is assumed against the accused

and the offence alleged to have been committed by the accused is treated as culpable homicide, in view of the absence of any strong intention or motive to kill the victim, charges u/s 304 (Part I) or 304 (Part II) ought to have been attracted. He submitted that in a spur of moment the incidence happened and the accused did not come with an intention of killing the victim. He also submitted that the appellant did not intend to kill the deceased. He has taken this court to the nature of injuries which is clear from the post mortem report and submitted that the case of the appellant may be considered u/s 304 (Part I) or 304 (Part II) of Indian Penal Code.

2.2 Mr. Barot further submitted that no case is made out against the conviction of the appellant - accused u/s 188(1) of Indian Penal Code and therefore the same may be set aside. He submitted that the prosecution has failed to prove the ingredients of section 188(1) of Indian Penal Code against the accused.

3. Mr. K.P. Rawal, learned APP has supported the order of the trial court and has submitted that the trial court has gone into the evidence in detail and has come to the conclusion that the appellant is guilty of the offence so convicted of. He submitted that the trial court is fully justified in basing the conviction on the ocular evidence as well as medical evidence. He submitted that considering the post mortem report at Ex. 08, it is clear that the cause of death was shock due to burns. He submitted that the trial court has rightly convicted the appellant - accused.

4. We have gone through the judgment and order passed by the trial court. We have also perused the oral as well as documentary evidence led by the trial court and also considered the submissions made by learned Advocate for the appellant and the State.

5. As per the prosecution case, the appellant had poured kerosene upon the deceased and set her on fire thereby causing her death. The main reason for the attack on the deceased is said to be a quarrel which had taken place between them with regard to the deceased going to the tempo for unloading of bricks which was not perceived by the accused in good faith.

6. We have perused the medical evidence which includes the post mortem report. The post mortem report mentions the nature of injuries in column 17 as under:

17. Dermoepidermal burns present all over the body except frontal aspect of right upper limb, lower part of abdomen, external genital region, uppermost part of right thigh & back of chest & abdomen at places.

Hairs shows singeing.

Injury has red colour base & skin peeled

Total area involved is 75-80% of whole body surface.

6.1 P.W. 1, Dr. Rajesh Patel is the Medical Officer who performed the post mortem. This witness has stated in his deposition that the death was caused due

to shock due to burns. He has stated that on internal examination, a contusion of size 7.5 cm x 6.5 cm was found over left frontal aspect of head and a contusion of size 8 cm x 6.5 cm was found on left side of parietal region. However, there was no evidence of any skull fracture.

7. P.Ws. 3, 4, 6, 7 & 9 have been declared as hostile witnesses by the prosecution as they have not supported the prosecution case. P.W. 2 - Ramchandra Dhobi is the eye witness who had seen the appellant committing the alleged offence. This witness vide his deposition at Ex. 9 has stated that on the date of incident he was sleeping outside his hut when he heard the appellant abusing and beating his wife. When this witness tried to intervene, the appellant objected and asked him as to why he was interfering in their fight. This witness has stated that thereafter, the appellant took the deceased to his hut and after sometime this witness saw fire coming out of the hut of the appellant. This witness has stated that he saw the deceased coming out of the hut in flames and was shouting and that the appellant was coming behind her. This witness has further stated that he tried to extinguish the fire by wrapping the deceased with a blanket which this witness was using to cover himself. Thereafter, the appellant took the deceased away in an autorickshaw. This witness has further stated that he had seen the appellant was pouring kerosene from a bottle on the hut and thereafter he set it ablaze with a matchstick. The clothes of this witness also got burnt during the course of saving the deceased.

7.1 In the cross examination of this witness, he has stated that he had seen the appellant pouring kerosene over the head of the deceased and that the appellant had beaten the deceased. This witness has accepted the suggestion that there was no light in the vicinity but he has stated that he could gauge the developments due to the lights of the vehicles which were passing by. He has also stated that the children were sleeping outside the hut and that one child was inside the hut. This witness has further stated that when the deceased was shouting one of the daughters of appellant was awake.

7.2 The evidence of this witness is quite clinching and narrates the entire episode as he had seen from his hut and the defence is not in a position to point out any infirmity in the evidence of this witness.

7.3 P.W. 4 - Hamirbhai Popatbhai Patada is the complainant who has been declared hostile by the prosecution. He has stated that on the date of incident at night hours, the appellant had come to his place and asked this witness to accompany him to hospital as his wife had sustained burn injuries. P.W. 4 has stated that when he inquired about the alleged incident, the appellant had told him that his hut had been on fire and that is how his wife had sustained burn injuries.

7.4 P.W. 5 - Rajajibhai Patel vide his deposition at Ex. 13 has stated that on the date of incident while he was asleep, the appellant came and had awakened him and told him that his wife had sustained burn injuries while cooking and

therefore he wanted to go to hospital. This witness has stated that he arranged for an autorickshaw and accompanied the appellant, his wife and four children. P.W. 5 has stated that in the autorickshaw, the wife of appellant stated that the appellant had set her on fire and the appellant was tutoring the children that if any one asks them about the alleged incident, they should be saying that their mother had sustained burn injuries while she was trying to pour kerosene in the stove. This witness has stated that they went to Sadhubhai's house first but he was not available and they then went to Vikrambhai who had given him some money. This witness has further stated that after he returned from the hospital he went to the appellant's hut and saw that it was not burnt. He has stated that he came to know that the appellant had set his wife on fire.

7.5 Another crucial witness which has supported the case of the prosecution is P.W. 23 - Radhaben Bharwad who is the minor daughter of the deceased and appellant. She has very categorically stated in her deposition that her father had set her mother on fire after pouring kerosene. She has stated that she was not asleep during the alleged incident but on hearing the commotion she woke up and when her father set her mother on fire she was in the room. She has stated that her father thereafter took her mother to hospital and that after the deceased raised shouts the neighbours gathered there. She has further stated that her mother had gone for work and therefore her father had beaten her mother. She has also stated that her younger sister's hair also got burnt.

8. Learned advocate for the appellant has tried to contend that the evidence of P.W. 12 being a minor witness cannot be admissible and is not trust worthy. It is true that child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it there is no obstacle in the way of accepting the evidence of a child witness.

8.1 In the cross examination, P.W. 12 has stated that she was sleeping but had woken up on hearing the commotion. This witness has stated that during the incident she was awake. It goes without saying that love of a child for a parent is far beyond explanation. A child aged 7 years under no circumstances can be imagined to falsely implicate some one and that too her father as is in the present case. No motive surfaces from the facts and circumstances of the case which establishes that the child has falsely deposed against her own father.

9. Going by the panchnama of scene of offence, nothing surfaces which could point out that the deceased was in the process of cooking food as narrated by the appellant. A bottle containing kerosene was found from the scene of offence. The panch witness of the recovery and discovery panchnama have supported the case of the prosecution. The evidence of P.W. 2 - Ramchandra is corroborated by the FSL report and the panchnama which shows that his clothes got burnt when he tried to save the deceased.

10. Moreover, the presence of the accused at the scene of offence is also proved and he has not explained the circumstances which weigh against him in the present case. In the case of Babu @ Balasubramaniam and Another Vs. The State of Tamil Nadu, the Apex Court has held as under:

21. It is also pertinent to note that PW-5 Dr. Rajabalan stated that the injuries sustained by the deceased could have been caused 10 to 12 hours prior to the post-mortem. We have already stated that the post-mortem was conducted at 5.00 p.m. Thus, the death occurred around 6.00 a.m. The death occurred in the house where the deceased resided with Al-Babu. Presence of the accused at 6.00 a.m. in the house is natural. Besides, it is not contended by Al-Babu that he was not present in the house when the incident occurred. To this fact situation, Section 106 of the Evidence Act is attracted. As to how the deceased received injuries to her head and how she died must be within the exclusive personal knowledge of Al-Babu. It was for him to explain how the death occurred. He has not given any plausible explanation for the death of the deceased in such suspicious circumstances in the house in which he resided with her and when he was admittedly present in the house at the material time. This circumstance must be kept in mind while dealing with this case. We are mindful of the fact that this would not relieve the prosecution of its burden of proving its case. But, it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, has offered an explanation which might drive the court to draw a different inference. In this case, in our opinion, the prosecution has succeeded in proving facts from which reasonable inference can be drawn that the death of the deceased was homicidal and Al-Babu was responsible for it. Al-Babu could have by virtue of his special knowledge regarding the said facts offered an explanation from which a different inference could have been drawn. Since he has not done so, this circumstance adds up to other circumstances which substantiate the prosecution case.

10.1 Similarly in the case of Trimukh Maroti Kirkan Vs. State of Maharashtra, the Apex Court has observed 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.

10.2 Therefore, looking to the evidence of witnesses, more particularly P.W. 2, P.W. 5 & P.W. 12, the panchnamas, the post mortem notes and 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 trial court has rightly convicted the appellant u/s 302 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 case against the appellant. We do not think that the case of the appellant deserves to be considered as an offence u/s 304 (Part I) or 304 (Part II) of Indian Penal Code.

11. However, as far as the offence punishable u/s 188(1) is concerned, the prosecution has not been able to prove its case beyond reasonable doubt. We do not find that the reasoning adopted by the trial court so far as conviction of the appellant u/s 188(1) of Indian Penal Code is concerned is just and proper and therefore the conviction of the appellant u/s 188(1) of Indian Penal Code is required to be quashed and set aside.

12. Accordingly, the conviction of the appellant u/s 302 of the Indian Penal Code and sentence awarded thereunder vide judgment and order dated 27.03.2009 passed by the 7th Additional Sessions Judge, Surat in Sessions Case No. 76 of 2008 is confirmed. However, life imprisonment as awarded by the trial court would not be till last breath and the case of the appellant may be reviewed by the appropriate authority considering the decision of Apex Court in the case of Annapurna (supra).

13. The conviction of the appellant u/s 188(1) of Indian Penal Code and sentence awarded thereunder vide judgment and order dated 27.03.2009 passed by the 7th Additional Sessions Judge, Surat in Sessions Case No. 76 of 2008 is hereby quashed and set aside. The appellant is acquitted of the charges levelled against him u/s 188(1) of Indian Penal Code. The judgment and order dated 27.03.2009 is modified accordingly. Appeal is allowed to the aforesaid extent. R & P, if lying with this court, to be sent back forthwith.