

(2008) 04 GUJ CK 0034

In the Gujarat High Court

Case No : Criminal Appeal No's. 1079 and 1142 of 1994

Santaben Kalabhai Bhangi

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 11-04-2008

Acts Referred:

Evidence Act, 1872 — Section 113B

Penal Code, 1860 (IPC) — Section 107, 306, 498A

Citation : (2008) 04 GUJ CK 0034

Hon'ble Judges : Akil Kureshi, J

Bench : Single Bench

Advocate : Satish R. Patel, in Cr.A. No. 1079 of 1994 and Hansa Punani, APP in Cr.A. No. 1142 of 1994, for the Appellant; Hansa Punani, APP in Cr.A. No. 1079 of 1994 and Satish R. Patel in Cr.A. No. 1142 of 1994, for the Respondent

Judgement

Akil Kureshi, J.—Criminal Appeal No. 1079 of 1994 has been filed by the original accused who was, by the impugned judgment and order dated 21.10.94 passed by the learned Additional Sessions Judge, Himatnagar, in Sessions Case No. 87/92, convicted for offence punishable under Sections 498A and Section 306 of the Indian Penal Code and sentenced to simple imprisonment of six months for offence u/s 498A and for one year for the offence u/s 306 of the Indian Penal Code. She was also ordered to pay fine. Criminal Appeal No. 1142 of 1994 has been filed by the State seeking enhancement of the sentence imposed by the learned Judge.

2. As per charge Ex.3, allegations against the accused-appellant were that she used to treat her daughter-in-law Champaben with cruelty. On 8.11.91, at about 11 O' clock in the morning, she had called Champaben and had told her to take divorce upon which Champaben had poured kerosene on herself and set herself ablaze. She died on 12.11.91.

3. Dr. Bharatkumar Solanki, PW-1, was examined at Ex.6. He was the medical officer at the Civil Hospital at Himmatnagar at the relevant time. He had carried

the postmortem on the body of the deceased. He had found that there were burn marks on almost the entire body of the deceased. She had received 90% burn injuries. He had found that the lady had received burn injuries on both the hands, stomach, abdomen, thighs and her hairs were also burnt. Upon internal examination, he found that there was congestion in the brain. The lungs were also congested. He opined that if accidentally her saree catches flame from a burning stove, the same could be extinguished.

In the cross-examination, he did not accept the suggestion that a person receiving 90% burn injuries would be mentally upset or that would invariably faint. To a question put by the Court whether 90% burn injuries could be caused upon a saree of a lady catching fire accidentally from stove, he stated that only if the saree were to continue burning for a long time, thereby setting other clothes to fire, if there was no one to help and if the person kept running around then such injuries could be caused.

4. One Murlidhar Bhogilal Shah, Ex.11, was the Executive Magistrate who had recorded the dying declaration of the deceased girl. In his deposition he stated that on 8.11.91, when he was posted as Mamlatar at Himmatnagar, he received information about Champaben having received burn injuries and having been brought to the Civil hospital at 11.15 in the morning. With the police yadi, he went to the hospital to record her dying declaration. The doctor showed where the patient was kept and introduced him to the patient and thereafter left. He recorded the dying declaration of the deceased. She had received burn injuries but was conscious. He had asked her about the cause of her injuries. She had told him that her mother-in-law quarreled with her and had told her to take divorce upon which she had set herself ablaze. He had taken the thumb impression of the lady. He had noted the dying declaration on his own hand writing.

In the cross-examination, he admitted that he had not taken the endorsement of the doctor that the patient was in a position to give dying declaration. He, however, stated that when he had taken the statement, the patient was conscious and was mentally in a condition to give answers.

5. In the dying declaration, Ex.13, deceased Chambaben had stated that her mother-in-law Shantaben used to taunt her excessively every day and used to quarrel with her. Feeling hurt by such conduct, she had poured kerosene on herself and committed suicide. Her mother-in-law was at home at that time. Her husband had come at 11.30 and had taken her to the hospital. At the time of the incident, her husband was not at home. Her mother-in-law had told her to take divorce. She had, therefore, committed suicide.

6. Panchnama of the scene of offence was drawn and produced and proved before the Court.

7. Dr. Subhashchandra Pandya, PW-9, Ex.51 was the Medical Officer at Civil Hospital, Himatnagar on 8.11.91. He had treated Chambaben in the burns ward.

He stated that the deceased had got burn injuries on account of pouring of kerosene. He had found Champaben in conscious condition when he had treated her. He had not given any sedative to her. Champaben was treated for 3 days at the hospital. He had found her capable of giving proper answers. In the cross-examination, he however, admitted that he was only holding charge of Dr. Vinaben Gor. He held the charges only for a couple of hours.

8. Primarily on the above evidence the prosecution sought to prove the charges against the appellant.

9. At the outset, it may be noted that from the evidence on record, there is little scope for doubt that the deceased Champaben committed suicide by pouring kerosene on her and setting ablaze. Though it was sought to be suggested on behalf of the appellant that possibility of Champaben having received accidental burn injuries cannot be ruled out, from the evidence on record, such possibility can be completely ruled out.

10. Primarily, as already noted, Champaben had received extensive burn injuries on her entire body. She had received 90% injuries and almost all parts of her body were covered with burns. This does not match with the theory of accidental burns particularly since the accident took place at about 11 O" clock in the morning and obviously there would be other members of the family or neighbours who could have immediately helped the unfortunate victim, had it been a case of accident. Further, the evidence of Dr. Subhashchandra, PW-9 also records that the injuries appeared to have been caused on account of pouring of kerosene. PW-1, Dr. Bharatkuamr also virtually ruled out any possibility when in a question put by the Court, as noted, he had stated that such extensive burn injuries could be caused accidentally only if saree of a lady were to keep burning for a long period of time, to set other clothes fire, if there was no help available and if the person had kept running around.

11. By all accounts, thus the prosecution had proved beyond doubt that Champaben died a suicidal death.

12. Question is whether the appellant was responsible for such death and if yes, what offence did she commit.

13. Learned advocate Shri Satish Patel for the appellant vehemently submitted that other than the so called dying declaration of the deceased girl, there is no independent evidence to prove the charges. He further submitted that the dying declaration is also not reliable. The Executive Magistrate had not taken the opinion of the doctor about the condition of the lady being in a position to give proper answers to the questions being put to her.

14. It is true that the charges are sought to be established primarily on the basis of the dying declaration. However, it is not the rule of evidence that such dying declaration even otherwise found to be legal and dependable, conviction on such dying declaration cannot be based. In the case of Mohan Lal and Others Vs. State

of Haryana, the Apex Court observed in para 9 as follows:

This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on his deathbed, being exceedingly solemn, serene and grave, is the reason in law to accept the veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.

In the case of Heeralal Yadav Vs. State of M.P. and Others, it was observed that:

The principle that "no man at the point of his death is presumed to lie. A man will not meet his maker with lie in his mouth" is based on sound public policy. No doubt, as the dead man would not be available for cross-examination, a duty is cast upon the court to examine the dying declaration with care and caution as to whether the dying declaration is creditworthy for acceptance. In other words whether it inspires confidence on the basis of which alone conviction can be recorded. Similarly, it is also an accepted principle of law that the dying declaration, keeping in view the above principles in mind, if inspiring confidence could be the sole basis for conviction.

15. Equally, though it is true that in the dying declaration, there is no mention that the doctor had certified that the patient was in a stable condition and was able to give proper answers, the Executive Magistrate who had recorded the dying declaration in his deposition at Ex.11, clearly stated that when he reached the hospital, Champaben was conscious, he had asked her the reason for the injuries, upon which she had narrated the entire background. He further stated that she was in sound mental state and was able to give answers.

16. There is no reason to discard the dying declaration recorded by an independent witness, i.e. Executive Magistrate merely because the dying declaration did not contain the certification of the doctor that the girl was conscious and was able to give proper answers when the Executive Magistrate was satisfied that the girl was not only conscious but was in stable enough state of mind to give proper answers. Dr. Bharatkumar, PW-1 had also denied the suggestion of the defence that upon 90% burns, a patient would invariably lose consciousness or would not be in stable state of mind. Additionally, as noted, Dr. Subhashchandra, PW-9 who had treated the girl stated that when he had treated Champaben, she was conscious and was in a position to give proper answers. In case of Muthu Kutty and Another Vs. State by Inspector of Police, Tamil Nadu, , it was observed that:

It was observed by a Constitution Bench of this Court in Laxman Vs. State of Maharashtra, that where the medical certificate indicated that the patient was conscious, it would not be correct to say that there was no certification as to state of mind of declarant. Moreover, state of mind was proved by testimony of

the doctor who was present when the dying declaration was recorded. In the aforesaid background it cannot be said that there was any infirmity. Further if the person recording the dying declaration is satisfied that the declarant is in a fit medical condition to make a dying declaration then such dying declaration will not be invalid solely on the ground that the doctor has not certified as to the condition of the declarant to make the dying declaration. (See Rambai Vs. State of Chhattisgarh, . In the instant case contrary to what accused-appellants plead, the doctors' certificate is there.

17. Cumulative effect of the above evidence on record would be that the evidence of the Executive Magistrate with respect to recording of dying declaration being reliable and dependable, need not be discarded from consideration. In the dying declaration itself, the deceased had given fairly accurate account of the background leading to her suicide. Notably, she had involved no other person than her mother-in-law. She had specifically stated that her mother-in-law used to continuously quarrel with her and taunt her daily. She had in fact, told her to take divorce which affected her badly. She, therefore, poured kerosene and set herself ablaze. Under the circumstances, I find that the learned Judge committed no error in basing the conviction on the available material on record. In so far as offence u/s 498A is concerned, therefore, I am of the opinion that the conviction is required to be upheld.

18. I, however, find that to prove the charge u/s 306 of the Indian Penal Code, there had to be something more than the cruelty required to be proved u/s 498A of the Indian Penal Code. In the case of Sushil Kumar Sharma Vs. Union of India (UOI) and Others, the Apex Court has explained the difference between two sections and observed as follows:

One other provision which is relevant to be noted is Section 306 IPC. The basic difference between the two Sections i.e. Section 306 and Section 498A is that of intention. Under the latter, cruelty committed by the husband or his relations drag the women concerned to commit suicide, while under the former provision suicide is abetted and intended.

19. It is true that u/s 113B of the Indian Evidence Act, a rebuttable presumption can be drawn in case of a suicidal death of a married woman within 7 years of marriage and it is proved that she was treated with cruelty by her husband or any of his relative. However, in the present case, all that the lady has stated to the Executive Magistrate was that her mother-in-law used to taunt her and used to quarrel with her. There were no further allegations of either dowry demand or physical or mental cruelty of such a nature which would by its intensity, persistence or regularity would drive a person to despair leaving no choice but to commit suicide. Offence u/s 306 read with Section 107 of the Indian Penal Code was therefore not established against the appellant.

20. This brings the question of sentence. Learned Additional Sessions Judge imposed a sentence of 6 months simple imprisonment on the appellant for

offence u/s 498A of the Indian Penal Code. I find that the same is grossly inadequate under the circumstances. However, considering the passage of time and the fact that the appellant would by now have crossed the age of 50 years, I find that sentence of one year of simple imprisonment would serve the ends of justice.

21. In the result, both the appeals are disposed of in following terms:

Conviction u/s 498A of the Indian Penal Code is upheld.

Sentence under the said section is enhanced to one year of simple imprisonment. Direction for payment of fine remains unaltered.

Conviction and sentence u/s 306 of the IPC is set aside. Fine, if paid for this offence shall be refunded.

Bail bond shall stands cancelled. The appellant-accused shall however have time upto 31st May, 2008 to surrender.

With the above directions, both the appeals are disposed of.