

(2009) 03 GUJ CK 0095
In the Gujarat High Court
Case No : Criminal Appeal No. 363 of 2004

Mukeshbhai Balubhai Ramani

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 31-03-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 498A

Citation : (2009) 2 GLR 1749

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

Bench : Division Bench

Advocate : Ashish M. Dagli, for the Appellant; M.R. Mengdey, Addl. P.P., for the Respondent

Final Decision : Allowed

Judgement

J.C. Upadhyaya, J.—The appellant, who was original-accused in Sessions Case No. 78 of 2001 came to be convicted by learned Additional Sessions Judge, Amreli by judgment and order dated 16-8-2003 for the commission of offences punishable under Sections 498A and 302 of Indian Penal Code ("I.P.C, for short). The appellant was sentenced to undergo R.I for three years and fine of Rs. 500/- and in default of payment of fine, R.I for three months for the offence punishable u/s 498A of the I.P.C. and imprisonment for life and fine of Rs. 2000/- and in default of payment of fine R.I for six months for the offence punishable u/s 302 of the I.P.C.

2. The prosecution case in nutshell is that deceased Savitaben was the second wife of the appellant. The first wife of the appellant had expired, and therefore, the appellant remarried Savitaben. At the time when appellant remarried Savitaben, it was also the second marriage of Savitaben. However, her husband had died, but during her wedlock with her first husband, Bhavna was born. Therefore, the appellant remarried Savitaben, at that time, along with Savitaben, Bhavna also came to reside with the appellant. It is the case of the prosecution

that Savitaben was ill-treated by the appellant, and she was meted out with physical and mental cruelty. It is the case of the prosecution that the incident occurred in the house of the appellant, situated at village Saladi, Taluka Liliya, District Amreli. The incident occurred on 2-5-2001, at about 14-30 hours. It is alleged that at the time of incident, the appellant, his wife Savitaben and Bhavna were present in the house. Because of quarrel by the appellant with Savitaben, the appellant poured kerosene on the body of Savitaben and set her on fire. It is alleged that at that time, appellant himself also sustained burn injuries. Initially, Liliya Police Station recorded the occurrence as accidental death and commenced inquiry in connection with A.D. No. 4 of 2001. On the next day, i.e. on 3-5-2001, Bhavna daughter of Savitaben and step-daughter of the appellant lodged the First Information Report before P.S.I. Liliya, and the offence came to be registered and the police commenced investigation. After collecting required material for the purpose of lodgment of charge-sheet, charge-sheet came to be filed in the Court of learned J.M.F.C, Liliya. As the offence was exclusively triable by the Court of Sessions, learned J.M.F.C. committed the case to the Court of Sessions, Amreli, which was registered as Sessions Case No. 78 of 2001.

3. The learned trial Judge framed charge at Exh.2 against the appellant for the offence punishable under Sections 498A and 302 of the I.P.C., to which the appellant did not plead guilty and claimed to be tried. Therefore, the prosecution adduced its oral and documentary evidence. After the completion of the oral evidence led by the prosecution, the learned trial Judge recorded further statement of the appellant u/s 313 of the Cr.P.C. and the appellant denied generally all the allegations levelled against him by the prosecution. However, he filed a written statement in support of his further statement, wherein in brief, he stated that Savitaben accidentally sustained burn injuries or in the alternative, she committed the suicide, but he has not committed the murder. About the incident, he explained that at the time of the incident, he was sleeping on a cot and Savitaben came out from the room, sustaining burn injuries and she fell on him, and therefore, he sustained burn injury on his right hand. After appreciating the evidence on record and considering the submissions made on behalf of both the sides, the learned trial Judge came to the conclusion that the prosecution successfully proved the involvement of the appellant for the murder of his wife Savitaben and recorded conviction of the appellant for the offences punishable under Sections 498A and 302 of the I.P.C. and awarded the sentence as hereinabove referred to in this judgment.

4. We have considered submissions made by learned Advocate Mr. Dagli for the appellant and learned A.P.P. Mr. Mengdey for the State. We have examined the record and proceedings in context with the submissions made on behalf of both the sides.

5. On behalf of the appellant, learned Advocate Mr. Dagli submitted that the entire case rests upon the testimony of Bhavna, the daughter of Savitaben and step-daughter of the appellant. It is submitted that the incident occurred on

2-5-2001 and according to the prosecution case, at the time of incident, the appellant, deceased Savitaben and Bhavna were only present in the house. On 2-5-2001, though soon after the incident, the occurrence was reported to police and the investigation was commenced in connection A.D. No. 4 of 2001, and at the time when the scene of offence panchnama was drawn by the police in connection with investigation in A.D. No. 4 of 2001, Bhavnaben was present and the place was shown by her to the panchas and police, yet, she did not tell to anyone, including the police that her mother Savitaben was murdered by the appellant. It is submitted that Savitaben's maternal uncle Shivjibhai, relative Vallabhbhai and other relatives, including the neighbours had gathered near the house of the appellant. Their statements were recorded by police in connection with A.D. Inquiry and they all stated to the police that it was a case of accident. It is submitted that those persons, whose statements came to be recorded by police during A.D. Inquiry were not eye-witnesses and they all came to know about the accident from none other than Bhavna, because, except accused and the deceased, she was the only person present in the house. Therefore, on the day of the incident, Bhavnaben disclosed to her maternal uncle and the neighbours that her mother accidentally sustained burn injuries. Surprisingly, on the next day i.e. on 3-5-2001, along with her maternal uncle Shivjibhai, she went to police station and lodged the F.I.R. Even statement of Shivjibhai was recorded by police during A.D. Inquiry, wherein Shivjibhai stated that Savitaben accidentally sustained burn injuries.

5.1. It is therefore submitted that no reliance can be placed upon the evidence of Bhavna and it is not safe to record conviction, solely on her testimony. However, it is submitted that even during the course of A.D. Inquiry, P.S.I. Mr. Makwana had recorded the statement of Bhavna, wherein she stated that her mother sustained accidental burn injuries, but the prosecution has suppressed said evidence and even P.S.I. Mr. Makwana is not examined as witness.

5.2. Ultimately, it is submitted that the appeal may be allowed.

6. Learned A.P.P. Mr. Mengdey vehemently opposed this appeal and submitted that the evidence of Bhavna is cogent, convincing and reliable. There is no reason whatsoever for Bhavna or her maternal uncle Shivjibhai to falsely implicate the appellant. It is submitted that there is nothing on record to come to the conclusion that during the course of A.D. Inquiry, statement of Bhavna was recorded and she stated in her statement that her mother sustained accidental burn injuries. That the trial Court, therefore, rightly recorded conviction relying upon the testimony of sole eye-witness Bhavna. The appeal, may therefore, be dismissed.

7. Considering the evidence on record, it is clear that the entire case of the prosecution rests upon the testimony child witness Bhavna Mukeshbhai, examined at Exh. 8, who is daughter of deceased Savitaben and step-daughter of the appellant. According to her version, the appellant was harassing her mother Savitaben. Appellant was doing his work in Surat, but she herself and her

mother Savitaben were kept by him at village Saladi. The appellant did not allow them to stay with him in Surat. About the incident, she stated that her mother Savitaben was inside the room and in the corridor her father - the appellant and she herself were sleeping on two different cots. After sometime, the appellant went inside the room and started quarrelling with Savitaben. She found that the door of the room was bolted from inside. After sometime, the door of the room was opened and her mother Savitaben came out from the room and she saw that she had sustained extensive burn injuries. The appellant followed her mother Savitaben and when Savitaben came in the corridor, the appellant kicked Savitaben and Savitaben fell down on the ground. She deposed that, thereafter, her maternal uncle Shivjibhai took her to his house and on next day, she along with her maternal uncle Shivjibhai lodged the F.I.R., Exh. 9 before Liliya Police Station.

7.1. Bhavna was succinctly cross-examined by the defence. Considering her cross-examination, she admits that soon after the incident, police personnel had come to her house and she went inside the house, only after police had come. However, she stated that at that time, police did not ask her about the incident. She stated that in Civil Hospital, where her mother was removed, police had inquired her, but whatever she stated was not written down by police. It is pertinent to note that if she had stated to the police that her mother was ablazed by the appellant, the police would have immediately recorded her statement in form of F.I.R. It has come in evidence that the panchnama of the scene of offence, Exh. 13, when drawn by the police in presence of panchas, during the course of A.D. Inquiry, at that time, Bhavna was present and the place of incident was shown to the police and panchas by Bhavna. Panchnama of scene of occurrence, Exh. 13 came to be drawn on 2-5-2001 between 18-30 hours to 19-30 hours. This fact reveals that even on the day of the incident, soon after the incident, the police had come to the house where incident had occurred, and at that time, Police Officer met Bhavna. She had an opportunity to tell police that her mother Savitaben was ablazed by her step-father-appellant, but nothing whatsoever was done.

7.2. It is further pertinent to note that considering the evidence of I.O. Mr. Rathod, it transpires that during the course of A.D. Inquiry, statements of neighbours as well as maternal uncle of Bhavna came to be recorded and all those persons, including her maternal uncle stated that Savitaben accidentally sustained burn injuries. It is pertinent to note that all those persons, including the maternal uncle of Bhavna, whose statements came to be recorded at the time of A.D. Inquiry were not eye-witnesses to the incident. As per the prosecution case, Bhavna alone was eye-witness to the incident. Under such circumstances, it becomes clear that the source of information of all those persons, whose statements came to be recorded during A.D. Inquiry is by none other than Bhavna herself. Under such circumstances, if at all Savitaben was set on fire by appellant by pouring kerosene on her body, and Bhavna had witnessed said incident, she would have stated to the neighbours as well as her maternal

uncle Shivjibhai about the incident. In that case, the neighbours as well as her maternal uncle would not have stated in their statements that Savitaben accidentally sustained burn injuries, but, they would have definitely stated that Savitaben was murdered by the appellant. On the day of the incident, in the hospital, police inquired Bhavna, and if at all she had witnessed the incident, she would have stated that her mother was murdered by the appellant. Nothing whatsoever was done.

8. Prosecution examined witness Vallabhbhai at Exh. 14. According to his evidence, the deceased Savitaben was his cousin sister. About the incident, he received a telephone call from Shivjibhai, the maternal uncle of Bhavna that Savitaben had sustained burn injuries, and therefore, he went to Amreli Civil Hospital. He saw the dead-body of Savitaben. In the hospital, Bhavna met him and he inquired to Bhavna as to what had happened and Bhavna told him that in the room of her house, a quarrel took place between the appellant and her mother Savitaben, and after ten to fifteen minutes, her mother Savitaben came out from the house in a burnt condition. Now, the material aspect is that if at all on the date of the incident, in Amreli hospital, Bhavna narrated the incident involving the appellant, to Vallabhbhai, then she would have informed the police about it, immediately on the date of the incident, because, according to the evidence of Bhavna, police was also available in civil hospital, Amreli. Moreover, as stated above, even during the course of drawing of scene of offence panchnama, Bhavna did not tell police about the incident, involving the appellant. Moreover, if Shivjibhai, maternal uncle of Bhavna informed this witness Vallabhbhai by telephone that Savitaben was ablazed, then Shivjibhai would have stated the same thing before police at the time when his statement came to be recorded during the course of A.D. Inquiry. However, considering the evidence of I.O. Mr. Rathod, he stated that Shivjibhai stated in his statement, during the course of A.D. Inquiry that Savitaben sustained burn injury, accidentally.

8.1. Thus, as discussed above, if Bhavna narrated the incident to Shivjibhai and witness Vallabhbhai involving the appellant in the offence of murder of Savitaben, then what was the reason in not disclosing those facts to police on 2-5-2001 itself? It has come in evidence that soon after the incident, on 2-5-2001 police visited the house of the appellant and Savitaben where the incident had happened. At that time, Bhavna was present in the house. The place of incident was shown by her to the panchas and police when panchnama of the scene of offence was drawn in her presence on 2-5-2001. In Amreli Civil Hospital, police was present on 2-5-2001 and as admitted by Bhavna, police inquired to her. However she states that police did not written down what she stated to police. As stated earlier, if at all she had stated to police in the hospital that her mother was murdered by the appellant, police would have immediately recorded her statement on 2-5-2001 and would have treated it as F.I.R. On the contrary, the evidence on record reveals the fact that on 2-5-2001, Shivjibhai - the maternal uncle of Bhavna, Vallabhbhai and other neighbours derived

information from Bhavna that Savitaben sustained accidental burn injuries. It has come on record that P.S.O. Mr. Makwana had made inquiry to Bhavna during A.D. Inquiry. Prosecution did not examine P.S.O. Mr. Makwana as witness in this case. Now in the above background, if F.I.R., Exh. 9 lodged by Bhavna on 3-5-2001 in the police station is seen, not only it is a delayed F.I.R., but creates reasonable doubt about the statement made by Bhavna in it that the appellant murdered her mother Savitaben.

9. Learned Advocate Mr. Dagli relied upon the case of Allil Mollah and Ors. v. State of West Bengal reported in 1996 Cr.LR (SC) 530. Considering the facts of said case, the sole eye-witness, who had seen the incident of murder, did not disclose the incident before anybody. After about two to three days from the date of occurrence, when his statement came to be recorded by police, he disclosed about the involvement of the accused in the offence of murder. Hon"ble the Apex Court observed that though conviction can be based upon testimony of sole eyewitness, but, the evidence of the sole eye-witness should be cogent, convincing and reliable and at the time of appreciating the evidence of sole eye-witness, the conduct of the witness is required to be considered. It was further observed that the conduct of the sole eye-witness that he did not tell anyone about the occurrence till the next day, appears to be rather unnatural and created an impression that he had not witnessed the occurrence. Ultimately, Hon"ble the Apex Court by allowing the appeal, set aside the conviction recorded by the trial Court which was confirmed by the High Court. Considering the principles established in the ruling and the evidence of Bhavna, it clearly transpires that in the instant case, the principles established by the Hon"ble Apex Court, apply with great force, in the sense that in the instant case, soon after the incident, Bhavna reported to her neighbours as well as her maternal uncle about the accidental burn injuries sustained by Savitaben and on the next day, she lodged the F.I.R., involving not only the appellant in connection with offence of murder, but mother of the appellant in said offence, though admittedly the mother of the appellant was not present even at the time of the incident.

10. It has come in evidence that appellant sustained burn injuries on the date of the incident. He was also removed to civil hospital, Amreli and according to the evidence of Dr. Dabhi, examined at Exh. 19, who performed the post mortem on the dead-body of Savitaben, also examined the appellant and according to his evidence, appellant had sustained first and second degree burns over right forearm, left palm and right leg. Considering the evidence of Bhavna, nowhere she deposed as to how her step-father, the appellant sustained the burn injuries. Even considering her F.I.R., Exh. 9, nowhere she explained as to how the appellant sustained the burn injuries. Dr. Dabhi in his evidence, Exh. 19, stated that the death on account of burn injuries of Savitaben may be due to suicide. He also stated that the possibility of accidental burns cannot be ruled out. As stated earlier, during the course of A.D. Inquiry, the witnesses stated that Savitaben sustained burn injuries due to accident and that fact gets support by the opinion given by Dr. Dabhi.

10.1. However, about the burn injuries sustained by the appellant, the appellant has explained it during the course of his further statement recorded u/s 313 of the Cr.P.C. that when he was sleeping on a cot in the corridor, Savitaben in a burnt condition, came out of the room and she fell on him, and therefore, he pushed her with his hand and he sustained the burn injury. However, considering the evidence of sole eye-witness Bhavna, she did not explain the burn injuries sustained by the appellant. Considering her evidence, the involvement of the appellant in the incident and setting Savitaben on fire by him, seems to be doubtful. Needless to say that primary duty is of the prosecution to explain the injuries on the person of the accused, especially when the injuries are serious in nature. This has direct nexus with the genesis (origin) of the offence. As stated above, Bhavna in her evidence and in her F.I.R. maintains complete silence as to how and under what circumstances, appellant sustained the burn injuries. She does not say that the appellant sustained the burn injuries while setting her mother Savitaben to fire. According to her, the incident happened inside the room and the door of the room was bolted from inside. She was outside the room in a corridor. According to her, in the room only two persons were there, her mother deceased Savitaben and the appellant. In such situation as it prevailed in the instant case, the appellant might have sustained burn injuries on account of various reasons, i.e. while setting the deceased to fire as per the case of the prosecution or while extinguishing the fire or as per the defence of the appellant, accidentally, if the deceased sustaining burn injuries and engulfed by flames, falls on the appellant who is sleeping and the appellant, to avert burn injuries pushes the deceased who fell on him. Bhavna does not say in clear terms that the appellant sustained burn injuries while setting her mother Savita on fire. When such is the situation, the explanation tendered by the appellant, cannot be discarded. The explanation cannot be said to be improbable or imaginary. It is pertinent to note that body of Savitaben was found lying in the courtyard of the house and not in the room where the incident allegedly happened. This fact supports the explanation tendered by the appellant.

11. It is alleged by the prosecution that Savitaben was subjected to cruelty and harassment by the appellant. Considering the F.I.R., Exh. 9 and deposition of first informant Bhavna, Exh. 8, appellant was doing diamond polishing work in Surat. He has agricultural land in his native place Saladi, Taluka Liliya. Initially, Savitaben and Bhavna were residing in Surat with the appellant and the agricultural work at Saladi was looked after by his father. However, soon before the incident, his father died. Therefore, the appellant, Savitaben and Bhavna had come to Saladi. From the evidence on record, it further transpires that the appellant desired that Savitaben and Bhavna should stay at Saladi and take care of the agricultural land, but Savitaben was not agreeable to this suggestion. This is the root cause of dispute. The controversy further aggravated when Shivjibhai, the brother of Savitaben issued a legal notice to the appellant to return all "streedhana articles" of Savitaben lying in her matrimonial home. However, Bhavna in her evidence stated that economic condition of the appellant is poor.

Appellant is the only earning member in the family, who has to maintain seven members of the family. She further admitted that her mother (deceased Savitaben) liked to stay at Saladi. Then she stated that she does not know as to what was the cause of dispute between the appellant and Savitaben.

11.1. It is pertinent to note that Shivjibhai, the brother of Savitaben, who issued legal notice to the appellant as stated above, is not examined as a witness by the prosecution. The prosecution examined Vallabhbhai Puna, relative of Savitaben at Exh. 14 and he tried to develop totally a new story about the cause of dispute between the spouses that Savitaben had a desire of having a male child out of her wedlock with the appellant, but the appellant was not ready for it. Thus the evidence adduced by the prosecution is not cogent and consistent about the cruelty. Moreover, considering the overall evidence on record, it can safely be said that the general allegations are levelled by the prosecution about the cruelty. The allegations cannot be said to have been proved beyond any reasonable doubt.

12. In light of the above discussions, we are of the considered opinion that the evidence adduced by the sole eye-witness Bhavna appears to be doubtful and shaky. It is not safe to record conviction solely relying upon her evidence. In the result, the appeal deserves to be allowed.

13. For the foregoing reasons, the appeal is allowed. The conviction of the appellant recorded by learned Additional Sessions Judge, Amreli in Sessions Case No. 78 of 2001 on 16-8-2003 for the commission of offences punishable under Sections 302 and 498A of the I.P.C. is set aside and he is acquitted of the charges levelled against him. The appellant be set at liberty forthwith from the prison, if no longer required in any other case. Fine, if paid, be refunded to him.