
(2012) 04 GUJ CK 0026
In the Gujarat High Court
Case No : Criminal Appeal No. 611 of 1992

State of Gujarat

APPELLANT

Vs

Thakor Chandanji Virchandji and Others

RESPONDENT

Date of Decision : 12-04-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 302, 323

Citation : (2012) 2 GLH 299

Hon'ble Judges : R.R. Tripathi, J;G.B. Shah, J

Bench : Division Bench

Advocate : L. R. Pujari, APP for appllent No. 1, for the Appellant; Tejas M. Barot, for opponent No. 1, None No. 2 - 4, for the Respondent

Final Decision : Dismissed

Judgement

Mr. G.B. Shah, J.—Present appeal u/S. 378 of the Code of Criminal Procedure, 1973 arises out of the judgment and order dated 1st April

1992 passed by the learned Additional Sessions Judge, Mehsana, Camp: Patan, (hereinafter referred to as "the learned Sessions Judge") in

Sessions Case Nos. 160 of 1990, whereby, the learned Sessions Judge was pleased to acquit all the accused of the charge under Sections 302,

323 and 114 of the Indian Penal Code (IPC) and Section 135 of the Bombay Police Act. Brief facts of the prosecution case are that on 3rd May

1990, the deceased - complainant had gone to the place of accused No. 1 herein - Thakor Chandanji Virchandji at Tajpur area, of Vareda village

of Patan Taluka to recover an amount of Rs. 30/ - lent to the latter. While demanding money from accused - respondent No. 1 herein, they had

some exchange of words. The accused No. 1, out of anger, assaulted the deceased -complainant by delivering knife blow, below chest on right

side. The accused No. 1 was also abusing the deceased -complainant. He then, assaulted the deceased with a wooden log on the right hand and

also below the neck on right side. The respondent - accused Nos. 2 to 4 abetted the offence. After that, the deceased - complainant ran away

from the place of incident. At that time, he met one Sardarji Mohanji, who rushed to village Vareda and called the father of the deceased -

complainant. They then took the deceased - complainant to Patan Civil Hospital. As the deceased - complainant was so serious, the Medical

Officer informed the Patan City Police. The Executive Magistrate, Patan was also informed to record the Dying Declaration of the deceased -

complainant. Consequently, Executive Magistrate recorded the Dying Declaration of the deceased complainant. From there, the deceased

complainant was shifted to Ahmedabad Civil Hospital, where, ultimately, he died on the next day. Accordingly, the accused committed the offence

as above for which complaint had been lodged against them.

1.1 As the offence was triable by the Sessions Court, the learned Judicial Magistrate First Class, Patan committed the case to the Sessions Court

at Mehsana. The accused were produced before the learned Sessions Judge. The learned Sessions Judge framed Charge against the accused and

read over to them. The accused, in turn, pleaded not guilty to the charge and consequently, the learned Sessions Judge conducted the trial.

1.2 To prove the guilt against the accused, the prosecution has examined in all 12 witnesses. In order to support the case, the prosecution also

produced on record several documentary evidence, which were also taken into consideration by the learned Sessions Judge.

1.3 At the end of trial, after recording the statements of the accused u/S. 313 of the Code of Criminal Procedure and hearing the arguments on

behalf of the prosecution and the defence, the learned Sessions Judge acquitted all the respondents - original accused of the charges levelled

against them.

2. Being aggrieved by and dissatisfied with the aforesaid judgment and order passed by the learned Sessions Judge, the appellant -State has

preferred the present appeal.

3. We have heard learned; Additional Public Prosecutor Mr. LR Pujari. The learned Additional Public Prosecutor submitted that the learned trial

Judge has erred in appreciating the oral as well as documentary: evidence adduced by the prosecution and thereby, acquitted the accused. The learned Additional Public Prosecutor also submitted that the learned trial Judge has erred in discarding the evidence of the complainant, whose evidence has supported the F.I.R., which was lodged immediately after the incident. He further submitted that the learned trial Judge ought to have considered that the incident has happened in the "Wada" of accused No. 2. The learned Additional Public Prosecutor further submitted that the learned trial Judge has also erred in holding that the deceased has given different version in two dying declarations recorded by Head Constable Vamanrao in the form of F.I.R. and another recorded by the Executive Magistrate. The learned Additional Public Prosecutor further submitted that the learned trial Judge ought to have considered that the deceased has disclosed the name of the accused and because the prosecution witnesses turned hostile, it cannot be said to be a ground to reject the evidence of dying declaration. The learned Additional Public Prosecutor also submitted that the learned trial Judge has failed to consider that the consequential evidence also lends corroboration to the dying declaration. Last but not the least, the learned Additional Public Prosecutor submitted that the judgment and order of acquittal passed by the learned Sessions Judge is erroneous, contrary to law and evidence on record and is required to be quashed and set aside.

3.1 Per contra, learned Advocate Mr. Tejas Barot, appearing for the respondent - accused No. 1 submitted that the trial Court has rightly appreciated the evidence on record and the reasons recorded by it for acquitting the respondents - original accused of the offence charged against them, are reasonable and cogent. He submitted that there are glaring contradictions in the dying declaration and the complaint, which was given by the deceased - complainant, which go to the root of the matter. It is further argued that this being an appeal against order of acquittal, the judgment and order rendered by the trial Court deserves to be upheld as proper and plausible reasons for acquittal have been recorded. They, therefore, prayed that the appeal be dismissed.

4 We have carefully considered the submissions made by the learned Additional Public Prosecutor as well as by the learned Advocate for the

respondent - original accused No. 1 in light of the oral as well as documentary evidence forthcoming on the record. We have also perused the

judgment impugned in the present appeal. The learned Sessions Judge has dealt with all the aspects involved in the case on hand. It is specifically

mentioned in Para 11 of the judgment as under :-

...If we compare the evidence of this witness (Executive Magistrate) with that of Doctor's, it is not cogent and satisfactory, on the contrary, it

creates doubt. Because, Dr. Maganbhai, in his cross-examination, has admitted that the relatives of the patient (deceased-complainant) had come

together with him and the Executive Magistrate had come at 11:30 to record the DD (dying declaration); he met the doctor; the doctor showed

patient (deceased-complainant); when the Executive Magistrate visited the patient (deceased-complainant), he (doctor) was sitting in his room on

chair; that there is a distance of about 15" between his room and the place where the patient was; he also said in his cross-examination that, when

the Executive Magistrate was recording dying declaration, 2-3 relatives of the patient were present there; that he does not know whether the

patient had got his dying declaration written by the Executive Magistrate or not; that the evidence of both, the Doctor and the Executive Magistrate

appear to be contrary: that the fact of presence of 2-3 relatives of the patient at the time of recording of dying declaration, is denied by the

Executive Magistrate: Now, who were those three relatives and it is possible that they must have given the names of the accused persons as the

names of other accused are not there; Moreover, as per the Executive Magistrate, the doctor was present, but in fact (as per the say of the

doctor), the doctor was not present there. Thus, there are material contradictions in the evidence of above two witnesses and are not

satisfactory....

(emphasis supplied)

4.1 Para 12 of the judgment reads as under :--

As per the prosecution case, the dying declaration at exh. 33. was recorded at 1:00 a.m. in night, whereas, as per the evidence of Head Constable

- Vamanrao, he had recorded the statement of the deceased, exh. 44 in Patan Government Hospital, by which it was stated that the accused No.

1 and other three persons had beaten the deceased; it is to be noted that in the

dying declaration at exh. 33, there is no mention of other such accused; now, if we consider the cross-examination of Vamanrao Dolatrao Patil, this statement exh. 33 does not appear to be reliable as he states in his cross-examination that his statement was recorded at 1:00 a.m. in night and he reached at Hospital at 11:40 p.m. and 15-20 minutes" time was taken in recording the statement and considering that, it must be 12:00 a.m. in night; he has earlier stated that the statement was recorded at 1:00 a.m. and 2-3 relatives of the patient were present there; moreover, the patient though was seriously injured, was conscious; but he did not go directly to the doctor but to the patient and recorded his statement; now, if we consider the evidence of Head Constable, he has recorded the statement at 1:00 a.m.. whereas, as per the evidence of the Executive Magistrate, he has recorded the dying declaration at 1:00 a.m.. however, neither any witness nor the doctor explains this aspect as to how it could be possible or who had recorded the statement First, which creates doubt on the case of the prosecution.

(emphasis supplied)

4.2 Para 13 of the judgment reads as under:

So far as the evidence of the father of the deceased exh. 37, evidence of witness Sardarji Mohanji exh. 36, evidence of witness Shravanji Daduji

exh. 35 and evidence of witness Veshiji Ravaji are concerned, they do not support the case of the prosecution. Not a single witness is shown the

accused as abusing or assaulting the deceased; besides, no witness states that the deceased had talked to his father about the incident; thus, these

witnesses do not support the case of the prosecution; on the contrary, the father of the deceased - complainant Joitaji states in his deposition at

exh. 37 that, as the deceased was attacked at the place of the accused, his name was given; thus, I agree with, the argument of the learned

Advocate for the defence that, at the time of incident, this illusion was created and hence, the name of accused No. 1 might have been given, and

hence, this fact does not support the case of the prosecution; Panch witness Somabhai Mohanbhai Soni, exh. 41, who has stated about the

discovery of the so-called weapons, has also not supported the case of the prosecution and has stated in his deposition that the accused have not

stated anything; when they reached the spot, both the Panch witnesses stayed

there and the accused and the police went and brought the muddamal; they do not know accused Chandanji and Ramchandji; thus, taking into consideration the overall facts of the case, the prosecution has failed to prove the case beyond doubt against the accused...

4.3 At this juncture, it will be important to note that the Executive Magistrate has not recorded the dying declaration in question and answer form.

Though law is well settled on the point by the Hon"ble the Apex Court time and again that dying declaration should be recorded in "question and answer" form and in the words uttered by the person whose dying declaration is recorded. The Apex Court in the matter of Rabi Chandra Padhan and Others Vs. State of Orissa, , held in para 10 as under :-

10. ""...Now when a Magistrate records a dying declaration, preferably, it should be in question and answer form.

4.4 The Honourable the Apex Court in the matter of State (Delhi Administration) v. Laxman Kumar and Others, reported in (1985) 4 Supreme

Court Cases 476 has held in Para 28 that :-

We also find that under the relevant Rules applicable to Delhi area, the Investigating Officer is not to scribe the dying declaration. Again, unless the dying declaration is in question and answer form it is very difficult to know to what extent the answers have been suggested by questions put.

4.5 The Honourable the Apex Court in the matter of Mohan Lal and Others v. State of Haryana, reported in (2007) 9 Supreme Court Cases 151

has held as under :--

8. A bare reading of the so called dying declaration Ex.PD/4 shows that according to the deceased, the appellants were enraged because she did

not show the place of the boil to her father in law (appellant No. 1). As rightly submitted, the doctor (PW1) who conducted the post mortem

clearly stated that there was no boil or pustule in the armpit of the deceased. There is no dispute to this factual position by learned Counsel for the respondent-State.

9. This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on his deathbed, being

exceedingly solemn, serene and grave, is the reason in law to accept the veracity of his statement. It is for this reason that the requirements of oath

and cross-examination are dispensed with. Besides should the dying declaration be excluded it will result in miscarriage of justice because the

victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence.

10. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a

power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should

be of such nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of the deceased was

not as a result of either tutoring or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of

mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary,

undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying

declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This

Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in Smt.

Paniben v. State of Gujarat (SCC pp.480-81, para 18-19) :-

(1) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See Munnu Raja & Anr. v.

The State of Madhya Pradesh (1976) 2 SCR 764)]

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See State of Uttar

Pradesh Vs. Ram Sagar Yadav and Others, and Ramawati Devi Vs. State of Bihar,

(iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or

imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See K.

Ramachandra Reddy and Another Vs. The Public Prosecutor,

(iv) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See Rasheed Beg and Others Vs.

State of Madhya Pradesh,

(v) Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected. [See Kake

Singh Alias Surendra Singh Vs. State of Madhya Pradesh,

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [See Ram Manorath and Others Vs. State of Uttar

Pradesh,

(vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. [See State of Maharashtra Vs.

Krishnamurti Laxmipati Naidu,

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.

[See Surajdeo Ojha and Others Vs. State of Bihar, .

(ix) Normally the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical

opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion

cannot prevail. [See Nanhau Ram and Another Vs. State of Madhya Pradesh, .

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. [See State

of U.P. Vs. Madan Mohan and Others, .

(xi) Where there is more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality

of dying declarations could be held to be trustworthy and reliable, it has to be accepted. [See Mohanlal Gangaram Gehani Vs. State of

Maharashtra,

11. In the instant case, it is to be noted that the evidence of PW-3 and doctor clearly show that before the dying declaration was recorded the

relatives of the deceased including PWs 7 and 8 were present with her and were subsequently asked to leave the room where the dying

declaration was recorded. Though much was made of the dowry demand by the Courts below there is only a vague reference to it in the dying

declaration. The statement of PWs 7 and 8 that they had told the Investigating Officer about the dowry demand is not correct. They had not said

so before the Investigating Officer. It is also significant that prior to the death,

neither the deceased nor her parents had complained to the police or told anyone else about any alleged dowry demand. In the circumstances, the dying declaration itself was clearly the result of tutoring and was not a free and voluntary one. The Courts below were therefore not justified in placing reliance on the same. Additionally, there was only a vague reference of dowry demand to the police which in any event has not been established and also was not told during investigation. Once the dying declaration is excluded, there is nothing to implicate the accused-appellants with the death.

5. In above view of the matter, we are of the considered view that the learned trial Judge has rightly appreciated the evidence on record and has rightly acquitted the accused of the offences charged against them as referred above and we find ourselves in agreement with the same.

6. It is well settled that in acquittal appeal, where there is a possibility of two views, the one favourable to the accused should be adopted. It is also well settled principles of law that the Appellate Court would be slow to interfere in an order of acquittal until and unless the judgment of the trial Court is perverse or demonstrably unsustainable. In the present Appeal, we find that the reasons given by the learned trial Court are plausible, cogent and convincing. Thus, in light of the evidence on record, it cannot be said that the learned trial Court has committed any error in acquitting the accused.

6.1 It is also a settled legal position that in acquittal appeal, the appellate Court is not required to re-write the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of State of Karnataka Vs. Hemareddy Alias Vemareddy and Another, wherein it is held as under :-

.... This Court has observed in Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury, that it is not the duty of the appellate Court when it agrees with the view of the trial Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice

6.2 Thus, in case the appellate Court agrees with the reasons and the opinion

given by the lower Court, then the detailed discussion of evidence is not necessary.

7.0 In view of the aforesaid discussion, this Court finds no substance in the appeal. The appeal fails and is dismissed. The impugned judgment and order dated 1st April 1992 passed by the learned Additional Sessions Judge, Mehsana in Sessions Case No. 160 of 1990 is confirmed. Bail Bonds stand cancelled. The office shall send back the Record & Proceeding to the trial Court forthwith, after following the due procedure.