Kumbhar Dhirajlal Mohanlal

Vs

State of Gujarat

Criminal Appeal No. 726 of 1992

(M. K. Mukherjee, S. P. Kurdukar JJ)

04.10.1996

JUDGMENT

M. K. MUKHERJEE, J. –

1. This appeal under Section 379 of the Code of Criminal Procedure, 1973 is directed against the judgment of the Gujarat High court in Criminal Appeal No. 1312 of 1983 which reversed the order of acquittal passed by the Sessions Judge, Bhavnagar and convicted the appellant for uxoricide and sentenced him to imprisonment for life.

2. According to the prosecution case the appellant married Hansaben (the deceased) three months prior to her death and since marriage they were living with the parents of the appellant. However, since a week before her death they started living separately at Nirmal Nagar. On 8-1-1983 at or about 8.45 a.m. Hansaben asked the appellant as to why he had sold her kandora (waistband). The appellant replied that for paying rent he had to sell the same. Over this issue a quarrel ensued between them in course of which the appellant first started beating her with a tawetha (iron instrument used for cooking purpose). Thereafter he poured kerosene on her and set her on fire by throwing a lighted matchstick. On seeing the blaze the appellant tried to extinguish the fire and in that process he also got burn injuries on his hands. Neighbouring people immediately rushed there and sent information to Laxmanbhai (PW 6), father of Hansaben who lived nearby. Laxmanbhai rushed to the house of the appellant and removed both of them to the hospital in an ambulance van. There Dr B.K. Joshi (PW 2) examined Hansaben at 9.15 a.m. in the emergency ward and found that she had sustained 65% burns. On the basis of the statement she made Dr Joshi then informed the Bhavnagar City Police Station over telephone that Hansaben was burnt by her husband by pouring kerosene and he had also received burn injuries. Shri Lakshari (PW 8), who was then the Duty Officer of the Police Station, entered the telephonic information in the station diary book at 9.50 a.m. He immediately sent a yadi (note) to C.K. Patel, a head constable who was then attached to the hospital as duty clerk, for doing the needful. On receiving that note Patel went to the hospital and recorded the statement of Hansaben (deceased) (Ext. 23). After taking down her statement he read over it to her and took her thumb impression thereon. He forwarded the statement to the Police Station and sent for the Executive Magistrate to record the statement of Hansaben. Shri Mathur (PW 3), the Executive Magistrate, reached the hospital at 10.30 a.m. and on receipt of the opinion of Dr Upadhyaya that she was conscious and fit to make a statement recorded her statement in a question and answer form.

3. On the basis of the statement earlier made by Hansaben before the head constable (Ext. 23) a case under Section 307 IPC was registered against the appellant and SI A.M. Khan (PW 29) took up investigation. He went to the house of the appellant, prepared a sketch map and seized some burnt

cotton mattresses, some pieces of jute and other articles. Consequent upon the death of Hansaben on 9-1-1983 at 9.30 a.m. and completion of investigation he submitted charge-sheet against the appellant under Section 302 IPC.

4. The appellant pleaded not guilty to the charge levelled against him and his defence was that while preparing breakfast Hansaben accidentally caught fire from the oven.

5. In the absence of any eyewitness, the prosecution rested its case upon three dying declarations of the deceased; the first of which was before Dr Joshi immediately on her admission in the hospital, the second before the head constable and the last one before the Executive Magistrate. On consideration of the evidence the trial Judge came to the conclusion that the prosecution failed to prove its case against the appellant beyond reasonable doubt and the defence of the appellant was probable. Accordingly he acquitted the appellant. In reversing the order of acquittal the High Court firstly noticed that the trial Judge did not even consider the dying declaration made by the deceased before Dr Joshi. The High Court next noticed that the trial Judge's remark that there were infirmities and discrepancies in the dying declaration recorded by the Executive Magistrate was patently wrong. The High Court also commented upon the inference drawn by the trial Judge, that in view of the excruciating pain the deceased was suffering it was not expected of her to make any dying declaration, as there was no evidence in support thereof; and took note of the testimony of Dr Joshi that after she was administered injection of calmpose and novalgin she would be relieved of the pain and be in a fit and proper condition to give her dying declaration. The finding of the trial Judge that, as Dr Upadhyaya who had certified that the deceased was in a fit condition to speak was not examined by the prosecution no reliance could be placed on the dying declaration, was overruled by the High Court on the ground that evidence was led to prove that Dr Upadhyaya was not available and that Mr Mathur had testified that Dr Upadhyaya had certified about the condition of the deceased. The other observation of the trial Judge that the attempt of the appellant in trying to save the life of his wife and getting injured thereby fully supported the defence theory was also negatived by the High Court. As, according to the High Court all the three dying declarations made by the deceased were reliable it passed the impugned judgment.

6. This being a statutory appeal we have for ourselves gone through the entire evidence on record to ascertain whether the High Court was justified in setting aside the acquittal of the appellant. Regarding the threshold question as to whether Hansaben met with her death due to burns, the parties did not join issue. This apart, uncontroverted evidence on record, particularly that of Dr C.C. Kothari, who held the post-mortem examination on the dead body of Smt Hansaben unmistakably provides an affirmative answer to the above question. The crucial question therefore that now falls for our determination is whether she met with her such death at the hands of the appellant or accidentally, as contended by him. To answer this question we may first advert to the admitted fact that the deceased sustained the burn injuries at or about 8.45 a.m. and was brought along with the appellant to the hospital within 30 minutes. Coming now to the evidence of Dr Joshi (PW 2) who examined her immediately after her admission, we get that he examined her in the emergency ward at 9.15 a.m. and found second and third degree burns over her face, neck, chest, abdomen, both upper lips and all over the body. She however was conscious. He gave her medicine as also calmpose and analgesic injection to relive her pain. She stated before him that she was burnt by pouring kerosene over her body. Thereupon Dr Joshi rang up Bhavnagar 'A' Division Police Station and suggested that her dying declaration should be recorded immediately. This information, as it appears from the relevant entry in the station diary book, was received by PSI Mr Lakshari (PW 8) at 9.50 a.m. Since this information, and for that matter the entry, has an important bearing in this appeal it is extracted below :

> "At this time, Medical Officer, Shri B.K. Joshi, doctor of the hospital, informed that Hansaben Dhirajlal, caste by Kumbhar Kadia, aged 18, of Bhavnagar, Add : Nirmal Nagar Street No. 5, has been burnt down by her husband Dhirajlal Mohanlal, aged 22, Nirmal Nagar, Street No. 5 by spraying kerosene, and he himself has been affected by fire. Both being carried to hospital for treatment are admitted in Burns Ward and the condition of Hansaben is serious and while the condition of her husband Dhirajlal is normal. The person who brought them to Hospital is Laxman Narain."

7. Refreshing his memory from the case papers of the deceased (Ext. 18) Dr Joshi next stated that her dying declaration was recorded at or about 10.30 a.m. on the same day in the hospital after her physical condition was certified by Dr Upadhyaya. He further stated that she died on the following date i.e. 9-1-1983 at about 9.10 a.m. In cross-examination he stated that the patient would be relieve of pain after having been administered injections of calmpose and analgesic. He asserted that the deceased did not find any difficulty in speaking because of burn injuries on the lips.

8. In proving the dying declaration made before him, Mr Mathur (PW 3), the Executive Magistrate, testified that on receiving the information on 8-1-1983 that his presence was required in the hospital to record a dying declaration, he reached there at 10.30 a.m. Dr Upadhyaya identified Hansaben as the person whose dying declaration was to be recorded and after he gave a certificate that she was in a fit condition to make a statement he recorded her statement (Ext. 20). According to Mr Mathur, at that time Hansaben was conscious and able to speak. He testified that in the beginning he asked questions about her name, husband's name etc. and after she replied to all these questions he asked as to why she was brought to the hospital. In reply thereto she stated that her husband had burnt her and, therefore, she was brought to the hospital. She next stated that due to quarrel she was burnt by her husband by pouring kerosene on her body. She further stated that the door of the house was closed and she was not allowed to open it. She next stated that only she and her husband were residing in the house. She lastly stated that as the quilt was thrown on her she could not raise shouts. Mr Mathur claimed to have read over her statement to Hansaben and that after finding it to be correct she put her right thump impression. On perusal of his evidence we find that in spite of searching cross-examination the appellant could not succeed in eliciting any favourable answer. Rather, it was elicited in his cross-examination that when he had gone to the cabin of Hansaben, Dr Upadhyaya was talking with her - which necessarily means that she was fully conscious. A suggestion was put to him that he was out of station on that particular day and that he did not record the dying declaration which was emphatically denied by him. It stands fully established that at the material time Hansaben was in a fit state of mind and she voluntarily made the statement on the basis of her personal knowledge without being influenced by others. We have not found any discrepancy whatsoever in the above dying declaration which could have justified the trial Judge to discredit the same. So far as the other declaration before Dr Joshi is concerned, the trial Judge did not, as noticed earlier, advert to it all. Since these two dying declarations prove the prosecution case beyond reasonable doubt, we need not go into the question whether the dying declaration made before the head constable (Ext. 23) is reliable or not.

9. Mr Kumar strenuously urged that the presence of burn injuries on the person of the appellant clearly indicated that the version as given out by him was a probable one and the High Court was not justified in setting aside the order of acquittal. We do not find any substance in this contention. The above two dying declarations clearly indicate that it was only after the deceased was put on fire that the appellant sustained the burn injuries. In the dying declaration which was made before the Executive Magistrate the deceased stated that since quilt was put upon her by her husband she could

not shout. It was not unlikely, therefore, that while putting the quilt the appellant might have sustained burn injuries. Another circumstance which negatives the theory of accidental death is furnished by the dying declaration (Ext. 20) itself wherein the deceased stated that in the house in question she and her husband were only living and that after she was burnt, the door of the house was closed for which she could not go out. Indeed, the above statement clearly negatives the theory of accidental death and on the other hand indicates that the appellant wanted to cause her death by burning. Even if we proceed on the assumption that the appellant sustained the injuries while extinguishing the fire still it would not lead to the inference that the fire was accidental for the dying declaration itself indicates that he received those injuries after he had set her on fire. As rightly pointed out by the High Court a shrewd person may adopt this tactics of first setting his wife on fire and then make a show to extinguish fire and thereafter remain by her side. The High Court was equally justified in remarking that in this case the appellant almost succeeded in making out his defence but unfortunately for him his wife was able to speak and make statement disclosing the entire facts.

10. Having considered the entire evidence on record in the light of the judgments of the learned courts below we are in complete agreement with the High Court that the reasons canvassed by the trial court for acquittal of the appellant are perverse. We therefore uphold the judgment of the High Court and dismiss this appeal.