

(2008) 08 GUJ CK 0055
In the Gujarat High Court
Case No : Criminal Appeal No. 581 of 2001

Maheshbhai Dhanjibhai Parmar	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 08-08-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374
Evidence Act, 1872 — Section 32(1)
Penal Code, 1860 (IPC) — Section 302

Citation : (2008) 08 GUJ CK 0055

Hon'ble Judges : Z.K. Saiyed, J; A.M. Kapadia, J

Bench : Division Bench

Advocate : J.M. Buddhbhatti, for the Appellant; K.C. Shah, Assistant Public Prosecutor for Respondent 1, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Kapadia, J.—Challenge in this Appeal u/s 374 of the Code of Criminal Procedure ("the Code" for short) is to the correctness of the judgment and order dated 4.7.2001 rendered in Sessions Case No. 101 of 1999 by the learned Additional Sessions Judge, Bharuch, by which the sole Appellant ("the Accused" for short) has been convicted for commission of the offence punishable u/s 302 of the Indian Penal Code ("IPC" for short) and sentenced to suffer imprisonment for life and fine of Rs. 5000/- in default of payment of fine to undergo further RI for 3 years.

2. The prosecution case as disclosed from FIR, which is in the nature of dying declaration and the dying declaration recorded by the Executive Magistrate, and unfolded during trial is as under:

(i) It is the case of the prosecution that deceased Jashodaben gave her statement before PW-15 Kanjibhai Roopjibhai Parmar, PSI, Jhagadiya Police Station, while she was in Bharuch Civil Hospital for treatment on account of burn injuries, wherein, inter alia it is alleged that she is residing with her children at

Jhagadia Motaval Faliya, Jhagadia and was doing miscellaneous labour and household work. Her marriage was performed with Khushalbhai Fulabhai Motala 17 years back. She has two sons named Rohan and Nilesh and two daughters named Daxa and Pragna. Her husband Khushalbhai Fulabhai had expired two years prior to incident due to heart attack. One Mahesh Dhanji Parmar, aged 25 years, residing opposite to her house, came in contact with her and used to visit her house. He is also doing miscellaneous labour work. He proposed her to marry him by a simple ceremony of "ful-har" and thereby set up a house. She told him that her sons and daughters have become major and yet they are not married. So he may find a girl and marry. He did not agree and of and on pressurized her to marry. She tried to persuade him not to come to her house. However, he was visiting her house by consuming liquor. He was quarreling with her on this issue in presence of her daughters and was beating her. She very much tried to persuade him but he did not agree. On 31.1.1999 (Sunday), Mahesh Dhanji came in drunken condition to her house at about 9:30 or 10:00 in the night. He told her "have I prepared his food". She informed "why should she prepare his food". She had nothing. Then she prepared something and gave it to her children and made them to sleep. He quarreled by saying "you have prepared food for your children and why not for me". He became angry. He said that she does not want to marry him and so she has not prepared his food. Thus he gave her two to four slaps and said he shall set her on fire as she has not prepared his food. She also said "let me see how you set me on fire". She felt that he is speaking in drunken condition and would do nothing. Then he opened the cover of the stove in the kitchen and sprinkled kerosene on her body and shoulder by holding her hand. At that time also she felt that he was threatening her and would not set her on fire. So she did not protest. Mahesh became very much angry after sprinkling the kerosene. He lightened a match-stick from a match box and threw on her. So, it was a sudden fire. She had put on a polyester gown which caught fire. She started burning. Mahesh left her hand. She started shouting. Her children got up by hearing her shouts and started weeping. At that time Mahesh threw small mattresses on her and tried to extinguish the fire. Out of her two daughters, one daughter brought water and poured on her body. The fire was extinguished. This incident of setting fire happened in her kitchen. She ran towards the bedroom from the kitchen after the fire and fell down near the cupboard. Her daughters also poured water on her and tried to save her. Mahesh came to her house in the night after her children slept. There was altercation in the kitchen for about thirty to forty five minutes and then kerosene was sprinkled on her and she was set on fire. When Mahesh came to her house, the door was closed. He entered from the back side and set her on fire. Her children awakened on hearing the shouts and poured water on her and opened the front door of her house. People rushed to her house. Though the mattresses were thrown on her body, the fire did not extinguish and Mahesh ran away from the back door. On receiving this news, her Jethani (wife of her husband's elder brother) and elder son Dinesh, residing near her house, rushed there. They took her to Jaghadia referral hospital, where only a peon was available, who told the son of her Jeth

(Husband's elder brother) to take her to Civil Hospital, Bharuch immediately and to get her admitted immediately. Thus they have brought her in Civil Hospital in Bharuch and admitted her. She is under the treatment. At the time when she gave statement before PW-15 Kanjibhai Roopjibhai Parmar, PSI, she was conscious and she has stated the aforesaid facts in full sound state of mind. Mamlatdar has recorded her statement and she has stated the facts in reply to his query.

(ii) The aforesaid complaint was recorded by PW-15 Kanjibhai Roopjibhai Parmar in Bharuch Civil Hospital and beneath the same he has obtained thumb impression of Jashodaben. The said statement is on record at Exh. 39. Prior to recording of the statement, PW-15 had already started investigation. During the course of investigation he has drawn the panchnama of the scene of offence and recorded the statements of four eyewitnesses. He has arrested the Accused after drawing the panchnama of his person and the clothes were also recovered from him. During the course of treatment Jashodaben died. Thereafter, he has received the vardi from the PSO that Jashodaben had died and therefore, he has added the offence of murder punishable u/s 302 IPC. The extract of the said station diary is on record at exh.40. Thereafter he has entrusted the investigation to PW-16 Yakubbbhai Emroz Bhatiya, PSI. After taking over the investigation, he has held the inquest on the dead body of Jashodaben and sent the same for PM. He has also obtained the dying declaration recorded by the Executive Magistrate and sent the muddamal to FSL for chemical analysis.

(iii) After receipt of the PM report, FSL report and the dying declaration recorded by the Executive Magistrate, as sufficient incriminating evidence was found against the Accused for commission of the offence punishable u/s 302 IPC, he filed charge sheet in the Court of learned JMFC, Jhagadia.

(iv) As the offence u/s 302 is exclusively triable by the Court of Sessions, the learned JMFC, Jhagadia committed the case to the Court of Sessions, Bharuch. The learned Additional Sessions Judge, to whom the case was made over for trial, framed charge against the Accused for commission of the offence punishable u/s 302 IPC.

(v) The charge was read over and explained to the Accused. The Accused pleaded not guilty to the charge and claimed to be tried. Therefore, he was put to trial by the learned Additional Sessions Judge, Bharuch in Sessions Case No. 101 of 1999.

(vi) In order to bring home the charge leveled against the Accused, the prosecution has examined in all 16 witnesses and relied upon their oral testimony, details of which have been narrated in paragraph 5 of the impugned judgment and order.

(vii) To prove the culpability of the Accused, the prosecution has also produced in all 12 documents and relied upon the contents of the same, the details of which are mentioned in paragraph 6 of the impugned judgment and order.

(viii) After recording of evidence of the prosecution witnesses was over, the trial Court explained to the Accused, the circumstances appearing against him and recorded his further statement u/s 313 of the Code. In his further statement, the Accused denied the case of the prosecution in its entirety. He has stated that a false case has been filed against him. However, he has neither led any evidence nor examined any witness in support of his defence.

(ix) On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial Court came to the conclusion that the Accused has sprinkled kerosene on deceased Jashodaben and set her ablaze to cause her death. The prosecution has proved that Jashodaben died a homicidal death as the Accused has sprinkled kerosene on the deceased Jashodaben and set her ablaze to cause her death, on the basis of the two DDs, one in the form of a complaint at Exh. 39 and the another recorded before the Executive Magistrate at exh.12 as well as eyewitnesses. Thus the involvement of the Accused for commission of the the offence of murder of Jashodaben u/s 302 has been proved by the prosecution beyond reasonable doubt.

(x) The prosecution has also proved the motive behind the murder, as the deceased Jashodaben refused to marry the Accused and therefore, the Accused was minded to kill her, therefore, there was a knowledge as well as the intention of doing the act by the Accused.

(xi) On the aforesaid finding, the trial Court has convicted the Accused for commission of the offence punishable u/s 302 IPC and sentenced to suffer imprisonment for life and fine of Rs. 5000/- in default to undergo further RI of 3 years, giving rise to instant Appeal at the instance of Accused, which has been filed by the Accused through the jail authorities.

3. Mr. J.N. Buddhbhatti, learned advocate of the Accused has submitted that the case of the prosecution is based on two DDs as well as four eye witnesses. However, looking to the burn injuries, it is doubtful whether deceased was physically and mentally fit to give the DDs. It was not possible for her to give the DD, therefore, she was unfit to give the DD. So far as eyewitnesses are concerned, they are the family members of deceased Jashodaben and they dislike the Accused as the Accused wanted to marry their mother Jashodaben, therefore possibility of falsely ropping the Accused in the murder of Jashodaben cannot be ruled out, therefore, no reliance can be placed on the oral testimony of those eyewitnesses. He, therefore, submitted that both the DDs are got up with a view to falsely rope the Accused in the offence of murder. He, therefore urged that the impugned judgment and order suffers from non-appreciation of evidence in its proper perspective, the same therefore, deserves to be quashed and set aside by allowing this Appeal and thereby acquitting the Accused of the offence with which he was charged.

4. In counter submission, Mr. K.C. Shah, learned APP for the Respondent - State of Gujarat has supported the impugned judgment and order by contending that

there is no infirmity or illegality committed by the trial Court in appreciating the evidence of two sets of dying declarations; one in the form of a complaint (exh. 39) and another recorded by PW-15 Executive Magistrate at exh.12. It is also emphasized by him that there are four eyewitnesses and there is no reason to discard their oral testimony. They saw the Accused sprinkling kerosene and setting their mother Jashodaben ablaze by the Accused. He, therefore, urged to dismiss the Appeal by confirming the judgment and order of conviction and sentence recorded against the Accused by the trial Court.

5. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record, which is read and re-read by the learned advocates of the parties with reference to broad and reasonable probabilities of the case. This Court has examined the entire evidence on record for itself independently of the learned Judge of the trial Court and considered the arguments advanced on behalf of the Accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence.

6. There is no dispute to the fact that deceased Jashodaben had died an unnatural death due to burn injuries. To prove this fact, the prosecution has examined and relied upon the oral testimony of PW-13 Dr. Sunil Dattarav, who has performed the PM on the dead body of Jashodaben and issued PM report, which is on record at Exh.35. A conjoint reading of oral testimony of Dr. Sunil Dattarav at Exh. 33 and the PM report, it is seen that in his evidence PW-13, has inter alia testified that deceased Jashodaben had received extensive burn injuries and died because of shock following extensive burn injuries. Therefore, it has to be held that deceased Jashodaben had died an unnatural death because of burn injuries received by her.

7. As per the prosecution case, deceased Jashodaben had died a homicidal death because the Accused has sprinkled kerosene on Jashodaben and set her ablaze. To prove this fact, the prosecution mainly relied upon 2 sets of DDs, one in the form of a complaint at Exh.39 and the another recorded by the Executive Magistrate at Exh.12. As well as four eyewitnesses.

8. Before appreciating the evidence of the witnesses, before whom the dying declarations were made by the deceased, it would be relevant to notice the law relating to dying declaration. In case of Smt. Paniben Vs. State of Gujarat, , the Supreme Court has formulated the principle laid down in several judgments of the Supreme Court governing dying declarations. A Division Bench of this Court in the case of State of Gujarat Vs. Maniben Jadav, , has very succinctly stated the law in this regard as under:

Section 32(1) of the Evidence Act, 1872 is an exception to the general rule that hearsay evidence is not admissible evidence or that unless evidence is tested by

cross-examination, it is not credit-worthy. u/s 32(1) when a statement is made by a person as to the cause of death or as to any of the circumstances, which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased called the dying declaration, falls in that category provided it has been made in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. If there are more than one dying declarations, then the Court has to scrutinize all the dying declarations to find out if each of them passes the test of being trustworthy. The Court must further find out whether different dying declarations are consistent with each other in material particulars before accepting and relying upon the same. A dying declaration made by a person on the verge of his death has a special sanctity, as at that solemn moment, a person is most unlikely to make any untrue statement. The sanctity attached to dying declaration is that a person on the verge of death would not commit sin of implicating somebody falsely. The shadow of impending death is by itself the guarantee of truth of the statement made by the deceased regarding cause or circumstances leading to his death. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the person is at that point of death and when every hope of this world is gone. At that point of time every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth. Such a solemn situation is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice. A dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Court, it becomes very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration by itself can be sufficient for recording conviction without looking for any corroboration. However, if there are any infirmities of such nature warranting further assurance then the Court has to look for corroboration. The rule of corroboration requires that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The dying declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise unreliable. Any evidence adduced for this purpose can only detract from its value, but does not affect its admissibility. One of the important tests of reliability of dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been devised in judicial pronouncement in order to answer the question whether the dying declaration is true: (1) Was the victim in a position to identify the assailant/s? (2) Whether the version narrated by the victim is intrinsically sound and accords with probabilities? and (3) Whether any material part is proved to be false by other

reliable evidence?

9. In the light of the principles laid down in the above-referred to two decisions, we may now proceed to consider the evidence on record relating to dying declarations and examine both the dying declarations independently to ascertain the veracity of each declaration.

10. Now so far as the first DD is concerned, it is in the form of a complaint, which is on record at Exh.39, which was recorded by PW-15 Kanjibhai Rupjibhai. It is inter alia stated therein that Jashodaben was residing with her children at Jhagadia Motaval Faliya, Jhagadia and was doing miscellaneous labour and household work. Her marriage was performed with Khushalbhai Fulabhai Motala 17 years back. She had two sons named Rohan and Nilesh and two daughters named Daxa and Pragna. Her husband Khushalbhai Fulabhai had expired two years back due to heart attack. One Mahesh Dhanji Parmar proposed her to marry him. She denied. On 31.1.1999 (Sunday), Mahesh Dhanji came in drunken condition to her house at about 9:30 or 10:00 in the night and picked up quarrel with her and threatened her to set her ablaze. Then he sprinkled kerosene on her body and lightened a match-stick from a match box and threw on her. So, it was a sudden fire. She started shouting. Her children awakened on hearing the shouts and poured water on her and opened the front door of her house. People rushed to her house. Though the mattresses were thrown on her body, the fire did not extinguish and Mahesh ran away from the back door. On receiving this news, her Jethani (wife of her husband's elder brother) and elder son Dinesh, residing near her house, rushed there. They took her to Jaghadia referral hospital, where only a peon was available, who told the son of her Jeth (Husband's elder brother) to take her to Civil Hospital, Bharuch immediately and to get her admitted immediately. Thus they brought her in Civil Hospital in Bharuch and admitted her. To prove the aforesaid statement, the prosecution has also examined PW-15 Kanjibhai Roopjibha at Exh.38. He has in term deposed with regard to recording the statement of deceased after drawing the panchnama about the physical and mental condition of Jashodaben.

11. On reappraisal of the aforesaid DD there is no manner of doubt that PW-15 Kanjibhai Roopjibhai after ascertaining about the physical and mental condition of Jashodaben had recorded her statement. As per the narration given by Jashodaben she has given the statement as to how the incident had taken place and as to how the Accused had sprinkled kerosene on her and set her ablaze. She has also stated about the motive behind it. Therefore, there is no reason to discard the DD which is in the form of the complaint at Exh.39.

12. Now, this takes us to examine the second DD which was recorded by the Executive Magistrate which is on record at Exh.12. To prove this fact, the prosecution has examined and relied upon the oral testimony of PW-4 Mohanbhai Mangabhai at Exh.10, Circle Officer in Mamlatdar Office, Bharuch. He received the police yadi for recording the evidence of deceased Jashodaben. He, therefore, went to the burn ward of the Civil Hospital. He himself has verified whether

Jashodaben was able to reply and thereafter he started interrogating Jashodaben and tried to get the information about the incident. Before him, Jashodaben had in term stated about the incident. Jashodaben had stated that on 31.1.1999 the Accused came to her house in drunken condition and picked up quarrel and thereafter sprinkled kerosene from stove on her and set her ablaze. The said DD is on record at Exh.12. It is true that on reappraisal of the evidence of PW-4 Mohanbai Mangabhai, he has not obtained the certificate from the Doctor about the physical and mental condition of the deceased prior to recording of the statement. But that is not fatal to the prosecution case as there are four eyewitnesses to the incident. Therefore, this evidence can be used for corroboration of the oral testimony of the eyewitnesses and therefore can be relied and acted upon.

13. In order to prove the culpability of the Accused, the prosecution has also examined 4 eyewitnesses. In this connection, the prosecution has relied upon the oral testimony of PW-1 Daxaben Khushalbhai at Exh.7 - daughter of deceased Jashodaben, PW-2 Praghaven Khushalbhai at Exh.8 - daughter of deceased Jashodaben, PW-3 Rohanbhai Khushalbhai at Exh.9 - son of deceased Jashodaben and PW-6 Nilesh Khushalbhai at Exh.16 - son of deceased Jashodaben. In their oral testimonies, all of them have unequivocally and in clear terms stated about the incident which had taken place. The sum and substance of their oral testimonies is that on the day of incident, i.e. 31.1.1999 the Accused came to their house. Prior to that also the Accused used to come to their house and picked up quarrel with Jashodaben. The Accused wanted to marry their mother which was not agreeable to Jashodaben. Therefore, the Accused had assaulted Jashodaben by sprinkling kerosene on her and thereafter setting her ablaze. It may be noted that the above four witnesses have been cross-examined by the learned advocate but nothing substantial has been brought out from their evidence which would impeach their credibility.

14. On overall reappraisal of two sets of dying declarations; one in the form of a complaint at Exh.39 and the another recorded by the Executive Magistrate at Exh.12 and also the oral testimony of four eyewitnesses, according to us, the complicity of the Accused for commission of the offence of murder is duly proved and established beyond reasonable doubt. Therefore, it has to be held that deceased Jashodaben had died a homicidal death after receiving the burn injuries by the Accused and there is no escape from the conclusion that the Accused had sprinkled kerosene on deceased Jashodaben and set her ablaze and on receiving the burn injuries deceased Jashodaben succumbed to the same. Therefore, the complicity of the Accused for commission of the offence of murder of Jashodaben, punishable u/s 302 IPC is proved beyond reasonable doubt.

15. We find ourselves in complete agreement with the finding, ultimate conclusion and the resultant order of conviction and sentence recorded by the trial Court, as according to us, no other finding, conclusion and order, is possible except the one reached by the trial Court, which is required to be affirmed by us.

16. Seen in the above context, there is no reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence passed by the trial Court, and as the Appeal lacks merit, deserves to be dismissed by confirming the judgment and order passed by the trial Court.

17. For the foregoing reasons, the Appeal fails and accordingly it is dismissed. Resultantly the judgment and order of conviction and sentence dated 4.7.2001 rendered in Sessions Case No. 101 of 1999 by the learned Additional Sessions Judge, Bharuch, is hereby confirmed and maintained.