IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1194 of 2006
With
CRIMINAL APPEAL No. 1195 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA

HONOURABLE MR.JUSTICE N.V. ANJARIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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FATHESINH MAGANBHAI BARIYA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR PRATIK B BAROT for Appellant(s) : 1,
MR K.P. RAWAL APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

and

HONOURABLE MR.JUSTICE N.V. ANJARIA

Date :11/05/2012

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE N.V. ANJARIA)

As these two appeals arise from common judgment, they are being disposed of together. Appellant in Criminal Appeal No.1194 of 2006 was accused No.2 whereas appellant of Criminal Appeal No.1195 of 2006 was accused No.1 before the trial court. By the impugned judgment and order dated 16.05.2006 delivered by learned Sessions Judge, Dahod in Sessions Case No.26 of 2006, both the accused came to be convicted for the offence punishable under section 302 of Indian Penal Code, 1860 (`IPC' for sake of brevity), and sentenced to life imprisonment and fine of Rs.2,000/-, and in default of payment of fine, to undergo simple imprisonment for further one month. They were convicted for offence under section 498-A read with section 114, IPC and sentenced to rigorous imprisonment for one year and fine of Rs.200/- and in default of payment of fine to undergo simple imprisonment for further seven days. For the offence punishable under section 201 IPC, they were convicted and sentenced to rigorous imprisonment for three years and fine of Rs.500/- and in default of payment of fine, to undergo simple imprisonment for further fifteen days. The sentences were directed to run concurrently. It was directed that they may be given set off for the period spent in jail as undertrial prisoners.

1.1 Appellants No.1 and 2, being accused No.1 and 2 before the trial court in that order (referred to as `A-1 and A-2' hereafter), happened to be the husband and father-in-law of deceased Sushila, who died under mysterious circumstances.

2. The prosecution case was launched with a complaint (Exh.11) lodged

on 19.10.2005 by Babubhai Mansukhbhai Koli, father of the deceased, residing at village Antela. In that complaint filed before Limkheda Police Station it was stated that the complainant was informed by one Selot Kansinhbhai, rector of boys hostel about the death of her daughter at around 5.30 p.m. when the complainant had gone towards bus stand in the town. Kansinhbhai told him that his son-in-law Ganpatbhai had telephoned to him from village Chatki that complainant's daughter had fallen down in the well. Thereupon complainant went to his house and informed his wife, his father, his sister-in-law and nephew about the incident, and they all went to village Chatki by hiring a jeep. Reaching there they saw dead body of Sushila lying near a well. Other people had gathered at the place. Son-in-law Ganpatbhai however was at his residence, therefore, the complainant and the family members reached at his residence. When Ganpatbhai was asked about the incident, he said that Sushila had gone to fetch water from the well, wherein she fell down and died due to drowning. In the complaint it was stated that on the body of the deceased there were no marks of any injury or bleeding and the clothes put on by her were wet. The deceased Sushila had married three years back and was staying with her husband, along with the father-in-law and mother-in-law, and had a boy child aged one and half month.

3. It appears that the offence alleged in that complaint (Exh.11) was not registered as First Information Report on the day when it was lodged, but the officer at the Police Station recorded only an entry about accidental death on the basis of declaration in the complaint which was at about 23.45 hours on 19.10.2005. The inquest panchnama of the body was done on the next day i.e. 20.10.2005 at around 09.15 – 10.00 a.m. The inquest panchnama

(Exh.13) would show that the inquest was performed at C.H.C. Hospital, Limkheda, and it was mentioned that the body was kept in morgue of the hospital.

3.1 The post mortem was performed at 12.00 noon on 20.10.2005, the report of which (Exh.57) revealed that the death was caused due to first survic vertibra fracture and dislocation of oxipital joint. The medical opinion (PW-1, Exh.7) was that the injuries on the body of the deceased were due to beating of hard and blunt substance and it was further confirmed that the lungs of the deceased did not contain water. The possibility of death by drowning was thus completely ruled out by the attendant medical evidence.

3.2 It appears from the record that the medical evidence having disclosed the cause of death different from the one stated in the complaint, by letter dated 28.10.2005 (Exh.27), the Police Inspector, Limkheda sought medical opinion raising certain queries to which the doctors replied (Exh.26) that the fracture suffered by the deceased was possible by hard and blunt object if hit on the back of the neck. It further appears from the record that thereafter the Deputy Superintendent of Police, Devgadh Baria, stepping into the shoes of complainant filed his own complaint and the F.I.R. (Exh.29) was registered on 22.10.2005 at Limkheda Police Station on that basis. That F.I.R. was to the effect that as A-1 wanted to have a second wife, he and A-2 had been harassing the deceased Sushila, and after committing murder of Sushila, they threw her body into the well. Thus the colour and shape of the prosecution case was changed.

3.3 Both the accused were chargesheeted before the learned Judicial

Magistrate First Class, Limkheda, who in turn committed the case to the Sessions Court. The trial culminated into the impugned judgment and order of conviction and sentences. The charge was framed (Exh.2) against the accused for offences under section 498-A read with section 114 of the IPC and also for the offence punishable under section 302 read with section 201 read with section 114 of the IPC.

4. Learned advocate Mr. Pratik Barot appeared for the appellants by way of legal aid and Mr. K.P. Rawal, appeared as learned A.P.P. Taking the court through the evidence on record of the trial court, it was elaborately submitted by learned advocate for the appellants that the prosecution had failed to connect the accused with the crime and no chain of circumstances was established which could prove the offence and there was no direct evidence to prove any offence against the accused. On the other hand, it was submitted by learned A.P.P. that from the circumstances proved in evidence, the commission of offence was attributable to the appellants only and therefore, the conviction recorded by the trial court was justified.

4.1 Concededly, the prosecution was required to prove the offence on the basis of circumstantial evidence only as there was no direct evidence available and none had witnessed commission of the alleged offences.

4.2 Considering the evidence on record, the body of the deceased was found lying near the well and as panchnama of the place (Exh.15) showed, the well was situated in a lonely place between two hills where there was no human habitation within the distance of one furlong. There were agricultural fields in the vicinity. The well near which the body was found

was of the circumference of fifteen feet and had its wall erected with stone and was cemented. The panchas measured the depth of the water in the well which was found to be 7-7½ feet deep. No article was found near the place of well nor any other marks were seen. The depth of the well and the extent of the water in the well suggested that a person falling therein may not get drowned and could not die of other injuries. The inquest panchnama (Exh.13) did not show any injury marks on the body, rather recorded that bangles made of glass were intact in both the hands of the deceased.

4.3 The medical evidence of Dr. Chintan Tabiyad (PW-1, Exh.7) and the post mortem report (Exh.8) prepared by him fortified that the death was certainly not caused by drowning. PW-1 in his evidence stated that the injuries were such as were inflicted with hard and blunt substance. The injuries recorded by him in col. No.17 of postmortem report (Exh.8) and described by him (Exh.7) included red and bluish bruises of the size of 2-3 cms below the oxipital interior neck, diffused contigen and survical vertebra as well as dislocation of oxipital bone. The movement of the neck of the deceased was normal on all sides. In the lungs of the deceased no water was found. The absence of water in the lungs and the kind and nature of injury ruled out the possibility of death by drowning.

4.4 The witnesses examined by the prosecution included the complainant Babubhai Mansukhbhai (PW-2, Exh.10), the father of the deceased, who deposed about his daughter having been married before three years with Ganpat, son of Fatesinh Maganbhai of village Chatki, Taluka Limkheda. According to him, the deceased used to come to parental house with complaints that her husband (A-1) and members of matrimonial house were

harassing her as A-1 wanted to have second wife. It was deposed that they used to persuade her and sent her back to matrimonial home. It was stated that a baby boy was born out of wedlock of Ganpatbhai and his daughter Sushila and when the child became one and half month old, Ganpatbhai married second time. No further details about harassment or second marriage were related. However, PW-2 stated that, for that reason, Sushila was thrown into the well. He admitted that after the delivery, her daughter had gone straight to her matrimonial house and did not come to parental house. Gajiben (PW-9, Exh.22) mother of the deceased deposed in similar veins as her husband (PW-2) did. She also stated about harassment to her daughter at matrimonial house and that she had persuaded and sent her back. She also expressed apprehension that as A-1 wanted to have second wife, her daughter was killed. Chimanbhai (PW-7, Exh.20) and Bhimabhai (PW-8, Exh.21) who happened to be the brothers of Babubhai (PW-2), deposed in tune with the evidence of PW-2 and PW-9 about harassment to the deceased from the matrimonial side. The prosecution also examined Ganpatbhai Pratapbhai Patel (PW-3, Exh.12) who was cousin brother of the deceased.

5. While the above witnesses stated about harassment being caused to the deceased by the accused persons, no specific details were given even about the nature of harassment. Merely saying that the wife was being treated cruelly did not amount to cruelty. The evidence about harassment to the deceased was too vague to be acceptable in law and to satisfy the requirements for constituting offence under section 498A, IPC. Even as the witnesses stated that A-1 wanted second wife and was the cause of killing the deceased, no specific facts about the second marriage or even name of

the second wife came in their evidence. Their evidence was bald in its content and in no way it could prove the offence under section 498-A read with section 114, IPC for which the appellants-accused were charged.

In ***State of Rajasthan v. Rajaram [(2003) 8 SCC 180]*** the Supreme Court has held:

> *"The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."*

6. Given the above evidence on record, it needed no elaboration to submit that it did not establish an unbroken chain of connecting events on the basis of which killing of the victim by the accused could be brought home. In a case based on circumstantial evidence, it is the cardinal principle that each facet of evidence in the chain of circumstances should independently as well as collectively lead to incrimination of the accused in the offence. The hypothesis against the innocence has to be so strong that the evidence would lead to, and would point only towards guilt of the accused.

6.1 The Supreme Court, referring to various judicial pronouncements on the nature of proof in a case based on circumstantial evidence, reiterated in ***Rajaram (supra)*** that the circumstantial evidence consisting of evidence of various other facts may not directly point to, but has to be such as are so closely associated with the fact in issue that taken together they form a

chain of circumstances from which the existence of the true fact can be legally inferred or presumed. It was further observed that the principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, i.e., the evidentiary facts.

6.2 In ***Gagan Kanojia v. State of Punjab [(2006) 13 SCC 516]*** the apex court outlined the principles in regard to appreciation of circumstantial evidence in the following terms:-

> "*1) There must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.*
>
> *2) Circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt.*
>
> *3) There should be no missing links but it is not that everyone of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts.*
>
> *4) On the availability of two inferences, the one in favour of the accused must be accepted.*
>
> *5) It cannot be said that prosecution must meet any and every hypothesis put forwarded by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise.*"

7. Measuring the evidence on record of the trial court by the yardstick of the above rules, the prosecution totally failed to connect the appellants-accused with the commission of offence itself, much less able to establish

an unbroken chain of circumstances leading to the inference of guilt. The body of the deceased was located on 19.10.2005 by the complainant father (PW-2) but there was nothing to indicate as to since when it was lying there and at what time the offence was committed. It did not come on record as to who, why and in what circumstances brought her near the well when the theory of death by drowning was ruled out and the F.I.R. (Exh.29) filed at the instance of Deputy Superintendent of Police itself was in respect of death caused by injuries with use of hard and blunt substance. Neither any circumstantial aspect was shown in the evidence nor any inferential fact was indicated which could implicate the appellants in the offence of murder. Though both the accused were charged for the offence punishable under section 302, the evidence on record could not prove their role so as to suggest the commission of or even participation in the offence alleged against them.

7.1 At the same time, the charge of offence under section 498-A IPC could not be established as the evidence was too general to be relied for the purpose of proving that offence, coupled with the fact that the witnesses who deposed in support of that charge were all close relatives of the deceased and in the peculiar circumstances of the case, their evidence did not inspire confidence and they could not be relied upon as independent witnesses, in view of nearly total absence of any detail of any harassment or any incident amounting to harassment or cruelty. There being no proof for the charge under section 498-A IPC, it could not probabalise or prove the offence under section 302, IPC. The factum probans emerging from the evidence on record were insufficient and inadequate to prove the factum probandum of the commission of offence of murder by the accused persons.

7.2 Another factual circumstance which emerged from record was that the mother in law of the deceased had filed a private complaint against five persons namely Maganbhai Rupabhai Baria, Gemabhai Maganbhai, Kosanben Raising, Kantaben Kamleshbhai and Kalia Kachara Damor of village Chatki to the effect that those accused had earlier quarreled and threatened her daughter in law Sushila, the deceased, while not permitting her to draw water from the well. However, since Sushila continued to fetch water from the well, the persons accused by her, in concert, had killed Sushila and destroyed the evidence. She alleged offences under section 302, 201, 114, 120-B of IPC. While there is nothing on record as to what happened to that complaint after it was filed and whether the police investigated in that direction, that complaint by itself was another feature which contributed to raising of a reasonable doubt.

8. From the record and proceedings examined by this court, it left no manner of doubt that the failure of the prosecution in proving the offences was the direct result of dismal investigation. Having noticed that the investigation was absolutely lackadaisical, even in a serious case of ghastly murder of a young lady, this court had called for the investigating officers to personally explain the obvious lapses. The police officers who had investigated the offences at the relevant time remained present in the court with the police diary and other documents on their record and station diary and there were also allowed to file affidavit to explain lapses in the investigation.

8.1 Even after considering the oral say of the investigating officers and

perusal of affidavit filed, the following omissions and lapses in the investigation remained unexplained.

(i) The complaint lodged by father of the deceased lady on 19.10.2005 was not immediately registered as FIR. Though the offence disclosed therein was a cognizable offence, which is required to be immediately registered, was not registered and only entry of accidental death being Entry No.18 of 2005 was noted.

(ii) Though the intimation was received on 19.10.2005, the police did not go to the place of offence on that day, even though the case was of death and the offence disclosed was cognizable.

(iii) The inquest panchnama was done on the next day morning i.e. 20.10.2005. Surprisingly, it was not done at the place where the body was lying but was conducted at CHC Medical Centre, Limkheda in its premises after bringing out the body from the morgue.

(iv) It is unanswered as to why the inquest was not performed at the place in question. It is not disclosed as to why, when and by whom the body of the deceased was removed from the well and who took it to the hospital and with what motive that was done.

(v) Panchnama of the place was also recorded on the next day when the body was not available and was already removed in intriguing circumstances as mentioned above.

(vi) The FIR was lodged on 22.10.2005 i.e. after three days of the incident, before recording of statement of any person in connection with the crime. The investigation was started only on 22.10.2005 when opinion of the doctor as to the cause of death was sought, when the post mortem had revealed the

cause of death to be different from the one indicated in the first instance in the Complaint. Even after receiving the opinion of the doctors, efforts were not made to investigate the offence with reference to the medical opinion on the manner of causing of injury and cause of death. No weapon or instrument with which injuries could have been caused were even sought to be found out.

(vii) The statements of the members of the maternal family of the deceased were recorded. No other person's statement was recorded. Though the accused were husband and father-in-law and charge was for the offence under section 498A, 302 read with 114 IPC, the police did not record statement of any of the family members or neighbours of the matrimonial home of the deceased.

(viii) There was a compliant filed by mother-in-law of the deceased against certain other persons alleging that they had thrown her daughter-in-law into the well and caused her death. It is not known as to what happened to that complaint and the investigation in that case appears not to have been undertaken for unearthing any evidence.

(ix) Deputy Superintendent of Police himself became the complainant to register offence against the accused persons under section 498A and section 302, IPC. However, it was incomprehensible, if not intriguing, as to why the investigation did not proceed in right direction and in proper manner to investigate the offences which were registered.

8.2 The lacuna in the process of investigation were conspicuous. Had the investigation been carried out sincerely and in a focused manner, the culprits could have been booked and properly punished. It is unfortunate that the failure of police agency in properly investigating the serious offence of murder has resulted into failure of justice as due to that the real offenders

are not identified and the appeal has to be allowed for want of necessary evidence.

9. In the circumstances, it is considered necessary and appropriate to direct the higher-ups in the State Government/police administration to call for an explanation from the police officers who were in charge of investigation of the offence in question and find out whether the lapses in the investigation noticed above were just unpardonable lapses in investigation or were amounting to dereliction of duty by the investigating officers. After conducting an inquiry, the State Government /competent higher authorities in the hierarchy of police may consider in their wisdom and judgment taking of necessary corrective measures including disciplinary action against the erring investigating officers.

10. Given the inadequate evidence on record to involve the appellants in the alleged offences, coupled with inept and inefficient investigation, ironically what is proved is only that the death of the lady was a homicidal death, but it could not be proved as to who were the offenders and in what circumstances the crime was committed.

11. For the foregoing reasons, no offence having been proved against the appellants-accused, they are entitled to be acquitted of the charges of offence. In the result, the conviction and sentence recorded against them by the trial court are quashed. The impugned judgment and order dated 16.05.2006 in Sessions Case No.26 of 2006 of learned Sessions Judge, Dahod convicting the appellants is set aside.

12. The appellants in each of the appeals shall be set at liberty forthwith unless they are required to be detained in connection with any other offence. Their conviction and sentence having been set aside, the fine paid, if any, by them shall be refunded. The appeal is accordingly allowed. A copy of this judgment shall be directly served by the office upon the Secretary of the Home Department, Sachivalaya, Gandhinagar in the Government of Gujarat for appropriate action as indicated in paragraph no. 9 hereinabove.

(D.H. WAGHELA, J.)

(N.V. ANJARIA, J.)

(SN DEVU PPS)