

(2008) 08 GUJ CK 0042
In the Gujarat High Court
Case No : Criminal Appeal No. 783 of 2002

Rameshbhai Narsinhbhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 27-08-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 300, 302, 306, 307, 324

Citation : (2009) CriLJ 1166 : (2009) 2 GLR 1038

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

Bench : Division Bench

Advocate : Shilpa R. Shah, for the Appellant; K.C. Shah, Ld. APP for Opponent 1, for the Respondent

Final Decision : Dismissed

Judgement

Z.K. Saiyed, J.—The present appellant -ori. Accused has been charged and tried for the offences punishable u/s 498-A, 404, 324, 342 and 302 of Indian Penal Code (for short "IPC") by the learned Addl. Sessions Judge, Jamnagar in Sessions Case No. 59/2000

2. The facts of the prosecution case is that deceased complainant Hansaben married with Karsanbhai Shivabhai Koli, resident of Surendranagar ten years prior to the incident and due to the kidney problem, her husband died and after the death of her husband, she came to Jamnagar with her son and daughter and was staying with her father Kana Virambhai at Shabarinagar, near Woolen Mill and working at Udhyanagar in Brass-part factory. Due to work, Hansaben came into contact with Shantaben Narshibhai Koli who was a visitory of the factory. Shantaben told her that wife of her son Ramesh has expired and he has two daughters and one son and because she was widow, Shantaben convinced her to marry with her son Ramesh. Prior to the incident before about one year, she met Ramesh and without any ceremony, she has started living with Ramesh in his house and has handled his house. For about two months, Ramesh has kept her

nicely and thereafter Ramesh started torturing her saying that she is keeping illicit relation with other persons and having a bad character, and he was not permitting her to go out and not giving money for maintenance of house, but for the sake of good future of her children, she kept quite.

3. On 21.2.2000, at about 4.00pm, when she was standing outside her house, her husband Ramesh came there and brought her in the house and told her that "rand" you are waiting for your "Bhadwa" and he sent all children outside and then he pulled out knife and two knife blows were given on the elbow and thereafter he confined her into the room and went away. Again he came back and one bottle of kerosene was in the house, so he poured the kerosene on her body and lighted the match stick and tried to kill her and thereafter, closed the house from outside and confined her in the house and went away. So, Hansaben shouted, therefore, her children called her brother-in-law Kishor and at that time, her mother-in-law, wife of her brother-in-law Nainaben and other neighbours came there and Kishor opened the door and extinguished the fire. Thereafter, she was brought to the hospital in a rickshaw by her mother-in-law and wife of brother-in-law. She was conscious and fit to speak and in a good mental condition. So, before P.I. of B-Division Police Station, Jamnagar, she narrated the incident, so complaint was registered vide CR No. I-96/2000 for the offence punishable u/s 307 of IPC and yadi was sent to Police Station and statements of the witnesses were recorded. Panchnama of scene of offence was drawn and accused was arrested and panchnama of physical condition was prepared and due to the death of Hansaben, offence punishable u/s 302 of IPC was added in the complaint which was registered for the offences punishable u/s 307, 324, 498-A. Prior to the death of Hansaben, her dying declaration was recorded by Executive Magistrate and inquest panchnama was prepared and dead body was sent for autopsy. Muddamal and blood was sent to the FSL for scientific analysis and map of the scene of offence, medical certificate, P.M. Note and report of FSL were tagged with the investigation papers and I.O. has filed the charge-sheet before the learned Judicial Magistrate First Class, Jamnagar. Since the alleged offence u/s 302, 307, 324, 498-A are exclusively triable by the Court of Sessions, learned Magistrate has committed the case to the Court of Sessions, Jamnagar which was registered as Sessions Case No. 59/2000 and then it was placed before the learned Addl. Sessions Judge, Jamnagar who has framed the charge u/s 498-A, 504, 324, 342, 307 and 302 of IPC. The appellant-accused has not pleaded guilty of the above charge and claimed to be tried.

4. In order to bring home the charges levelled against the accused, the prosecution has examined, in all, 17 witnesses, which are under:

PW-1 Dr. R.G. Datta Ex. 9

PW-2 Dr P.B. Patel Ex. 14

PW-3 Dr K.H. Shah Ex. 18

PW-4 Dr H.G. Shah Ex. 19

PW-5 Yagneshkumar Prahladray Acharya Ex. 22

PW-6 Dr. S.J. Chhatwani Ex. 26

PW-7 Praful Vrajlal Vora Ex. 29

PW-8 Jethalal Karsanbhai Ex. 33

PW-9 Sukhdevbhai Jivrajbhai Gohil Ex. 34

PW-10 Jivraj Laxman Ex. 35

PW-11 Shabbir Musabhai Ex. 43

PW-12 Kanabhai Virdajibhai Ex. 44

PW-13 Ashok Kanjibhai Rathod Ex. 45

PW-14 Kanubhai Bhagwanjibhai Ex. 47

PW-15 Halubha Nathubha Ex. 54

PW-16 Narendrasinh Bharatsinh Jadeja Ex. 56

Bhikhubha Balubha Jadeja Ex. 59.

5. To prove the culpability of the accused-appellant, the prosecution has also produced and relied upon the following documentary evidence. They are as under:

Police Yadi Ex. 10

PM Report Ex. 11

Yadi for blood sample of deceased Hansaben Ex. 12.

Treatment papers of deceased Hansaben Ex. 15

Case papers of deceased Hansaben Ex. 20

Medical Certificate Ex. 21

Yadi to Doctor Ex. 23

Original dying declaration Ex. 24

Yadi for blood sample of appellant Ex. 27

Form Ex. 28

Yadi to police for drawing map Ex. 30.

Original Map Ex. 31

Inquest panchnama Ex. 39

Yadi of Head Constable Ex. 48

Copy of station diary Ex. 49
Yadi for complaint to PSI Ex 50
Entry in station diary Ex. 51
Copy of MLC Ex. 55
Complaint Ex. 57
Yadi Ex. 58
Panchnama of scene of offence Ex. 60
Arrest panchnama Ex. 61
Receipt of FSL Ex. 62
Letter of sending muddamal Ex.63
Certificate Ex. 64
Receipt of receiving the muddamal by FSL Ex. 65
Forwarding letter of FSL Ex. 66
Report of Chemistry Division, Junagadh Ex. 67
Forwarding letter of Serology Department Ex. 68
Serological Report Ex. 69
Yadi Ex. 70
Report to Higher officer for the offence Ex. 71
Form Ex. 72

6. Thereafter, after examining the witnesses the further statement of accused u/s 313 of Cr.P.C. was recorded in which the appellant - accused has denied the case of prosecution.

7. After considering the oral as well as documentary evidence and after hearing the parties, the learned Additional Sessions Judge vide impugned judgment and order dated 22.7.2002 held the accused guilty for the offence punishable u/s 302, 498-A, 504, 324 and 342 of IPC and accused-appellant was convicted and sentenced to suffer rigorous imprisonment for life for the offence punishable u/s 302 IPC and a fine of Rs. 500/-, in default, S/I for five months, and he was also sentenced for the offence u/s 498-A to suffer rigorous imprisonment for three years and a fine of Rs. 300/-, in default, S/I for three months, and sentenced for the offence punishable u/s 504 of IPC for six months rigorous imprisonment and a fine of Rs. 100/-, in default, S/I for one month, for the offence u/s 324 of IPC, he was sentenced to suffer R/I for six months and a fine of Rs. 100/-, in default, further S/I for one month, and for the offence u/s 342 of IPC, he was sentenced

to suffer R/I for six months and a fine of Rs. 100/-, in default, further S/I for one month. All the sentences were ordered to run concurrently.

8. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence passed by the learned Judge, the appellant accused has filed this appeal through Jail.

9. Heard Ms. Shilpa Shah for the appellant appointed by the Legal Aid committee and Mr KC Shah learned APP for the respondent-State.

10. Ms. Shah learned advocate for the appellant has contended that the impugned judgment and order of the trial court is not proper, legal and against provisions of law and trial court has not considered the defence put up by the appellant. She has also contended that in view of the oral dying declaration and dying declaration made before the Doctor and Executive Magistrate, the prosecution has failed to establish the guilt of the appellant-accused. She has read the medical evidence and argued that looking to the burns injuries received by the deceased, in such type of position, the patient cannot even speak and cannot be in fully conscious and state of mind. So, the evidence regarding dying declaration is concerned, it cannot be considered as trustworthy evidence against the present appellant. She has also contended that the prosecution has failed to establish its case beyond any reasonable doubt, yet the present appellant - accused has been wrongly punished by the trial court.

11. Learned APP Mr. K.C. Shah appearing on behalf of the respondent-State has read the charge framed against the appellant as well as oral and documentary evidence and also read the oral dying declaration made before the Doctor in the form of case history and also made before the constable and PSI in form of complaint and detailed oral dying declaration also made before the Executive Magistrate. He has argued that they all are public servants and they have no enmity with the present appellant and, therefore, their evidence cannot be discarded. Mr. Shah has also contended that from the medical evidence, the doctor has opined that this is not the case of suicide but it is a case of homicide. He has also contended that the learned trial Judge has considered each and every aspects of the different version and there is no lacuna to make any prejudice against the present appellant-accused.

12. We have perused the papers and considered the oral evidence as well as documentary evidence. PW-1 Dr. R.G. Datta Ex. 9 is the maker of autopsy. He has examined the following injuries on the deceased Hansaben:

About 80% to 90% body surface was shown superficial to deep irregular manners burns.

Burning present all over the body, except the back of neck, outer aspect of Rt. Upper limb, Rt. palm, front aspect of lower part of legs, both feet and soles.

13. It is established by this witness that PM Note Ex. 11 was prepared by the panel of doctors and we have also perused the oral evidence of second medical

expert PW-2 Dr PB Patel Ex. 14. Before this witness, deceased patient Hansaben has stated that when she was present in her house, at that time, at about 5.30 pm appellant-accused Ramesh came there from outside and firstly blows were given to her and knife blows were also given on the left hand and then he poured kerosene on her and set ablaze. This witness has recorded dying declaration in the form of case history. This witness has stated that at the time of examination of the deceased Hansaben, she was conscious and able to identify place, person and time. He has examined the injuries of the patient.

14. In cross-examination, we have found that defence has failed to establish its version. We have considered the documentary evidence of case history and case papers as well as papers of treatment. We have not found any doubt against the prosecution. From the oral evidence of PW-3 Dr. K.H. Shah Ex. 18, we have found that he was present at hospital on 21.2.2000 in female surgical ward and deceased Hansaben was there in the said ward with burns injuries and bleeding was also there from the wounds and policeman and Executive Magistrate came to him at 8.30pm and they have inquired & verified regarding consciousness of patient Hansaben. So, this witness has checked blood pressure of deceased Hansaben and also made some questions to her and he found that she was conscious and able to speak, therefore statement of Hansaben was recorded by the policeman and this witness has also informed the mental condition of the patient Hansaben to the policeman. He has also proved his signature on the complaint. He has also stated on oath that Executive Magistrate has also visited on 21.2.2000 at 10.00pm and he has also obtained certificate regarding mental and physical condition of the deceased Hansaben and again this witness has measured the blood pressure and again put some questions to the Hansaben and then he has given his opinion to the Executive Magistrate and colleague of this witness Dr. Pradip Patel has made an endorsement at the end of dying declaration of deceased Hansaben. We have gone through the medical evidence of PW-4 Dr. H.G. Shah Ex. 19. We have found from the oral evidence of this witness that at the time of examination of deceased Hansaben, she was totally conscious and she stated before this witness that her husband has enlightened the fire and beaten her and went away. The said statement was made by the deceased in a form of case history. This witness has also examined her. This witness has found superficial and deep burn injuries on the part of the boy of deceased and also examined the Injury No. 1 cut wound in size 3cm x 0.5cm on elbow of left hand and between wrist and second injury was found on left wrist in size 2.00cm x 1/4cm cut wound. He has also produced documentary evidence at ex. 20. We have considered the oral evidence of this witness. We have not found any contradictory version from the evidence of medical experts. We have considered his opinion and as per his opinion, the injuries received by deceased Hansaben can be possible by sharp edge weapon and burns injuries can be possible by one person who pour the kerosene to other and ablaze the fire.

15. We have perused the oral evidence of PW-5 Yagnesh Prahladrai Acharya, Executive Magistrate Ex. 22. He has recorded the dying declaration of deceased

Hansaben. He has verified the consciousness and mental position of deceased Hansaben and also obtained opinion of the doctor. We have perused the yadi and endorsement made by the expert witness. We have found that deceased has specifically stated the act of her husband - present appellant and explained the whole incident. So, from the oral version as well a documentary evidence and dying declaration of the deceased Hansaben, it is established on record that deceased Hansaben has made dying declaration before the doctors as well as Executive Magistrate. We have perused the map prepared by PW-7 Praful Vrajlal Vora Ex. 29 and evidence of PW-6 Dr. S.J. Chhatwani Ex. 26 regarding physical check-up of present appellant. We have also perused the panchnama of scene of offence and panchnama of inquest. It is proved by the oral version of the panch witness PW-9 Sukhdevbhai Jivrajbhai Gohil Ex. 34 regarding seizure of articles from the scene of offence. We have found that the case of the prosecution is relied upon the evidence of dying declaration. PW-12 Kanabhai father of deceased Hansaben Ex. 44 has stated that when he went to his daughter Hansaben at hospital, she has also made a statement regarding incident. This witness has stated that two knife blows on her head were given by the present appellant and then he poured kerosene and after closing the door, he went away. We have also perused the oral evidence of this witness with the evidence of other corroborative piece of evidence. We have also considered oral evidence of PW-13 Ashokbhai K. Rathod, brother of deceased, who has stated on oath before the trial court that before him deceased Hansaben has made a statement regarding involvement of the present appellant and this witness has also narrated the incident in a form of corroboration with the dying declaration made by deceased Hansaben before the doctors as well as Executive Magistrate, police and her father. We have perused yadi Ex. 23, prepared prepared by PW-15 Police Head Constable Ex 54. This witness has also visited the deceased at hospital in connection with the inquiry of MLC and he has also verified from the deceased Hansaben. So before him also, the deceased has made a statement that her husband has set her on fire. So, we have considered oral evidence of this witness who is police Head Constable and before whom also the prosecution has established that dying declaration was made by the deceased Hansaben. We have also considered the oral evidence of PW-16 Narendrasinh Bharatsinh Jadeja, Ex. 56, before whom the deceased has explained the whole incident in a form of complaint and Ex. 57 complaint was also proved before the trial court. We have perused the complaint Ex. 57 with the oral evidence given by the prosecution witnesses and we have also perused the oral evidence of PW-17 Bhikhubha Balubha Jadeja, C.P.I., Ex. 59. From the perusal of the evidence of all the witnesses, we have not found any contradictory version while considering the case of the prosecution. Even we have not found any illegality from the papers of investigation. At the first glance, the prosecution has produced evidence to show that before the doctors oral dying declaration was made and before PSI and Executive Magistrate the dying declaration was also made. So, in this case, the prosecution has produced so many dying declarations of deceased Hansaben and we have perused the mental and physical condition of deceased Hansaben and

we have found that she was conscious and able to speak with sound mental condition.

16. In the case of Ramavati Devi v. State of Bihar reported in AIR 1983 164, the Apex Court has observed as under:

"Dying Declaration recorded by Police Sub Inspector is admissible and can be relied for conviction". It is also noted by the Apex Court that "it may be noticed that none of these witness including the police officer who recorded the statement could be attributed with any kind of ill-feeling against the accused."

17. There is no reason not to rely upon the dying declaration of the deceased in a form of complaint, case history before doctor, dying declaration before Executive Magistrate and oral dying declaration before witnesses wherein she has given a clear and vivid account of pouring of kerosene all over her body and she being set on fire by the appellant. All these dying declarations made by the deceased have the ring of truth and the testimony of doctors PW-1 Dr. R.G. Datta, PW-2 Dr. P.B. Patel, PW-3 Dr. K.H. Shah, PW-4 Dr. H.G. Shah, PW-6 Dr. S.J. Chhatwani, PW-16 Narendrasinh Bharatsinh Jadeja, PSI Ex. 56, PW-5 Yagneshkumar Prahladrai Acharya, Executive Magistrate Ex. 22 and other witnesses, clearly establishes that she was in a fit mental condition to make the statement before all these witnesses.

18. The case history given by the deceased to doctor regarding the incident was a communication by patient to the doctor who treated her and doctors were a Government doctors, on duty in the hospital at that time and from the cross-examination nothing has been borne out that witnesses were interested witnesses or enimical to the appellant and there is no ground to disbelieve the testimony of these independent witnesses. As per the evidence, it is not on record that there was shock and she was unconscious and her voice was feeble. So there is no doubt at all that all the dying declarations were conscious statements voluntarily made by the deceased. It is also established by oral as well as documentary evidence that deceased was in fully conscious state of mind to give a dying declarations before all the witnesses.

19. From the above facts we found that the deceased was in fully conscious state of mind at the time of recording of dying declarations by the Executive Magistrate, Doctors and PSI. There is no doubt about the correctness and authenticity of dying declaration in question and we are of the view that the dying declaration does not require corroboration. The principle of proof beyond reasonable doubt is applicable in the matter of testing the guilt of the accused. It has no operation in the area of proof of primary facts, particularly in cases where the guilt of the accused is sought to be established by circumstantial evidence. The proof of primary facts is one thing and inference of facts to be drawn from primary facts is another thing. In regard to the proof of basic or primary facts the Court has to judge the evidence in the ordinary way and in the appreciation of evidence in respect of proof of these basic or primary facts. There is no scope

for the application of the principle of benefit of doubt. The Court considers evidence and decides whether that evidence proves the particular fact or not. When it is held that certain facts are proved, the question then arise whether these facts lead to an inference of the guilt of the accused or not and in dealing with these aspects, the doctrine of benefit of doubt would apply and inference of guilt of accused can be drawn only if the proved fact is incompatible with his innocence and is compatible with the guilt of accused.

20. We are of the opinion that if the substratum of prosecution case remains unaffected and remaining part of the evidence is trustworthy the prosecution case should be accepted to the extent it is considered safe and trustworthy.

21. From the above it is clearly established that at the time of recording of the Dying Declarations, the deceased was fully conscious. The statement made in the form of Dying Declarations, in presence of medical experts, are the best proof and there is no reason to disbelieve the same. The Dying Declarations are admissible in evidence on which conviction can be based without any further corroboration if Dying Declarations are found genuine and trustworthy. Looking to the evidence, there is a time gap between the recording of Dying Declaration and occurrence of death. Even if there is time gap, that by itself would not destroy the evidentiary value of the statement. The statement does not loose its credibility if the declarant chances to live longer than anticipated. The Dying Declarations are the best guarantee of the truth if the statement made by dying person who is totally conscious at the time of recording of the Dying Declarations. It is also laid down by the Hon''ble Supreme Court that admissibility of the dying declaration rests upon the principles that a sense of impending death produces in a man''s mind the same felling as that of a conscientious and virtuous man under other nemomoriturus praesumiture mentire i.e. a man will not meet his maker with a lie on his mouth. Such statements are admitted upon consideration that their declaration are made in extremity when the maker is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced and the mind induced by the most powerful consideration to speak the truth. In the case of Najjam Faraghi @ Nijjam Faruqui Vs. State of West Bengal, , the Hon''ble Supreme Court has observed in Head Note (A) as under:

(A) Penal Code (45 of 1860), Section 300 - Murder - Evidence - Death of woman due to burning - Evidence of post-mortem examiner that it was not case of suicide - No attempt by accused-husband who was admittedly present at scene of occurrence to put out fire and save wife - Dying declaration by wife showing that husband killed her by setting her on fire - mental condition of deceased sufficiently good to give statement to Magistrate - Conviction of accused upheld - Mere fact that case was registered initially u/s 306 and later after examination of witnesses alternative charge under same section was framed - will not vitiate proceedings.

22. 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 for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with criminal appeals, this Court has examined the entire evidence on record for itself independently 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.

23. As observed and discussed at length, in our opinion, in light of the oral as well as documentary evidence, it is established by the prosecution that accused had poured the kerosene on the deceased victim and setting on fire. There is no reason for the deceased to falsely involve the appellant - accused in the incident. From the oral as well as documentary evidence adduced by the prosecution, in our opinion, the learned trial Judge has rightly convicted and sentenced the appellant - accused. Therefore, the conviction and sentence awarded by the trial Court against the appellant - accused does not call for any interference of this Court in exercise of appellate powers.

24. We find ourselves in complete agreement with the said findings, ultimate conclusion and resultant order of conviction passed by the trial Court and we are of the view that no other conclusion except the one reached by the trial Court is possible in the instant case as the evidence on record stands. Therefore, there is no valid reason or justifiable ground to interfere with the impugned Judgment and order of conviction and sentence.

25. For the forgoing reasons the Appeal fails and is hereby dismissed. The Judgment and Order of conviction and sentence dated 22.7.2002 recorded by the trial Court against the appellant - accused in Sessions Case No. 59/2000 is hereby confirmed and maintained. Muddamal be disposed of in terms of directions contained in the impugned Judgment and order passed by the trial Court. The Appeal is accordingly dismissed.