
(2009) 08 GUJ CK 0003
In the Gujarat High Court
Case No : Criminal Appeal No. 236 of 2004

Savji @ Savo Somabhai Chavda	Vs	APPELLANT
State of Gujarat and Another		RESPONDENT

Date of Decision : 28-08-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 313
Penal Code, 1860 (IPC) — Section 302, 323, 498A

Citation : (2009) 08 GUJ CK 0003

Hon'ble Judges : J.C. Upadhyaya, J; Bhagwati Prasad, J

Bench : Division Bench

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

Final Decision : Dismissed

Judgement

J.C. Upadhyaya, J.—The appellant has challenged the legality and validity of the impugned judgment and order rendered by learned Additional Sessions Judge, Fast Track Court No. 4, Jamnagar on 31.12.2003 in Sessions Case No. 37 of 2000 whereby the appellant accused was convicted for the offences punishable under Sections 302, 498A and 323 of the Indian Penal Code ("IPC", for short) and was sentenced to undergo life imprisonment and fine of Rs. 1000/- and in default of payment of fine, S.I for three months for the offence punishable u/s 302 of the IPC, R.I for two years and fine of Rs. 250/- and in default of payment of fine, S.I for two months for the offences punishable u/s 498A of the IPC and S.I for three months and fine of Rs. 100/- and in default of payment of fine, S.I for one month for the offence punishable u/s 323 of the IPC. The substantive sentence of imprisonment was ordered to run concurrently.

2. The prosecution case in nutshell is that the appellant was the husband of the deceased Vanitaben. Both the spouses were residing in Village Lalpur, District Jamnagar. It is alleged that the deceased was meted out with cruelty and ill treatment by the appellant. The incident occurred round about 8 pm on

24.10.1999, and it is alleged that deceased was beaten by the appellant with stick and kick & fist blows and, thereafter, the appellant poured kerosene on the deceased and set her to fire. Deceased was immediately removed to initially Lalpur hospital, and thereafter, Civil hospital, Jamnagar. In Civil hospital, Jamnagar, her first information report came to be recorded. The FIR was registered and investigation was started. After collecting the required material for the purpose of lodgment of chargesheet, chargesheet came to be filed in the Court of learned JMFC, Lalpur. Since the offence was exclusively triable by the Court of Sessions, learned JMFC, Lalpur committed the case to the Court of Sessions at Jamnagar, which was numbered as Sessions Case No. 37 of 2000.

3. Learned trial Judge framed charge at Exh.3 to which the appellant did not plead guilty and claimed to be tried. Thereupon the prosecution adduced its oral and documentary evidence. The prosecution examined in all 16 witnesses and produced relevant documentary evidence. After the prosecution concluded its evidence, 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 incriminating circumstances put to him by the trial Court and stated that he was falsely implicated in this case. However, the appellant examined as defence witness Dr. Gagan Bihari Yadav at Exh.67. After considering the evidence on record and the submissions made on behalf of both the sides, the learned trial Judge came to the conclusion that the prosecution successfully proved its case beyond reasonable doubt on the basis of dying declaration of the deceased. The trial Court came to the conclusion that the history given by the deceased before Medical Officer and her statement recorded of Investigating Police Officer in form of FIR are her dying declaration. Ultimately, the trial Court recorded conviction of the appellant for the offences punishable under Sections 302, 498A and 323 of the IPC and awarded the sentence as herein above referred in this judgment.

4. Learned advocate Mr. Tirmizi for the appellant assailing the judgment rendered by the trial Court submitted that the learned trial Judge committed serious illegality and error in relying upon the so-called dying declaration of the deceased. It is submitted that there is no consistency in the various dying declarations relied upon by the prosecution. Material details are missing in the dying declaration. The dying declaration is expected to be in her own words. There are material improvements in the dying declarations.

5. It is submitted that the prosecution suppressed material fact in the dying declaration in form of history given by the deceased recorded by Dr. Yadav examined by the defence as its witness. The deceased clearly stated that while preparing food, accidentally she caught fire. That thus the dying declaration in form of history recorded by Dr. Yadav creates sufficient doubt about the case of the prosecution.

6. It is further submitted that the prosecution intentionally dropped important witness. Even as per the dying declaration at the time of the incident one Lakhabhai Pethabhai was present and he tried to rescue the deceased, yet, such

important witness is dropped. Therefore, it is submitted that on this count, the impugned judgment and order rendered by the learned trial Court deserves to be set-aside or in the alternatively, the evidence of the material witness which came to be dropped by the prosecution may be recorded u/s 311 of the Cr.P.C. Ultimately, it is submitted that the appeal may be allowed.

7. Per contra, Id. Addl. Public Prosecutor Mr. Shah for the State vehemently opposed this appeal and submitted that the prosecution successfully proved its case beyond reasonable doubt on the basis of the dying declaration. The first dying declaration in form of history before the Medical Officer came to be recorded by Lalpur Doctor and in it the deceased implicated the appellant, thereafter, in Civil hospital, Jamnagar, history came to be recorded, wherein also the deceased implicated the appellant. Considering the contemporaneous papers of the medical treatment, it clearly transpires that there was no reason for Dr. Yadav to record history at 1 am in the night, once the deceased was already admitted in the hospital at Jamnagar. The history recorded by Dr. Yadav does not form part of the main case papers. It is further submitted that the case of the prosecution is duly established by the dying declaration of the deceased herself, so it was not necessary to adduce more oral evidence. However, the defence has examined Dr. Yadav as defence witness. If at all the defence felt any witness was necessary to be examined by the prosecution, but, the same was not examined by the prosecution, the defence could have examined said witness like the one examined by the defense i.e. Dr. Yadav. Therefore, it is submitted that the appeal may be dismissed.

8. We have examined the record and proceedings in context with the submissions made by the rival sides.

9. Considering the evidence on record and the submissions made on behalf of both the sides, the entire prosecution case rests upon the evidence in form of dying declaration. The variety of dying declarations available in the instant case are in the nature of history recorded by Medical Officer of the deceased and the statement of the deceased recorded by Investigating Police Officer which is now FIR. Considering the evidence of Dr. Vachchani PW-10 and injury certificate, Exh.28, it transpires that Dr. Vachchani, who was performing his duty as Medical Officer in Lalpur Community Health Centre deposed that on 24.10.1999 at 9 pm, Vanitaben in injured condition was brought before him. He had examined Vanitaben and was referred to Jamnagar civil hospital for further and better treatment. Considering his evidence and certificate, Exh.28, the history of injury appears to be by burns. Then the evidence of Dr. Ambasana PW-11, reveals that on 24.10.1999 at 10.30 pm while he was performing his duty as Medical Officer in Irwin hospital, Jamnagar, Vanitaben was brought before him. Vanitaben gave history of injury before another Dr. J.R. Darshan, and according to the evidence of Dr. Ambasana and the certificate, Exh.31 and the case-paper, Exh.34, the history was given by Vanitaben to the effect that the appellant at 9 pm inflicted blows with stick on her body and, thereafter, poured kerosene on her and was

set to fire. The prosecution has also examined Dr. Darshan PW-14, Exh.46. According to his evidence, at 10.30 pm, he had examined Vanitaben and he had recorded the history given by Vanitaben and he reiterates the same history as deposed by Dr. Ambasana. According to him, Vanitaben stated that at 9 pm, she was beaten with stick by her husband - appellant and thereafter, the appellant poured the kerosene on her and she was ablazed. It is further stated in the history that at that time one Lakhabhai Pethabhai was present and he tried to rescue her.

10. So at Lalpur hospital, the history of injury by burns was given. In Irwin hospital, Jamnagar Vanitaben was brought for further and better treatment and detailed history was given by Vanitaben at 10.30 pm before Dr. Darshan involving the appellant in the incident. It is pertinent to note that the evidence of PW-5 Natha Meghabhai is recorded at Exh.19. He is father of deceased Vanitaben. According to his evidence, upon receipt of information that his daughter has sustained burn injuries at 12.30 in the midnight, he went to Jamnagar Irwin hospital and met his daughter and asked his daughter as to what had happened, to which his daughter said that she was beaten by the appellant with stick and then poured kerosene from the can containing 5 liters of kerosene and set her to fire by matchstick. This is the oral dying declaration of the deceased before her father.

11. Considering the evidence of ASI Vaghela PW-9, Exh.23, he recorded the FIR of Vanitaben. The FIR came to be recorded on 23.45 on 24.10.1999 in Irwin hospital, Jamnagar. The FIR is at Exh.40. About the incident in the FIR, the deceased herself stated that at about 8 pm, while she was in her matrimonial home, she was beaten with stick by her husband - the appellant and then kicked her and, therefore, she fell on the ground and the appellant poured kerosene from a kerosene can on her body and set her to fire by matchstick. Thereafter, appellant left the house, at that time her father-in-law and mother-in-law were in the corridor of the house. She cried for help and, therefore, her in-laws and neighbors tried to extinguish the fire. Thereafter, her in-laws and neighbors like Dahiben Rambhai etc. escorted her to Lalpur hospital. Thus, the FIR, Exh.40 is the dying declaration by the deceased before police. Considering the medical papers, it transpires that the deceased died at 2.10 am on 25.10.1999 while she was under treatment in Irwin hospital, Jamnagar.

12. However, the learned advocate Mr. Tirmizi for the appellant stated that there are material inconsistencies in the dying declaration. However, we have examined the above referred dying declarations. The absence of reference in one of the dying declarations that the can from which the kerosene was poured contained 5 liters kerosene and that she was kicked by the appellant and she fell on the ground, cannot be said to be material inconsistency, which may go to the root of the dying declaration. The tenor and texture of all the dying declarations remained the same, in the sense that the appellant initially inflicted stick blows on the body of the deceased and, thereafter, poured kerosene on her and set her

to fire and she was ablazed.

13. Learned advocate Mr. Tirmizi relied upon the case of Ram Nath Madhoprasad and Others Vs. State of Madhya Pradesh, We have perused the facts of said case. In paragraph 14 in said case, Hon'ble the Apex Court observed that three witnesses gave evidence as regards a statement alleged to have been made to them by the deceased. Thus, the evidence of three witnesses came to be recorded by the prosecution on the issue of oral dying declaration before the witnesses by the deceased. Hon'ble the Apex Court found that there were material inconsistencies in the oral dying declarations made by the witnesses. Ultimately, it was observed that unless one is certain about the exact words uttered by the deceased, no reliance should be placed on verbal statements of witnesses and the oral dying declarations.

14. Learned advocate Mr. Tirmizi for the appellant relied upon the case of Patel Dashrathbhai Atmaram v. State of Gujarat reported in 1998(2) GLH 155. That was also the case of oral dying declarations before witnesses by the deceased. Relying upon Ram Nath Madhoprasad's case (supra) this Court held that there was material inconsistency in the oral dying declarations made by the deceased before the witnesses and, therefore, the same cannot be relied upon. Furthermore, this Court observed that even the presence of the two witnesses before whom the deceased allegedly made oral dying declarations was found doubtful.

15. We have perused the above referred authorities. In the instant case, as per the evidence on record, the oral dying declaration is made by the deceased only before one witness, who is her father, named, Nathabhai PW-5. The rest of the dying declarations are in form of history before Medical Officers and statement before Investigating Police Officer, which is considered as FIR. In other words, those dying declarations are reduced in writing by the Medical Officers and the Police Officers respectively. To put it differently, in the instant case, therefore, there is no question of having inconsistency or contradictions between the two or more oral dying declarations. Thus, the facts of our case are totally different than the fact referred in above two cases.

16. The defence examined Dr. Yadav as defence witness at Exh.67. According to him, the patient was referred to him at 1 am on 25.10.1999 and he asked the patient (deceased) about the history and she stated that she sustained burn injuries while cooking. In this respect, it is necessary to consider the medical case paper produced at Exh.34. Considering the case paper, the initial history given by the deceased at the time of her admission in the Civil hospital, Jamnagar at 10.30 pm is recorded and as per the evidence of Dr. Darshan and the history recorded in the case papers, Exh.34, she stated that she was beaten up by the appellant at 9 pm with stick and thereafter, the appellant poured kerosene on her and she was burnt. She was found conscious at 10.30 pm. Then perusing the case papers, the nature of treatments administered to her at different intervals are referred. According to Dr. Yadav, he examined the patient

at 1 am. However, in the running case paper, Exh.34, if the nature of treatment administered to the deceased at 1 am is considered, there is nothing about the history as referred by Dr. Yadav in his evidence. On the contrary, at 1 am, her condition was found to be deteriorating and painful. Ultimately, she expired at 2.10 am. The running case paper ends at page No. 7, then there are two blank papers and then on page 8, again at 1 am on 25.10.1999, it is stated as under:

Thanks for reference. History by patient. H/o. accidental burns while cooking. No other complains.

17. Now, according to Dr. Yadav, this history bears his handwriting. However, the history recorded by Dr. Yadav does not form part of pages containing the main case paper, Exh.34. Moreover, the history was already recorded in Lalpur Hospital and thereafter when she was shifted to Civil hospital, Jamnagar for further and better treatment, at 10.30 pm on 24.10.1999. In Civil hospital, her history was recorded by Dr. Darshan. Thereafter, at 1 am on 25.10.1999, even otherwise there was no reason for Dr. Yadav to record the history of the patient. Dr. Yadav allegedly recorded the history of the deceased at 1 am on 25.10.1999. Before that at 10.30 pm on 24.10.1999, the deceased had at length given the history before Dr. Darshan in the said hospital itself, involving the appellant. Thereafter, at 23.45 hours, police recorded her FIR, wherein the involvement of the appellant is emerging, and at 12.30 pm her father Nathabhai met the deceased and according to the evidence of Nathabhai, deceased orally told her about the incident involving the appellant. When the evidence regarding the dying declaration is so cogent and convincing, we are of the considered opinion that the history allegedly recorded by Dr. Yadav at 1 am seems to be doubtful. Even it emerges from the main case paper, Exh.34, that at 1 am her condition was deteriorating and it was very painful. Moreover considering further statement u/s 313 Cr.P.C. of the appellant, nothing is stated by him that his wife sustained burn injury while cooking. A general defence of denial is raised. The fact regarding sustaining burn injury by accident while cooking, even otherwise is not substantiated by panchnama of scene of occurrence of any other evidence on record.

18. Therefore, in light of the above discussion, we are of the considered opinion that the learned trial Judge rightly did not rely upon the history allegedly recorded by Dr. Yadav at 1 am on 25.10.1999. The prosecution case is duly established by the history recorded by Dr. Darshan at 10.30 pm on 24.10.1999, statement of the deceased recorded by the police at 23.45 hours as FIR, which is now the dying declaration before police and the oral dying declaration by the deceased to her father.

19. It is submitted that the prosecution dropped material witnesses. About such submission first of all we are of the considered opinion that when the prosecution case is duly established on the evidence of the dying declaration, it was not necessary for the prosecution to adduce more oral evidence. It is quality of evidence and not quantity of evidence that counts. Furthermore, if at all the

appellant felt that the evidence of some material witnesses is required to be adduced and must have come on record, in that case he could have examined such witnesses as defence witnesses. The accused examined Dr. Yadav as defence witness and he could have equally examined more such witnesses, which according to him were material. Under such circumstances, the submission made on behalf of the appellant that the impugned judgment deserves to be set-aside on the ground that material witnesses are not examined by the prosecution, is not required to be taken into consideration.

20. In the result, we are of the considered opinion that the prosecution has successfully proved its case beyond reasonable doubt against the appellant. The appeal is devoid of any merits and deserves dismissal.

21. For the foregoing reasons, the appeal stands dismissed.