
(2009) 04 GUJ CK 0021
In the Gujarat High Court
Case No : Criminal Appeal No. 1358 of 2008

Maresh Govindbhai Barot and Another	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 02-04-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 304A, 313, 314, 498A

Citation : (2009) CriLJ 3535 : (2010) 1 Crimes 571 : (2009) 2 GLH 276 :
(2009) 2 GLR 1418 : (2009) 4 RCR(Criminal) 720

Hon'ble Judges : J.C. Upadhyaya, J;A.L. Dave, J

Bench : Division Bench

Advocate : Mahesh Bhavsar, Nos. 1 to 2, for the Appellant; M.R. Mengdey,
Assistant Public Prosecutor for Opponent No. 1, for the Respondent

Final Decision : Allowed

Judgement

A.L. Dave, J.—This appeal challenges the judgment and order rendered by the learned Fast Track Judge, Court No. 5, City Civil and Sessions Court, Ahmedabad, on 13-10-2006 in Sessions Case No. 234 of 2005.

2. The appellants were accused Nos. 1 and 2 before the trial Court. They came to be tried along with 4 other accused, namely, Godavariben Maneklal, Vidyaben Nandkishor, Amrutbhai Vithhalbhai Patel and Manubhai Nathaji, original-accused Nos. 3, 4, 5 and 6 respectively, for offences punishable under Sections 304A, 313, 314, 498A and 114 of the Indian Penal Code (I.P.C).

3. As per the prosecution case, appellant original accused No. 1 was married to Ashaben somewhere in 1997. Appellant No. 2 is mother of appellant No. 1. It is the case of the prosecution that appellant Nos. 1 and 2 had a strong desire for a male child through deceased Ashaben. She then conceived, later they came to know that foetus was that of a female child, and therefore, they have resorted to witchcraft, and ultimately, got the foetus aborted with help of original accused Godavariben and Vidyaben. Godavariben and Vidyaben were working as

midwives but were not qualified. Because of abortion caused by them of Ashaben, Ashaben started bleeding profusely. It is the case of the prosecution that the appellants instead of taking deceased Ashaben to qualified doctor, they took her to accused No. 5-Amrutbhai Vithhalbhai, who did not give appropriate treatment which ultimately resulted into death of Ashaben, which took place on 2-8-2000. The miscarriage occurred on 31-7-2000.

4. On learning about the death of Ashaben, maternal uncle of deceased, therefore, told the father of the deceased, who went to the matrimonial home of the deceased and then lodged F.I.R. (Exh. 16) before the Dy. S. P., Sarkhej, on basis of which an offence came to be registered by Kanbha Police Station vide C.R. No. I-162 of 2000 against 6 accused persons tried by the trial Court. On basis of the F.I.R., offence was registered and investigated and charge-sheet was filed in the Court of the Metropolitan Magistrate Court No. 19, who in turn committed case to the Court of Sessions and Sessions Case No. 234 of 2005 came to be registered.

4.1. The Sessions Court framed charges against all the accused persons at Exh. 1. The accused persons pleaded not guilty to the charge and claimed to be tried.

4.2. The Sessions Court, after considering the evidence, came to a conclusion that there was lack of evidence against accused Nos. 3, 4, 5 and 6 and recorded their acquittal, but convicted the accused Nos. 1 and 2, the appellants herein, for offences punishable under Sections 304A, 313, 314 and 498A of the I.P.C. and sentenced them as under:

Rigorous Imprisonment (R.I.) for one year and fine of Rs. 500/-, in default Simple Imprisonment (S.I.) for three months for the offence punishable u/s 304A of I.P.C.

Imprisonment for life and fine of Rs. 1,000/-, in default S.I. for six months for the offence punishable u/s 313 of I.P.C.

R.I. for seven years and fine of Rs. 1,000/-, in default S.I. for one year for the offence punishable u/s 314 of I.P.C.

R.I. for one year and fine of Rs. 500/-, in default S.I. for six months for the offence punishable u/s 498A of I.P.C.

All the sentences were ordered to run concurrently and benefit of set-off was given to each of the convicts appellants.

5. Learned Advocate Mr. Bhavsar for the appellants submitted that the trial Court has erred in convicting the appellants for offence of causing miscarriage, on same set of evidence on basis of which the trial Court has acquitted the accused Nos. 3, 4, 5 and 6. If there is no evidence of miscarriage by accused Nos. 3 and 4 and no evidence of non-giving proper treatment by accused No. 5, the appellants could not have been convicted for the same. Mr. Bhavsar submitted that there is no evidence on record to show that the foetus was that of a female

child. This would rule out the presence of alleged motive. Mr. Bhavsar submitted further that the cause of death of the foetus is not indicated in the post-mortem notes. The medical evidence does not indicate the cause of abortion of the deceased nor is there any evidence to show that the abortion was caused against the will of the deceased. Mr. Bhavsar submitted that the allegation against accused No. 6 was that he performed witchcraft on the deceased and in doing so, he resorted to physical violence, but there is no evidence to show any violence on person of the deceased lady. There were no injuries on the private parts of the dead-body of the deceased. Ordinarily, if there was forced abortion, there might have been some marks of violence. Mr. Bhavsar, therefore, submitted that the trial Court has committed an error in convicting the appellants and the appeal, may therefore, be allowed.

6. Learned A.P.P. Mr. Mangdey has opposed this appeal.

7. We have examined the record and proceedings in context of arguments made before us by rival sides.

8. At the outset, we may record that against acquittal of accused Nos. 3, 4, 5 and 6, the State has not preferred any acquittal appeal and that order has, therefore, attained finality.

9. The second glaring feature in this case, without even touching the merits of the case, is that the appellants are convicted by the trial Court for offences punishable under Sections 304A of I.P.C. as well as under Sections 313 and 314 of I.P.C. Ingredients for both these offences are contra-indicative and cannot go together. When conviction is recorded u/s 304A, it presupposes a negligent act, which would rule out any intentional act; where as the conviction for offences under Sections 313 and 314 can be founded only on intentional act of the accused and not negligence. Presence of mens rea would be sine-qua-non in such a situation. The trial Court, therefore, apparently erred in recording conviction of the appellants for offences punishable under Sections 304A and 313 and 314 of I.P.C.

10. Apart from the foregoing legal error, we find that the trial Court has erred factually also. Despite scanning the medical evidence in form of postmortem report of foetus Exh. 31, post-mortem report of Ashaben Exh. 33 and evidence of Dr. Jayantilal Virjibhai Sitapara Exh. 30 and Dr. Rajendrakumar Bhagirathprasad Joshi Exh. 32, who prepared the post-mortem reports respectively of the foetus and the deceased, we do not find any evidence to indicate the cause of abortion or that it was a forced abortion. We do not find any evidence to know the sex of the foetus. We have for that purpose also examined the inquest panchnama of the foetus Exh. 26, which is also silent on this aspect.

10.1. This would go to show that the motive which is attributed to the appellants that they wanted a male child and because the foetus was of a female child, they got the female foetus aborted forcibly, gets ruled out.

10.2. We also find that the foetus was exhumed, which was buried on 31-7-2000. There is no evidence to show that foetus which was exhumed was of deceased Ashaben. This would be relevant because the case of the prosecution is that the appellants caused the foetus aborted because it was of a female child and it was aborted against the wish of the deceased. We have no evidence on record to show that the abortion was caused against wish of the deceased either.

11. The post-mortem notes of the deceased Exh. 33 would go to show that there were no marks of any external violence. All that is indicated is uterine was bulky and there were multiple haemorrhagic areas with small blood clots in the inner mucos of the uterine. The histo-pathological report and the viscera report did not indicate presence of any substance, which would cause an abortion as is deposed by doctor. It is, therefore, difficult to come to a conclusion that the abortion was a forced abortion or a manipulated abortion. Possibility of it being a natural abortion cannot be ruled out.

11.1. The evidence of the parents of the deceased, namely Jaydevbhai Vishnubhai Exh. 15 and Ramilaben Jaydevbhai Exh. 19, sister Gauriben Chimanbhai Exh. 20 and Chimanbhai Bababhai, uncle of the deceased Exh. 21, is examined by us only to know that the allegations are general in nature.

11.2. The trial Court has on one hand come to conclusion that factum of practicing witchcraft on the deceased and causing abortion by accused Nos. 6 and 3 and 4 respectively is not proved and still has recorded conviction of the appellants for causing abortion of the deceased and practicing witchcraft, which findings run contrary to each other and cannot be upheld.

12. The resultant effect of the foregoing discussion is that the allegation of motive is not proved by the prosecution, the factum of forced miscarriage is nor proved by the prosecution, the possibility of natural miscarriage is not ruled out by the prosecution and the factum of foetus being that of Ashaben is also not proved by the prosecution. There is no evidence to show that there was any physical violence meted out to the deceased. Under the circumstances, the conviction recorded by the trial Court cannot be permitted to stand.

13. For the foregoing reasons, the appeal deserves to be accepted. Accordingly, the appeal is allowed. The conviction of appellants "Mahesh Govindbhai Barot and Gauriben Govindbhai Barot as recorded by the learned Fast Track Judge, Court No. 5, City Civil and Sessions Court, Ahmedabad in Sessions Case No. 234 of 2005 is hereby set aside. They are acquitted of the offences for which they were convicted and they be set at liberty forthwith from the prison, if no longer require for any other case. Fine, if paid, be refunded to them.