

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 87 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS and
MR.JUSTICE A.M.KAPADIA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

KOLI DEVA BHAYA PRABHASPATAN

Appearance:

MR BD DESAI, ADDL PP for the appellant.

MR DM VASAVADA for Respondent.

CORAM : MR.JUSTICE K.R.VYAS and
MR.JUSTICE A.M.KAPADIA

Date of decision: 31/03/99

ORAL JUDGEMENT

PER: A.M.KAPADIA,J

Respondent was tried by the learned Additional Sessions Judge, Junagadh for commission of the offences punishable under Sections 498A and 306 of the Indian

Penal Code on the accusation that he had abetted his wife in committing the suicide and she was subjected to mental and physical cruelty by him and, therefore, she herself by pouring kerosene on her body lit the fire and thereby put an end to her life. At the conclusion of the trial, the learned trial Judge by his judgment and order dated 30-10-91 passed in Sessions Case No.140 of 1991 acquitted the respondent. Feeling aggrieved by the aforesaid judgment and order, the State of Gujarat has preferred this appeal before us.

Briefly stated the prosecution case is that the respondent married Jethiben before 8 to 10 years of the incident at Prabhas Patan and out of the said wedlock the deceased gave birth to three children. It is further alleged that the respondent was frequently giving mental torture by beating his wife and, therefore, out of the exasperation and frustration, the deceased left her matrimonial home frequently and went to her parental home. It is further alleged that she left her matrimonial home for more than 10 to 15 times and went to her parental home. It is further alleged that prior to four months of the incident also she went to her parental home and at that time at the intervention of her father and the leaders of the caste she again came back to her matrimonial home. It is further alleged that on the fateful day, the respondent was sleeping outside his house and because of the mental torture received from the respondent, she poured kerosene on her person and lit the fire with the result she received burn injuries. At that time the neighbours Naranbhai and Bhikhabhai were called and they went inside the house with lantern and saw the deceased sitting in burnt conditions. Her clothes were also burnt and she received burn injuries throughout her body. Therefore all of them including the respondent took her to the Municipal hospital in a rickshaw and admitted her for treatment and during the treatment she succumbed to the burn injuries on 11-6-91 at 11.00 O'clock. It is further the case of the prosecution that during the treatment, the Medical Officer informed the police personnel of Prabhas Patan through nurse about the alleged occurrence and therefore the Duty Head Constable Chandra Prabhas came there. Police Officer Ratilal Naranbhai wrote a Yadi to the Executive Magistrate for recording dying declaration of the injured Jethi and pursuant to the same the Executive Magistrate Dholakia came to the hospital and recorded the dying declaration at 8.15 a.m. It is also the case of the prosecution that the Duty Head Constable Chandrasinh Prabhatsinh has also interrogated the deceased and recorded her complaint and the thumb impression was also obtained beneath the said

complaint and thereafter the said complaint was sent to Prabhas Patan Police Station and pursuant to the same offence was registered.

After registering the offence, the investigation was put into motion and the statements of various witnesses were recorded; panchnama of the scene of offence was also prepared; inquest panchnama was also drawn and the dead body was sent for autopsy and at the conclusion of the investigation, the offence was divulged against the respondent. He was chargesheeted for the commission of the aforesaid offences.

On committal, the learned Additional Sessions Judge framed charge which was read over and explained to the respondent. The respondent pleaded not guilty and claimed to be tried. Therefore he was put up on trial.

The prosecution, in order to bring home the charge levelled against the respondent, examined the following witnesses :

Witness No.	Name of witness	Ex.No.
-------------	-----------------	--------

1	Dr. Pramjibhai Devjibhai Movaliya	5
2.	Vinodrai Ratilal Dholakia	14
3.	Valabhai Karsanbhai	17
4.	Naranbhai Govindbhai	18
5.	Samatbhai Naranbhai	19
6.	Bhikhabhai Jivabhai	20
7.	Chandrasinh Prabhatsinh	21
8.	Ratigar Narangar	24
9.	Parbatsinh Bhurabhai Bariya	26

In order to prove the culpability of the respondent, the prosecution also placed reliance on various documents which were produced during the trial.

After recording of evidence of the prosecution witnesses was over, the learned trial Judge recorded the statement of the accused under section 313 of the Criminal Procedure Code with a view to explain the incriminating evidence recorded against him. In the further statement also he reiterated that he is innocent and falsely implicated in this case. He has further stated therein that there was no electricity in his house and therefore he was using kerosene-lantern and for the purpose of cooking also, he was using kerosene. He has further stated that he had never beaten her nor he had given mental torture to her. He has never abetted her to

commit suicide nor he had created any situation to commit suicide. Their family affairs were going on very smoothly and were maintaining themselves by doing labour work and out of the wed lock they have got three children. He has not examined any defence witness.

The learned trial Judge appreciated the evidence led by the prosecution and recorded the following conclusions:

- 1 The prosecution has failed to establish that the deceased was subjected to mental and physical cruelty by the respondent.
- 2 The evidence of the prosecution witnesses is full of contradictions so far as the allegation with respect to mental and physical cruelty is concerned.
3. The dying declaration Ex.16 recorded by the Executive Magistrate Dholakia and the complaint Ex.23 recorded by the Head Constable Chandrasinh Prabhatsinh which has become the dying declaration as the injured died subsequently do not inspire any confidence in view of the 100 percent burn injuries received by the deceased.
4. There are contradictory versions with respect to the time of recording dying declaration, Ex.16 and the complaint, Ex.23.
5. At the time of recording the dying declaration the relatives of the deceased were present and therefore the possibility of tutoring the deceased cannot be ruled out.
6. The prosecution has failed to prove that the respondent abetted the deceased to commit suicide.

In view of the aforesaid conclusions, the learned trial Judge acquitted the accused of the offences punishable under Sections 306 and 498 of the Indian Penal Code, giving rise to the present appeal.

Mr. B.D.Desai, learned Additional Public Prosecutor appearing for the State has taken us through the entire testimonial collection on record and contended that the FIR and the dying declaration are genuine pieces of evidence and on the basis of the same the learned trial Judge ought to have convicted the accused of the

offences with which he was charged and according to him, there is no infirmity in both the pieces of documentary evidence viz the FIR and the dying declaration. The authors of both the documents have been examined by the prosecution and their evidence is clinching and on the basis of their evidence, both the documents have been proved beyond doubt. He does not rest here. He further contended that in view of the evidence of Prosecution Witnesses Nos. 3,4, and 5, the charge that the deceased was subjected to mental and physical cruelty is also proved and there is ample evidence on record to establish that the accused has abetted the deceased to commit suicide and, therefore, the finding recorded by the learned trial Judge is vulnerable which requires to be quashed and set aside by this Court by holding that the accused is guilty for the offences for which he was charged and accordingly he may be convicted and sentenced.

The evidence of the prosecution can be divided into two compartments. First compartment consists of the dying declaration, Ex.16 and the complaint Ex.23 which has become the dying declaration as the deceased succumbed to the burn injuries during the treatment and the second compartment consists of the oral testimony of the witnesses viz the father and other relatives of the deceased.

We shall now deal with the evidence of the first compartment i.e. the dying declaration. In order to prove the dying declaration, Ex.16, the prosecution has examined PW 2 Vinodrai Ratilal Dholakia, Ex.14 who, inter alia, testified that on 11-6-91 he was informed by Patan Police with the Police Yadi and on receiving the said Yadi he went to Veraval Municipal Hospital where Dr. Nimbark was present who accompanied him while he recorded the dying declaration. He had asked all the relatives of the injured to go outside the ward and thereafter he started recording dying declaration. He also obtained the certificate from the said doctor with respect to her physical condition and also ascertained as to whether the injured was in conscious state of affairs. He recorded the dying declaration in question-answer form. He also obtained the right thumb impression of the injured beneath the said statement. The said statement is on record at Ex.16. It may be appreciated that during the cross-examination he denied all the suggestions put by the defence counsel and repelled all the suggestions. Now so far as the complaint, Ex.23, is concerned, the prosecution has examined PW 7 Chandrasinh Prabhatsinh, Ex.21. He has, inter alia, testified that on 11-6-91 he

was on duty at Prabhas Patan Police Station and on receiving the message from the hospital Duty Constable Ratigar Narangar he went to Veraval Municipal Hospital where he found deceased Jethiben under treatment in the Burns Ward. He reached there at 8.15 in the morning and recorded her complaint. The said complaint is on record at Ex.23. After recording the said complaint, he went to the Police Station and the offence was registered. It may be appreciated that in the cross-examination he has stated that he reached the Hospital at 8.15 a.m. and he interrogated the injured for 5 to 10 minutes and thereafter he started recording the complaint which lasted for 15 minutes. He has unequivocally admitted that when he reached the Hospital lot of relatives of the deceased, including the leaders of the community, had gathered there. He has also unequivocally admitted that Jethiben received burn injuries all throughout her body and therefore she was serious. However, he has repelled the suggestion that Jethiben was not able to speak and give her statement. He has also unequivocally admitted that he had not obtained any certificate from the concerned doctor who was on duty whether she was in a conscious state of affairs to give her statement. Further he has also admitted that when he recorded the complaint, the relatives of Jethiben were standing outside the Burns Ward. He has further admitted that the Executive Magistrate had not come till the time he was in the Ward as he came prior to his arrival. He has unequivocally denied the suggestion that in his presence, the Executive Magistrate came there and recorded the dying declaration. He has further admitted that he was in the hospital from 8.15 to 9.15 a.m.

Now on over all appreciation of the evidence of the aforesaid two witnesses, it can be made out that the Executive Magistrate also started recording dying declaration at 8.15 a.m. and completed it at 8.25. Now in view of the contradictory evidence of both the witnesses, the presence of both of them in the hospital from 8.15 to 9.15 a.m. becomes doubtful. We fail to understand why Head Constable Chandrasinh Prabhatsinh has denied that in his presence the Executive Magistrate had come and recorded the dying declaration. In view of this contradictory evidence, it is very difficult to come to the conclusion that both the pieces of documentary evidence are genuine and free from any doubt. On the contrary, according to us, this is a serious infirmity found in the prosecution evidence. On having perused the dying declaration, Ex.16, recorded by the Executive Magistrate, we also could notice that the doctor has stated that the deceased was conscious but he has not

stated whether the deceased was in a mental state of affairs and in a position to depose or make a statement. Furthermore, the concerned doctor is also not examined to prove that the injured was in a mental and physical state of affairs to depose or make a statement.

Now, after having found the aforesaid infirmities, let us examine whether the deceased was conscious and in fit state of affairs to depose in view of 100 per cent burn injuries received by her. In this regard according to the evidence of PW 1 Dr. Premjibhai Devjibhai, whose evidence is recorded at Ex.5, it is seen that on 11-6-91 he was serving as a Medical Officer, Veraval Municipal Hospital and he was on duty in the morning hours. He received the dead body of deceased Jethiben for performing autopsy. He, inter alia testified that she had first, second and third degree burns from head to legs. He has also testified that she was in conscious state of affairs. She was accompanied by Masaribhai Bhayabhai and Naranbhai Govindbhai Vaja. He informed Prabhas Patan Police Station. He had also asked the injured about the injury which she sustained and she replied that she wanted to die and, therefore, she poured kerosene on her body and lit the fire. She died on the same day at 11.00 O'clock. According to us, this was also oral dying declaration. It was first in point of time. In the said statement before the concerned doctor, she has nowhere stated that she was subjected to mental and physical cruelty by her husband and her husband abetted to commit suicide. However, he has ruled out the theory put by the defence about the accidental death and he reiterated that it was a suicidal death.

On over all appreciation of the evidence of PW 1 Dr. Premjibhai, it is established that the deceased made a statement before the concerned doctor wherein she has stated that she wanted to die and therefore she poured kerosene on her person and lit the fire. If she would have been abetted to commit suicide, then she would have stated the same version before the concerned doctor also that her husband had abetted to commit suicide, but it is not so.

The evidence of Dr. Premjibhai is free from any doubt and there is no reason to discard his oral testimony and on the basis of the said evidence, it is not difficult to come to the conclusion that Ex.16 and Ex.23 are got up and fabricated documents which were recorded in presence of the relatives of the deceased and the possibility also cannot be ruled out that she must

have been tutored to falsely implicate the accused.

Now coming to the evidence of the second compartment which consists of oral evidence of PW 3 Valabhai Karsanbhai, Ex.17 father of the deceased, PW 4 Naranbhai Govindbhai, Ex.18 , leader of their caste, PW 5 Samatbhai Naranbhai , Ex.19 , a neighbour of the deceased and PW 6 Bhikhabhai Jivabhai, Ex.20 the landlord of the accused, except Valabhai Karsanbhai, the father of the deceased, none has stated that the deceased was subjected to mental and physical cruelty. However, Valabhai has unequivocally admitted that he had not lodged any complaint in that connection. Naturally Valabhai being father of the deceased has stated so. But on perusal of the cross-examination , we have noticed so many contradictions in his evidence. He has given gobye to his previous statement recorded by the police and he has overstated in his oral evidence. The evidence of rest of the witnesses does not suggest any allegation about the deceased being subjected to mental and physical cruelty by the respondent. The evidence of PW 5 Samatbhai Naranbhai unequivocally suggests that Jethiben was not able to speak properly. Her parent interrogated her but the statement made by her was not understandable. He has also unequivocally stated that in his presence the Executive Magistrate and the police personnel came there. The evidence of PW 6 Bhikhabhai Jivabhai ruled out the story of the deceased being subjected to mental and physical cruelty by the respondent. He being a landlord and residing in the adjoining house was the first person who could have noticed if there was mental and physical cruelty sustained by her. However, he has not whispered a word about the same in his evidence. On the contrary his evidence suggests that the deceased and the accused were on very good terms and there was no quarrel between them and their relations were harmonious. The evidence of the second compartment also ruled out the theory of the deceased being abetted by the respondent to commit suicide and she was subjected to mental and physical cruelty by the respondent.

On over all appreciation of the aforesaid evidence coupled with the documents i.e. dying declaration Ex.16 and the complaint Ex.23 which has become dying declaration after the deceased succumbed to the injuries, the following aspects can be highlighted:

- 1 The suicidal death of the deceased is proved.
- 2 Ex.16 dying declaration recorded by the Executive Magistrate is not free from doubt and it suffers

from the grave infirmities with the recording of time. At the time of recording the said dying declaration, the relatives, including the father of the deceased and the leaders of the community were very much present inside the Burns Ward. Therefore, the possibility cannot be ruled out about she being tutored by the relatives and, therefore, no reliance can be placed on the said piece of evidence.

3 Complaint, Ex.23, as noticed hereinabove and which has become the dying declaration is also not free from any doubt. It was recorded by the Investigating Officer without ascertaining and verifying from the concerned doctor about the physical and mental condition of the deceased whether she was able to give her statement. Therefore, serious doubt is raised upon the said piece of evidence.

4 From both the documents referred to hereinabove, it is evident that they were recorded simultaneously in the presence of the father and the relatives of the deceased.

5 The evidence of Head Constable Chandrasinh Prabhatsinh also does not inspire any confidence as according to him, when he went to the hospital, the Executive Magistrate was not there. But in view of the time mentioned in Exs.16 and 23, the Executive Magistrate was very much present in the hospital.

6 Oral evidence of PW 3 Valabhai Karsanbhai, the father of the deceased, suffers from so many contradictions and, therefore, no reliance can be placed on the same with respect to the allegation made against the respondent for giving mental and physical cruelty to the deceased .

7 The evidence of other witnesses i.e. Prosecution Witnesses Nos. 4,5, and 6 suggests that they were present at the time of recording both the documents i.e. Ex.16 and Ex.23 and from their evidence, it has been divulged that the deceased was not able to speak properly and it was not understandable.

8 The evidence of PW 1 Dr.Premjibhai is so clinching which ruled out the theory that the accused abetted the deceased to commit suicide

because as per his evidence, the deceased had stated before him that she wanted to die and, therefore, she herself poured kerosene and lit the fire. Therefore, the evidence of Dr. Premjibhai puts the last nail to the coffin of the prosecution case and in view of his evidence there is no substance in the prosecution case.

On the conclusions as above, we are of the opinion that the learned trial Judge has very rightly appreciated the evidence led by the prosecution and reached a just and correct conclusion which does not require any interference by this Court, but on the contrary, it requires our affirmation, when we are in full agreement with the reasoning and the conclusions arrived at by the learned trial Judge.

Moreover, this is an acquittal appeal in which Court should be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly, when the evidence has not inspired confidence of the learned trial judge. As this Court is in general agreement with the view expressed by the learned trial judge, it is not necessary for this Court either to reiterate the evidence of the prosecution witnesses or to restate reasons given by the learned trial judge for acquittal and in our view, expression of general agreement with the view taken by the learned trial judge would be sufficient in the facts of the present case for not interfering with the judgment of the learned trial judge and this is so, in view of the decisions rendered by the Hon'ble Supreme Court in the case of Girija Nandini Devi and others v. Bijendra Narain Chaudhari, AIR 1967 SC 1124 and State of Karnataka v. Hema Reddy and another, AIR 1981 SC 1417. On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned trial judge for acquitting the respondent / original accused. Suffice it to say that the learned trial judge has given cogent and convincing reasons for acquitting the respondent / original accused and the learned A.P.P. has failed to dislodge the reasons given by the learned trial judge and convince this Court to take a view contrary to the one taken by the learned trial judge. Therefore, there is no merit in the acquittal appeal.

In the result, the appeal filed by the State being meritless, is dismissed. The respondent is on bail.

Therefore, his bail bonds shall stand cancelled. Sureties
are discharged.

naik *****