

(2016) 01 GUJ CK 0144
In the Gujarat High Court
Case No : Criminal Appeal No. 1259 of 2006

State of Gujarat

APPELLANT

Vs

Aslam Pirbhai Parmar and Others

RESPONDENT

Date of Decision : 20-01-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173(8), Section 313, Section 378
Dowry Prohibition Act, 1961 — Section 2
Penal Code, 1860 (IPC) — Section 114, Section 304(B), Section 306, Section 323,
Section 498(A)

Citation : (2016) 01 GUJ CK 0144

Hon'ble Judges : M.R. Shah and Z.K. Saiyed, JJ.

Bench : Division Bench

Advocate : K.P. Raval, APP, for the Appellant; S.B. Toliya for Harshit S. Tolia, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Shah, J.—1. Feeling aggrieved and dissatisfied with the impugned judgment and order of acquittal passed by the learned Presiding Officer and Additional Sessions Judge, Fast Track Court No. 10, Rajkot, in Sessions Case No. 41 of 2005 dated 30.11.2005, by which the learned trial Judge has acquitted the respondents - original accused for the offences under Sections 498(A), 304(B), 323 and 114 of the Indian Penal Code, the appellant - State has preferred present Criminal Appeal under Section 378 of the Code of Criminal Procedure.

2. That the prosecution case in nutshell is as under:

2.1 That Firojkhani Allarakhakhan Jalwani, father of the victim/deceased lodged the FIR before Rajkot City "A" Division Police Station, alleging inter alia that on 10.12.2004 at about 1:00 p.m., he received phone call from his wife that she has received phone call from Aslam (respondent No. 1 - accused) from Rajkot and told her that Sofiya (deceased) sustained burn injuries. As per the complainant, thereafter, all the family members went to Rajkot and they went to the hospital,

where Sofiya was admitted. According to the complainant, at that time, Sofiya was able to speak slowly and when he asked her, she told that today, her mother-in-law Kulsumben has quarreled with her and in noon, when she was preparing food, at that time, gas was on and flames touched her and due to the same, she has sustained burn injuries. It was further stated in the complaint that prior thereto, when his daughter Sofiya after marriage, was coming to Jetpur, she told the family members that her mother-in-law - Kulsumben and father-in-law - Pirbhai and her husband Aslam are beating her on small thing and are taunting on small thing and that her husband was hiding thing and thereafter, asked the same from her and by quarreling with her, they (in-laws) were beating her. It was further submitted in the complaint that she was also telling that her father-in-law and mother-in-law as well as her husband were taunting and telling her that at the house of your (deceased) father, there are so many things and she was not permitted to go out. Therefore, it was requested to investigate into the matter as his daughter Sofiya was subjected to quarreling and taunting and also subjected to mental and physical torture by her husband - Aslam and in-laws. At this stage, it is required to be noted that prior thereto, vardhi was received by the concerned police station on the basis of which, accidental death case No. 15 of 2004 and the Investigating Officer reached to the hospital and having found that the patient is conscious, he immediately sent Yadi to the Executive Magistrate to record dying declaration. At this stage, it is required to be noted that the Yadi was sent by ASI, Rajkot City "A" Division Police Station to the Executive Magistrate at about 2:00 p.m. on 10.12.2014 i.e. on the very day and the Yadi was received by the Executive Magistrate at about 3:20 p.m. and the Executive Magistrate after obtaining the endorsement/opinion of the Dr. Tushar Shah that the patient is conscious, he started to record dying declaration at 15:50 p.m. and completed the dying declaration about 16:10 p.m. and also obtained endorsement of the opinion that the patient is conscious and also obtained signature of the victim/injured. That thereafter, FIR/complaint was given by the father of the deceased at about 19:15 p.m. At this stage, it is required to be noted that initially the complaint was for the offence under Sections 498(A), 323 and 114 of the Indian Penal Code, however, subsequently, after a period of 19 days, the deceased died because of septicemia and thereafter, offence under Section 304(b) was added.

2.2 That the aforesaid FIR was investigated by the PSI Shri Ibrahim Dela. He recorded the statements of the concerned witnesses. He also prepared Panchnama of place of incident. That after he received vardhi from the hospital on 29.10.2004 that the injured has died, he sent Yadi to the Executive Magistrate for inquest panchnama and in the presence of Executive Magistrate, inquest panchnama was prepared. He recorded further statement of the concerned witnesses. He also collected medical evidence etc. Thereafter, on conclusion of the Investigating Officer, the Investigating Officer filed the charge-sheet against all the accused for the offences under Sections 498(A), 304(B), 323 and 114 of the Indian Penal Code in the Court of learned Judicial Magistrate First Class,

Rajkot. As the case was exclusively triable by the Court of Sessions, the learned Judicial Magistrate First Class, Rajkot, committed the case to the Sessions Court, Rajkot, which ultimately thereafter, transferred to the Court of learned 10th Fast Track Court, Rajkot, which was numbered as Sessions Case No. 41 of 2005. As the learned trial Judge framed the charge against the accused for the offences under Sections 498(A), 304(B), 323 and 114 of the Indian Penal Code, all the accused pleaded not guilty and therefore, all of them claimed to be tried for aforesaid offences.

2.3 To prove the case against the accused, the prosecution examined following 7 witnesses:

2.4 Through the aforesaid witness, the prosecution brought on record the following documentary evidence

2.5 That after submitting closing purshis by the prosecution, further statements of the accused were recorded under Section 313 of the Code of Criminal Procedure. All of them denied having committed any offence. The accused also submitted their additional further statement in writing in which they have specifically stated that Sofiya (deceased) sustained injuries while preparing food. There was no demand of dowry and/or ill-treatment by them for non-fulfillment of dowry demand. That the mother-in-law specifically stated in her further statement that she tried her best to save Sofiya and therefore, she also sustained burn injuries and that she took her to the hospital and for best treatment, she was admitted in private hospital.

2.6 At this stage, it is required to be noted that during the trial, the original complainant gave two applications at Exhibit 16 and 17; one for further investigation under Section 173(8) of the Code of Criminal Procedure and another for adding charge for the offence under Section 306 of the Indian Penal Code, on the basis of one letter alleged to have been written by the deceased addressed to her grandfather (Exhibit 53). However, on the basis of endorsement made by the learned advocate appearing on behalf of the original complainant, same may be considered. Subsequently, learned trial Judge disposed of both aforesaid applications. (Aforesaid shall be discussed hereinafter).

2.7 That thereafter, on appreciation of evidence, more particularly, considering the dying declaration of the deceased recorded in presence of Dr. Tushar Shah (Exhibit 29) in which it was specifically stated that while preparing the food and the gas was in fully operated condition and her gown touched with the flames and because of that she sustained burn injuries. By impugned judgment and order, the learned trial Judge acquitted the accused for the offences under Sections 498(A), 304(B), 323 and 114 of the Indian Penal Code. Hence, the State has preferred present appeal challenging the impugned judgment and order of acquittal passed by the learned trial Court.

3. Shri K.P. Raval, learned APP is appearing on behalf of the appellant - State and Shri S.B. Toliya, learned advocate is appearing on behalf of the original accused.

3.1 Shri K.P. Raval, learned APP appearing on behalf of the appellant - State has vehemently submitted that in facts and circumstances of the case, the learned trial Court has committed grave error in acquitting the accused for the offences under Sections 498(A), 304(B), 323 and 114 of the Indian Penal Code.

3.2 It is further submitted by Shri K.P. Raval, learned APP appearing on behalf of the State that the findings recorded by the learned trial Court, while acquitting the original accused, are on mis-appreciation of evidence on record, more particularly, depositions of P.Ws. 2, 3, 4 and 6.

3.3 It is further submitted by Shri K.P. Raval, learned APP appearing on behalf of the State that all the aforesaid witnesses specifically stated in their depositions that the deceased was subject to physical and mental cruelty by all the accused and thereto on small thing and because of the fact that their dowry demand was not fulfilled. It is submitted by Shri K.P. Raval, learned APP appearing on behalf of the State that the aforesaid is corroborated by the letter written by the deceased herself addressed to her grandfather produced at Exhibit 53. It is submitted by Shri K.P. Raval, learned APP appearing on behalf of the State that when the deceased died within six months of her marriage life, by burn injuries and she was subjected to physical and mental torture, the learned trial Court has committed grave error in acquitting the original accused.

3.4 It is submitted by Shri K.P. Raval, learned APP appearing on behalf of the State that even in the dying declaration, the deceased has specifically stated that in the morning, her mother-in-law had quarreled with her and that she was subjected to cruelty and earlier they (the accused) were quarreling with her on small thing. It is, therefore, submitted that the impugned judgment and order of acquittal passed by the learned trial Judge has resulted into miscarriage of justice.

Making the above submissions, it is requested to quash and set aside the impugned judgment and order of acquittal passed by the learned trial Judge and to punish all the accused for the offences for which they came to be tried.

4. Present appeal is vehemently opposed by Shri Toliya, learned advocate appearing on behalf of the original accused persons.

4.1 It is vehemently submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that findings recorded by the learned trial Court are on appreciation of evidence, more particularly, dying declaration produced at Exhibit 29 and deposition of the Executive Magistrate and Investigating Officer, who have been examined at Exhibit 27 and 59 respectively. It is submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that this being an appeal against the judgment and order of acquittal passed by the learned trial Court unless it is found that the findings recorded by the learned trial Court, while acquitting the accused, are perverse and contrary to the record, which has resulted into miscarriage of justice, then and then interference of the Appellate jurisdiction is called for.

4.2 It is submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that in the present case, the deceased in her statement recorded by the Executive Magistrate i.e. in dying declaration categorically stated that she sustained burn injuries, while preparing the food and that there was no harassment by any of the accused. It is submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that it is true that in the dying declaration, it is stated that in the morning, there was some quarrel between mother-in-law and deceased, however, because of death of deceased and/or burn injury received by the deceased, has nothing to do with the quarrel took place in family. It is submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that as the deceased categorically stated in the dying declaration that she sustained burn injuries, while preparing the food, the concerned ingredients of Section 304(B) are not at all satisfied. It is vehemently submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that the dying declaration has been duly proved by examining the Executive Magistrate as P.W. 3 at Exhibit 27. It is submitted that in Yadi which was sent by Investigating Officer to the Executive Magistrate, it has been specifically stated by the Investigating Officer that patient is conscious. It is submitted that even when the Executive Magistrate started recording dying declaration of the deceased at that time also, Doctor endorsed that the patient is conscious and even at the time of completing recording of dying declaration also, the Doctor has endorsed that the patient is conscious. It is submitted that even the dying declaration was recorded in the presence of Doctor, who endorsed that the patient was conscious.

4.3 It is submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that even the original complainant and father of deceased in his complaint, has specifically stated that when he reached at the hospital and inquired from his daughter what happened, she has stated that she sustained burn injuries while preparing the food. It is submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that same can also be considered to be oral dying declaration before his father. It is submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that therefore, when the deceased sustained burn injuries, while preparing food, it was an accidental death and therefore, the ingredients of Section 304(B) of Indian Penal Code are not at all satisfied and the learned trial Judge has not committed any error in acquitting the accused for the offence under Section 304(B) of the Indian Penal Code.

4.4 It is further submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that even the learned trial Judge has not committed any error in acquitting the original accused for the offence under Sections 498(A) and 323 read with Section 114 of the Indian Penal Code.

4.5 It is vehemently submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that even in the complaint, which was given by the

father of the deceased, there was no allegation of dowry demand at all. It is submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that there was no allegation in the complaint which was given by the father of the deceased that the deceased was subjected to physical or mental harassment and/or torture due to non-fulfillment of any dowry demand. It is submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that thereafter, as an afterthought and in improvement of their case, the complainant, his wife and grandmother came with a case of dowry demand and/or harassment and/or ill-treatment by the accused due to non-fulfillment of dowry demand. It is submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that there are material contradictions in their statements before the police and their depositions before the Court with respect to allegations of harassment/ill-treatment by the accused for non-fulfillment of dowry demand. It is submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that therefore, the prosecution has failed to prove and establish by leading cogent evidence that the deceased was subjected to mental and/or physical torture and/or harassment or ill-treatment for non-fulfillment of dowry demand. It is submitted that no error has been committed by the learned trial Court in acquitting the original accused for the offence under Section 498(A) read with Section 114 of the Indian Penal Code.

4.6 It is submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that the prosecution has failed to lead any evidence with respect to the offence under Section 323 of the Indian Penal Code. It is submitted that therefore, the learned trial Court has not committed any error in acquitting the original accused.

4.7 Now, so far as letter alleged to have been written by the deceased to her grandfather, which has been produced at Exhibit 53, it is submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that firstly, the contents of letter written are not proved. It is submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that the same is alleged to have been received by the father of the deceased on 14.12.2004 i.e. after 4 days from the date of the incident. It is submitted by Shri Toliya, learned advocate appearing on behalf of the original accused that even if the letter at Exhibit 53 is considered, in that case also, as such there are no specific allegation with respect to ill-treatment and/or harassment by the accused for non-fulfillment of dowry demand. It is submitted that therefore, no error has been committed by the learned trial Court in acquitting the original accused.

Making the above submissions, it is requested to dismiss the present appeal.

5. Heard learned advocates appearing on behalf of the respective parties at length.

6. As we have gone through the entire impugned judgment and order passed by the learned trial Court in detail and considered the findings recorded by the

learned trial Judge, while acquitting the original accused. We have re-appreciated the entire evidence on record.

7. At the outset, it is required to be noted that all the accused were tried for the offences under Sections 498(A), 304(B), 323 and 114 of Indian Penal Code.

8. It is required to be noted that it is not disputed that the deceased died within a period of six months of marriage life. It is also true that the deceased died because of burn injuries. However, it is required to be noted that the deceased died after a period of 19 days and that due to septicemia. Even the cause of death mentioned in the P.M. report is septicemia. However, for convicting the accused for the offence under Section 304(B) of the Indian Penal Code i.e. death within 7 years from the date of marriage, the prosecution is required to prove the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry.

9. For the purposes of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961.

10. As defined Sub-Section 1 of Section 2 of the Dowry Prohibition Act, 1961, "Dowry" means any property or valuable security given or agreed to be given either directly or indirectly....

(a) by one party to a marriage to the other; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;

at or before or after the marriage as consideration for the marriage of the said parties, but does not include dower or mahr in the case of persons to whom Muslims Personal Law applies."

11. Therefore, to bring home the charge for the offence under Section 304(B) of the Indian Penal Code, the prosecution is required to prove that the death of women is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within 7 years of her marriage and that the deceased was subjected to cruelty or harassment soon before her death in connection with any demand of dowry.

12. In the present case, the incident occurred on 10.12.2004 at about 11:00 a.m.. Immediately thereafter, the deceased was taken to the private hospital for medical treatment. Immediately, information was sent to Rajkot City "A" Division Police Station with respect to burn injuries sustained by the deceased, which was registered as accidental death case No. 15 of 2004. It is also come on record that at that time, the original accused No. 3 - mother-in-law also sustained burn injuries while trying to save the deceased. Immediately, on receipt of information

with respect to accidental death, the ASI Rajkot City "A" Division Police Station Shri M.V. Gadhvi sent Yadi to the Executive Magistrate requesting to come to the hospital for recording dying declaration of the deceased. From the Yadi sent to the Executive Magistrate at Exhibit 28, which was sent at about 2:00 p.m. and the endorsement made by Dr. Tushar Shah that the patient is conscious right now. It appears from Exhibit 29 and even the deposition of the Executive Magistrate, who has been examined as P.W. 3 at Exhibit 29, the Executive Magistrate started recording of dying declaration at about 15:50 p.m. On dying declaration, there is an endorsement by the Dr. Tushar Shah that the patient is conscious at 15:50 p.m. From the dying declaration produced at Exhibit 29 and the deposition of the Executive Magistrate, the Executive Magistrate completed recording of dying declaration of the deceased at about 16:10 p.m. In the dying declaration at Exhibit 29, there is an endorsement by Dr. Tushar Shah that the dying declaration is completed and the patient was conscious throughout recording of dying declaration and that dying declaration was as such recording in the presence of Dr. Tushar Shah. Therefore, at the time of recording of dying declaration by the Executive Magistrate, the deceased was conscious. Now, in the dying declaration recorded by the Executive Magistrate, which has been produced at Exhibit 29, the deceased has when asked what happened, she has categorically stated that she has sustained burn injuries. She has categorically stated that while preparing the food, the gas was fully on and her gown touched the flames and because of that, she sustained burn injuries. When the question was asked as to who was present in the house, she stated that her aunt-in-law and mother-in-law were present. When the question was asked as to whether any quarrel took place, she has stated that she had quarreled with her mother-in-law. She has also categorically stated that earlier on small thing, there was quarrel and there was quarrel before few days with respect to some household work. When the question was asked to her about any harassment or ill-treatment by anybody, she has categorically stated "NO".

13. At this stage, it is required to be noted that even the father of the deceased as original complainant - P.W. 3 in his complaint, which was given on 10.12.2004 at about 19:15 p.m. has also categorically stated that he reached to the hospital and he asked the deceased what happened, she answered that she received burn injuries while preparing food. Considering the aforesaid clinching evidence, it cannot be said that the case for the offence punishable under Section 304(B) of the Indian Penal Code is made out. The death of the deceased cannot be said to have occurred otherwise than under normal circumstances. Even from the evidence on record, it cannot be said that the prosecution has been successful in proving by leading of the evidence that soon before her death, the deceased was subjected to cruelty or harassment by her husband or any relative of her husband for or in connection with any demand of dowry. Under the circumstances, learned trial Judge has committed no error in acquitting the original accused for the offence under Section 304(B) of the Indian Penal Code.

14. Now, so far the impugned judgment and order of acquittal passed by the

learned trial Court acquitting the original accused for the offence under Section 498(A) read with Section 323 and 114 of the Indian Penal Code is concerned, at the outset, it is required to be noted that there are material contradictions on the aforesaid aspect in their statements of P.Ws. 3, 4, 5 and 6 before the police and their case before the Court (in their depositions). It is also required to be noted that in the complaint, which was given by the father of the deceased on 10.12.2004 produced at Exhibit 52, there was no allegation that the deceased was subjected to mental or physical torture and/or harassment and/or ill-treatment due to non-fulfillment of dowry demand.

15. Even from the letter produced at Exhibit 53, which was alleged to have been written by the deceased addressed to the grandfather of the deceased, it cannot be said that there are any allegations with respect to mental or physical torture due to non-fulfillment of dowry demand. It is required to be noted that as such the contents of the letter at Exhibit 53 are not proved in accordance with the provisions of Evidence Act, by examining handwriting expert and/or comparing the same with natural handwriting of the deceased. Even otherwise, we have considered the contents of Exhibit 53 and as observed herein above, considering the contents in the letter at Exhibit 53 there are no allegation whatsoever that the deceased was subjected to mental or physical torture because of non-fulfillment of dowry demand.

16. From the letter at Exhibit 53 and even from the dying declaration, it can be said that there was some problem between the deceased and her in-laws and husband and there was some harassment. However, merely because of the some harassment and/or ill-treatment of in-laws and/or there was quarrel, that itself is not sufficient to hold the accused guilty for the offence under Section 498(A) of Indian Penal Code. To make out the case for the offence under Section 498(A) of the Indian Penal Code, the prosecution is required to prove by leading cogent evidence that the woman was subjected to cruelty by the husband or relatives of the husband of a woman subjecting her to cruelty. For the purposes of this section, "cruelty" means-

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.]

17. Under the circumstances and when the prosecution has failed to prove by leading cogent evidence that the deceased was subjected to cruelty for non-fulfillment of dowry demand, it cannot be said that the learned trial Court has committed any error in acquitting the original accused for the offence under Section 498(A) read with Section 114 of the Indian Penal Code. Even the

prosecution has failed to prove by leading cogent evidence that the accused has committed the offence under Section 323 of the Indian Penal Code.

18. Considering the aforesaid facts and circumstances, more particularly, dying declaration produced at Exhibit 29 and deposition of the Executive Magistrate, who recorded dying declaration of the deceased on 14.12.2004 and even so stated by the father of the deceased in his complaint that the deceased told him that while preparing the food, she sustained burn injuries, no error has been committed by the learned trial Court in acquitting the original accused for the offences under Section 498(A), 304(B), 323 and 114 of the Indian Penal Code and therefore, we see no interference with the impugned judgment and order passed by the learned trial Court in acquitting the original accused.

19. In view of the above and for the reasons recorded by the learned trial Court on appreciation of evidence, same cannot be said to be perverse and/or contrary to the evidence which calls interference of this Court.

20. In the result, this appeal is dismissed. The impugned judgment and order of acquittal dated 30.11.2005 passed by the learned Presiding Officer and Additional Sessions Judge, Fast Track Court No. 10, Rajkot, in Sessions Case No. 41 of 2005 is hereby confirmed. Bail bonds, if any, stand cancelled. R & P to be sent back to the concerned trial court forthwith.