
(2001) 02 GUJ CK 0076
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Khasia Gabha Bhupat and Others

RESPONDENT

Date of Decision : 15-02-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173

Evidence Act, 1872 — Section 32, 32(1)

Penal Code, 1860 (IPC) — Section 302, 304(1), 320(4), 326, 34

Citation : (2001) 4 GLR 3086

Hon'ble Judges : H.H. Mehta, J;C.K. Buch, J

Bench : Division Bench

Judgement

C.K. Buch, J.—The State of Gujarat has preferred this appeal against the order of acquittal recorded by the learned District and Sessions Judge, Bhavnagar at the conclusion of the trial of Sessions Case No. 39 of 1985. The respondents are original accused charge-sheeted and tried by the Sessions Judge of the offences punishable under Sees. 302, 303 and 324 read with Section 34 of the Indian Penal Code.

2. For the sake of brevity and convenience, we have referred the respondents as "accused" and the witness examined by the prosecution as "P.Ws".

3. The prosecution case, in short, is that on 27-10-1984 at about 8-00 p.m. when deceased Shivubhai Bhupatbhai was passing through the shop of P.W. Jayantibhai located near a chowk, he dashed with P.W. Dipubhai Merubhai. This dashing of P.W. Dipu Meru and deceased Shivu Meru had resulted into a hot exchange of words and a scuffle. At that time, the accused came running to the spot of incident with deadly weapons like spear, axe and knife and gave blow to P.W. Dipu Meru, Visu Meru and his father Meru Hamir. All these 3 persons sustained injuries but P.W. Meru Hamir died after some time when he was undergoing treatment in the Civil Hospital at Bhavnagar. The accused are real brothers of deceased Shivubhai Bhupatbhai. This Shivu Bhupatbhai was also named as an accused by the prosecution initially but on challan filed by the

Investigating Agency u/s 173 of the Criminal Procedure Code, it is clear that this Shivu Bhupatbhai had died immediately on the next day of the incident i.e. 28-10-1984. The learned trial Judge after hearing the parties and considering the evidence laid by the prosecution, oral as well as documentary acquitted the accused by the impugned judgment dated 20-5-1985.

4. Learned Asstt. Public Prosecutor Mr. K.C. Shah, has submitted that though the injured eye-witnesses i.e. P.W.s Visu & Dipu have turned hostile and other independent prosecution witnesses examined have not supported the case of the prosecution, there was ample scope for the Sessions Judge to convict the accused as two consistent dying declarations of deceased Meru Hamir were sufficient to link the accused with the crime. He has submitted that this is not a case of uncorroborated testimony of a deceased person admissible u/s 32(1) of the Evidence Act because the say of deceased Meru Hamir to some extent is corroborated by medical evidence, the injuries narrated by him in the complaint i.e. first dying declaration and the dying declaration recorded by the Executive Magistrate get corroborated by post-mortem note admitted in evidence by the defence Counsel. The deposition of Executive Magistrate recorded by the trial Court is without any infirmity or material contradictions. If the version of the Executive Magistrate is accepted to be true, then the dying declaration should be accepted as a reliable piece of evidence. The learned trial Judge has committed error in appreciating the evidence laid by proving dying declaration and the finding recorded by the learned trial Judge holding the dying declaration as untrustworthy is wrong. It is further submitted that the learned trial Judge even after considering the cause of death mentioned in the post-mortem note could have convicted the accused for some lesser offence than the murder punishable u/s 302. The injured had succumbed to the injury after some days and the cause of death as discussed by the learned trial Judge was a complication developed in the small intestine. Septic shock was the cause of death. So atleast, accused could have been convicted for the offences punishable u/s 304(11) read with Section 34 of the Indian Penal Code. During the course of his submissions, Mr. Shah has fairly submitted that considering the police challan and the endorsement made in column No. 2 which refers the death of Shivu Bhupatbhai, brother of the accused in the fact that there were cross-cases for the very incident. The Investigating Officer ought to have produced the injury certificate of accused No. 1 and deceased Shivu Bhupat, copy of cross F.I.R. also could have been supplied to the defence side. However, he has submitted that it is the duty of the defence side to prove that non-production of such document has resulted into a serious prejudice.

5. It is submitted that evidence of P.W. Dr. Muljibhai Exh. 24 corroborates the case of deceased unfolded by way of dying declaration. In short, the order of acquittal needs to be reversed and the accused should be convicted for the offences punishable u/s 320(4) read with Section 34 or in the alternative u/s 326 read with Section 34 as argued before the trial Court.

6. Mr. Siraj Ghori, learned Counsel appearing for the respondent-accused appearing for Sr. Counsel Mr. P.M. Raval has submitted that learned Asstt. Public Prosecutor failed in pointing out any perversity in the judgment acquitting the accused. This Court after several years should go very slow in disturbing the finality of acquittal where there is no patent illegality or material error in the order of acquittal. Learned Counsel has relied on a judgment for this purpose, reported in *State of Gujarat v. Shreeji Agrico and Ors.* reported in 1993 (1) GCD 682. After referring Section 32(1) of the Evidence Act, he has submitted that the learned trial Judge could not have appreciated two dying declarations on merits as both these pieces of evidence were inadmissible, in view of the nature of evidence available through post-mortem note. By pointing out the finding recorded by the learned Sessions Judge, in Para 5 of the judgment, he has submitted that the learned Sessions Judge has positively concluded that prosecution has failed in proving the death of deceased Meru Hamir as culpable homicide. There was no need for the trial Judge to appreciate the dying declaration on merits. However, it seems that by way of abundant caution he has appreciated that part also. The learned Counsel has tried to point out some contradictions and infirmities in the dying declaration relied on by the prosecution and has submitted that the finding of the learned trial Judge acquitting the accused needs confirmation and the appeal should be dismissed. At the time of elaborating the legal submissions advanced in light of the provision of Section 32(1) Mr. Ghori has cited two decisions of this Court and a decision of the Apex Court:

1. Referring to the case of *Moti Singh and Another Vs. State of Uttar Pradesh*, , he has submitted that the statement of a person has no protection u/s 32(1) of the Evidence Act unless the deceased is proved to have died because of injuries received by him in the incident wherein the person is alleged to have been killed. His statement relating to that incident cannot be said to be a statement as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death.

2. The 2nd judgment relied by Mr. Ghori is reported at 1994 (1) GLH 451 in the case of *Hathabhai Jethabhai and Ors. v. State of Gujarat*. While dealing with similar type of case, this Court has held that where the death of the deceased is in no way connected with the injuries on his person and when prosecution has failed in proving the fact that the injured died as a result of the injuries received by him in the incident, the statement of such deceased would lose the protection of Section 32 of the Evidence Act.

3. The third citation is of the case of *State of Gujarat v. Hatha Bana* reported in 1984 GLH 567, where this Court referring the above referred Apex Court judgment of *Motisingh* has held that the deceased Baliben did not die of the injuries sustained by her. In absence of any medical evidence to connect the pus formation with the injuries sustained by Baliben, it would be difficult to say that statements made by Baliben are relevant u/s 32(1) of the Evidence Act. The

Court ignored all the statements alleged to have been made by Baliben to the effect that the accused Hatha Bana had given her knife blows and refused to consider any of such statement.

7. We have considered the rival contentions. We would like to deal with the legal aspect without going into the merits or factual controversies put forward before us. The prosecution has not examined the doctor who has performed the post-mortem of deceased Mem Hamir. Normally, in such cases, the Sessions Court should see that the doctor is examined, so the ambiguity or confusion may not arise. On careful consideration of post-mortem note, we are satisfied that the deceased had sustained 3 external injuries. According to the prosecution, the spear blow was inflicted by accused No. 1. Gabba Bhupat, the second injury was inflicted on right arm allegedly inflicted by accused No. 3-Kala Bhupat and third injury which was sustained on the left thigh by knife was inflicted by accused Vaju Bhupat. The incident in question had occurred on 27-10-1984 and the deceased died on 16-11-1984 i.e., after around 19 to 20 days. The doctor who had performed the autopsy of the deceased had found 5 external injuries on the body of the person deceased, out of which 2 wounds were there because of the operations performed on the deceased when he was under treatment. Three inflicted injuries referred to hereinabove were found healed.

We would like to refer all the 5 external injuries seen by the doctor who had performed autopsy. Three of them indicate injuries inflicted on the body of the person deceased as per the case of prosecution and first 2 wounds are operational wounds. We would like to refer these 3 injuries mentioned in column No. 17 of the post-mortem note:

1. Operational (laparotomy) incised wound over midline of abdomen vertical almost healed of 6 (inch) in size (5 cm.)
2. Operational puncture wound for drainage over Rt. hypochondrium and drainage tube seen inside it.
3. Transverse healed wound over Rt. hypochondrium of about 1 & 1/2 inch length just below 9th rib (ant.)(4 cm.)
4. Healed wound over lat side of (1 inch) of Rt. Arm of 2 & 1/2 (cm. size) oblique latromedially above downward.
5. Healed wound over lat side of left thigh of 2 & 1/2 in size (1 inch) oblique latromedially above downward.

8. We are inclined to supply emphasis on the word "healed" used by the doctor who has prepared the post-mortem note. When the case of the prosecution is specific that deceased was inflicted with 3 injuries and all these 3 wounds were found healed, there was no scope of development of pus in the intestine or any other organ related to process of digestive system. Initially, we have also considered whether the injury inflicted below the 9th rib could have any relation to pus formation in the abdomen but as this wound was found healed on the day

of autopsy, this possibility is ruled out. Internal injury is mentioned in column 21 of the post-mortem note and we refer following injury which is relevant to appreciate the case before us:

sepsis and pus discharge at 2nd part of ducaneram at the site of Biliary fraut junction.

A wound No. 1 mentioned in column No. 17 indicates that during treatment of deceased Meru Hamir explanatory leprotomy operation must have been performed. The doctor who had performed this operation has not been examined by the prosecution. Otherwise the Surgeon who had performed the operation would have ably said as to whether he had found any internal injury in the intestine having link with the external injury inflicted during the course of the alleged assault. The learned Sessions Judge, though he has not discussed medical evidence in detail in his judgment, gave a finding as to the cause of death and it is found to be in accordance with the facts available on record. We are satisfied that there was no nexus between the alleged blows or injuries inflicted on the deceased and the complication of development of septisimia in the intestine. According to Dr. Kothari who had performed the autopsy of deceased Meru Hamir has positively recorded that on post-mortem examination, the cause of death of deceased was septic shock following biliary peritultions. It may be that some infection might have entered into the abdomen when a leprotomy operation was performed as a part of treatment on the deceased. In absence of oral evidence of Dr. Kothari or the Doctor who had performed the leprotomy operation, it would not be legal to hold in view of the fact that all the 3 allegedly inflicted injuries were seen healed on the day of autopsy that there was nexus between the injury inflicted and the cause of death recorded by the doctor.

9. We agree that the learned Counsel appearing for the accused that ratio/judgment of Motisingh (*supra*) would be squarely applicable to the facts of this case. The Apex Court has held that:

Clause (1) of Section 32 of the Evidence Act makes a statement of a person who has died relevant only when that statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death in cases in which the cause of that person's death comes into question. When Gaya Charan is not proved to have died as a result of the injuries received in the incident his statement cannot be said to be the statement as to the cause of his death or as any of the circumstances of the transaction which resulted in his death.

Considering the above ratio, this Court while dealing with the case reported in 1984 GLH 567 (*supra*) has held as under:

9. The Supreme Court, in the case of Moti Singh and Another Vs. State of Uttar Pradesh, had an occasion to consider whether when it is not possible to hold that the death was on account of the injuries sustained by deceased, the statement made by the deceased was relevant u/s 32(1) of the Evidence Act. The Supreme

Court held that Clause (1) of Section 32 makes a statement of a person who has died relevant only when that statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. The Supreme Court has further observed that when the deceased is not proved to have died as a result of injuries received by him in the incident where the deceased is alleged to have been killed his statement relating to that incident cannot be said to be the statement as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death. The Supreme Court ultimately held that the statement was not relevant u/s 32(1) of the Evidence Act. It appears from the facts of the said case that it was not established that the deceased died on account of the injuries sustained by him and hence the Supreme Court took the view as above.

In the present case, it appears that Baliben was admitted in the hospital in injured condition on 23-10-1982 and she expired in the hospital on 7-11-1982 i.e., about a fortnight after the incident. It is clear from the evidence of the Medical Officer that Baliben did not die of the injuries sustained by her. The cause of death as stated in the post-mortem notes is "septic and shock resulting therefrom". The Medical Officer has stated that Baliben had developed bed-sores on her back on account of having remained in the bed constantly for a long time. The Medical Officer, Dr. Modi, Exh. 8 has stated that on internal examination he found that there was pus in both the lungs and the cause of death was pus having circulated in the blood which caused shock resulting in death. He has further stated that the main cause of death was pus formation in the blood.

In the above case, the deceased Baliben had died because of septic and shock resulting in death and prosecution has failed in establishing the case that the septic or result of such septic had nexus with the injury inflicted on her. The Court had also found the evidence of Dr. Modi as inadequate in establishing the link between the development of septic and the injury inflicted. The case on hand before us is very much similar. We would like to refer to the relevant portion of the case of Hathabhai Jethabhai 1995 (1) GLH 451 (supra), where this Court has tried to appreciate the F.I.R. Exh. 44 and the dying declaration made before the Executive Magistrate as to whether these two pieces of evidence has any protection available u/s 32(1) of the Evidence Act. This Court has observed that-

12. The moment we recall the fact that his death is not directly connected with the injuries caused, the statements made orally before the said witness Girdhar Jaga and the F.I.R. Exh. 44 both will lose the protection of Section 32 of the Evidence Act and will be reduced to the category of an ordinary statement required to be proved like any other statement by direct hearsay evidence. It is also an exception to the rule that author of the statement must himself be examined to prove the statement. The reason is of convenience as well as of prudence. Section 32 covers the cases where witnesses are not available or cannot be brought before the Court without any amount of delay, etc., as

enumerated therein. In the instant case, the maker of the statement has died, and therefore, the case would fall under Sub-section (1) of Section 32 of the Evidence Act.

13. It covers only the statements where cause of a death of the maker of the statement is given or he gives circumstances of the transaction which resulted in his death (Emphasis supplied), as disclosed in the statement.

14. The aforesaid factual position as disclosed from the crossexamination of Dr. Kalele clearly indicates that the F.I.R. Exh. 44 and the oral dying declaration as deposed to by witness Girdhar Jagar Exh. 21 will come out of the purview of Sub-section (1) of Section 32 of the Evidence Act.

10. It is not a matter of dispute that the case before the trial Court had rested only on 2 dying declarations i.e., F.I.R. recorded by Police Head Constable P.W.V.P. Trivedi and the dying declaration recorded by the Executive Magistrate because the other witnesses had turned hostile. When both these dying declarations were inadmissible having no protection u/s 32 of the Evidence Act, it was not possible for the trial Court to link the accused with the crime in absence of legal evidence. It is the accepted principle of the criminal jurisprudence that firstly the evidence laid by prosecution should be legal and secondly it should be cogent and convincing. A convincing evidence if not found legal cannot be taken into any account. However, it seems that the learned trial Judge has tried to appreciate both the dying declarations on merits. We can also hypothetically point out certain infirmities in the dying declarations and the inadequacy of the evidence to link the evidence with the crime, but we do not see any need to undergo any such exercise. The evidence of Dr. Muljibhai P.W. 24, obviously therefore, does not carry the case of prosecution any further.

11. We agree that it is a settled legal proposition of law that in an acquittal appeal, the Appellate Court should not disturb the finding merely on the ground that other view was possible or even on the same set of fact, the Appellate Court could reach to the different finding or conclusion. According to us, the case before the trial Court was of the nature were in view of the above legal position, acquittal was the only available finding and there was no scope to record the other finding of acquittal.

12. So, we dismiss this appeal and confirm 1 the finding of acquittal recorded by the trial Judge.