

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1634 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
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 concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

GITABEN MAHMAD NIZAM SAIYED

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1634 of 2003
MR NK MAJMUDAR for Petitioner No. 1-2
MR HM PRACHHAK LD. APP for Respondent No. 1
-

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 30/01/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

The appellants-accused - Gita Mahmad Nizam Saiyad and Ismail Usman Shaikh, have challenged in this appeal the impugned judgment and order of conviction and sentence dated 14.11.2003, passed by the ld. Jt. District Judge and Addl. Sessions Judge, Fast Track Court-1, Bharuch, in Sessions Case No. 55/2000, whereby the ld. judge found both the appellants guilty for the offences under sec. 302 read with sec. 114 of IPC for committing murder of deceased Chameli and sentenced them to suffer life imprisonment and to pay fine of Rs. 500/-, in default, to further undergo 2 months S/I.

When this appeal was placed before this court for the first time on 19.1.2004, for admission and after having heard ld. counsel Mr. Majmudar for the appellants-accused and having carefully gone through the impugned judgment and order of conviction and sentence passed by the ld. trial judge, we were not at all convinced and on that day itself, we would have dismissed the appeal but on that day, record and proceedings of the case were not before us, therefore, on 19.1.2004 we had called for the record and proceedings of the case so as to reach this court on or before 29.1.2004 and the matter was ordered to be placed today i.e. 30.1.2004, for further hearing. Accordingly, record and proceedings has come. Today, once again, we have heard ld. counsel Mr. Majmudar for the appellants-accused extensively. Mr. Majmudar has taken us through the relevant evidence of the prosecution witnesses as well as the defence witnesses examined by the appellants-accused in their defence. He has also taken us through the reasoning assigned by the ld. trial judge for convicting both the appellants-accused for the major offence under sec. 302 read with sec. 114 of IPC and submitted that this court should give at least one chance to the appellants-accused because this is a first appeal.

Ordinarily, when the accused are convicted for the major offence under sec. 302 IPC and ordered to suffer life imprisonment, then, one chance is given. But, having gone through the impugned judgment and order of conviction and sentence recorded by the ld. trial judge and having regard to the peculiar facts and circumstances of the case, we are of the opinion that this case does not deserve even admission and it is required to be dismissed summarily in limine at the admission stage itself. Therefore, we have fully heard ld. counsel Mr. Majmudar as if we were hearing the matter at the final hearing stage and ld. counsel Mr.

Majmudar has argued the matter at great length.

Mr. Majmudar firstly submitted that there is a material discrepancy in the "Vardhi" Ex. 50 and dying declaration made by the deceased Chameli at ex. 30.

From the record and proceedings of the case, we found that dying declaration exh. 30 of deceased Chameli was recorded by Executive Magistrate, Bharuch. It bears the thumb impression of deceased Chameli. She was hardly 35 years old. Her dying declaration was recorded in Civil Hospital, Bharuch. She was brought to the hospital by Sheela Rajendrasinh. She has stated in her dying declaration that her husband Ismail Usman Shaikh had illicit relation with Gitaben since last two months. Because of that, she had a quarrel with her husband at 9.00p.m. Thereupon, Gitaben poured kerosene on her and her husband Ismail threw Bidi and burnt her alive. She was carrying child and running full pregnancy of 9 months. Before four years of the incident, she has got married and out of that wed-lock, she had one son and another child with full running pregnancy of 9 months. After the aforesaid statement made by deceased Chameli, she was asked by the Executive Magistrate as to whether she wants to state anything more? She stated that after setting her at blaze, both, Gita and her husband ran away. The Executive Magistrate - Mohan Shankarbhai Vasava, PW-10, was examined at ex. 27. He had stated in his evidence that on the basis of the letter dated 22.1.1999 received from the Police Head Constable, Bharuch Railway Police, for recording dying declaration of deceased Chameli, he immediately reached Civil Hospital, Bharuch and the Doctor concerned made the endorsement that the patient was conscious and able to answer properly. Thereafter, he had recorded dying declaration of the deceased in his own hand-writing. He has clearly stated that deceased Chameli was giving answers to all the questions put by him which were recorded by him as narrated by her. The said dying declaration was read over and explained to her which she has stated to be true. Below that, he had obtained her right thumb impression which was identified by him. At the time of recording the dying declaration, she was fully conscious and able to speak properly. In his cross-examination, he has frankly admitted that he had not asked her whether she was literate or not. However, he had clearly denied the suggestion that she was Hindi speaking lady. He had also denied the suggestion that when he had asked the questions, she replied it in Hindi. In his cross-examination, he had explained the timing mentioned by him in dying declaration between 21.00 to

24.00 hours, as she has stated that the incident had happened between 9.00 to 12.00 evening hours of 22.1.1999. However, he has admitted that she had not stated in her dying declaration that Ismail lighted the match stick. He has clearly stated in his cross-examination that at the time of recording of her dying declaration, no one including her mother, was present. He has also admitted in his cross-examination that deceased had burns injuries on both the sides of her hands as well as on her body and the skin had also come out. But, he has clearly denied the suggestion that she was not in a position to put up her thumb impression. He has also denied the suggestion that deceased has not made any dying declaration and that on his own he recorded the dying declaration of the deceased. He has also stated in his cross-examination that when he came for recording the dying declaration of the deceased, he has not asked the question whether she was conscious or not ? However, he stated that the doctor had already made an endorsement about her condition. Thus, the dying declaration recorded immediately after the incident is clearly proved by the Executive Magistrate, Mohanbhai Shankarbhai Vasava. Nothing has come out in his cross-examination. There was no reason for him to falsely implicate the accused persons. In fact, there was not even a remote suggestion put to him that he was inimical to the accused, therefore, he had falsely deposing against them. He was not even remotely related to the deceased also. It seems that a question was put to him in his cross-examination about the deceased not mentioning match-stick thrown by her husband Ismail- accused no. 2, as there was a reference to match stick used by accused Ismail at the time of commission of the offence in "Vardhi". This would not make much difference in the case of the prosecution. It is true that in "Vardhi", there is a reference of match stick thrown by accused Ismail, but, in dying declaration of deceased Chameli, there is a reference to lighted Bidi thrown on her by the accused - Ismail. However, deceased had 95% burns injury and while making statement before the police and the Executive Magistrate, if she had inadvertently stated about 'Bidi' or 'match stick', then nothing much turns out from it. She has clearly stated about the role played by her husband- Ismail at the time of incident. She had no axe to grind and to falsely involve her husband for the major offence under sec. 302 IPC.

It was submitted by ld. counsel Mr. Majmudar that the deceased had made her intention clear of committing suicide before two defence witnesses; i.e. (i) Shantu Jingori Bhaiya (her first husband) Ex. 59,

and (ii) Mahmad Nizambhai Saiyad (husband of accused Gitaben) Ex. 60, because of illicit relation of her husband with Gitaben. Therefore, possibility of the deceased committing suicide cannot be ruled out. In our opinion, their evidence was rightly discarded by the ld. judge in view of the fact that none of them had gone to the police and stated about it. It is for the first time, the accused examined them as the defence witnesses and both of them have admitted that for the first time, they have deposed before the court that the deceased wanted to commit suicide. Shantu was her ex-husband. He may have some grievance against her who was also his first wife, therefore, he has tried to save accused Ismail, who is the second husband of his first wife. Mahmad Nizambhai Saiyad is the husband of Gitaben accused no. 1. He has stated in his evidence that on the day of incident, deceased Chameli came to his house and sprinkled kerosene and threatened to falsely involve them, if his wife continue her illicit relation with her husband. This story, he had stated for the first time before the court. The very fact that the deceased Chameli had given the names of only two persons i.e. Gita, who poured kerosene on her and her husband Ismail, who lighted the match stick or Bidi and set her at blaze and not of others, shows that defence witness no. 2 Mahmad Nizambhai Saiyad Ex. 60 had falsely deposed to favour the accused. Therefore, his defence was rightly rejected by the ld. judge.

Last submission of Mr. Majmudar was that deceased Chameli must have committed suicide and after committing suicide, she had falsely involved both the appellants-accused as she wanted to take revenge against both of them, cannot be accepted for the simple reason that ordinarily no mother having pregnancy of full 9 months would even think of committing suicide. As per the dying declaration of deceased Chameli, both the appellants-accused had illicit relation since last two months. She had already one son, therefore, there was no question of committing any suicide. Dying person would ordinarily not like to falsely involve innocent persons at the time of his or her death. Similarly, in the instant case, deceased Chameli had also not tried to falsely involve both the appellants-accused. In the instant case, the "Vardhi" and dying declaration both were recorded at the earliest, therefore, there was no question of falsely involving both the appellants-accused. In that view of the matter, this submission of Mr. Majmudar that after committing suicide, she had falsely involved both the appellants-accused for the offence under sec. 302 IPC

has to be rejected and it is rejected.

Having carefully gone through the entire evidence on record as well as reasons assigned by the ld. Judge for convicting both the appellants-accused, we are fully satisfied that no error much less error on facts or law committed by the ld. Judge while convicting both the appellants-accused for the major offence under sec. 302 IPC read with sec. 114 IPC. Therefore, this appeal does not requires admission and accordingly, it is dismissed summarily at the admission stage.

(B.J. SHETHNA, J.)

(J.R. VORA, J.)

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