

(2010) 02 GUJ CK 0030

In the Gujarat High Court

Case No : Criminal Confirmation Case No. 1 of 2009

State of Gujarat

APPELLANT

Vs

Fatehsinh Ramlal Chauhan

RESPONDENT

Date of Decision : 02-02-2010

Acts Referred:

Bombay Police Act, 1951 — Section 135

Criminal Procedure Code, 1973 (CrPC) — Section 313

Penal Code, 1860 (IPC) — Section 302, 342, 427, 436, 452

Citation : (2010) CriLJ 2473 : (2010) 2 GLH 231 : (2011) 6 RCR(Criminal) 2382

Hon'ble Judges : H.N. Devani, J;A.L. Dave, J

Bench : Division Bench

Advocate : Public Prosecutor, for the Appellant; Mita S. Panchal, for the Respondent

Judgement

A.L. Dave, J.—An incident occurred on 2.4.2008 between midnight and 2-00 a.m. in the outskirts of village Aadityana, Taluka Ranavav, District Porbandar in which three persons namely, Hasmukh Popatlal Umrana, Manju Hasmukh Umrana and Ritaben, daughter of Popatlal Jivraj Umrana lost their lives of burn injuries. It is the case of the prosecution that while they were in the house, the door to the house was locked from outside and a fire was set with the help of inflammable liquid like kerosene by Fatehsinh Rambhai Chauhan. The three victims were burnt to death in the house. It is the case of the prosecution that Fatehsinh's daughter married Dinesh, brother of victim Hasmukhbhai, following a love affair. Fatehsinh was, therefore, deprived of certain monetary benefit customary in the community. He, therefore, made the demand of Rs. 35,000/-, which was not acceded to. It is the case of the prosecution that Fatehsinh, therefore, nurtured a revenge against victim Hasmukh and family. On the day of the incident, it is the case of the prosecution that Fatehsinh went to his bed as usual. His son also went to bed. When his son got up, he found his father to be absent and the victims' house was on fire. By the time the victims could be rescued, all three died because of burns. Their dead bodies were fully charred and were virtually

not identifiable. It was found that the door to the house was locked from the front and was bolted from inside. The key to the lock was found near the house. A wrist watch, a half burnt slipper and a bundle of bidies were also found near the place of incident. Offence was registered, investigation started. Fatehsinh Rambhai came to be arrested on 2.4.2008 at about 21-45 hours from village Godhana, which is at a distance of about 6 kms. from the place of incident. When he was arrested, he was barefooted and was wearing a trouser and a banian. It was also found that he had sustained burn injuries on his hands, his legs and forehead. His eye-lashes and part of his hair were also found burnt by doctor when he was taken to hospital for treatment. The investigating agency ultimately concluded that the victims were set to fire by Fatehsinh because of his dislike of marriage of his daughter Savita with Dinesh, brother of victim Hasmukh, and ultimately filed a chargesheet in the Court of JMFC, Ranavav. Learned JMFC, Ranavav, in turn, committed the case to the Court of Sessions as offences were triable by the Court of Session.

2. Sessions Case No. 14 of 2008 came to be registered. Charge was framed against the accused at Exh.3. The accused pleaded not guilty to the charge and came to be tried.

2.1 After considering evidence led by the prosecution, the Sessions Court came to a conclusion that the prosecution was successful in proving offences punishable under Sections 302, 342, 427, 452 and 436 of IPC and Section 135 of the Bombay Police Act and convicted him of the same.

2.2 After hearing the parties on question of quantum of sentence, the Sessions Court found the case to be one falling under the category of rarest of rare and awarded capital punishment requiring the accused Fatehsinh to be hanged till death, subject to confirmation by the High Court.

3. The judgment was rendered on 18.2.2009 by the Sessions Court, the Confirmation Case No. 1 of 2009 came to be registered here. Against the said judgment recording conviction and awarding death penalty, the convict has also preferred Criminal Appeal No. 646 of 2009. Since they both arise out of the same judgment and order, they are heard together and are disposed of by this common judgment.

4. For the sake of convenience, the appeal is heard first. Learned advocate Ms. Panchal represents the convict Fatehsinh alias Rambhai Ramlal Chauhan. She submitted that the incident occurred in late night hours and there is no eye-witness to the incident. The whole case depends on circumstantial evidence. According to her, the prosecution has not been able to establish a complete chain of circumstances which would connect the convict with the offence. The trial Court has overlooked this aspect and has convicted the appellant. She also submitted that the trial Court has given undue weightage to the fact that three persons have lost lives and has recorded the conviction and awarded death penalty without properly appreciating the material on record. Ms Panchal

submitted that it is true that the appellant had suffered burns injuries on his person but that has been appropriately explained by the appellant. The appellant's wife was disabled. She had recently delivered a child and the appellant while trying to help her carrying a big vessel of hot water, suddenly his young daughter Tulsi collided with him and the water got spilled, resulting into burns injury. Even minor Tulsi also suffered injury therefrom. Ms. Panchal submitted that the motive which is attributed to the appellant is not entirely true. She has also drawn our attention to evidence of Dinesh, who has stated that till 27.3.2008, the relations were not strained. The incident has occurred on 2.4.2008 and, therefore, the motive attributed to the appellant that because of the marriage of Dinesh with Savita, the appellant had dissatisfaction and grievance as he could not get Rs. 35,000/- which he would have got customarily, is not established. Ms Panchal submitted that another circumstance which has weighed with the trial Court is that a half burnt chappal and bundle of bidies and a watch was found from the place of incident, which according to the prosecution belonged to the accused. This aspect is denied by the appellant and the prosecution has not been able to establish that these articles belonged to the appellant. Except witness Velji saying so at the time of drawal of panchnama of the place of incident, there is no other evidence and Velji in his deposition does not say anything about the same. Ms Panchal submitted that an extra-judicial confession was placed in service by the prosecution in form of the history being given to the doctor. She submitted that when the appellant was taken to the doctor by police while in custody and, therefore, whatever is stated by the appellant cannot be treated as an extra-judicial confession. Ms Panchal submitted that the prosecution has not brought on record any evidence of the genesis of the incident and the sequence of it. There is no evidence to know as to how the incident occurred. It is submitted that the dead bodies were found totally charred, which could not have happened in any eventuality where it was a case of homicide, suicide or accident. The door to the house was bolted from inside, which would mean that no attempts were made by the three occupants of the room to open the door and escape. Two of the dead bodies were found in sitting position, which is also very rare and no explanation therefore is coming forward from the prosecution. Ms Panchal submitted that the motive which is attributed can only be used as a motive against Dinesh with whom Savita eloped and got married whereas the victims were brother, sister and sister-in-law of Dinesh and for them the appellant cannot be said to have any grievance. She, therefore, submitted that the trial Court committed an error in recording conviction.

5. By way of alternative submission, she submitted that even if this Court comes to the conclusion that conviction is well recorded then also the trial Court has awarded the highest punishment awardable, namely, death penalty. The appellant is not a hardened criminal. He is not a menace to the society in any manner. He has a family of nine members. His wife is disabled and has eight children. He does not have any past criminal record. He comes from an underprivileged strata of society where education is also less. He may not be

denied his life and that the sentence may be commuted to imprisonment for life.

Learned Counsel for the appellant relied on Sushil Kumar Jain Vs. Manoj Kumar and Another, wherein the principles governing award of death penalty are dealt with.

6. Learned APP Mr. Dabhi appears for State in confirmation case whereas Mr. Nanavati appears for the respondent-State in the appeal. We have heard both of them. According to them, the motive is well established by the prosecution. It is an accepted fact that the appellant demanded Rs. 35,000/- from the victim, which was denied and as such the appellant nurtured a grievance against him and his family.

6.1 The appellant and the victim, stay in adjacent houses. The appellant used to sleep on a cot outside the house and on the day of the incident also he slept on the cot as usual. Soon after noticing of the fire, the appellant was found missing even by his son and came to be arrested only after about 20 hours from village Godhana. He was found to be wearing only a trouser and a banian. He had burn injuries on his person. He was taken to hospital where he has stated before the doctor that he suffered the burns while pouring kerosene through the window of the house of the victims and setting them to the fire. It was, therefore, submitted on behalf of the State that motive and presence of the appellant is established by the prosecution. It was submitted that the appellant took a plea of having gone out for two days, but no evidence is led and when he is arrested he is found to be wearing only a banian on the upper part of his body. It was then contended that the prosecution has brought on record the evidence to the effect that the appellant had purchased five litres of kerosene from market a few days prior to the incident. As regards the injuries found on person of the accused appellant, it was contended that the injuries were on his arms, foot and face (forehead). The explanation tendered by the appellant that these were caused while he was carrying hot water in a vessel and was hit by daughter Tulsi, resulting into spilling over of the hot water, cannot be accepted for the reason that the injuries were burns injuries. The doctor also found that the eye-lashes and hair were burnt. It was contended that this can happen only if the burns are with a flame. The explanation tendered by the accused is, therefore, not correct.

6.2 It was then contended that the trouser which the accused was wearing when he was arrested carried particles of petroleum hydrocarbon. Therefore, presence of the appellant in proximity of the time of incident which is before the incident, thereafter his disappearance, thereafter his arrest from a different village, burns injuries on person of the appellant etc. would establish a complete chain of circumstances to connect the accused with the crime.

7. Learned APP then submitted that the trial Court is justified in awarding death penalty for the reason that in this case three persons, of whom, two are ladies, have lost lives, one of them was physically challenged. They have been done to death ruthlessly by setting them to fire while they were fast asleep and

defenceless. Chances of their escape have been set at naught by locking the door to the house from front and this is done only out of the dislike of a marriage between the brother of the victim Dinesh and the appellant's daughter. The act of the appellant is a barbaric act and the entire family is eliminated and there is no remorse. The appellant has committed this act with a preplanning of purchasing kerosene, locking the door from outside, pouring kerosene and setting the victims to fire. The appellant has taken plea of alibi, which is not proved. Under the circumstances, the death sentence awarded by the trial Court may be confirmed and the appeal by the convict may be dismissed.

8. We have examined the record and proceedings in context of rival side submissions.

9. We find that the case of the prosecution depends on circumstantial evidence. The incident occurred somewhere between midnight and 2-00 hours of 2.4.2008. The victims were in the house. It is a cluster of houses, most of which are not occupied. One of the houses was occupied by the deceased and the other is occupied by the appellant. The nearest house is that of first informant Velji, who stays in the adjoining field at a distance of about 50 feet. Despite scanning the entire evidence, we are not able to find out any evidence which would show as to how the incident occurred, either its genesis or its sequence. All that comes on record is the consequence, namely death of three persons by burn injuries in their own house. The appellant's son Rakesh is examined at Exh.21. He has obviously not supported the prosecution but from his deposition it emerges that the appellant used to sleep outside the house on Otta ordinarily. On the eventful day also, the appellant was sleeping on the Otta and when Rakesh realised about the fire, he found that his father was not in his bed and he did not know where had he gone.

9.1 The appellant was found to be moving in a suspicious condition and was apprehended around 21-45 hrs. on 2.4.2008, that would be after about 20 hours of the incident. He was apprehended at Godhana, a village situate about 6 kms. from Aadityana. His arrest panchnama is at Exh.31. It indicates that he was wearing a cream coloured pant and a white banian. He had burn injuries on both his hands and the skin had peeled off. He had burns injuries on throat and forehead. An amount of Rs. 16,440/- was recovered from his person.

9.2 The appellant has in his further statement u/s 313 indicated that he was apprehended at Godhana while he was returning to Aadityana. The money recovered from his person i.e. Rs. 16,440/- was that of the five labourers working in the factory. He had no grievance against any of the deceased. In the earlier part of his further statement, he had stated that he had left the house two days prior to the incident. The clothes that were worn by the appellant at the time of his arrest have been recovered by the investigating agency by the panchnama Exh.52 and it is recorded in the panchnama that both the clothes carried stray spots of some liquid. They were sealed in a baggy and ultimately sent to the FSL.

10. The FSL report at Exh.53 would go to indicate that the clothes of the appellant had traces of petroleum hydrocarbons.

10.1 The appellant was sent to doctor for medical examination and treatment. He was examined by Dr. Mrutyunjay Kumar Ramsharan Sharma Exh.8. He states that the appellant was brought to him on 3.4.2008 at about 12-30 in the midnight, which would indicate that he was taken to him immediately after the arrest. As per the doctor, burn injuries were noticed on anterior surface and posterior surface of both the hands. Mild burn injury on the forehead resulting into a spot at the place of injury. Injuries on hands were from the palm and wrist to the elbow and were of superficial nature. The doctor deposed that the patient was referred to Bhavsinhji Hospital at Porbandar. This doctor had admitted during cross-examination that the injuries found on the person of the accused may have been suffered about 48 to 56 hours preceding the examination. He also admits that barring the injuries indicated on palm, wrist, elbow, hands and forehead, no other injuries were noticed by him.

10.2 Dr. Devendrakumar Purshottam Sojitra Exh.12 was the Medical Officer at Bhavsinhji Hospital before whom the appellant was taken at 2-45 hrs. on 3.4.2008. Describing the injuries as described by Dr. Sharma Exh.8, this doctor also noticed burns injuries on throat as well as on left foot. He also noticed singeing of frontal hair, eyelashes, eyebrows, moustaches, beard and chest hair. The doctor has recorded history as given by the appellant, which as per the prosecution should be considered as extrajudicial confession, but since the appellant was taken to the doctor under police custody, we do not deem it proper to treat it as such. The doctor opined that the injuries found on the person of the appellant may have been caused about 24 to 48 hours prior to his examination and were possible with flames. The deposition of the doctor is tested on the touchstone of cross-examination and he admits that the injury marks found on the person of the appellant were possible even accidentally.

11. The inquest panchnama and the panchnama of the place of incident would go to show that the door to the house was locked from outside and the key to the lock was found lying on the Osri. The door was bolted from inside and three dead bodies were found in a totally charred condition. One dead body was lying in the cot and another dead body was found in a sitting posture near the door and the third was found in a sitting posture near TV stand. The room in question is of the size of 10 ft. x 12 ft. The room had two windows, one in the front besides the door and one at the rear. The windows did not have any shutters but had iron rods fitted in it. Some part of the ceiling was broken and particles therefrom had fallen on the floor, both inside the room and outside the room. There were carbon marks in all the walls and ceiling, as certified by experts from the FSL. There were soot marks on the rods of the front window.

12. Since we have no evidence to know the genesis and the sequence of events, we have to rely on the evidence which is available and deduce a conclusion. The door to the house was locked from outside, which would necessarily rule out the

possibility of the burns having been suffered by the victims either accidentally or by way of suicide, otherwise the door would not have been bolted from inside and locked from outside. We, therefore, conclude that the death of the victims was homicidal.

13. Since there are no eye-witnesses to the incident, the evidence which has come on record would show that the appellant was present in proximity of time and place of the incident, just before the incident was noticed by his son Rakesh. This emerges from the evidence of son Rakesh only. The version of Rakesh gets supported by the fact that in the bed used by the appellant, some money was also found amounting to Rs. 20/-. If the explanation tendered by the appellant was correct that his bed was found because it was ordinarily kept there and that the appellant had left Aadityana two days prior to the incident, there would have been no money in the bed. The appellant was apprehended after about 20 hours from the time of incident at village Godhana. He was found to be moving in suspicious circumstances and was, therefore, apprehended. It was only later in point of time that it was revealed that he was involved in the incident. But when he was apprehended, he was found to be wearing only trouser and a banian. This would again go against his explanation that he had left the house two days prior to the incident.

14. The FSL report indicates that the clothes of the appellant which were seized under a panchnama had traces of petroleum hydrocarbon, for which no explanation is coming from the defence.

15. The next factor that calls for serious consideration is that the appellant had burn injuries on his person along with singeing of frontal hair, eyebrows, eyelashes and moustaches. The doctor has in clear terms opined that the burns injuries and the singeing can be caused by flames. The explanation tendered by the appellant that he suffered burns injuries while helping his wife with hot water in a vessel when his younger daughter suddenly collided with him two days prior to the incident, therefore, cannot be accepted. Apart from an expert opinion, even a layman would accept that singeing of hair would occur only if there is a flame and not with the help of hot water.

16. Added to the above factors is the evidence adduced by the prosecution in form of witnesses Pravinbhai Exh.22 and Bhalabhai Exh.23. Both these witnesses have, however, not supported the prosecution case. However, Bhalabhai admits that he had gone to the shop of Pravinbhai three days prior to 4.4.2008. At that time, the appellant had also gone to the shop for purchase of kerosene and Pravinbhai had sold five litres of kerosene to the appellant for Rs. 110/-.

17. In cross-examination by the defence also, it emerges that there was a talk for giving five litres kerosene for Rs. 110/- about 10 to 12 days prior to the incident. This would, therefore, indicate that the appellant had purchased kerosene just before the incident.

18. Thus, the circumstantial evidence put in sequence would link up the appellant

with the offence thus,

(i) the presence of the appellant in proximity of time and place just before the incident is established;

(ii) the appellant absconded after the incident and came to be arrested after about 20 hours from a different village about which he has no explanation except a false plea that he had left Aadityana two days prior to the incident.

(iii) the clothes which are found on his person namely the trouser and banian carry petroleum hydrocarbons.

(iv) the appellant himself has suffered burns injuries which can be caused by flame including singeing of moustaches, eyelashes, eyebrows and frontal hair.

(v) the appellant was aggrieved by marriage of his daughter Savita with Dinesh brother of deceased Hasmukh. It emerges from evidence as well as from his own admission in statement recorded u/s 313 of Cr.PC. that he demanded Rs. 35,000/-. It emerges from evidence of Dinesh, brother of the victim, that the appellant had demanded Rs. 35,000/- after his marriage with Savita. The appellant had gone to the house of the witness 2-3 days prior to the marriage of his sister-in-law and the marriage was solemnized on 27.3.2008 in the room where the incident occurred and while they were returning from Adityana to Porbandar, the appellant had told him that, if not Rs. 35,000/- an amount of Rs. 15,000/- may be arranged for. The marriage of the witness was then solemnized on 30.3.2008, which was not attended to by the appellant or his wife or his sons and daughters. The witness has admitted, however, during the cross-examination that, there were no disputes till 30.3.2008 with the accused-appellant.

(vi) the overall fact is that the appellant did have a grievance, may be rightly or wrongly, against the marriage of his daughter with the brother of the deceased.

(vii) there is evidence that the appellant purchased kerosene before the incident.

19. The above chain of events would link the appellant with the offence and the trial Court, in our opinion, was, therefore, justified in convicting the appellant for the offence of murder of Hasmukhbhai Popatlal, Manjuben Hasmukhbhai and Ritaben Popatlal.

20. Now comes the question of punishment. The trial Court found that the act of the appellant is pre-planned and heinous. As many as three persons have lost their lives. If the appellant is not awarded the highest penalty of death, it would be a risk and menace for the society. The act of the appellant is more of a massacre than murder and ultimately came to conclusion that he is required to be awarded death penalty.

21. It is true that the act of the appellant is barbaric and gruesome. Three helpless persons are done to death while asleep in a room which they thought to be safe after bolting the door from inside. The door is locked from outside to ensure that no one escapes. However, we also find that the appellant is not a

professional or a hardcore killer. He is influenced by the factor which may be insignificant for a layman but because of his own notions he has taken an action wherein three persons have lost their lives, two ladies one of whom was physically impaired. The prosecution has not been able to bring on record the exact manner in which the incident has occurred, the genesis or the sequence of the events, but evidence establish only the circumstances which leave no scope for any other hypothesis than the guilt of the appellant. But how the act was committed is not established. In this set of circumstances, it would be stretching a bit too far to put this case in the category of rarest of rare cases. We have no material to come to the conclusion that the appellant would be a risk and menace for the society in future and his elimination is the only remedy for the safety of society. Further the appellant has a disabled wife and eight children to look after. We are, therefore, of the view that the punishment of death is a bit too harsh.

It is true that the act committed by the appellant may not fall in the category of rarest of rare cases and death penalty may be a bit too harsh on him considering the facts of the case. The option left to the Court is, therefore, to commute the death penalty awarded by the trial Court to imprisonment for life as prescribed u/s 302 of IPC. But what occurs to us is that just as the act committed by the appellant cannot be considered to fall in the category of rarest of rare cases, it cannot be treated as a simple case of murder. The act committed by the appellant has resulted into death of three persons who were charred to death. The act is ghastly and gruesome. Can such a case be placed at par with any other simple case of murder? The conscience of the Court is well shaken considering the manner in which the three victims have lost their lives. In the opinion of this Court, just as this case does not fall within the category of rarest of rare cases, the same does not fall in the category of an ordinary case of murder. The punishment to be awarded to a culprit has to commensurate with the crime committed by such person. Just as capital punishment would be disproportionately high for the appellant as the case does not fall within the category of rarest of rare cases, the punishment prescribed for an ordinary case of murder would not be proportionate to the act of the appellant in the opinion of this Court. Section 302 of IPC prescribes only two penalties either death penalty or imprisonment for life. The question before us then, therefore, was what punishment can be awarded to the appellant which would commensurate with his act and would be well within the law.

We find answer to the above question in the decision of the Apex Court in *Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka*, where their Lordships have awarded imprisonment for life specifying that a convict shall not be released from prison till his last breath. We, therefore, propose to award imprisonment to the appellant with similar rider which would be punishment heavier than simple imprisonment and lighter than death penalty.

22. Foregoing discussion would result into partly allowing the appeal preferred by

the convict appellant by altering the sentence from death penalty to imprisonment for life while confirming his conviction for the offence of murder. He shall suffer imprisonment for life, that is, till he breathes his last breath.

Considering the nature of offence that the appellant has committed and its gravity, we are of the view that awarding punishment of imprisonment for life simpliciter would not be sufficient and, therefore, we direct that he shall not be released from prison till the rest of his life.

The Confirmation Case stands disposed of by not confirming the death penalty.