

State of Gujarat

Vs

Mohan Bhai Raghbhai Patel and Another

Criminal Appeal No. 32 of 1979

(S. R. Pandian, K. Jayachandra Reddy JJ)

25.04.1990

JUDGMENT

K. JAYACHANDRA REDDY, J. –

1. This is an appeal against the order of the High Court of Gujarat acquitting the two respondents on the charge of murder. Both were tried under Section 302 read with Section 34 I.P.C. for offence of murder of one Lilaben. The learned City Sessions Judge, Ahmedabad convicted them under Section 302 I.P.C. and sentenced them to suffer imprisonment for life and on appeal the High Court set aside their conviction and sentence. Hence this appeal by the State pursuant to the leave granted by this Court.

2. The prosecution case is as follows. The family of the accused consists of the father of accused 1, his mother, his younger brother Manubhai and the deceased was Manubhai's wife. All of them were living in a residential block in Meghaninagar locality. Accused 1 was a widower having two sons before he married accused 2. There is an age gap between accused 1 and 2. It is alleged that Manubhai, the younger brother of accused 1 and the husband of the deceased was having illicit relationship with accused 2. The deceased was objecting to the same and she also complained to her mother. Accused 1 was, however, not very mindful of it. Accused 1, however, was a hot-tempered man and that at the time of the birth of the first son of deceased, the expected Kariyavar (gift) was not received by him and his father from the family members of the deceased and he was giving threats not only to the deceased but also to her father. The deceased was not allowed to go to her parents' place on account of this. On the day of occurrence i.e. October 26, 1976 at about 8.30 p.m. there was some commotion in the house. PW 2 and other neighbours came hearing the shouts and in one of the rooms he found flames of fire and saw accused 2 standing near the entrance door. He also found the deceased lying on the floor and a mattress over her person was burning and accused 1 pressing his leg over the mattress while standing. He also was accused 1 having burns. PW 2 switched on the light and took accused 1 out. PWs 5, 12 and 13 also entered the room. PW 2 removed the mattress from the body of the deceased and found her to be conscious. She was in burnt condition and there was smell of kerosene and smoke in the whole room. The deceased and accused 1 were removed to the hospital. The Doctor PW 10 examined both of them and the cause of the burns was noted to be due to accident and it was accordingly noted in the case-sheet. The Doctor also put questions to the deceased but she did not reply. The deceased was admitted as an in-patient. Another Doctor PW 19, the Surgeon examined her and on his questioning the deceased told him that her husband's elder brother poured kerosene and set fire. The father of the deceased, PW 1 on coming to know about the incident went to the hospital and he questioned the deceased and it is alleged that she also told him that husband's elder brother was responsible. PW 23 the police officer received the information, went to the hospital and he recorded a statement Ex. P-58 in the presence

of Dr Kapadia and Dr Bhatt, PW 7. Both of them attested the dying declaration. They also testified that the deceased was conscious at the time when she made dying declaration. The post-mortem was conducted and the accused were arrested and after completion of the investigation the charge-sheet was filed. The accused denied the offence.

3. Exhibit P-58 is the important dying declaration from the prosecution's point of view. According to the prosecution PW 23 sent for the Executive Magistrate for recording the dying declaration of the deceased but before he could reach the hospital he found that the deceased was becoming more serious and, therefore, he thought it proper to record the dying declaration. The deceased implicated accused 1 and 2. It is stated that accused 1 came from behind and poured kerosene while accused 2 caught hold of her and accused 1 lighted a matchstick and applied the same to the clothes of the deceased. The deceased cried "I am burning, save". The learned City Sessions Judge relying on this and the other oral dying declaration and circumstantial evidence convicted the accused. The High Court, on the other hand, found that it is not at all safe to rely on this dying declaration.

4. The learned counsel for the appellant submitted that the dying declaration recorded by the Police Officer coupled with the other circumstances establish the guilt of the accused. It is also his submission that though this is an appeal against acquittal yet under Article 136 of the Constitution this Court can re-appraise the evidence in a case where the reasons for acquittal are found to be wholly unsound. Learned counsel, in this regard, relied on the decisions of the Supreme Court in *Surinder Kumar v. State (Delhi Administration, Delhi)* [(1987) 1 SCC 467 : 1987 SCC (Cri) 181] and *State of U.P. v. Chet Ram* [(1989) 2 SCC 425 : 1989 SCC (Cri) 388]. He further submitted that there was no misunderstanding between the husband and the wife and it is not a case of suicide and this circumstance lends assurance to the version given in the dying declaration.

5. In this case we find absolutely no motive for accused 1 to cause the death of the deceased. According to the prosecution, accused 1's younger brother was having illicit intimacy with accused 2 with the connivance of accused 1 and the deceased was objecting to the same. In such a situation it is rather opposed to human nature to suggest that accused 1 would think of causing the death of the deceased. According to the witnesses, particularly PW 2, the deceased was found under a mattress and accused 1 was pressing the same on her and in the process he also got burns. The High Court has rightly observed that the culprits who had decided to put an end to the life of the deceased would never go to the extent of extinguishing the fire after throwing a mattress on her, and in this view, according to the High Court, the prosecution has not proved beyond reasonable doubt that this was a case of homicide and not suicide. In this context it is also pertinent to note that in the earlier stages the deceased did not implicate the accused. Even when the Doctor PW 10 asked her she did not give any reply and it is only at a later stage she came out with this story. According to the prosecution case, the occurrence took place in the bathroom and the deceased stated in Ex. P-58 that she was filling the water tank in the bathroom and that accused 1 came and poured kerosene. But panchnama of the scene of occurrence does not make any mention about kerosene in the bathroom but kerosene was found outside the bathroom. The clothes of accused 2, who was holding the deceased when accused 1 poured kerosene did not show any smell of kerosene. Therefore, it becomes doubtful whether accused 2 held the deceased in the manner alleged. The High Court has adverted to number of these details and doubted the prosecution case. The High Court has rightly held that these features would not lend any corroboration to the dying declaration but, on the other hand, cause suspicion. There is no other corroboration coming forth. The conduct of the accused in throwing the mattress over the burning woman is an important circumstance which creates a doubt about the prosecution version. Having regard to these circumstances the High Court has given the benefit of doubt to the accused. We have also gone through the details of the dying declaration

recorded by the police officer. We have unable to persuade ourselves to disagree with the findings of the High Court particularly when this is an appeal against acquittal. We do not find any strong ground as laid down by this Court in some of the cases cited above which warrants interference. The appeal is accordingly dismissed.

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