
(2009) 11 GUJ CK 0006
In the Gujarat High Court
Case No : Criminal Appeal No. 1337 of 2004

Thakore Gambhirji Nathaji	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 13-11-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302

Citation : (2009) 11 GUJ CK 0006

Hon'ble Judges : J.C. Upadhyaya, J;A.L. Dave, J

Bench : Division Bench

Advocate : Prakash K. Jani, for the Appellant; M.G. Nanavati, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

J.C. Upadhyaya, J.—The appellant who was original accused in Sessions Case No. 14 of 2004 has preferred this appeal challenging the conviction recorded by Additional Sessions Judge, Fast Track Court No. 4, Patan on 25.6.2004 for the offence of murder of the wife of the appellant named Chandaben punishable u/s 302 of the Indian Penal Code ("IPC", for short) and the appellant was sentenced to undergo life imprisonment and fine of Rs. 5000/- and in default of payment of fine, S.I for six months.

2. The prosecution case in nutshell is that the appellant along with his deceased wife Chandaben was residing in Village Dhanodharda, Taluka Chanasma, District Patan. The incident occurred in night falling between 23.11.2003 from 21.00 hours on wards to 5 a.m. on 24.11.2003. It is the case of the prosecution that the deceased along with her husband-appellant was sleeping in a shed situated in the compound of the house of the appellant. At 5 a.m. in the morning, on 24.11.2003, Ranjanben Fulaji, the daughter-in-law of both the appellant and the deceased woke-up and came out from the house and she found her mother-in-law Chandaben lying unconscious on a cot. Her father-in-law, the appellant was

not found in the shed. She immediately called the younger brother of the appellant, named, Somaji Nathaji. Somaji Nathaji and his wife Ambaben Somaji immediately came near the shed and they found injuries on the neck and other parts of body of Chandaben and Chandaben was dead. They also found that the appellant was missing. Somaji Nathaji, the younger brother of the appellant reported the incident to Chanasma police station and his FIR was registered.

2.1 During the course of investigation, statements of material witnesses were recorded. During the course of investigation, it was revealed that during the night hours when the incident occurred, appellant was present in the house and was last seen together with the deceased. It was further revealed during the course of investigation that soon after the incident, the appellant was found missing and he had absconded. As per the arrest panchnama, the appellant came to be arrested from Village Sewala and it was revealed that at Village Sewala, the brother-in-law of the appellant, named, Govindji Vasaji was residing. At the time when the appellant was arrested and the arrest panchnama was prepared, the pant of the appellant was containing bloodstains. From the pocket of his pant, muddamal weapon knife, containing bloodstains, came to be found. When the statement of Govindji Vasaji, the brother-in-law of the appellant was recorded, it was revealed during the course of investigation that the appellant allegedly made extra-judicial confession, confessing his act of murdering his wife before the witness Govindji Vasaji. PM report prepared by the Medical Officer, FSL report of muddamal articles, including the pant and knife and clothes of the deceased were collected. After collecting required material for the purpose of lodgment of chargesheet, chargesheet came to be filed in the Court of learned JMFC, Chanasma. Since the offence was exclusively triable by the Court of Sessions, learned JMFC committed the case to the Court of Sessions at Patan, which was registered as Sessions Case No. 14 of 2004.

3. Learned trial Judge framed charge against the appellant at Exh. 3, to which he did not plead guilty and claimed to be tried. Thereupon, the prosecution adduced its oral and documentary evidence. The prosecution examined in all ten witnesses and produced necessary documentary evidence. After the prosecution concluded its evidence, the learned trial Judge recorded further statement of the appellant u/s 313 of the Cr.P.C., and the appellant in his further statement denied all the incriminating circumstances put to him by the trial Court and also filed a written submission wherein the appellant contended that he was falsely implicated in this case. At the time of the incident, he was not present in the house as he had gone to Village Sewala to meet his brother-in-law Govindji Vasaji, and he came to know about the incident while he was at Sewala, and therefore, he went to his Village Dhanodharda and there he found the dead body of his wife Chandaben in a pool of blood and he hugged the dead-body of the deceased, and therefore, his clothes contained the bloodstains of the blood of his wife and, thereafter, he was arrested by police.

3.1 After considering the evidence on record and the submissions made on

behalf of both the sides, the learned trial Court recorded the conviction of the appellant for the offence of murder of his wife punishable u/s 302 of the IPC. However, when the prosecution case was put to trial before the trial Court, and when the prosecution witnesses stepped into the witness box one by one, the material witnesses examined by the prosecution turned hostile and did not support the case of the prosecution and the entire picture of the prosecution case which had emerged during the course of police investigation was completely changed. PW-7 Govindji Vasaji, before whom the appellant had allegedly made extra-judicial confession, did not support the theory of extra-judicial confession. PW-5 Ranjanben, the daughter-in-law of both the appellant and the deceased who was in the house at the time when the incident occurred, did not support the theory of the appellant having been last seen together with the deceased and she was declared hostile witness. Even the first informant PW-1 Somaji Nathaji was declared as hostile witness and did not support the FIR. All the witnesses, namely, first informant PW-1 Somaji Nathaji, PW-5 Ranjanben, the daughter-in-law of the deceased and the appellant, PW-3 Fulaji the son of both deceased and the appellant and PW-7 Govindji, the brother-in-law of the appellant categorically stated before the trial Court that on dated 23.11.2003 the appellant had come to Village Sewala and on 24.11.2003, he received a news about the incident which occurred at Village Dhanodharda at his house. Thus, the prosecution case that soon after the incident, the appellant had absconded from his house and went to Village Sewala did not get support during the course of trial, but on the contrary, the evidence as adduced before the trial Court rather probablized the defence of the appellant regarding his alibi. The defence raised by the appellant explaining the bloodstains found on his clothes not only came to be explained by him during the course of his further statement u/s 313 of the Cr.P.C., but was corroborated by the evidence of PW-1 first informant Somaji Nathaji, that seeing the dead-body of Chandaben lying in a pool of blood, the appellant fell on the dead-body and hugged her and his clothes came to be bloodstained.

3.2 However, despite of the fact that the prosecution case hinges on circumstantial evidence and the important links in the chain of circumstantial evidence like the circumstance about the appellant having been last seen together with the deceased and the circumstance regarding the extra-judicial confession allegedly made by the appellant before the prosecution witness and the circumstance regarding find of blood of the deceased on the clothes of the appellant and his conduct of abscondence could not be established beyond any reasonable doubt by the prosecution and the chain of circumstantial evidence was not established, but was rather broken, the trial Court recorded the conviction of the appellant holding that-

(1) The defence of the appellant that he had gone to Village Sewala a day earlier to the date of the incident cannot be said to have been established, since after receiving the news regarding the death of Chandaben, PW-3 Fulaji Gambhirji, son of both appellant as well as deceased reached to Village Dhanodharda from Surat (distance being approximately about 400 kms.) earlier than his father. The

appellant reached to Dhanodharda from Village Sewala, which is hardly 20 to 25 kms. away from Dhanodharda, after his son reached to the village.

(2) The defence of the appellant that his clothes contained the blood of the deceased because seeing the dead-body of his wife Chandaben lying in a pool of blood in his house at Dhanodhara, he fell on the body and he hugged her, is completely unreliable and false because the police had arrested the appellant from Village Sewala and not from his house situated at Village Dhanodhara.

(3) There is no reason to disbelieve the Investigating Police Officer when he says that the appellant came to be arrested from Village Sewala and the arrest panchnama, Exh.29 was prepared at Village Sewala in presence of panchas. That, thus, there was no reason for the Investigating Police Officer to concoct false evidence against the appellant.

(4) The trial Court held that in fact the appellant was present in the house when the incident occurred.

(5) The knife seized at the time of arrest of the appellant contained blood of the deceased.

3.3 Thus, the trial Court held that the prosecution successfully proved its case and, ultimately, recorded the conviction of the appellant for the offence of murder punishable u/s 302 of the IPC and awarded the sentence as hereinabove referred to in this judgment, which has given rise to this appeal.

4. Learned advocate Mr. Thakore with learned advocate Mr. P.K. Jani for the appellant submitted that in the instant case, the main circumstantial evidence, namely, the accused having been last seen together with the deceased in his house and that the deceased made extra-judicial confession before witness PW-7 Govindji Vasaji, has admittedly not been established. In the instant case, all the material witnesses, namely, the brother of the appellant, namely, PW-1 Somaji Nathaji, the son of the appellant, namely, PW-3 Fulaji Gambhirji, the daughter-in-law of the appellant, namely, PW-5 Ranjanben Fulabhai, first informant PW-1 Somaji Nathaji's wife, namely, PW-6 Ambaben Somaji and the brother-in-law of the appellant PW-7 Govindji Vasaji did not support the case of the prosecution and turned hostile.

4.1 It is submitted that perusing the impugned judgment rendered by the trial Court, it is very clear that the trial Court recorded the conviction of the appellant merely on the basis of assumptions and presumptions. The trial Court criticized the conduct of the appellant, that, though the incident occurred at Village Dhanodharda and according to the appellant, he was at the relevant time in Village Sewala, which is 20-25 Kms. away from Dhanodharda, yet, his son PW-3 Fulaji who was in Surat at about 500 Kms. away from Dhanodharda came earlier than the appellant. It is submitted that this can hardly be an incriminating circumstance connecting the appellant with the crime, in the sense that there is no evidence worth the name on record as to at what exact time, the appellant

was informed about the incident. The appellant has explained the blood of the deceased on his cloth not only during the course of his further statement, but even considering the evidence of first informant PW-1 Somaji Nathaji, in his cross-examination, he categorically states that seeing the bloodstained dead-body of his wife, the appellant fell on her body and hugged her. The recovery of knife cannot be said to have been established, since the panchas turned hostile. The evidence of Investigating Police Officer in this respect is shaky. Even otherwise, the knife is not recovered by the police, leading to any discovery made by the appellant.

4.2 It is further submitted that as a matter of fact, all the material witnesses stated that a day prior to the day of the incident, the appellant had gone to Village Sewala. At the time when the incident occurred, the appellant was not present in his house, despite this the trial Court erred in not properly appreciating this evidence and came to the conclusion that the appellant absconded after the commission of the offence. Nothing emerges on record to come to the conclusion that at the time of the incident, the appellant was in the house.

4.3 Ultimately, it is submitted that the prosecution failed to prove the complete chain of circumstantial evidence, so as to connect the appellant with the crime. Therefore, the appeal may be allowed and the appellant may be acquitted.

5. Per contra, learned Additional Public Prosecutor Mr. Nanavati for the respondent - State submitted that the prosecution has successfully proved its case beyond any reasonable doubt. The find of blood of the deceased on the cloth of the appellant and the find of knife from his pocket stained with blood of the deceased is material circumstance connecting the appellant with the crime. The appellant as per the arrest panchnama, Exh.29 came to be arrested from Village Sewala. One of the panchas of said panchnama PW-8 Bharatji Rataji though turned hostile, but in his evidence, admitted that he was called by the police at Village Sewala. That there is no reason for Investigating Police Officer to concoct any false evidence against the appellant. That the conduct of the appellant soon after the incident is rightly taken into consideration by the trial Court that he absconded from the place of the incident and he was arrested from different village.

5.1 Ultimately, it is submitted that the appeal may be dismissed.

6. We have examined the record and proceedings in context with the submissions made by the rival sides.

7. At the outset, it is pertinent to note that the prosecution examined first informant PW-1 Somaji Nathaji, who is brother of the appellant and PW-5 Ranjanben Fulabhai, who is daughter-in-law of the appellant, to prove that at the time of the incident, the appellant was in the house with his deceased wife and soon after the incident, he absconded. However, when both the witnesses during the course of trial entered witness-box of the trial Court, they did not at all

support the case of the prosecution. PW-1 Somaji in his evidence stated that his house is situated opposite to the house of the appellant and during early morning hours, PW-5 Ranjanben came to his house and shouted for help and he went to the house of the appellant and he found deceased Chandaben lying in a pool of blood in corridor of her house. He categorically stated that he did not find the appellant in the house. He asked PW-5 Ranjanben about the whereabouts of the appellant and she stated that the appellant had gone to Village Sewala. The appellant came at about 4 p.m. and seeing the bloodstained dead-body of his wife, he fell on her body and hugged her. He categorically stated that the appellant had gone to Village Sewala a day earlier to the day of the incident.

7.1 In view of the above evidence, the deposition of PW-5 Ranjanben Fulabhai would carry greater importance in the sense that according to her evidence, during night hours, when the incident occurred, she herself was in the house and according to her evidence, a day earlier to the day of the incident her father-in-law (appellant) had gone to Village Sewala to meet her sister-in-law (married daughter of the appellant). According to her, during night hours, she herself and her children were sleeping in the room and her deceased mother-in-law was sleeping alone in the corridor of the house. During early morning hours, when she woke up, she found dead-body of her mother-in-law in a pool of blood. PW-5 Ranjanben was declared as hostile witness. She did not support the case of the prosecution that at the time of the incident, along with the deceased, the appellant was present in the house.

8. If we see the evidence of PW-7 Govindji Vasaji, the brother-in-law of the appellant, who is residing at Village Sewala, he did not support the case of the prosecution and was declared as hostile witness. He stated that the appellant had come to his village a day earlier to the day of the incident wherein deceased Chandaben had died. He stated that after 12 o'clock in the noon, he came to know that some person had come to Village Dhanodharda with the information that deceased had died, and, therefore, the appellant had gone to his house at Dhanodharda. He denied the prosecution case that the appellant had confessed the guilt before him. Now, as per the prosecution case, the incident occurred during the night hours falling between dated 23.11.2003 and 24.11.2003 and according to this witness, the appellant had come to his Village Sewala on 23.11.2003. Thus, a very important piece of evidence regarding the extra-judicial confession having been made by the appellant before this witness cannot be said to have been proved. It transpires that the very defence of the appellant about his alibi is rather established from the evidence of this witness PW-7 Govindji.

8.1 Moreover, according to the evidence of PW-7 Govindji, upon receipt of the message about the death of appellant's wife, the appellant had gone to Village Dhanodharda at his house. According to the evidence of PW-1 Somaji, the appellant had come to his house at about 4 p.m. in the evening and seeing bloodstained dead-body of his wife, he fell on her dead-body. This explains the

blood of the deceased found on the clothes of the appellant. On behalf of the State it was strenuously urged that considering the arrest panchnama of the appellant, Exh.29, the appellant came to be arrested from Village Sewala and, therefore, the defence raised by the appellant that he had gone to Village Dhanodharda and seeking the bloodstained dead-body of his wife, he fell on her dead-body and, therefore, his clothes contained blood of the deceased, falls to the ground. However, in this respect, if the arrest panchnama, Exh.29 is seen, the panchnama was drawn on 25.11.2003 ie. after about 2 days from the time of the incident. None of the witnesses say that after the incident, the appellant continued to stay at Village Sewala for two days. Moreover, considering the evidence of PW-8 Bharatji Rataji, one of the panchas of panchnama, Exh.29, he was declared as hostile witness and did not support the contents of the panchnama. According to him, his signature was obtained by the police in the panchnama, while he was at Village Chanasma on his duty in a factory. He categorically stated that he was not called by police at Village Sewala in the house of Thakore Devuji. He did not support the case of the prosecution that in his presence at Village Sewala, the appellant was arrested, and at that time, his clothes were found bloodstained and from the pocket of his pant, a bloodstained knife was found. When such is the situation, the contents of the panchnama, Exh.29, cannot be said to have been proved beyond any reasonable doubt. The prosecution also examined PW-9 Madarji Pratapji, the second panch of the arrest panchnama, Exh.29, but he is declared as hostile witness and did not support the contents of the panchnama nor he supports the case of the prosecution that he was called by police at Village Sewala. We have examined the evidence of Investigation PSI Mr. Gadhvi PW-10, Exh.32. About the panchnama, Exh.29, he only states that along with panchas, he went to the house of Devuji at Village Sewala and found that the appellant was there and the panchnama, Exh.29 was drawn. No details are stated by him regarding the contents of the panchnama, Exh.29 in his evidence. He denied the suggestion that the appellant was arrested from Village Dhanodharda. However, considering the evidence of the material witnesses examined by the prosecution, nothing emerges that after the death of the deceased, the appellant did not come to his house and continued to stay at Village Sewala for about two days. On the contrary, considering the evidence of PW-1 Somaji, it clearly transpires that on 24.11.2003 at 4 p.m., the appellant came to Village Dhanodharda at his house. When such is the situation, the fact that appellant's son PW-3 Fulaji Gambhirji receiving the message of death of his mother came to Village Dhanodharda from Surat at about 2 p.m. to 3 p.m., but the appellant came to the Village at 4 p.m., cannot be said to be such a suspicious conduct of the appellant leading to the inference of his guilt.

9. One more fact which emerges from the evidence of Investigating PSI Mr. B.K. Gadhvi examined as PW-10 at Exh.32 is that in his cross-examination, he admits that the place where deceased Chandaben was sleeping during the fateful night was open from all directions and it was only covered up by iron-sheets, as roof. If we examine the panchnama of the scene of occurrence, Exh.10, the admission

made by the Investigating Police Officer gets support. Examining the panchnama of the scene of occurrence, it clearly transpires that the place where the incident occurred in the compound of the house of the deceased and the appellant, was almost open place and the height of the compound wall was found to be only 3 feet. Such facts emerge from the evidence, are required to be taken into consideration in light of the picture that emerges from the other evidence on record and especially the defence of the appellant.

10. Honourable the Apex Court in the case of *Pohalya Motya Valvi v. State of Maharashtra* in paragraph 5 discussed about the well established principles governing the appreciation of evidence in a case dependent upon circumstantial evidence. In paragraph 5 of the judgment, the Honourable Apex Court observed as under:

It is common ground that there is no direct evidence implicating the appellant. Prosecution case rests on circumstantial evidence. As the case depends on circumstantial evidence, at the outset the well-established principles governing the appreciation of evidence in a case dependent upon circumstantial evidence may be borne in mind. Briefly, the principles are that each circumstance relied upon by the prosecution must be established by cogent, succinct and reliable evidence; that the circumstance relied upon must be such as cannot be explained on any hypothesis except the guilt of the accused. In other words, the circumstances must be of an incriminating character. All the proved circumstances must provide a complete chain no link of which must be missing and they must unequivocally point to the guilt of the accused and exclude any hypothesis consistent with his innocence.

11. Applying the ratio laid down by Honourable the Apex Court in the above-referred case and considering the facts and circumstances of the present case, we are of the considered opinion that the prosecution failed to establish the chain of circumstantial evidence, which would unequivocally point to the guilt of the appellant and excluding any hypothesis consistent with his innocence. Therefore, the appeal merits acceptance.

12. For the foregoing reasons, the appeal is allowed. The judgment and order rendered by learned Additional Sessions Judge, Fast Track Court No. 4, Patan on 25.6.2004 in Sessions Case No. 14 of 2004 recording the conviction of the appellant for the offence punishable u/s 302 of the Indian Penal Code and the sentence awarded to the appellant thereunder are hereby set-aside. The appellant is acquitted of all the charges levelled against him. He be set at liberty forthwith from jail, if no longer required in connection with any other matter. Fine, if paid, be refunded to him.