
(1994) 10 GUJ CK 0003
In the Gujarat High Court

Umedsing Sursing Mahida

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 20-10-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374

Evidence Act, 1872 — Section 32(1)

Penal Code, 1860 (IPC) — Section 302

Citation : (1995) 2 GLR 1302

Hon'ble Judges : S.K. Bhatt, J;J.N. Bhatt, J

Bench : Division Bench

Judgement

J.N. Bhatt, J.—Unfortunately, again we are dealing with a bride burning case in this appeal filed by the appellant-original accused (hereinafter referred to as the accused) by invoking the aids of the provisions of Section 374 Criminal Procedure Code.

2. The appellant was charged for having committed murder of his wife Bai Kesar who was 18 years old. The accused was thus charged u/s 302 of Indian Penal Code in Sessions Case No. 211 of 1986. On appreciation of the facts and the circumstances and evidence, the learned Addl. Sessions Judge, Nadiad, found the accused guilty for the offence punishable u/s 302 of Indian Penal Code and is ordered to be sentenced to undergo imprisonment for life. The impugned judgment and sentence came to be passed on 31-8-1987. The accused being dissatisfied by the impugned judgment of conviction and sentence has come up, before us, in this appeal.

3. Before we examine the merits of this appeal and the challenge against it, we would like to highlight the salient features of the prosecution story which have come forth in this appeal.

4. The unfortunate incident in question burning of bride occurred on an auspicious day - Janmashtami which is celebrated popularly as it is the day on which Lord Krishna was born mythologically. Deceased Bai Kesar was the wife of

the accused. The marriage between the accused and Bai Kesar took place before 3 years prior to the unfortunate incident. They were living as husband and wife without enjoying the marriage bliss as it appears from the record. There was a child born out of the said wedlock who was aged about 6-9 months at the time of the incident in question.

5. According to the prosecution version the incident occurred around 10-00 p.m. on 27-8-1986 (Janmashtami day). It appears from the record that the deceased had gone to her parental home with a view to tie a Rakhi on the hand of the brother on the date of the incident in the morning. The deceased was brought back at the matrimonial house by the accused around 5-00 p.m. The accused had been residing along with his parents and a brother.

6. It is the case of the prosecution that at the time of the incident around 10-00 p.m. on the unfateful day, the parents and brother of the accused had gone to the temple in the village for celebrating Janmashtami (Birth festival of Lord Krishna). The accused and deceased Bai Kesar were in the house which is the venue of the offence. As such the child was sucking the mother before the unfortunate incident occurred. At that time deceased Bai Kesar was beaten by the accused after snatching away the sucking child. Not only that the accused started giving fists and kick blows on the anatomy of Bai Kesar. She was dragged thereafter into the Vada portion of the house wherein the accused with a view to accomplish his cherished desire and get away from the unwanted spouse - deceased Bai Kesar poured kerosene on her body and thereafter lit a match stick which culminated into extensive burns on almost entire body of Bai Kesar.

7. She was shifted to Petlad Civil Hospital from her village in excruciating painful condition for medical aids (not by the husband). The Medical Officer on duty had informed the police on telephone about the incident. The police station officer in-charge of Petlad town directed one police head constable - Ramabhai Somabhai and investigated into the said incident which was sought to be brought as an accidental fire. The police head constable had gone to the Civil Hospital and recorded the statement of deceased Bai Kesar. In view of the serious nature of injuries, the Executive Magistrate was also summoned who had also recorded the statement of deceased. In view of the statements given by the deceased Bai Kesar accused came to be arrested and he was also sent for medical examination as he had injuries on both the cheeks, on the middle fingers of both the hands and part of the palms (normally such injuries occur when a person attempts to set anything or anybody on fire).

8. Deceased Bai Kesar thereafter was sent to the Medical Officer, at Sojitra for medical treatment. Deceased succumbed to the burn injuries on 31-8-1986. Thus, she had survived for a spell of more than 72 hours. The post mortem was conducted. A case was filed against the accused and the concerned police station forwarded the accused with the papers before Sessions Court in which the accused was charged for an offence u/s 302 of the Indian Penal Code. He was found guilty for the said offence by the learned Additional Sessions Judge and

therefore, the accused is before us.

9. It has been submitted on behalf on the accused by Advocate Ms. Acharya that the trial Court ought to have given benefit of doubt to the accused in view of the first dying declaration made before the medical officer Dr. Pratap Radhakishan and the testimony of 4 defence witnesses, if not clean acquittal. This submission is, vehemently, countenanced on behalf of the prosecution.

10. Reliance is placed on the case history and the dying declaration recorded by Dr. Pratap Radhakishan. He is examined as P.W. 12 Exh. 37 who was working as Medical Officer at Petlad Government Hospital at the relevant time. According to his evidence the case papers contained that deceased Bai Kesar had given her statement. He has testified that deceased Bai Kesar mentioned before him that "she was preparing tea on stove and for that she was lighting the stove and at that time she had put on a polyester sari and she was burnt. She stays with her parents-in-law. She was having a child aged about 9 months." The case papers are produced at Exh. 38. Relying on this statement of deceased it has been contended that there was an accidental fire and no homicidal death as alleged by the prosecution. It is true that it was the first dying declaration recorded within five hours after the unfortunate incident. Such a statement prima facie runs counter to the proposition propounded by the prosecution in this case and supported one of the multiple versions of defence. The submission raised in this behalf, howsoever, subtle, on the whole does not appear to be sound and sustainable when one gets into the reality of the facts. It may be mentioned that the entire testimony of Dr. Pratap Radhakishan must be borne in mind and not the few stretched phrases or statement in the examination-in-chief or the statement recorded in the case papers, at Exh. 38. It is, unequivocally, stated by Dr. Pratap Radhakishan under the cross-examination that the history at the time of admission is asked by him to the patient or the victim (as the case may be) and the relatives of such person. Not only that, it is categorically testified by him in para 2 in the cross-examination in his evidence at Exh. 37 that in the present case, he did not ask the history to the deceased and the history of the case came to be recorded by him on the basis of the information supplied by the relatives of the deceased.

11. There is no dispute about the fact that when deceased Bai Kesar was taken to the hospital (at first instance) only relatives of the accused like mother-in-law etc. were present. Therefore, obviously the doctor ought to have asked the mother-in-law of the deceased and/or other relatives of the accused in so far as a formal ritual was to be performed before the medical aid could be started and at that time it appears that very guardedly, the relatives of the accused who were admittedly not on good terms with the relatives of the deceased must have stated and gave the history which is sought to be used as a missile for dynamiting the prosecution version. The entire testimony when it is read, it leaves no any manner of doubt that it was deceased Bai Kesar or none of her relatives who narrated the history of the incident at the hospital but was only

given by the relatives of the accused. At the time of entry into the hospital, the relatives of the accused like his mother and brother who were staying generally at the venue of offence were present at the hospital. In the circumstances, in our opinion Advocate Ms. Acharya is not in a position to make any slice of profit out of the history narrated in the case paper. It was never the statement of the deceased. On the contrary we are of the opinion that the history must have been given by the close relatives of the deceased with a view to make out a case or the defence for future. Consequently, the first submission raised on behalf of the accused is meriting only rejection.

12. On behalf of the defence reliance again is placed on 4 defence witnesses. The accused in his defence has examined 4 witnesses and they are, viz. (1) D.W. 1 Baldevbhai Ramsing Exh. 43, (2) D.W. 2 Kesarsing Pratapsing Exh. 44, (3) D.W. 3 Chhatrasing Jitsing Exh. 45 and (4) D.W. 4 Ranjit Devising Exh. 46. Firstly it may be mentioned that the defence has raised various defence pleas. The accused has raised the plea of alibi. Defence has also contended that there was accidental fire. It appears that in order to support the same different pleas were raised by the defence.

13. We have dispassionately and carefully examined the defence evidence and are of the opinion that the evidence of the defence is not only incorrect but is also not natural. We are conscious of the fact that the accused has to prove his defence version by preponderance of probability unlike the prosecution which is obliged to prove its case beyond shadow of doubt. If the accused is in a position to show any doubt or suspicion either from the prosecution evidence or even from the defence evidence, he is entitled to benefit of doubt according to the settled proposition of law. After having carefully examined the defence version, we have not been able to see any doubt or suspicion about the authenticity of the prosecution case. The defence witnesses are admittedly relatives or friends of the accused and they are also neighbours of the accused. We do not propose to say that the evidence of the relatives or friends should be discarded. But we clearly feel that the evidence in such a situation is required to be scanned, analysed and scrutinised very carefully.

14. The evidence of D.W. 1 Baldevbhai at Exh. 43 does not throw any light on the defence version. The testimony of this witness does not help the version of the defence. Apart from contradictions in his evidence his testimony does not sound natural.

15. D.W. 2 Kesarsing is examined at Exh. 44. This witness has stated that he along with 4 defence witnesses including the accused returned home around 12 mid night from the temple after Janmashtami festival as father of the accused came to the temple and instructed them to back home. Such a version is conspicuously silent in the evidence of Baldevbhai. All the defence witnesses have stated that they had gone to the temple in connection with Janmashtami festival. Defence witness Baldevbhai has stated in his evidence that all the 4 persons returned from the temple for the sake of visit and again they were to go

back to the temple, whereas, the defence witness Kesarsing has stated in his evidence that they went back on the instructions given by the father of the accused. Not only that even in the testimony of Kesarsing it is found that witnesses Baldevbhai, Kesarsing again went back to the temple and thereafter deceased Bai Kesar was shifted to Government hospital on the next day early in the morning.

16. Same is the factual scenario in the testimony of defence witness Chhatrasing Jitsing. He has stated in his evidence that defence witness Baldevbhai called him stating that wife of accused (accused Umed) was burnt. He had gone along with his wife where many persons had collected in the house of the accused. At that time according to the evidence of this witness he had asked the accused Umed as to what had happened and he replied that he did whatever he liked. Instead of asking to deceased Bai Kesar who was lying on the cot in excruciating pain, this witness had asked the accused and the reply given by the accused is a pointer not in the direction of defence version but the prosecution case. The other two witnesses have not cared to ask the injured Bai Kesar on reaching the house of the accused.

17. Defence witness No. 4 Ranjit Devising is examined at Exh. 46. He is son-in-law of village Runaj where the unfortunate incident occurred. He has stated in his evidence that two months prior to the date of the incident in question when he visited village Runaj of the accused, this deceased Bai Kesar had threatened to commit suicide by pouring kerosene on her body. None of the defence witnesses has even remotely suggested such a version except this defence witness Ranjit. His evidence is also unnatural and unbelievable.

18. It could very well be seen from the evidence of defence witnesses that accused has gone on challenging the defence version consistently at different stages during the course of the proceedings before the trial Court. It would be interesting to note that the accused in his statement u/s 313 Criminal Procedure Code has stated that the deceased Bai Kesar had committed suicide by putting herself on fire by pouring kerosene. Firstly the unreliable history given to the Medical Officer Dr. Pratap Radhakishan by the relatives of the accused was that the deceased accidentally got burnt as she put on polyester sari came in contact with the flame of stove. The defence version raised differently at different stages, is highly unreliable. The story of stove is not supported or substantiated even by the panchnama of the scene of incident. No stove was found from the scene of offence. On the contrary burnt match stick and a kerosene bottle was found. Kerosene was also badly smelling in the house of the accused at the time of panchnama. Therefore, series of contentions that the accused has been able to create atleast by leading evidence of four witnesses is unsustainable and is required to be rejected.

19. Since 2 serious contentions were raised before us at the outset on behalf of the accused by Advocate Ms. Acharya we have dealt with them first. Obviously, now we would like to deal with the evidence of the prosecution. The prosecution

in our opinion has successfully established the culpability of the accused which has proved beyond reasonable doubt that the accused and nobody else is guilty for committing the murder of his wife Bai Kesar who was just 18 years old at the time of the unfortunate incident.

20. Firstly we would like to refer the dying declaration recorded by the Executive Magistrate and produced, at Exh. 19. The prosecution witness No. 2 Ayubhai Husenmiya is an Executive Magistrate is examined, Exh. 18. According to the evidence of this witness deceased Bai Kesar had unequivocally involved the accused in her dying declaration. The dying declaration recorded by Executive Magistrate is produced at Exh. 20. It is clearly stated in this dying declaration that the accused forcibly took Bai Kesar from her parental home to his house in the evening. That the deceased was brought by accused on a Chaudas day according to Hindu calendar against the wish of parents and the deceased. It is customary which is unquestionable that ordinarily the day, i.e. Chaudas, according to Hindu calendar is considered to be not auspicious and good for functions or actions are not taken on that day. Therefore, parents of the deceased and herself repeatedly requested the accused not to take her on the same day on account of inauspicious day and desired to go on the next day. There was a quarrel on this aspect. Apart from that the accused forcibly took the deceased from the parental home to his house in village Runaj. It is further stated by Bai Kesar in her dying declaration that she was severely beaten. At about 10 p.m. on the night of the incident the accused had mercilessly dragged her away from the room to the Vada portion and thereafter he poured kerosene on her body and burnt her by lighting a match stick.

21. The dying declaration can form the basis for conviction according to the settled proposition of law if it is found truthful and representing correct version of the deceased or the victim of the offence under the provision of Section 32(1) of the Indian Evidence Act, 1872 (Evidence Act for short). However, it may be noted that dying declaration is a statement of a person as to the cause of his or her death or as to any of the circumstances of the transaction which resulted into the death and it becomes relevant u/s 32(1) of the Evidence Act. No doubt, dying declaration is not deposition in Court of law. It is untested by the cross-examination. It is neither made on oath nor in the presence of the accused. Therefore, such a piece of evidence is required to be scrutinised with full of circumspection. Weak points of a dying declaration as aforesaid should put the Court on its guard while testing its reliability imposing on the prosecution as to an obligation when scrutinised and examined from all the relevant and attendant circumstances.

22. We may also make it clear that the dying declaration made by the deceased which is relevant under the provisions of Section 32(1) of the Evidence Act, is a substantive piece of evidence and conviction can be founded upon the sole basis of a dying declaration. Dying declaration become relevant as it is made by a person as to the cause of death and it assumes more sanctity because it is made

upon approaching death. There is a necessity for the victim being generally the only principal eye witness to such a crime. Exclusion of such a statement by the deceased might defeat the ends of justice and secondly the sense of impending death which creates a sanction equal to sanctity of an oath or an obligation of a sworn testimony. Therefore, dying declaration if proved and if found representing the correct version of the deceased as to the cause of death, it does not only become admissible and relevant but it assumes the colour of substantive evidence and conviction can be founded upon. This proposition of law requires no elucidation as there was no controversy as such about it.

23. Reliance placed by the prosecution on the dying declaration recorded before the Executive Magistrate is rightly upheld by the trial Court. We also find from the scrutiny of evidence on record of this case that it is untainted and representing the correct version of the victim Bai Kesar. She was found mentally fit to make a rational statement before the Executive Magistrate as per the endorsement thereon and the evidence of the medical officer and from the cross-examination of the Executive Magistrate, it is noticed that he had recorded the correct version of the victim Bai Kesar in a question and answer form and that the attempt of the medical officer was for ascertaining whether she was mentally fit to make such a rational statement. Therefore, the dying declaration Exh. 20 is natural and reliable. The trial Court has rightly upheld the contention of the prosecution placing reliance on such a dying declaration.

24. The victim had also made one dying declaration before the police head constable, Petlad. It came to be recorded at 3-20 a.m. on the next day. As per the evidence on record, said dying declaration is proved by the prosecution in the evidence of police constable Ramanbhai Somabhai P.W. 8 examined at Exh. 28. Thus, the second dying declaration recorded by this police head constable is produced at Exh. 29. It is found rightly by the trial Court dependable. Nothing has been shown to us or brought to our notice which would affect the reliability of this dying declaration recorded by the police head constable which is consistent with the dying declaration recorded by the Executive Magistrate. The pith and substance of both the dying declarations recorded by the Government officials in discharge of their duties comes to the same and pointing unerringly the guilt of the accused and therefore, we find no substance in the contention that such dying declarations are wrongly relied upon by the trial Court.

25. The prosecution has also relied upon two more dying declarations. No doubt, they are verbal. One is made by the deceased before her mother Devuben and second one is made before her brother Bhagubhai. Thus, there are two oral dying declarations which unequivocally support the version of the prosecution. The prosecution witness No. 4 Devuben - mother of the deceased is examined at Exh. 22 and prosecution witness No. 5 Bhagubhai - brother of the deceased is examined at Exh. 21.

26. It is found from the record of the present case that there are two recorded dying declarations of the deceased and two oral dying declarations and all the

four dying declarations which are made by the deceased are in substance constitute and convey undoubtedly that the author of murder of deceased Bai Kesar is accused and nobody else. Therefore, in our opinion the trial Court has rightly relied upon the dying declarations.

27. Apart from the dying declarations there are substantial circumstantial evidence which corroborates the dying declarations. We may make it clear that a dying declaration as such needs no corroboration from any quarter for proving the capital charge against the accused. However, in the present case, the four dying declarations and the prosecution version is clearly corroborated by the following circumstances: (1) That as per the panchnama Exh. 26 with regard to the physical condition of the accused, the accused had sustained several burn injuries particularly on both cheeks, left and right ring fingers. There was also swelling on frontal part of the palm. Over and above, it is clearly noticed that there were a number of abrasion marks on the left jaw and cheeks of the accused. When such question was pointedly put to the accused u/s 313 Criminal Procedure Code he has not been able to contend or put any other version. He has simply stated that it is false. Again this aspect is re-inforced in the evidence of prosecution witness No. 1 Dr. Habib K. Punjabi who is examined at Exh. 15. He has clearly justified that there were abrasion marks on the left part of the jaw and cheek and they were possible only by nails. This shows that deceased Bai Kesar must have made frantic unsuccessful efforts to thwart the evil design cherished by the accused to finish her. (2) There was find of burnt match stick and kerosene bottle. According to the panchnama of the venue of offence and other evidence on record there was smell of kerosene not only in the room where the accused got his dream accomplished but also on the clothes of the deceased. The Forensic Science Laboratory report also supports this aspect unquestionably.

28. The defence version went on changing from time to time. It was the defence of the accused that either there was accidental fire on account of touching the flame on the polyester sari or by pouring kerosene on the body of the deceased by Bai Kesar herself to commit suicide. No where in either of the three defence versions, the stove is in the focus; whereas it is nowhere seen on the record much less in the panchnama of the scene of offence prepared after the unfortunate incident.

29. There was a deep seated motive for the commission of the crime in question. Both the sides were not on good terms. The relations between the two sides had wrecked. Therefore, even the ceremony known as "Shrimant" at the time of first pregnancy was performed at the residence of the brother of the deceased instead her own house, i.e., the matrimonial house if not the home. In short, the relationships between the spouses were so strained that the accused forcibly brought deceased Bai Kesar on the date of the incident from the parental house on an inauspicious day and against the wish of the parents-in-law.

30. Aforesaid circumstances unquestionably support and corroborate the case of the prosecution and the four dying declarations made by the deceased after

extensive burn injuries and before she made the final voyage of life.

31. Having regard to the facts and circumstances and the documentary evidence emerging from the record of the present case, we have no hesitation in finding that the author of the crime in question, viz., the killing or murder of deceased Bai Kesar is accused and nobody else.

32. Therefore, the trial Court has rightly found the accused guilty for the offence punishable u/s 302 of Indian Penal Code and sentenced him to life imprisonment. In our opinion, present appeal filed by the accused is without any substance and requires to be dismissed in its entirety. In the result, the appeal is dismissed and the impugned order of conviction and sentence is confirmed.