

Vimlaben Motiram Vs. State of Guj.

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Court : Gujarat

Decided On : Jul-28-2008

Reported in : 2008CriLJ4280; (2009)1GLR261

Judge : A.M. Kapadia and; Z.K. Saiyed, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 300, 302 and 306; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Criminal Appeal No. 438 of 1993

Appellant : Vimlaben Motiram

Respondent : State of Guj.

Advocate for Def. : Mukesh Patel, APP for Opponent 1

Advocate for Pet/Ap. : Y.V. Brahmbhatt, Adv. for Appellant 1

Disposition : Appeal dismissed

Judgement :

Z.K. Saiyed, J.

1. The present Appellant/original accused in Sessions Case No. 145 of 1992 was charged and tried by the learned Additional Sessions Judge, Jamnagar, for the offence punishable under Section 302 of Indian Penal Code (for short 'IPC').

2. The facts of the prosecution case is that the complainant deceased Lilaben, wife of Ramchand Shravan, was staying with her husband and four children since last 8 to 10 years from the date of incident. On the date of incident i.e. on 21.6.1992 when she was, along with her two daughters, at home the wife of Motiramani and the wife of Madawala Ghanshyam, who were neighbours of the deceased/complainant, called the complainant - deceased as witch ('Dakan'). Thereupon the complainant told them as to why they are telling her as 'Witch' and thereupon hot discussion took place between them. Thereafter, wife of Motiramani, present appellant/accused poured the kerosene on the complainant and was set ablaze her. The complainant fell down on the earth and at that time the daughters of the complainant and other neighbours gathered there. Thereafter her husband and niece of the complainant took her to the hospital in a rickshaw. At that time the complainant was fully conscious and she lodged complainant in the Hospital in presence of P.S.I. of Udhna Police Station at 14.30 hours. Below the said complaint the complainant has put her thumb impression. The husband of the complainant had also signed to identify the thumb impression of complainant below it. The investigation was carried out by P.S.I., Udhna Police Station. P.S.I. also sent the Yadi to the Executive Magistrate requesting him to record the Dying Declaration of the deceased/complainant. Thereafter, the Executive Magistrate came and recorded the dying declaration of deceased complainant. Thereafter, the complainant expired and therefore Section 302 of I.P. Code was added by the Police. The Investigating Officer prepared the Inquest Panchnama, panchnama of dead body of deceased and the panchnama of scene of offence were drawn. The accused was arrested and the Muddamal was seized. Post Mortem Note was prepared by the Medical Officer. The Medical Certificate and the Post Mortem Note, showing the cause of death, was obtained from the Medical Officer. During the investigation the Investigating Officer has recorded the statement of witnesses, map of scene of offence was also prepared. Thereafter, after completion of investigation, the Police filed charge-sheet against the accused in the Court of learned Chief Judicial Magistrate, Surat.

3. After filing the charge-sheet, in the present case, as the offence was exclusively triable by the Court of Sessions, the learned Judicial Magistrate First Class, Surat, committed the said case to the Court of Sessions at Surat.

4. Thereafter, the charge (Ex.2) was framed against the present-appellant. The accused pleaded not guilty to the said charge and claimed to be tried.

5. In order to bring home the charge levelled against the accused, the prosecution has examined in all 9 witnesses and relied upon their oral testimonies. They are as under:

P.W. 1 - Dr. Ravjibhai Kantilal Mehta, Ex.8

P.W. 2 - Executive Magistrate Pravinlal Motiram Vankavala, Ex. 12;

P.W. 3 - Vandnaben Ramchand Koshti, Ex.16, daughter of deceased;

P.W. 4 - Ramchand Shravan Koshti, Ex.17

P.W. 5 - Mansur Gulam Qureshi, Ex.18;

P.W. 6 - Dr. Pankaj Nanubhai Desai Ex.21;

P.W. 7 - Parshuram Tulsiram Shinde, P.S.I., Udhna Police Station, Ex.23

P.W. 8 - Police Constable Ragho Bihari Dhanurdhari Dube, Ex.25, who was on duty at the Civil Hospital on the day of incident;

P.W. 9 - Madhukar Nateshwar Chaudhri, Ex.28, P.S.O.

6. To Prove the culpability of the accused, the prosecution has also produced and relied upon the following documentary evidence. They are as under:

Inquest Panchnama Ex.6;

map of scene of offence at Exh.7

Post Mortem Note Ex.10;

Medical Certificate of cause of death, Ex.11;

Dying Declaration of deceased/complainant, Ex.14

Panchnama of scene of offence, Ex.22;

complaint at Exh.24;

7. The appellant - accused has also examined following witnesses as defence witnesses:

Dr. Pankaj Nanubhai Desai, Ex.35;

Dr. Amit Narendrabhai Biniwala, Ex.36;

Dr. Amrutlal Chhotubhai Mayavanshi, Ex.38

8. Thereafter, after examining the witnesses the further statement of accused under Section 313 Cr.P.C. was recorded in which the appellant/accused has denied the case of prosecution.

9. After considering the oral as well as documentary evidence and after hearing the parties, the learned Additional Sessions Judge vide impugned Judgment and Order dated 23.2.1993 held the accused guilty to the offence punishable under Section 302 I.P. Code. The accused was convicted and sentenced to suffer rigorous imprisonment for life for the offence punishable under Section 302 I.P. Code.

10. Being aggrieved by and dissatisfied with the impugned Judgment and Order of conviction and sentence passed by the learned Trial Judge the present appellant/accused has filed this Appeal, through Jail, Learned Advocate Mr. Y.V. Brahmbhatt is appointed through Legal Aid to defend the case of the present Appellant/accused.

11. Heard Mr. V.Y. Brahmbhatt, learned Advocate, appointed through Legal Aid, for the appellant 'accused and Mr. Mukesh Patel, learned A.P.P., for the respondent' State.

12. Learned Advocate Mr. Brahmbhatt for the appellant/accused contended that this is not a case of murder, but, it is case of suicide. He has contended that before the incident, as per the prosecution case, the accused called the

complainant as 'witch' (Dakan) and on stating so there was quarrel between the deceased/complainant and the accused in presence of neighbour-hood. There was no intention of the accused to kill the complainant without any reason. Therefore, the learned trial Judge has erred in believing the say of the prosecution and held the accused guilty of the offence under Section 302 I.P. Code. Mr. Brahmbhatt also contended that as per the evidence of Dr. Rajivbhai Kantilal Mehta, P.W.1, Exh.8, who has examined the deceased and prepared a Post Mortem Note, the deceased sustained 96 % burns and due to this 96 % burns injuries the person cannot speak properly with a sound mental position with a conscious mind. He has also contended that the said injuries are corroborated with Post Mortem Note Ex.10 and, therefore, Dying Declaration given by the deceased is doubtful and concocted and the same cannot be considered in eye of law. He also contended that P.W.2 Pravinlal Vankavala, Exh.12, never bothered to inquire from the Doctor as to whether the patient is conscious or not and is in a position to give reply to the questions. He contended that the Dying Declaration was written under the influence of relatives and, therefore, the same cannot be considered in eye of law. Mr. Brahmbhatt further contended that P.W.3 Vandna Ramchandra Koshti, examined at Exh.16, is the daughter of deceased complainant. She is tutored witness and cannot be considered as an independent witness to the incident. He contended that all the neighbours were telling the deceased as Witch (Dakan) and, therefore, the deceased must have committed suicide. Mr. Brahmbhatt has read the evidence of the husband of deceased Ramchandra who is examined as P.W. 4, Exh.17 and contended that this witness has turned hostile and has not supported the prosecution case. Mr. Brahmbhatt has compared the evidence of this witness with the evidence of P.W.3 Vandna Ramchandra, daughter of deceased and P.W.4 and the complaint Exh.24 and contended that the version stated in their deposition as well as in the complaint are different. He further contended that P.W. 5 Mansurali Kureshi, Ex.18 also turned hostile and has not supported the prosecution case. He, therefore, contended that from the above evidence it is clearly established that this is a clear case of suicide and the prosecution has wrongly booked the present appellant as accused. He further contended that the prosecution has not examined material independent eye witnesses who were present at the time of incident. He also contended that the

Investigating Officer has not carried out the investigation properly. Mr. Brahmhatt has contended that in Exh.29-entry in station diary that deceased has received burns injuries due to untold reason. Mr. Brahmhatt contended that the accused has also obtained permission from the trial Court to examine defence witnesses. Thereafter, the defence witnesses have been examined on behalf of the accused. Mr. Brahmhatt has contended that Dr. Pankaj Nanubhai Desai, D.W. No. 1, Exh.35 has fairly deposed that the deceased must have received the burn injuries by herself. Mr. Brahmhatt has contended that all the three defence witnesses are independent witnesses. He also contended that looking to the medical evidence and the Post Mortem Report, in such a critical condition having severe burn injuries nobody would be able to say anything. He has also contended that the Dying Declaration which was recorded by the Executive Magistrate is against the provision of law and from the medical evidence it transpires that this is not a case of murder, but, it is a case of suicide. He, therefore, prayed that in such circumstances and the fact that the accused is a lady, benefit of doubt is required to be given to the appellant/accused and the accused may be acquitted from the charges levelled against her.

13. Learned APP Mr. Mukesh Patel, for the respondent, has contended that there is voluminous reliable, trustworthy and clinching evidence on record which unequivocally and unerringly proves that the appellant/accused had poured the kerosene and lighted the stick from the match box and set ablaze the deceased and thereby he committed the murder of victim lady. He further contended that from the evidence of the complainant and other witnesses as well as from the documentary evidence, the prosecution has proved the guilt of the accused. He also contended that the dying declaration is a corroborative piece of evidence and, therefore, no other evidence is necessary. He further contended that the prosecution has established its case beyond reasonable doubt and prayed that the Judgment and Order passed by the trial Court is required to be confirmed. He also contended that the trial Court, after fully appreciating the evidence, has rightly convicted and sentenced the appellant/accused. There is no lacuna in the Judgment of the trial Court and prayed to confirm the Judgment and order of conviction and sentence passed by the trial Court.

14. We have gone through the oral as well as documentary evidence led by the prosecution before the trial Court.

15. The Hon'ble Apex Court in a number of decisions held that 'it is not the duty of the appellate Court when it agrees with the view of trial Court on the evidence either to restate the effect of the evidence or to reiterate the reasons given by the trial Court'. The said law is laid down by the Hon'ble Court in the case of (1) *Girijanandini Devi and Ors. v. Bijendra Narain Choudhary* reported in : [1967]1SCR93 , and (2) in the case of *State of Karnataka v. Hemareddy and Anr.* reported in : 1981 CriLJ1019 . Yet, in the interest of justice and to observe said cause of Appeal in a legal way, we have discussed the evidence as well as the reasons assigned by the trial Court.

16. We have gone through the Judgment and also the arguments advanced by both the sides. We have also perused the evidence on behalf of the prosecution as well as on behalf of the defence. From the Post Mortem Note as well as from the medical evidence it clearly reveals that the deceased had received 96 % burnt injuries. The Executive Magistrate, who has recorded the Dying Declaration of the deceased is an independent witness. He has no interest in the result of the case. He has also no personal enmity with the accused. After testifying the consciousness of the deceased, he recorded the Dying Declaration. Endorsement of the Doctor on the dying declaration even if not obtained, yet, the same cannot be said to be fatal to the prosecution case. Prosecution has also examined the daughter of deceased complainant, P.W.3, Exh. 16 as an eye witness. We have scrutinized the whole evidence. The said witness has fully supported the prosecution evidence. Considering the fact that the incident took place just outside the house of victim it can safely be presumed that the presence of this witness (daughter of deceased) is quite natural. In the cross examination also this witness has stucked to her version and the appellant has failed to establish his defence that the cause of injury was due to suicidal attempt.

17. The Hon'ble Supreme Court in number of decisions has propounded and settled law that (1) there is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration; (2) if the Court is satisfied

that the dying declaration is true and voluntary, it can base conviction on it without corroboration. We have gone through the medical evidence and also the evidence of Executive Magistrate, who recorded dying declaration of the deceased. We are fully satisfied on going through the evidence of Executive Magistrate that the victim was conscious and in a fit mental condition. The dying declaration was recorded immediately after the occurrence of the incident and in the said dying declaration the deceased has clearly mentioned that the accused has poured the kerosene on her and set ablaze her. F.I.R. was also lodged immediately after the occurrence of incident. Therefore, it cannot be said that the dying declaration is not trustworthy. The dying declaration was recorded in writing in a question answer form by the Executive Magistrate and, therefore, it cannot be said that it is not admissible in eye of law. In the facts and circumstances of the case there is no doubt at all that the dying declaration made by the deceased was a voluntary and in a conscious state of mind. A person on the verge of death is not likely to tell lie or to concoct a false story or falsely involve somebody. It cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence. The deceased has given a statement before the Investigating Officer and the Executive Magistrate which is a proof of the manner in which deceased was assaulted. Therefore, there is no reason to doubt the correctness and authenticity of dying declaration which is fully supported by the Executive Magistrate and also by P.W. 3 eye witness. There cannot be any hard and fast rule regarding the conduct of a human being during the occurrence of the incident or subsequent thereto. In a given set of circumstances or a situation, a person may not behave in an ideal way or in any set pattern. It varied from man to man. So conduct could not be examined in light of the facts situation of the case. It is a fact that the daughter of deceased is an eye witness. Though this witness is a child witness yet, she has explained the whole incident. It cannot be said that this witness is an interested witness. The basic innocence and truthfulness of a child is also to be taken into consideration. Interested evidence is not necessarily unreliable and even partisanship by itself is not a valid ground for rejecting the entire sworn testimony. Was his/her presence probable If so, whether the substratum of his/her story is consistent with other evidence, natural course of events, surrounding circumstances, and inherent probabilities of the case, and will

it carry conviction with a prudent person If the answer is yes, and if the evidence appears to be almost flawless and free from suspicion, the Court may accept it, without seeking corroboration from any other source. The Court must consider the substratum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by defence. The Court must bear in mind that witnesses to a crime may not react in a normal manner, nor do they react uniformly. The efforts should be made to find out the truth by separating the chaff from the grain. Sufficient weight must be given to the evidence of doctor who performed autopsy against the statements in Text Books. The Court can also prefer to accept eye witness's testimony in preference to the opinion of medical expert. Evidence of two doctors is conflicting, it must be scrutinized carefully and the more reliable version can be accepted. The court must carefully examine the discrepancies and if it is reasonably possible to arrive at the substantial and true version, the Court should not throw out the prosecution case on the basis of such discrepancies.

18. From the above facts we found that the deceased was in fully conscious state of mind at the time of recording of dying declaration by the Executive Magistrate. There is no doubt about the correctness and authenticity of dying declaration in question and we are of the view that the dying declaration does not require corroboration. The principle of proof beyond reasonable doubt is applicable in the matter of testing the guilt of the accused. It has no operation in the area of proof of primary facts, particularly in cases where the guilt of the accused is sought to be established by circumstantial evidence. The proof of primary facts is one thing and inference of facts to be drawn from primary facts is another thing. In regard to the proof of basic or primary facts the Court has to judge the evidence in the ordinary way and in the appreciation of evidence in respect of proof of these basic or primary facts. There is no scope for the application of the principle of benefit of doubt. The Court considers evidence and decides whether that evidence proves the particular fact or not. When it is held that certain facts are proved, the question then arise whether these facts lead to an inference of the guilt of the accused or not and in dealing with these aspects, the doctrine of benefit of doubt would apply and inference of guilt of accused can be drawn only if the proved fact is incompatible with his innocence and is compatible with the guilt of accused.

19. We are of the opinion that if the substratum of prosecution case remains unaffected and remaining part of the evidence is trustworthy the prosecution case should be accepted to the extent it is considered safe and trustworthy.

20. From the above it is clearly established that at the time of recording of the Dying Declaration, the deceased was fully conscious. The statement made in the form of Dying Declaration, in presence of medical expert, is a best proof and there is no reason to disbelieve the same. The Dying Declaration is admissible in evidence on which conviction can be based without any further corroboration if Dying Declaration is found genuine and trustworthy. Looking to the evidence, there is a time gap between the recording of Dying Declaration and occurrence of death. Even if there is time gap, that by itself would not destroy the evidentiary value of the statement. The statement does not lose its credibility if the declarant chances to live longer than anticipated. The Dying Declaration is a best guarantee of the truth if the statement made by dying person who is totally conscious at the time of recording of the Dying Declaration. It is also laid down by the Hon'ble Supreme Court that admissibility of the dying declaration rests upon the principles that a sense of impending death produces in a man's mind the same feeling as that of a conscientious and virtuous man under *oathemortis* *praesumptio mentis* i.e. a man will not meet his maker with a lie on his mouth. Such statements are admitted upon consideration that their declaration are made in extremity when the maker is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced and the mind induced by the most powerful consideration to speak the truth. In the case of *Najjam Faraghi @ Najjam Faruqui v. State of West Bengal* reported in : 1996 CriLJ866 , the Hon'ble Supreme Court has observed in Head Note (A) as under:

(A) Penal Code (45 of 1860), Section 300 'Murder' Evidence 'Death of woman due to burning' Evidence of post-mortem examiner that it was not case of suicide 'No attempt by accused-husband who was admittedly present at scene of occurrence to put out fire and save wife' Dying declaration by wife showing that husband killed her by setting her on fire 'mental condition of deceased sufficiently good to give statement to Magistrate' Conviction of accused upheld 'Mere fact that case was registered initially under Section 306 and later after examination of witnesses

alternative charge under same section was framed' will not vitiate proceedings.

21. This Court has considered the submissions advanced by the learned Advocates appearing for the parties and perused the impugned Judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with criminal appeals, this Court has examined the entire evidence on record for itself independently of the trial Court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence.

22. As observed and discussed at length, in our opinion, in light of the oral as well as documentary evidence, it is established by the prosecution that accused had poured the kerosene on the deceased victim and setting on fire. There is no reason for the deceased to falsely involve the appellant/accused in the incident. From the oral as well as documentary evidence adduced by the prosecution, in our opinion, the learned trial Judge has rightly convicted and sentenced the appellant/accused. Therefore, the conviction and sentence awarded by the trial Court against the appellant/accused does not call for any interference of this Court in exercise of appellate powers.

23. We find ourselves in complete agreement with the said findings, ultimate conclusion and resultant order of conviction passed by the trial Court and we are of the view that no other conclusion except the one reached by the trial Court is possible in the instant case as the evidence on record stands. Therefore, there is no valid reason or justifiable ground to interfere with the impugned Judgment and order of conviction and sentence.

24. For the forgoing reasons the Appeal fails and is hereby dismissed. The Judgment and Order of conviction and sentence dated 23.2.1993 recorded by the trial Court against the appellant/accused in Sessions Case No. 145 of 1992 is hereby confirmed and maintained. Muddamal be disposed of in terms of directions

contained in the impugned Judgment and order passed by the trial Court. The Appeal is accordingly dismissed.

It appears from the Jail record that the appellant/accused was released on bail by this Court after completing her 9 years sentence. Therefore, the appellant/accused is directed to surrender herself before the Jail within 15 days from today to undergo her remaining sentence. If the accused failed to surrender herself before the Jail Authority within the time stipulated then Non-bailable warrant shall be issued against the appellant/accused.

25. This Appeal is accordingly dismissed.

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