

(2010) 07 GUJ CK 0088
In the Gujarat High Court
Case No : Criminal Appeal No. 2420 of 2005

Rupalsinh Parbatsinh Rathod

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 01-07-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313 , 378
Dowry Prohibition Act, 1961 — Section 3, 7
Penal Code, 1860 (IPC) — Section 302, 304, 498A

Citation : (2010) 07 GUJ CK 0088

Hon'ble Judges : J.C. Upadhyaya, J;A.M. Kapadia, J

Bench : Division Bench

Advocate : D.P. Kinariwala, for the Appellant; R.C. Kodekar, APP, for the Respondent

Judgement

J.C. Upadhyaya, J.—Challenge in this Appeal is against the judgment and order rendered by the learned Presiding Officer, Fast Track Court No. 6, Sabarkantha at Himatnagar, in Sessions Case No. 50 of 2005, whereby the learned Judge recorded conviction of the appellant herein, who was original accused No. 1 in the aforesaid Sessions Case, for the offences punishable under Sections 302 and 498A of the Indian Penal Code ("IPC" for short) and Sections 3 and 7 of the Dowry Prohibition Act and the appellant accused was sentenced to undergo life imprisonment and to pay fine of Rs. 1,000/-, in default, to undergo simple imprisonment of six months for the offence punishable u/s 302 of the IPC; rigorous imprisonment of three years and to pay fine of Rs. 250/-, in default, to undergo simple imprisonment of two months for the offence punishable u/s 498A of the IPC and rigorous imprisonment of three years and to pay fine of Rs. 250/- in default, to undergo simple imprisonment of two months for the offence punishable under Sections 3 and 7 of the Dowry Prohibition Act, by virtue of the impugned judgment and order dated 6th September, 2005. All the sentences were ordered to run concurrently.

2. The prosecution case in nutshell is that the incident occurred on 23.4.2005 at

10"O in th morning in the house of the appellant accused, situated at village Bhatia, Taluka Talod, District" Sabarkantha. Deceased Sangitaben married to the appellant prior to about two and half years from the date of the incident. It is alleged that Sangitaben was subjected to physical and mental torture by the appellant as well as co- accused Vajiben Parbatsinh Lalsinh Rathod, the mother of the appellant as well as mother-in-law of deceased Sangitaben. About the incident, it is alleged that, the appellant poured kerosene on Sangitaben and abalzed her by match stick, and in the said act, original accused No. 2 Vajiben aided and abetted the appellant. Sangita was initially shifted to Primary Health Centre, Talod and thereafter she was shifted to the private Nursing Home of PW-2 Dr. Jagdishkumar Devchandbhai Prajapati at Gandhinagar. During the course of her treatment, Sangitaben succumbed to the injuries and died on 9.5.2005. One Sendhaji Shanai Thakore, father of the deceased Sangitaben, lodged the FIR regarding the incident against the appellant - accused as well as co-accused Vajiben before PSI, Talod Police Station and the FIR was registered and investigation was commenced. The Executive Magistrate recorded Dying Declaration ("DD" for short) of the deceased. The Investigating Police Officer recorded statements of material witnesses and collected the required muddamal. After completion of the police investigation, charge sheet came to be filed in the Court of learned Judicial Magistrate (First Class), Prantij. Since the offence was exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Sessions Court, Sabarkantha at Himatnagar, which was registered as Sessions Case No. 50 of 2005.

3. The learned Trial Court framed the charge against the appellant herein as well as co-accused Vajiben at Exhibit-6, to which they did not plead guilty and claimed to be tried. Thereupon, the prosecution adduced its oral and documentary evidence. The prosecution examined as many as 15 witnesses and tendered required documentary evidence before the Trial Court. After the prosecution concluded its evidence, the learned Trial Judge recorded further statements of both the accused including the appellant-accused as contemplated u/s 313 of the Criminal Procedure Code and the appellant accused denied generally all the incriminating circumstances put to him by the Trial Court and submitted that at the time of the incident, his wife deceased Sangita was preparing food and abruptly there was busting of stove and she caught fire. After evaluating the oral and documentary evidence on record and considering the statements made on behalf of both the sides, the learned Trial Court came to the conclusion that the prosecution has successfully proved its case beyond any reasonable doubt against the appellant accused and recorded the conviction for the offences punishable under Sections 302, 498A of the IPC as well as under Sections 3 and 7 of the Dowry Prohibition Act and awarded the sentence, as referred to here-in-above in this judgment. However, the learned Trial Judge came to the conclusion that so far as co-accused No. 2 Vajiben Parbatsinh Lalsinh Rathod was concerned, there was no sufficient evidence to record her conviction and the learned Trial Judge recorded acquittal of original accused No. 2 Vajiben.

It is submitted that the State did not challenge the acquittal of original accused No. 2 Vajiben Parbatsinh Lalsinh Rathod by preferring any Appeal u/s 378 of the Criminal Procedure Code.

4. We have heard the arguments of learned Advocate Mr. D.P. Kinariwala, for the appellant" accused and learned APP Mr. R.C. Kodekar, for the respondent " State.

5. At the outset, learned Advocate Mr. Kinariwala for the appellant submitted that considering the oral and more particularly the evidence in the nature of DD, the appellant does not dispute the incident itself and his involvement in the incident. However, learned Advocate Mr. Kinariwala for the appellant submitted that considering the facts and circumstances of the case and more particularly the fact that deceased Sangitaben was admitted in hospital on 23.4.2005 on account of her burn injuries and she died on 9.5.2005 and the postmortem report reveals that the death was on account of septicemia, the learned Trial Judge erred in coming to the conclusion that an offence of murder was made out. He submitted that considering the medical evidence on record and more particularly the Postmortem Report as well as the evidence of the Doctor, who performed the autopsy, the offence which can be said to have been committed is culpable homicide not amounting to murder, punishable u/s 304 Part-II of the IPC. He further submitted that the deceased Sangitaben did not die on account of burn injuries but died due to septicemia, which was not the direct result of the bodily injuries received by the deceased. The medical evidence reveals that because of certain complications, the death occurred. It is further submitted that the appellant is in jail since last 5 years and the punishment provided for the offence punishable u/s 304 Part-II of the IPC is imprisonment for 10 years or fine or both and, therefore, considering the facts and circumstances of the case, the period undergone by the appellant in jail, would be sufficient sentence in the instant case.

6. Per contra, learned AGP Mr. Kodekar for the State submitted that the Trial Court was perfectly justified in coming to the conclusion that the offence of murder was committed by the appellant. Considering the manner and method in which the incident occurred and more particularly the act committed by the appellant in pouring kerosene on the body of the deceased and then set her to fire by match stick, clearly suggests that, the only intention of the appellant was to see that the deceased is murdered. Therefore, it is submitted that the appeal may be dismissed.

7. We have examined the record and proceedings in context with the submissions made by the rival side.

8. Since the instant appeal is pressed only on the issue as to what offence can be said to have been constituted, it would not be necessary entering deep into the merits of the case. However, suffice it to say that the entire prosecution case centers round the dying declaration recorded by the Executive Magistrate, PW-6 Jitendra kumar Kalidas, examined at Exhibit-28. According to his evidence, upon

receipt of police yadi, he immediately went to the hospital and contacted in the first point of time Dr. Jagadishkumar Devchandbhai Prajapati and inquired about the physical and mental state of deceased Sangitaben and he was told by the Doctor that Sangitaben was fit to make dying declaration and thereupon he recorded the dying declaration of the deceased which is produced at Exhibit-30. Considering the dying declaration at Exhibit-30, it clearly transpires that, the involvement of the appellant in the incident is very clear. It was he who poured kerosene on the body of the deceased and set her to fire by match stick. If the dying declaration is considered, it clearly transpires that, regarding the main incident, no allegations are made qua the original accused No. 2 Vajiben, who came to be acquitted by the Trial Court. Considering the evidence of PW-2 Dr. Jagadishkumar Devchandbhai Prajapati, examined at Exhibit-19, he corroborated the evidence of the Executive Magistrate, in the sense that, Doctor clearly stated that the Executive Magistrate had come before him and he had inquired about the physical and mental state of the deceased and he made endorsements in the dying declaration to the effect that the patient was fully conscious and was able to make statement. The defence raised by the appellant before the Trial Court to the effect that the deceased sustained accidental burn injuries did not weigh with the Trial Court and the Trial Court discarded the said defence. Considering the panchnama of scene of occurrence, it clearly transpires that the stove found on the scene of offence was intact and no busted stove could be found on the scene of offence. More over, the Trial Court has rightly come to the conclusion that there was no reason, whatsoever, to discard the evidence of the independent witness, namely, the Executive Magistrate.

9. In the above background, it is submitted by the learned Advocate Mr. Kinariwala for the appellant that the only offence which could be said to have been made out is culpable homicide not amounting to murder, punishable u/s 304 Part-II of the Indian Penal Code. To substantiate such submission, our attention was drawn to the evidence of Dr. Vipulaben Kantibhai Chauhan, who performed the autopsy and the postmortem report produced at Exhibit-14. The deceased has sustained third degree burn injuries on both cheeks, anterior side of neck, right ear, chest and abdomen, etc. The cause of death reported to be cardio respiratory failure due to septicemia due to burn injuries. In her evidence, Dr. Vipulaben opined that on account of burn injuries, septicemia may occur and death may also occur. It has come on record that the incident occurred on 23.4.2005. Initially the deceased was brought to Primary Health Centre, Talod and she was initially examined by PW-2 Dr. Dipeshbhai Maganbhai Patel, examined at Exhibit-16. Thereafter, on the same day, for further and better treatment, she was admitted in Navjeevan Hospital, Gandhinagar of Dr. Jagadishkumar Devchandbhai Prajapati, PW-3, examined at Exhibit-19. The case papers prepared by Dr. Jagadishkumar are collectively produced at Exhibit-22 and considering the case papers, it transpires that, till the last moment of her death, she was conscious. On 9.5.2005, abruptly her condition started deteriorating and she died. Thus, it could safely be said that after sustaining burn

injuries, she survived for about 16 days. The cause of her death is septicemia which is a complication occurred on account of burn injuries. The immediate cause of death, therefore, was not the burn injuries but subsequent complications occurred on account of the burn injuries.

10. Learned Advocate Mr. Kinariwala, for the appellant relied upon a case of Maniben Vs. State of Gujarat, Considering the facts of said case, almost identical facts were there, in the sense that, the deceased sustained burn injuries as she was set to fire by the appellant. She died after 8 days on account of septicemia. Considering the medical evidence on record and more particularly the fact that the deceased did not die by burn injuries but died due to septicemia, which was not the direct result of the bodily injury received by the deceased, the Trial Court came to the conclusion that the offence of culpable homicide, not amounting to murder, punishable u/s 304 Part-II of the IPC was committed by the appellant and recorded conviction of the appellant accordingly. However, in the appeal before the High Court, the High Court came to the conclusion that the offence of murder punishable u/s 302 of the IPC was made out and recorded the conviction of the appellant for the offence of murder. The Hon''ble Apex Court evaluating the evidence on record, came to the conclusion that the view taken by the Trial Court to record the conviction of the appellant of the offence punishable u/s 304 part-II of the IPC was a cogent and plausible view and came to the conclusion that the appellant was guilty of the offence punishable u/s 304 Part-II of the IPC.

11. We are of the considered opinion that the ratio laid down in the Maniben''s case (supra) squarely applies to the facts and circumstances of the instant case. As stated above, after sustaining the burn injuries, deceased survived for about 16 days and subsequently she died not on account of burn injuries but septicemia, a complication occurred on account of burn injuries. When such is the situation, we are of the considered opinion that the act committed by the appellant cannot be said to be with the intention that such act on his part is likely to cause death of the deceased. Only knowledge can be attributed to the appellant that he is likely by such act to cause death. The inescapable conclusion is that the appellant has committed the offence of culpable homicide, not amounting to murder, punishable u/s 304 Part-II of the Indian Penal Code.

12. Now the question would be as to what sentence should be awarded to the appellant. There are catena of decisions of the Hon''ble Apex Court that when an offence is made out not amounting to murder which is punishable u/s 304 Part-II of the IPC, normally, sentence of imprisonment varies from 4 to 5 years. In the instant case, the jail remarks reveal that the appellant has actually undergone the imprisonment of five years and 20 days. Therefore, considering the facts and circumstances of the case, we are of the considered opinion that, the period undergone by the appellant in jail, is just and sufficient punishment, which would meet the ends of justice.

13. For the foregoing reasons the Appeal is partly allowed. The conviction and sentence of the appellant-Rupalsinh Parbatsinh Rathod, recorded by the learned

Presiding Officer, Fast Track Court No. 6, Sabarkantha, Himatnagar, by judgment and order dated 06th September, 2005, in Sessions Case No. 50 of 2005, so far as it relates to the offence punishable u/s 302 of the Indian Penal Code is set aside and the appellant is hereby convicted for the offence punishable u/s 304 Part-II of the IPC and he is sentenced to undergo the period already undergone by him in jail which is more than 5 years, which shall be the sentence of imprisonment and fine of Rs. 1,000/- and in default of payment of fine, simple imprisonment for six months. The conviction and sentence awarded by the Trial Court to the appellant for the offence punishable u/s 498A of the IPC and Sections 3 and 7 of the Dowry Prohibition Act, are maintained and confirmed. All the substantive sentences of imprisonment shall run concurrently. If the amount of fine imposed upon the appellant by the Trial Court is not deposited by him, he shall serve out the sentence awarded for default of payment of fine. Accused is in jail and he shall be set at liberty forthwith if he is not required to be detained for any other offence upon the payment of fine.