

(2016) 02 GUJ CK 0023
In the Gujarat High Court

Case No : Criminal Appeal Nos. 1859, 2353 and 2354 of 2005

State of Gujarat

APPELLANT

Vs

Upendrasinh Rameshwarsinh and Others

RESPONDENT

Date of Decision : 03-02-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, Section 357, Section 377, Section 378(1) (3)
Penal Code, 1860 (IPC) — Section 114, Section 299, Section 299(b), Section 299(c), Section 300, Section 300(2), Section 300(4), Section 302, Section 306

Citation : (2016) 02 GUJ CK 0023

Hon'ble Judges : K.S. Jhaveri and R.P. Dholaria, JJ.

Bench : Division Bench

Advocate : C.M. Shah, APP, for the Appellant; Shakeel A. Qureshi, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Jhaveri, J.—1. Criminal Appeal No. 1859 of 2005 has been preferred by Original Accused Nos. 2 & 3 of Sessions Case No. 31 of 2004 whereby they challenge the validity of the judgement and order dated 24.08.2005 passed by the Additional Sessions Judge, Fast Track Court No. 11, Rajkot, wherein the accused No. 2 & 3 have been found guilty of commission of offence under Section 498-A and 306. Original accused No. 2 & 3 accordingly has been awarded rigorous imprisonment for one year & fine of Rs. 1,000/-, in default, simple imprisonment for two months under section 498-A of IPC and original accused No. 2 & 3 have been awarded rigorous imprisonment for three years and fine of Rs. 2000/-, in default, simple imprisonment for two month under section 306 of Indian Penal Code.

1.1 Whereas, Criminal Appeal No. 2353 of 2005 has been preferred by the State of Gujarat for enhancement of the sentence imposed by the trial court against original accused No. 2 and 3 of Sessions Case No. 31 of 2004 whereby the State has challenged the judgment and order dated 24.08.2005 passed by the learned

Addl. Sessions Judge, Fast Track Court No. 11, Rajkot for enhancing the sentence against the original accused No. 2 and 3 under Section 377 of the Code.

1.2 Whereas, Criminal Appeal No. 2354 of 2005 has been preferred by the State of Gujarat the order of acquittal passed by the trial court against original accused No. 2 and 3 of Sessions Case No. 31 of 2004 under Section 378(1) (3) of the Code.

2. It is the case of the prosecution that on 07.11.2003, at around 05.00 pm, the daughter of the complainant Pinkiben poured kerosene on herself and set herself on fire as her husband, mother-in-law and maternal uncle-in-law were harassing her regarding dowry. As she was burnt, she was taken to the Civil Hospital, Rajkot. Therefore, a complaint in this regard was lodged against the original accused persons.

2.1 The appellants were apprehended and after investigation charge sheet was submitted. The case was committed to the Court of Sessions at Rajkot. The trial was initiated against the accused and during the course of trial the prosecution examined the following witnesses whose evidences were read before us by learned advocates for both the sides:

- (i) P.W.1 Dr. Jignaben Shirishchandra Dave Ex. 13
- (ii) P.W.2 Kanchanben Denishbhai Ex. 23
- (iii) P.W.3 Vidhyaram Roshanlal Ex. 25
- (iv) P.W.4 Rajubhai Jivajibhai Bavalia Ex. 27
- (v) P.W.5 Makbulbhai Mohamadbhai Ex. 28
- (vi) P.W.6 Rafiqbhai Sulemanbhai Ex. 30
- (vii) P.W.7 Anilbhai Rambhai Ramani Ex. 32
- (viii) P.W.8 Radhamohansinh Babusingh Ex. 34
- (ix) P.W.9 Babubhai Nagjibhai Babariya Ex. 36
- (x) P.W.10 Bhattbhai Tankaprasad Patil Ex. 37
- (xi) P.W.11 complainant - Jaykishorsinh Hardevsinh Patel Ex. 38
- (xii) P.W.12 Smt. Naduben Chhaganbhai Chaudhary - Ex.55
- (xiii) P.W.13 Sanjaybhai Jaykishorbhai Patel-Ex.92
- (xiv) P.W. 14 Devnantiben Jakshibhai - Ex.96
- (xv) P.W. 15 PSI Bhagvatsinh Shivubha Jhala-Ex.120
- (xvi) P.W.16 PI(At present Deputy Police Commissioner, Rajkot) Motibhai V. Damor - Ex.115

(xvii) P.W. 17 PI Kishorkumar Keshavlal Bhatt- Ex.120

2.2 The prosecution also exhibited the following documents which have been perused by us during the course of hearing:

(i) P.M. Note Ex. 14

(ii) Police yadi for performing postmortem Ex. 15

(iii) Form for after death inquiry Ex. 16

(iv) M.L.C. Case report (in cross) Ex. 17

(v) Panchnama of local place Ex. 26

(vi) Arrest Panchnama of accused No. 2 and 3 and child-accused Bhupendrasinh Ex. 31

(vii) Arrest Panchnama of accused No. 1 Ex. 7

(viii) Panchnama drawn by FSL officer Ex. 33

(ix) Inquest Panchnama Ex. 35

(x) chit written by Pinky Ex.42

(xi) chit for dowry Ex.43

(xii) original complaint Ex.44

(xiii) Application made in Social Security Branch and compromise Ex.45

(xiv) Photographs Ex.97 to 105

(xv) Entry No. 4 - Exh.111

(xvi) O.C. Of letter written to Executive Magistrate Ex.112

(xvii) O.C. Of after death form - Ex.113

(xviii) O.C. Of Yadi written to Medical Officer - Ex.114

(xix) Forwarding letter to lodge complaint of complainant - Ex.116

(xx) Yadi written to PSI Shri K.K. Bhatt to inquire into Accident Case No. 172 of 2003 Ex.121

(xxi) O.C. Of letter written to FSL officer about carrying out investigation of the local place Ex.122

(xxii) Memos informing relatives of the arrestees about arrest Exs.123 and 124

(xxiii) Letter about analysis of Muddamal with the short information of offense Ex.125

(xxiv) Sample of seal - Ex.126

(xxv) Yadis about receiving of samples Ex.127 to 129

(xxvi) Receipt about receiving of deadbody Ex.130

(xxvii) Special Report Ex.131

(xxviii) Cause of death Ex.132

2.3 At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Additional Sessions Judge convicted the appellants as mentioned aforesaid. Being aggrieved by and dissatisfied with the aforesaid judgement and order passed by the Sessions Court the State as well as the accused have preferred the present appeals.

3. Mr. Shakeel Qureshi, learned advocate appearing for the original accused No. 2 - Upendrasinh Rameshwarsinh has already undergone the sentence of about more than one year.

3.1 Mr. Qureshi submitted that the prosecution failed to prove the case against the appellants beyond reasonable doubt. He submitted that there are contradictions and variations in the evidence of witnesses and the complainant himself and therefore the appellants are required to be granted benefit of doubt.

3.2 In the alternative, Mr. Qureshi submitted that considering the fact that original accused No. 2 has been sentenced to imprisonment for one year coupled with the fact that he has already under gone about more than 1 year's imprisonment, this court may take a lenient view qua him. He submitted that the incident was not premeditated or motivated and therefore this Court may consider the case of accused No. 1 under section 304 (Part I) or (Part II) of Indian Penal Code.

4. Ms. C.M. Shah, learned APP appearing for the State has contended that the trial court has erred in convicting the accused No. 2 and 3 for the offense mentioned in the judgment. The trial Court should have granted punishment to the accused under Section 377 of the Code.

4.1 Ms. C.M. Shah, learned APP appearing for the State further contended that the trial court has also erred in acquiring the original accused No. 2 and 3 from the charges under Sections 498(A), 304(B) and 306 of the Indian Penal Code. She submitted that the trial Court has also erred in taking linnet view in such a serious offense. She submitted that the trial court has not gone into the evidence in detail and has erred in come to the conclusion by giving punishment for lessor offense. She has submitted that considering the offence committed by the appellants, the trial court has not properly convicted the appellants. She also submitted that the sentence imposed upon the appellants is not just and proper and it deserves to be enhanced.

5. We have heard learned advocates for both the sides and perused the papers on record. The accused accused No. 2 - Upendrasinh Rameshwarsinh has already

undergone the sentence of about more than one year.

6. Looking to the facts and circumstances of the case it cannot be said that the death of the deceased was not homicidal. The post mortem report gives the details of the injuries after burnt on the body of the deceased.

7. In this regard it shall be relevant to go through the decision of the Hon''ble Supreme Court in the case of Babu alias Balasubramaniam and another vs. State of Tamil Nadu reported in , (2013) 8 SCC 60, wherein the Apex Court has observed as under:

"24. Considering the medical evidence, particularly the evidence of PW 5 Dr. Rajabalan that the head injury was ante-mortem and must have been inflicted prior to the consumption of poison and considering the circumstances of the case, we concur with the High Court that A-1 Babu first caused the head injury to the deceased and when she became unconscious in order to create evidence to suggest that the deceased committed suicide administered poison to her. It reached her stomach and intestine but before it could reach the kidney and liver she died. When she succumbed to the head injury, the poison did not pass on to the liver and kidney. The High Court has rightly observed that this is the reason why there is no evidence of any resistance being offered by the deceased and no bruises were found on her lips.

25. The trial court has convicted A-1 Babu for offence punishable under Section 304 Part I IPC and not for offence punishable under Section 302 IPC on the ground that the deceased had suffered only one head injury. The High Court has concurred with the trial court. We see no reason to interfere with the impugned order."

7.1 In the case of Lashuben Chemabhai Chaudhary vs. State of Gujarat reported in 2013(2) GLH 706, this Court has observed as under:

"13. We have already discussed above that the action of the accused in pushing the deceased in the fire of a hearth was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record, it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our view, the case cannot be said to be covered under Clause Fourthly of Section 300 IPC, however, the case of the appellant is covered under Section 304, Part-II IPC. Clause (4) to Section 300 reads as under:-

"300. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

2ndly xxx xxx xxx xxx

3rdly xxx xxx xxx xxx

4thly. - If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

This clause covers class of cases which are very dangerous in themselves and the act is done with the knowledge that it must in all probability cause death or such bodily injury as is likely to cause death and despite such knowledge, the act is done without any excuse. In other words, provisions of this clause are required to be attracted only when the offender knows that his act is so imminently dangerous that it would in all probability cause death or at least such bodily injury which is likely to cause death. Such knowledge on the part of the accused must be of highest degree of probability. It is also a well known fact that the clause 4thly is designed to provide for that class of cases where the acts resulting in death are calculated to put lives of many persons in jeopardy without being aimed at any one in particular and perpetrated with full consciousness of the probable consequence, as can be seen from illustration (d) of Section 300 of the IPC. Under clause (4) the degree of probability or likelihood of the act resulting in fatal harm is required to be of highest level. This can be gathered from the clear wording of the clause (4), namely, "If the person committing the act knows that it is so imminently dangerous that it must, in all probability cause death....." For applicability of this clause following are the necessary requirements:-

- (1) the act must be imminently dangerous;
- (2) the act must be of extraordinary recklessness;
- (3) the danger to human life must be so imminent; and
- (5) the imminence should be such that it will in all probability cause death or cause such bodily injury as is likely to cause death.

The word "imminently" implies a risk which is both threatening and near. The question whether an act is imminently dangerous depends upon nature of the act and its evident risk to human life. The danger threatened must be to human life. It must be an act in which death of human is certain or almost so, and it would cause surprise if the result was otherwise. Moreover, the danger must not only be of certain or almost certain death, but of a death which is near and may be counted by days or may be hours. Thus, it can be seen that unlike the preceding three clauses of Section 300 clause (4) revolves round the knowledge of the accused and intention of the accused is of no relevance to attract provisions of this clause.

7.2 The comparison between Section 299 and 300 can be described as thus;

Section 299:- A person commits culpable homicide if the act by which the death is caused is done

Section 300:- Subject to certain exceptions culpable homicide is murder if the act by which the death is done....

INTENTION

Section 299:- (a) with the intention of causing death;

or

Section 300:- (1) with the intention of causing death; or

Section 299(b) with the intention of causing such bodily injury as is likely to cause death; or

Section 300(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or

(3) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;

or

KNOWLEDGE

Section 299(c) with the knowledge that the act is likely to cause death.

Section 300(4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

7.3 In the case of Lashuben Chemabhai Chaudhary (supra), this Court has further observed in paragraph No. 14 and 15 as under:

"14. We may, therefore, at this juncture refer to the provisions of Section 299 of the Indian Penal Code and in particular the last part of that section and examine the said provisions vis-a-vis clause (4) of section as both these provisions are totally based on the knowledge of the offender of the consequences of his act. Section 299 of the Indian Penal Code deals with culpable homicide. It reads as under:-

"Whoever causes death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

This comparison is quite helpful in appreciating the points of distinction between the two offences viz. offence made punishable u/S. 302 of the IPC and offence made punishable u/S. 304 II of the IPC. Clause (c) of Section 299 and clause (4) of Section 300 in the table given above, as can be seen, are put under the head

of knowledge. It is further explained by the learned authors as under:-

"Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death."

15. From aforesaid discussion, it will be sufficient to say that normally clause (4) of section 300 would be applicable where the knowledge of the offender as to the probability of death of a person in general as distinguished from a particular person or persons being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of such offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid. In a given case this clause can be made applicable to a case wherein the offending act is done against a particular person. As against that the case would fall in the category of "culpable homicide not amounting to murder" if all the ingredients of clause (4) of section 300 of the IPC are absent and where evidence establishes that the act by which the death is caused is done with the knowledge that the act is likely to cause death. Thus it can be seen that the knowledge of the offender is closely connected with the probable result of his act. The probability in the two cases relates to the causing of death, but in one case it is comparatively not so strong as in the other. Similarly the act is in the two cases dangerous, but if it is imminently dangerous, it is prima facie murder and not merely culpable homicide."

8. In that view of the matter, we are of the opinion that when the incident is of the year 2003 and since there are five dependent members in the family, from which one daughter is from the deceased lady and two other children from the subsequent marriage of the present wife of the accused.

9. As far as accused No. 2 - Upendrasinh Rameshwarsinh is concerned, we are of the considered opinion that the recent decision of the Apex Court in the case of Ankush Shivaji Gaikwad vs. State of Maharashtra, reported in , 2013(6) Scale 778 will squarely apply to the facts of the present case considering the fact that the accused No. 2 has already served considerable part of his sentence. In that view of the matter, we have felt it appropriate that when the Apex Court has shown concerned that section 357 of Cr.P.C. be implemented in its proper perspective this is a fit case where we feel that the same requires to be adopted.

10. In the premises aforesaid, we are of the opinion that interest of justice shall be served if the following order is passed:

In the result, Criminal Appeal No. 1859 of 2005 is partly allowed. The impugned judgment and order of conviction and sentence dated 24.08.2005 passed by the Additional Sessions Judge, Fast Track Court No. 11, Rajkot in Sessions Case No. 31 of 2004 is modified as under:

(1) The conviction of original accused No. 2 and 3 under Section 302 r/w 114 of the Indian Penal Code is upheld.

(2) However, the sentence imposed upon accused No. 2 and 3 is suspended on condition that the original accused No. 2 and 3 shall deposit Rs. 5,00,000/- in the name of child being Priya Upendrasinh by way of a fixed deposit with a nationalized bank initially for a period of five years and shall be renewed every year till the time the child attains majority. The periodic interest accruing on the said deposit shall continue to accrue and be added on to the deposit on maturity/renewal. The maturity amount shall be paid to the child on his attaining majority. The said deposit shall be made within a period of 4 months from today. The FDR receipt shall be retained by Nazir Department of the concerned Sessions Court.

(3) The original accused No. 2 and 3 are already released on bail pursuant to the order of this Court. Accordingly their bail and bail bonds stand canceled on payment of the aforesaid amount unless extended by this Court.

(4) However, it is clarified that if the amount as ordered herein above is not deposited by the accused No. 2 and 3, the sentence awarded by the trial court shall stand revived and it shall be open to the concerned authorities to take the accused No. 2 and 3 into custody and they shall be liable to serve the remaining part of the sentence.

(5) In view of the above, Criminal Appeals No. 2353 & 2354 of 2005 are dismissed.

R&P, if lying with this Court, to be sent back forthwith. Direct service is permitted.