
(2013) 07 GUJ CK 0074
In the Gujarat High Court
Case No : Criminal Appeal No. 308 of 2007

Vasantbhai Ratilal Makwana	Vs	APPELLANT
The State of Gujarat		RESPONDENT

Date of Decision : 23-07-2013

Acts Referred:

Citation : (2014) 1 GLH 182

Hon'ble Judges : K.S. Jhaveri, J;K.J. Thaker, J

Bench : Division Bench

Advocate : Yogendra Thakore, for the Appellant; C.M. Shah, APP, for the Respondent

Judgement

K.S. Jhaveri, J.—Challenge in this appeal is to the judgment and order passed by the learned Addl. Sessions Judge, Court No. 2, Ahmedabad City in Sessions Case No. 314 of 2005 dated 16.11.2006 whereby, the appellant, original accused, has been convicted for the offence punishable u/s. 302 of Indian Penal Code and has been sentenced to undergo imprisonment for life and fine of Rs. 1000/. The period of imprisonment already undergone by the appellant was given as setoff. Antecedent facts of this case, which require brief mention, are these;

The appellant, original accused, married Lilaben, d/o. Kantibhai Ghanabhai some where in the year 1991 and was residing along with his wife and two children in Amraiwadi slum quarters of Ahmedabad City. Before about four months prior to the alleged incident, Lilaben used to reside at her parental home on account of some dispute between her and the appellant and it was only after an out of Court settlement in the proceedings that were filed against the appellant before the concerned trial Court at Viramgam, Lilaben had returned to her matrimonial house.

1.1 It was alleged that Lilaben was having illicit relationship with one Pratapji Thakor, whom she was knowing from the days she had filed the proceedings against the appellant herein before the concerned trial Court and that even after

the out of Court settlement, said Pratapji Thakor used to frequently visit the house of appellant for meeting Lilaben.

1.2 It is alleged that one day prior to the date of alleged incident, i.e. on 06.01.2005, when the appellant returned to his house in evening after work, Lilaben informed him that said Pratapji Thakor would be coming to their house some time late in the evening. On hearing the same, the appellant got enraged and he decided to end the illicit relationship between his wife and said Pratapji Thakor. He picked up an empty barrel from his house and thereafter, went to a nearby Petrol Pump. It is further alleged that the appellant purchased 10 litres of petrol worth Rs. 416/- and kept it in his house. At around 2100 hrs., Pratapji Thakor came to his house and at around 2230 hrs., they all had dinner.

1.3 It is further alleged that his wife Lilaben and said Pratapji Thakor slept inside the house whereas, he and his mother slept outside in the veranda of the house. At around 0300 hrs. on 07.01.2005, the appellant heard sounds of whispering between his wife and Pratapji Thakor. The appellant got enraged by it and when he peeped into the room, he noticed that his wife Lilaben and Pratapji Thakor were sleeping together. He prepared a torch by using the petrol and thereafter, threw it inside the room where his wife Lilaben and Pratapji Thakor were allegedly sleeping together. On feeling the flash of inferno, both Lilaben and Pratapji Thakor woke up and on witnessing the danger, they both tried to come out of the room. However, at that time, the appellant threw petrol on both of them with the help of a bucket and the resultant effect being that both of them caught fire. On hearing their shouts, residents from the neighborhood gathered at the house of appellant. On the basis of message given by some resident, an ambulance and police arrived at the house of appellant. Both Lilaben and Pratapji Thakor were rushed to L.G. Hospital. However, both of them succumbed to the burn injuries before effective treatment could be given.

1.4 Thereafter, the appellant himself went to Amraiwadi Police Station and gave a complaint in this regard, which was, ultimately, registered vide I.C.R. No. 19/2005. Necessary investigation was carried out and the appellant-accused was arrested. At the end of investigation, chargesheet was filed before the concerned magisterial Court but, since it was a sessions triable offence, the case was committed to the Sessions Court, Ahmedabad.

1.5 During the course of trial, the prosecution had examined fifteen witnesses, viz. Jagdishbhai Nathalal Vaghela as PW 1 at Exhibit 8, Naranbhai Pursottambhai Solanki as PW 2 at Exhibit 11, Prabhatji Pratapji Thakor as PW 3 at Exhibit 13, Becharji Bhikhaji Thakor as PW 4 at Exhibit 14, Rajeshbhai Shivrambhai Rajput as PW 5 at Exhibit 16, Laxmiben Bachubhai Parmar as PW 6 at Exhibit 18, Maheshbhai Budhabhai Bariya as PW 7 at Exhibit 19, Dr. Pravinbhai Valjibhai Desai as PW 8 at Exhibit 21, Selvi Sundarmurthy Ponnuswamy as PW 9 at Exhibit 26, Rakeshkumar Ganpatbhai Vaghela as PW 10 at Exhibit 27, Suresh Meghabhai Naiya as PW 11 at Exhibit 31, Virchandbhai Ganeshbhai Vankar as PW 12 at Exhibit 32, Kanuji Chaturji Rathod as PW 13 at Exhibit 35, Mukeshbhai Dhirubhai

Mehta as PW 14 at Exhibit 39 and Gopinath Narnarayan Rao as PW 15 at Exhibit 44.

1.6 The prosecution had also collected and relied upon several documentary evidence, more particularly, the complaint at Exhibit 37, inquest panchnama of deceased Lilaben at Exhibit 33, inquest panchnama of deceased Pratapji at Exhibit 34, panchnama of scene of offence at Exhibit 40, FSL Report at Exhibits 38/49/51/53, panchnama regarding seizure of clothes of both the deceased at Exhibit 28, medical certificates of both deceased at Exhibits - 42 & 43, Postmortem Report of deceased Lilaben at Exhibit 22 and Certificate at Exhibit 24, Postmortem Report of deceased Pratapji at Exhibit 23 and Certificate at Exhibit 25.

1.7 At the end of trial, the Court below recorded further statement of accused u/s. 313 Cr.P.C. and ultimately, passed the impugned judgment and order of conviction, which has led to the filing of present appeal.

2. Mr. Yogendra Thakore learned Counsel for the appellant, original accused, submitted that the impugned judgment and order passed by the Court below is bad in law and erroneous inasmuch as the Court below has failed to appreciate the settled principle of criminal jurisprudence relating to confessions or admissions admissible against the maker. He submitted that except the averment made in the complaint (Exhibit 37) regarding purchase of petrol, there is nothing on record to establish the guilt of appellant-accused. He submitted that confessions/admissions made by the appellant in the complaint cannot be used against the appellant and conviction cannot be based upon it.

2.1 In support of the above submission, learned Counsel Mr. Thakore has placed reliance upon the decision rendered in Aghnoo Nagesia Vs. State of Bihar, wherein, it has been held that confessions made by an accused to a Police Officer or made by him while he is in the custody of a Police Officer are not to be trusted, and should not be used in evidence against him. By placing reliance upon the said decision, learned Counsel submitted that the appellant made the confession in complaint (Exhibit 37) given to the Police Officer and therefore, it cannot be used as evidence against him in view of the principle rendered in the above decision.

2.2 Learned Counsel Mr. Thakore further submitted that there are no eyewitness to the alleged incident and that the Court below has proceeded to convict the appellant by heavily relying upon the confession made by him in the complaint (Exhibit 37). He, therefore, prayed to quash and set aside the impugned judgment and to acquit the accused of all the charges. He also drew attention of the Court to an unreported decision of this Court rendered in Criminal Appeal No. 120/2007 decided on 07.05.2013.

3. Learned APP Mrs. C.M. Shah supported the impugned judgment and submitted that the Court has recorded conviction of the appellant after appreciating the entire oral as well as documentary evidence on record. She submitted that the

Court below has appreciated the entire evidence in its proper perspective and has rightly recorded the guilt of the appellant. She, therefore, prayed that the present appeal may be rejected.

4. We have heard learned Counsel for the respective parties and have perused the oral as well as documentary evidence on record. We have also gone through the impugned judgment and order of conviction rendered by the Court below.

5. There is no dispute regarding the fact that both the deceased died a homicidal death. It is a matter of record that the appellant and deceased Lilaben had a married life spanning more than fourteen years but, it was not without bitterness. Deceased Lilaben had filed proceedings against the appellant before the concerned trial Court at Viramgam. However, the parties arrived at an out of Court settlement, in pursuance of which deceased Lilaben returned to her matrimonial house.

6. It appears from the record that the alleged incident occurred during the early hours of 07.01.2005 at about 0300 hrs. The scene of offence is a room situated inside the house of appellant and therefore, naturally, during that time of the day, no independent witness is expected to be present in the house except the family members. As such, it is not even the prosecution case that there is any eyewitness to the alleged incident. We find that the prosecution case does not get much support from the oral evidence on record inasmuch as the -witnesses are either hearsay witnesses or have been declared hostile. None of the prosecution witness has been able to throw light upon the prosecution case so as to make the position clear. It appears that the Court below has recorded conviction of the appellant by mainly relying upon the complaint (Exhibit 36) filed by the appellant himself on the very date of alleged incident.

7. Before we embark upon the legality and validity of the judgment rendered by the Court below, it would be relevant to discuss certain facts. It is undisputed that dead body of deceased Pratapji Thakor was found inside the house of appellant where the dead body of deceased Lilaben was also found. There is nothing on record for arriving at a definite conclusion regarding the reason behind the presence of deceased Pratapji Thakor in the house of appellant during that time of the day. Furthermore, it is not that deceased Pratapji Thakor alone had died on account of extensive burn injuries. The cause of death of deceased Lilaben, the wife of appellant, is also the same.

8. Considering the fact that there is ambiguity behind the presence of deceased Pratapji Thakor in the house of appellant at around 0300 hrs. on the date of alleged incident and that cause of death of both deceased Pratapji Thakor and deceased Lilaben are similar, the possibility that burn injuries could be the result of a free-for-all fight between the two deceased does not remain also because they belonged to opposite genders. The Postmortem Reports of both the deceased does not show the presence of any external injuries other than those caused by burns. Thus, it is a fact apparent that both the deceased died solely on

account of extensive burn injuries, which is corroborated by the medical evidence on record as well.

9. On appreciation of the evidence on record, we find that the Court below has recorded conviction of deceased by mainly relying upon the confession made by the appellant in his complaint (Exhibit 36). The appellant averred in the complaint filed before Mukeshbhai Dhirubhai Mehta (PW 14), Sr. Police Inspector of Amraiwadi Police Station that on 06.01.2005 when the appellant returned home after work at around 1900 hrs., his wife, deceased Lilaben, informed him that deceased Pratapji Thakor would be coming to their house in evening for dinner. It is further averred that on hearing the same, he got enraged and went to a nearby Petrol pump from where he purchased 10 Litres of petrol amounting to Rs. 416/-. The appellant carried the barrel of petrol to his house at around 2000 hrs. and kept it at a safe place outside the house. At around 2100 hrs., deceased Pratapji Thakor arrived at his house and at around 22.30 hrs., the appellant, deceased Lilaben and deceased Pratapji Thakor had dinner. It is further averred that after taking dinner, deceased Pratapji Thakor and deceased Lilaben slept inside the house whereas, the appellant slept in the veranda of his house where his mother was also sleeping.

9.1 It is categorically averred in the complaint that on 07.01.2005 at around 0300 hrs. the appellant heard sounds of whispering between his deceased wife Lilaben and deceased Pratapji Thakor. Therefore, he woke up and peeped through the door of the house. He noticed that his deceased wife - Lilaben and deceased Pratapji Thakor were sleeping together. He got enraged and prepared a torch with the use of petrol and thereafter, threw it inside the room where both the deceased were sleeping. On feeling the flash of inferno, both the deceased woke up and tried to come out of the room, during which time, he threw a bucket full of petrol upon both the deceased. As a result thereof, both the deceased as also the articles kept inside the house caught fire. It is also averred in the complaint that he came to know about the death of both the deceased from the Police Officer (PW 14).

9.2 From a bare reading of the averments made in the complaint (Exhibit 36) filed by the appellant-accused himself, the guilt of the accused comes on the fore. However, on the basis of such averments, which are in the form of confessions or admissions, the accused could not be convicted for the offence alleged. It is by now well settled that when an admission of an accused is sought to be used against him, the whole of it should be tendered in evidence and where a part of the admission is exculpatory and a part inculpatory, then the prosecution cannot use in evidence the inculpatory part only. In the present case, we find that the Court below has mainly relied upon the inculpatory part of confession made by the appellant for recording the conclusion of guilt, which is impermissible. Such confession was made by appellant before the Police Officer (PW 14), which is inadmissible, in view of the provision of Section 25 of Evidence Act. PW 14 has admitted to the lodging of complaint by the appellant and

recording of the same before him. In the complaint (Exhibit 36), we find that there are both exculpatory and inculpatory admissions/confessions of the appellant.

9.3 Considering the facts of the case and the settled law on confessions, it is not open to the prosecution to rely only upon the inculpatory part of confession where the appellant has averred about the modus operandi and to ignore the exculpatory part. The presence of traces of petrol on dead bodies of both the deceased, clothes and also at the scene of offence, which is evident from the FSL Report (Exhibit 49), cannot be used as the attending circumstance against the appellant in absence of cogent evidence on record regarding the purchase of said highly inflammable substance (petrol) by the appellant himself.

9.4 Except bare averment in the complaint, there is nothing on record to show as to how the highly inflammable substance (petrol) reached the house of appellant. The prosecution has not led any evidence, much less any cogent evidence, to establish that the petrol used in the commission of alleged offence was purchased and/or transported by the appellant himself. If the confession made by the appellant regarding purchase, transportation and use of petrol in the commission of alleged offence is ignored, in light of the provisions of Section 25 of Evidence Act, there is nothing on record to show the involvement of appellant in the crime in question. A confession may consist of several parts and may reveal not only the actual commission of crime but also the motive, the preparation, the opportunity, the intention, etc. The complaint (Exhibit 36) reveals the motive, the preparation and the intention behind commission of the alleged offence. However, it is not permissible in law to separate one part and to admit it in evidence as a nonconfessional statement, which the Court below has done. When a statement contains an admission of an offence, not only that admission but also every other admission of an incriminating fact contained in the statement, is part of the confession.

9.5 Looking to the facts and circumstances of the case and the settled law on confessions, we are afraid to concur with the view taken by the Court below. In our considered opinion, the Court below has committed serious error in law in relying upon only the inculpatory part of confessions made by the appellant and in ignoring the exculpatory part. In the absence of cogent evidence on record pointing towards the guilt of appellant, we are afraid that the impugned judgment and order of conviction cannot be sustained and deserves to be quashed and set aside by granting benefit of doubt to the appellant accused on the peculiar facts and circumstances of the case.

For the foregoing reasons, the appeal is allowed. The impugned judgment and order passed by the learned Addl. Sessions Judge, Court No. 2, Ahmedabad City in Sessions Case No. 314/2005 dated 16.11.2006 is quashed and set aside and the appellant, original accused, is acquitted of the charge levelled against him. The appellant, original accused, is ordered to be set at liberty forthwith, if he is not required in connection with any other case. The appeal stands disposed of

accordingly. Records and proceedings, if lying with this Court, be transmitted to the Court below forthwith.