

(1990) 04 GUJ CK 0012
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Babuji alias Mulsing Dhudaji

RESPONDENT

Date of Decision : 13-04-1990

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 311, 313, 391, 417(3), 423
Evidence Act, 1872 — Section 165
Penal Code, 1860 (IPC) — Section 302, 307, 323, 324, 326

Citation : (1990) 2 GLR 1325

Hon'ble Judges : T.U. Mehta, J; Sharad D. Dave, J

Bench : Division Bench

Judgement

J.U. Mehta, J.—Rule. Mr. K.B. Pujara waives service of Rule on behalf of the respondent.

2. This application is filed u/s 391 of Cri. Pro. Code on behalf of the State to issue summons to Dr. Manoj A. Sanghvi to come with case papers of deceased Leelaben who was treated in the V.S. Hospital, Ahmedabad.

3. The facts of the case are as under:

The deceased Bai Leela, wife of the accused was residing with the accused in Viramgam town. As per the prosecution, the accused was in the habit of consuming liquor and he had no other activity and hence quarrels often took place between the accused and deceased Leela. On 14-3-1984 at about 9 p.m., the accused came to his house after consuming liquor and quarreled with his wife and during this quarrel, the accused sprinkled kerosene on Bai Leela in the kitchen and set fire her by a match-stick. On hearing the shouts and cries of Leela, Lalsinh Ranaji and other neighbours residing nearby came. The neighbours tried to extinguish the fire by means of quits. According to the prosecution, the accused was present in the house in a drunken condition at that time and he was handed over to the Police Station by P. W. Natubhai, the brother-in-law of the accused. The injured Leelaben was placed in a rickshaw and removed to

Viramgam Mahatma Gandhi Hospital. The Medical Officer of Viramgam Hospital advised Leelaben to be immediately removed to the Civil Hospital, Ahmedabad. Since there was a strike in the Civil Hospital, Leelaben was transferred to V.S. Hospital at Ahmedabad, where she was admitted and treated by Doctor. According to the prosecution. Head Constable Adambhai, Ex. 26 of Ellisbridge Police Station, who was on duty at the V. S. Hospital, found that the injured was serious and sent a Yadi at Ex. 28 to the Executive Magistrate for taking the dying declaration. The Executive Magistrate, P. W. 2 Babulal Shah recorded the dying declaration at Ex. 17 of the injured Leela on the same night. P. W. 9 Head Constable Adambhai also recorded the statement, Ex. 36, of injured Leelaben. Necessary information about this incident was sent to Viramgam Police Station. During treatment Leelaben died in the V. S. Hospital on 15-3-1984 at 10.55 p.m., P.W. 11 P.S.I. Dashrathsinh Vaghela came to know of the incident on 14-3-1984 and he started the investigation. He visited the place of the incident and took the F.I.R. Ex. 15 at 0-40 a.m., on 15-3-1984 from the complainant P. W. 1 Madarsinh. Panchnama of the person of the accused was also prepared. Statements of concerned witnesses were recorded. On occurrence of the death of the injured Leelaben, the offence was changed from Section 307 I.P.C. to Section 302 I.P.C. After completion of the investigation, the accused was charge-sheeted in the Court of the learned Judicial Magistrate. F.C. Viramgam, who committed the case to the Court of Sessions. The case of the accused was tried by the Court of the learned Addl. Sessions Judge, Ahmedabad (Rural) at Narol. By his judgment and order dated 10-9-1984, the learned Addl. Sessions Judge convicted the accused for the offence punishable u/s 302 I.P.C. and sentenced him to imprisonment for life.

4. Being aggrieved by the said judgment and order of conviction and sentence, the accused preferred the aforesaid appeal in this Court.

5. At the outset, when the matter was called out the learned Addl. Public Prosecutor on 3-8-1990 submitted an application u/s 391, Cri. Pro. Code to examine Dr. Manoj A. Sanghvi by taking Addl. evidence. Before hearing the appeal, this application is required to be disposed of, and therefore, we fixed the hearing of the aforesaid application.

6. Mr. Divetia, appearing on behalf of the State, submitted that in the present case, deceased Leelaben was treated in the V. S. Hospital after she was referred by the Viramgam Hospital. Mr. Divetia submitted that in the present case, the prosecution examined Adambhai Alibhai, Head Constable, who recorded the statement of the deceased, which must be treated as a dying declaration. Witness Adambhai has stated on oath at para 3 of his evidence that he had gone in Ward No. 12 and that the lady was in conscious state, and therefore, he recorded the statement of the deceased. He has also produced the statement of the deceased which is on record at Ex. 30. In cross examination, this witness has stated that when he went to the ward, only the deceased and Doctor were there and other relatives were not there. This witness has also produced a Yadi at Ex.

29 addressed to the Executive Magistrate. In Ex. 29, inter alia, it is recited that the said lady is at present conscious, and therefore, it is requested that with a view to record the dying declaration, the Executive Magistrate may come in Ward No. 12. Mr. Divetia also drew our attention to the endorsement made on Ex. 29 wherein it is stated, "patient is conscious" and below the said endorsement, it is signed by somebody. This Yadi is dated 15-3-1984. In the above said endorsement it is written "15-3-1984, 2-00 p.m.," Mr. Divetia also drew our attention to the evidence of the Executive Magistrate, Mr. Shah, which is recorded at Ex. 16. In the said evidence, Mr. Shah has stated on oath that when the dying declaration was recorded by him, the lady was in complete conscious state. The Executive Magistrate has also stated in his evidence that he recorded the dying declaration in question and answer form. The dying declaration recorded by the Executive Magistrate, Mr. Shah is produced at Ex. 17. Mr. Divetia also invited our attention to the Rojnama, the relevant part of which is produced at page 7 of the paper-book, which reads as under:

At this stage, the Government Pleader states that Doctor from the V. S. Hospital has not come and at his request the case is adjourned to 2-30 p.m.

Mr. Divetia submits that after this endorsement, there is nothing further to show as to why the Doctor is not examined or whether the Doctor is dropped by the prosecution. Mr. Divetia submits that the present case rests only upon the dying declaration recorded by the Executive Magistrate and the dying declaration recorded by the Head Constable Adambhai in the form of statement of the deceased. Mr. Divetia submits that the other prosecution witnesses who came to the scene of offence on hearing the shouts of the deceased have turned hostile to the prosecution. Under these circumstances, to arrive at the just decision in the present case, it will be necessary to examine the Doctor who treated deceased Leelaben at the V. S. Hospital. Mr. Divetia submitted that for arriving at a just decision, whether the patient was conscious at the time when the statement was recorded by Head Constable Adambhai and at the time when the dying declaration was recorded by the Executive Magistrate, Mr. Shah, it is necessary to examine the said Doctor. Mr. Divetia therefore, submitted that it will be essential in the interest of justice to arrive at the just decision that additional evidence of Dr. Manoj A. Sanghvi be recorded in the aforesaid appeal who was at the relevant time at the V. S. Hospital and treated the deceased.

7. Mr. Pujara appearing on behalf of the accused opposed this application.

8. Mr. Divetia invited our attention to the judgment of this High Court in the case of State of Gujarat v. Shanabhai Dahyabhai Patel and Ors. reported in 1979 Cri. LR 12 (Guj.) . It is laid down by our High Court in the aforesaid case as under:

The Courts are not absolutely helpless. They have been clothed with powers to summon material witnesses, and if it appears that the evidence of a witness is essential to the just decision of the Court, there is a duty cast on the Court to summon such a witness, if the prosecution has failed to do so.

In the aforesaid case, the accused were tried for offences punishable under Sections 452, 326, 324 and 323 I.P.C., as also u/s 135 of the Bombay Police Act. In that case, the certificate of injuries of the victim was produced on record through witness Police Head Constable without examining the Doctor who treated the injured. In the said case, the accused were acquitted and State preferred an appeal in the High Court. The High Court observed as under:

It was the duty of the learned Public Prosecutor who conducted the matter to see that full and complete material is on the record of the Court to enable it to pronounce judgment and it was absolutely necessary for that purpose that the Medical Officer who had examined and treated the two injured witnesses should have been summoned and examined before the Court. This is, therefore, a case where it is necessary to have additional evidence on record, because the same would be essential for the just decision of the case.

9. It is further observed by this High Court in that judgment at Para 8 as under:

I may also make a reference here for the guidance of the subordinate Courts that, in such cases, the Courts are not absolutely helpless. They have been clothed with powers to summon material witnesses, and if it appears that the evidence of a witness is essential to the just decision of the Court, there is a duty cast on the Court to summon such a witness, if the prosecution has failed to do so. The provisions contained in Section 311 of the Code are very eloquent in this respect and they read thus:

311. Any Court may, at any stage of any inquiry, trial or other proceedings under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just of the case.

The trial Court, therefore, could have and should have acted under the powers vested in it by these specific provisions. After all Section 311 was not enacted merely to adorn the statute as an ornament. The trial Courts, should, in appropriate cases, have recourse to these provisions.

After these observations, the High Court directed to send the papers back to the Chief Judicial Magistrate, Baroda with a direction to place the matter before any other Judicial Magistrate, First Class, except the learned Magistrate who heard the matter, for the purpose of taking evidence of medical witness who issued the certificates in respect of the injuries to the complainant and her husband and/or any other witness or witnesses, for the purpose of taking on record the injuries caused to the complainant and her husband, as also the treatment given to them and further directed that the learned Magistrate, after recording evidence of this witness or other witness, will further examine the accused for the purpose of recording their statements under the provisions of Section 313 of the Code, and afford an opportunity to the accused to lead evidence in rebuttal, if they so

desire.

10. Section 311, Cri. Pro. Code, confers a wide discretion on the Court to act as the exigencies of justice require. The power of the Court u/s 165 of the Evidence Act is complementary to its power under this Section. These two Sections between them confer jurisdiction on the Court to act in aid of justice.

11. Section 391 of the Code of Criminal Procedure reads as under:

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.

Section 391 forms an exception to the general rule that an appeal must be decided on the evidence which was before the trial Court. Its manifest object is the prevention of a guilty man's escape through some careless or ignorant proceedings of a trial Court or the vindication of an innocent person wrongly accused where the trial Court through some carelessness or ignorance has omitted to record the evidence of the circumstances essential to the elucidation of the truth. Being an exception to the general rule the powers under it must always be exercised with circumspection, and the doing of justice should be the goal invariably aimed for.

12. The Supreme Court in the case of *Rajeshwar Prasad Misra v. State of West Bengal and Anr.* reported in AIR 1965 SC 1887 has observed at Para 9 as under:

Additional evidence may be necessary for a variety of reasons which it is hardly necessary (even if it was possible) to list here. We do not propose to do what the legislature has refrained from doing, namely, to control discretion of the appellate Court to certain stated circumstances. It may, however, be said that additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order

must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise.

This decision also lays down as under:

The Code does not make difference between the ambit of an appeal from a conviction and that of an appeal from an order of acquittal except that in the former case the appeal is as of right and lies to Courts of different jurisdiction depending on the nature of sentence, the kind of trial and the Court in which it was held, whereas an appeal in the latter case can only be made to the High Court by the State Government or by a complainant (where the case is stated on a complaint) with the special leave of the High Court. Such appeals lie on a matter of fact as well as a matter of law (except in trials by jury). The procedure for dealing with the two kinds of appeals is identical. The Appellate Court's powers in disposing of the appeals, are in essence the same, though indicated separately in Section 423(old). Section 428(old) which occurs in Chapter XXXI which deals with appeals, speaks of any appeals under that Chapter. Section 428 clearly applies to appeals against acquittal u/s 417(3).

Therefore, power u/s 391 can be exercised in both types of cases i.e., appeal from an order of acquittal and appeal from an order of conviction. It also lays down that the word "necessary" appearing in Section 391 does not import that it is impossible to pronounce judgment without the additional evidence. Additional evidence may be taken for the just decision of the case. It also lays down that the words of Section 391 do not restrict to the nature of evidence, either substantial or formal. Thus, the necessity for taking additional evidence must be determined on the particular facts of each case and no exhaustive list can be given as to in which cases the powers u/s 391 should be exercised.

13. Mr. Pujara submitted that the object of Section 391 is not to enable the prosecution to produce evidence at a later stage which could have been produced by the prosecution at the first opportunity and the powers cannot be exercised to fill up the lacuna left by the prosecution. It is true that the discretion should not be exercised by the Court to take additional evidence to fill up the gap or lacuna in the prosecution evidence but if the Court comes to the conclusion that for the just decision of the case, additional evidence is required to be taken, then, in our opinion, there is no limitation or prohibition on the Court to exercise the powers u/s 391 of the Code. In our opinion, when a person who could have spoken of relevant fact was not called by either party and the trial Court failed to call him, the appellate Court can exercise the powers given by the Code u/s 391 for arriving at the just decision.

13.1. Mr. Pujara further contended that in the present case, the incident was of 14-3-1984 and the judgment was pronounced by the trial Court on 10th September, 1984, and therefore, after a long delay of six years, it will not be expedient in the interest of justice to open a new trial, and therefore, the application for additional evidence should be rejected. We do not find any

substance in this argument of Mr. Pujara. The mere fact that six years had elapsed is no ground for refusing to act in order to promote the interests of justice. If for arriving at a just decision of the case additional evidence is required, it must be ordered.

14. In the present case, Adambhai in his evidence at Ex. 26 has stated that he had recorded the statement of the deceased Bai Leela as she was conscious. It is also stated by Adambhai that when he went to take statement, Bai Leela and the Doctor were present and the other relatives were not there. Adambhai also sent a Yadi to the Executive Magistrate on 15-3-1984 to record the statement of the deceased Bai Leela, wherein it is stated that the said lady is in conscious state, and therefore, the Executive Magistrate should come to record the dying declaration in Ward No. 12. The evidence of Babulal Shah, who is the Executive Magistrate, shows that he had gone to record the dying declaration. He has also stated in his evidence that when he went to record the dying declaration, the lady was conscious and that he recorded the statement in question and answer form. In the cross-examination also this witness has stated that when he recorded the dying declaration, the lady was in completely conscious state. Not only that but the Executive Magistrate has also made a note below the dying declaration that he ascertained that the patient was completely in conscious state of mind. Only in order to come to the just decision and to ascertain the truth that, in our opinion, the Doctor who treated the patient ought to have been examined. It was the duty of the learned Public Prosecutor who conducted the matter to see that full and complete material is on the record to the Court to enable it to come to the just decision and it was absolutely necessary for that purpose that the Medical Officer who treated the patient ought to have been summoned and examined before the Court. The Courts have been clothed with powers to summon material witnesses and if it appears that the evidence of a witness is essential to the just decision of the case, there is a duty cast on the Court to summon such a witness, if the prosecution has failed to do so. In our opinion, therefore, the trial Court could have and should have acted under the powers vested in it by Section 311 Cri. Pro. Code. We are of the opinion, on going through the record, that additional evidence is necessary for reasons already set out earlier.

15. Therefore, we allow this Miscellaneous Criminal Application filed on behalf of the State and direct the office to summon Dr. Manoj A. Sanghvi to appear before this Court on 27-8-1990 for recording evidence as prayed. Rule is made absolute.