Mukeshbhai Gopalbhai Barot

v.

State of Gujarat

(Supreme Court Of India)

HON'BLE MR. JUSTICE HARJIT SINGH BEDI HON'BLE MR. JUSTICE C.K. PRASAD

Mukeshbhai Gopalbhai Barot v. State of Gujarat

Criminal Appeal No. 15 Of 2010 | 04-08-2010

1. The facts leading to this appeal are as under:

The appellant accused, a lawyer by profession, was residing in Kalol, District Mahesana whereas Kamlaben Ratilal Parmar, wife of Ratilal Hembhai Paramar PW-7, deceased was residing along with her family at Mahesana and was serving as a Mid-wife at the Primary Health Centre in village Vamaj, Taluka Kadi, District Mahesana. Kamlaben had also been allotted a residential quarter in village Vamaj. The appellant was known to the family of the deceased as she had appointed him as an advocate to represent her in a departmental enquiry. On the 14th September 1993 the deceased, as per her routine, left for village Vamaj to attend to her duties. At about 11 a.m. she went to her residential quarter.

The appellant also reached that place and taking advantage of the fact that she was alone, asked her to have intercourse with him saying that he would not disclose the facts to anyone, but in case she refused his advances, he would disclose her illicit relationships with several other persons to her husband. The deceased, however, did not succumb to the pressure, which annoyed the appellant and he pushed her onto a cot and tried to rape her. The deceased resisted the attempt but the appellant picked up some kerosene oil and threw it on her and set her on fire. The cries of agony of the deceased attracted several persons residing in the locality and fearing that his guilt would be exposed, the appellant himself doused the flames and removed the deceased (who was by then unconscious) in a jeep to the Kalol Civil Hospital where she was admitted at about 12.45 p.m. PW1 the Medical Officer, who was on duty at the relevant time, informed the Kalol City Police Station and the Officer In-charge in turn informed the Kadi Police Station. On receiving the information PSI Trivedi PW14 of Kadi Police Station went to the place of incident and made the necessary enquiries and prepared the Panchnama and also picked up several incriminating articles. In the meanwhile, as the condition of the victim had deteriorated, she was shifted to the Ahmedabad Civil Hospital and the Officer In-Charge of Kadi Police Station was also told about the transfer. Necessary arrangements were made for recording the dying declaration of the victim which came to be recorded on the same day i.e. on 14th September 1993 by the Executive Magistrate. A second statement was recorded by the police two days thereafter and in both these two dying declarations she stated that she had been burnt accidentally and nobody was responsible for her injuries. Kamlaben succumbed to her injuries on the 18th September 1993 and on 26th September 1993 the husband of the deceased, Ratilal Hemabhai Parmar PW7, gave a complaint in the police station alleging inter-alia that shortly before her death she had informed him that the appellant was responsible for her injuries and he had thrown kerosene on her and set on fire, on her refusal to accept his sexual advances. It is in this background that the appellant was arrested, and after investigation a charge-sheet was filed against him and he was ultimately brought to trial for offences punishable under Section-302 etc. of the IPC.

2. The Additional Sessions Judge, in the course of an elaborate judgment, held that there were three dying declarations made by the deceased; the first Ex.44 dated 14th September 1993 recorded at 4 p.m. by the Executive Magistrate, a second Ex.48 by the police on the 16th of September 1993 and in both these statements she had completely exonerated the appellant whereas in the third dying declaration Ex.59 dated 17th September 1993 allegedly written by PW-7 her husband on her dictation she had made a complete departure from the earlier dying declarations and inculpated the appellant and as such there appeared to be great uncertainty in the veracity of the dying declarations. It also observed that the deceased had died on 18th September 1993 and it was on the basis of the dying declaration Ex.59 that a complaint had been registered in the police station on the 26th September 1993 which again was grossly delayed. The trial court also held that the reliance of the prosecution on Exs.22 and 31 admittedly in the handwriting of the accused and deceased respectively to indicate that there was something amiss and improper in the relationship of the appellant and the deceased was misplaced as the two appeared to share a close and healthy relationship, and were on the contrary indicative of the deep attachment and concern which a brother would have for a sister. The trial court then examined the evidence of PW18 Dr.Vijay, who had conducted the post-mortem on the dead body and opined that this too did not support the prosecution version. The Court also observed that at the initial stage a charge under section 302 of the IPC had been framed against the appellant but while the matter was yet pending, an application Ex.64 had been filed by the prosecution seeking an alteration of the charge from one under Section 302 to 306. The trial court thus opined that in this situation where the prosecution itself was not clear about the nature of the case, it appeared that the death was caused in a simple accident, as was apparent from the first two dying declarations. The trial court, accordingly, acquitted the appellant-accused. An appeal against acquittal was taken to the High Court. The High Court prefaced its judgment in the following terms:

"This is a classic case where the knowledge possessed by an individual in the specialized filed of law has been successfully utilized by him in influencing the outcome of a criminal case in which he has been charged of an offence of murder and alternatively, of the charge of abetment to commit suicide. Hereinafter, we shall see as to how effectively, tactfully and successfully the legal knowledge possessed by the accused has been utilized in converting a serious criminal act of causing the death of a married lady into an accidental death."

The Court accordingly reversed the judgment of the trial court on all material particulars by observing that the neither of the dying declarations Ex.44 and 48 could not be treated as First Information Reports and it was only Ex.59 on which the FIR had formally been recorded on 26th September 1993, which was the First Information Report in the light of the provisions of Sections 161 and 162 of the Cr.P.C. The High Court further held that the first two dying declarations had no evidentiary value and were even otherwise suspicious statements as they had been recorded in the presence of the appellant. The court also held that the appellant had indeed been with the deceased in her residential quarter when the incident had happened and that the evidence would have to be appreciated in that background. The High Court, accordingly, accepted the prosecution story that taking advantage of the fact that the deceased was alone in her quarter, the appellant had asked her to have intercourse with him on her refusal, he had got annoyed and burnt her after pouring kerosene oil and it was only to cover up his criminal act (as her loud cries had attracted the neighbours) that he had doused the fire himself and had rushed her to the hospital in a borrowed jeep. The High Court further opined that Exs.22 and 31 when read cumulatively, (Ex.22 written by the appellant to the deceased and Ex.31 written by the deceased to the appellant), which were admittedly in the hands of the two, proved beyond doubt that the appellant was blackmailing the deceased as he was aware of her sexual

dalliances with other persons and he had, accordingly, attempted to take advantage of her predicament to satisfy his lust as well. The Court then examined the dying declaration Ex.59 recorded on 17th September 1993 and observed that it appeared to a genuine statement made at a stage when Kamlaben was on the verge of death and had decided to speak the truth, notwithstanding the fact that the complaint had been filed on 26th September 1993 after a delay of almost ten days. The court, finally, concluded as under:

"In view of the above discussion, we are of the firm opinion that the impugned judgment and order of acquittal cannot be sustained in the eyes of law and is required to be quashed and set aside. As discussed hereinabove, it is established that the deceased died a homicidal death. The deceased belonged to the backward community and the respondent-accused, with the ill-intention to satisfy his sexual desire, entered the quarter of the deceased at a time when no one else was present in the house.

But, when the deceased declined to satisfy his long pending illegitimate demand, which is evident from the document at Ex.22 and the dying declaration at Ex.59, the respondent-accused caused the death of the deceased and thereafter, tried to create a picture of accidental death.

Looking to the facts and circumstances of the case and the evidence on record, particularly, the document at Ex.22, the dying declaration at Ex.59 and the oral evidence on record, we find the respondent-accused guilty for the offences punishable u/s 302 IPC and Section 3(ii)(v) of the Atrocities Act".

The judgment of the trial court was accordingly reversed.

3. Mr. E.C. Agrawala, the learned counsel for the appellant has raised certain basic issues in this appeal. He has pointed out that the only material evidence against the appellant which had been relied upon by the High Court was the dying declaration Ex.59 and if the story projected therein was disbelieved, the appellant's conviction could not be sustained on the basis of the peripheral and circumstantial evidence. It has been pointed out that Exs.44 and 48 were two dying declarations, one to a Magistrate and a second to a police officer, in which the appellant had been completely exonerated of any wrong doing and these were admissible in evidence contrary to the findings of the High Court, whereas Ex.59 appeared to have been motivated on account of the fact that in the case of death of Scheduled Caste such as the deceased in some circumstances, an ex-gratia payment of Rs.2 lacs was disbursable, and this amount had, indeed, been claimed and taken by the husband of the deceased, Ratilal PW-7. It has been pointed out that Exs.22 and 31 were, in fact, entirely in favour of the appellant and when read together showed the concern he had towards the deceased as he had often advised her to desist from her illicit affairs and had warned her that in case she did not do so, he would inform her husband. It has also been submitted that even if there was some evidence with regard to the smell of kerosene oil on the carpet on the floor it would in no way detract from the innocence of the appellant in the face of no other evidence, more particularly as the statements Exs.44 and 48 were to be read as dying declarations. Mr. Ninad Laud, the learned counsel for the respondent State of Gujarat has, however, submitted that the medical evidence clearly supported the prosecution story that the deceased had been burnt after kerosene oil had been sprinkled on her and corroboration with regard to the involvement of the appellant was available in the evidence of PW9 Vithalbhai and PW10 Wankar Devendrabhai. He has also submitted that the presence of the appellant at the time

when the first two dying declarations had been recorded clearly showed that the deceased had been pressurized to make them and as such they could not be believed.

4. We have considered the arguments advanced by the learned counsel for the parties. At the very outset, we must deal with the observations of the High Court that the dying declarations Ex.44 and 48 could not be taken as evidence in view of the provisions of Section 161 and 162 of the Cr.P.C. when read cumulatively. These findings are, however, erroneous. Sub-Section (1) of Section 32 of the Indian Evidence Act, 1872 deals with several situations including the relevance of a statement made by a person who is dead. The provision reads as under:

"Sec.32. Cases in which statements of relevant fact by person who is dead or cannot be found, etc., is relevant. - Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount to delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1) When it relates to cause of death. - When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

We see that the aforesaid dying declarations are relevant in view of the above provision. Even otherwise, Section 161 and 162 of the Cr.P.C. admittedly provide for a restrictive use of the statements recorded during the course of the investigation but sub-Section (2) of Section 162 deals with a situation where the maker of the statement dies and reads as under:

"(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act."

5. A bare perusal of the aforesaid provision when read with Section 32 of the Indian Evidence Act would reveal that a statement of a person recorded under Section 161 would be treated as a dying declaration after his death. The observation of the High Court that the dying declarations Ex.44 and 48 had no evidentiary value, therefore, is erroneous. In this view of the matter, the first dying declaration made to the Magistrate on 14th September 1993 would, in fact, be the First Information Report in this case.

6. Having said as above, we must now examine as to the truthfulness of the three dying declarations that had been made by the deceased. As already mentioned above, the first two completely exonerated the appellant from wrong doing, and had attributed the burn injuries to an accident. The High Court has given a finding that those documents have no evidentiary value and were even otherwise shrouded in suspicion as the appellant had been present at the time when they had been recorded. We find this assertion is factually incorrect. We requested the learned State counsel to show us any material on record which could indicate that the appellant had, indeed, been present at that time. He was unable to do so. On the contrary, we find that the Executive Magistrate had given a note at the end of the dying declaration Ex.44 in the following word:

"At the time of recording the dying declaration the police officer/staff or any relatives of the patient are not present, the patient is conscious, this verified.

Sd/- P.P.Patel

Executive Magistrate

Metropolitan Area

Ahmedabad"

Even more significant perhaps is the dying declaration Ex.48. This dying declaration had, admittedly, been recorded by the Police Officer in the presence of Babulal Parmar, the brother of the deceased and Ratilal PW, the husband of the deceased and they had attested this document as well. On the contrary, the statement Ex.59 is obviously suspicious. We have perused the original document which is on record and notice that the manner in which it has been written, the clarity of the language used, the writing and spacing of the words being very symmetrical and the flow of words indicate that this could not be the statement of a person who was on the verge of death. The High Court has been at pains to point out that as there was a reference to letter Ex.22 in this dying declaration, it completed the chain against the appellant as this document had apparently been concealed by the deceased and it was she and she alone who could have told her husband where to find it. We find this story to be far fetched. Ex.59 was written on 17th September 1993 and the complaint was filed on the 26th September 1993 on which date PW7, the husband of the deceased, had also made an application to the Government seeking compensation on the death of his wife as she belonged to a Scheduled Caste and was entitled to compensation on that account. We are told that the compensation has since been taken.

7. Mr. Laud has, however, submitted that the story given in Ex.59 was supported by the evidence of PW9 Vithalbhai and PW10 Wankar Devendrabhai. We find this assertion without any basis. PW was declared hostile as he disowned the statement made under Section 161 of the Cr.P.C. whereas PW10 had nothing whatsoever to say about the incident.

8. The High Court has been at pains to emphasize that the two letters Exs.22 and 31 being of signal importance completed the prosecution's case against the appellant. Ex.22 is an undated letter written by the appellant to the deceased whereas Ex.31 is a letter written by the deceased to the appellant. It is the case of both parties that they are indeed written in the hands of the appellant and the deceased. Ex.22 reads as under:

"Do tell me and Vasu to stay at your house during Sunday night otherwise I will come on Sunday night or early morning on Monday and will create a problem. Today the Doctor was to come and you were knowing about it and therefore, you stayed back at home and made me a fool. After Master left for service, you both had met. Now onwards the Doctor must not come at your house. Do come to office on Monday. So lovingly you were talking with the Doctor. I will create a problem. I am not bothered even if my relationship breaks but, I will disclose the truth to Master."

It bears explanation that 'Vasu' is the appellant's wife whereas 'Master' is the husband of the deceased. The letter Ex.31 which is on an inland letter card dated 15th February 1992 is reproduced below:

Maheshbhai Gopalbhai Barot

Hodi Chakla Barot Vas

Nandlal Chowk

Kalol

North Gujarat

District Mehasama

Shri Mukeshbhai, Vasu, all and mother-father must be happy and I pray accordingly.

Kamlaben Parmar writing from Vamaj villages blesses you all. This is for Mukeshbhai to know that, I have become so helpless before you that I cannot even ask for your pardon personally, therefore, I am writing this letter and begging your pardon. Because, today because of me you and Master had hurt feelings. What you have done for me perhaps a real brother also may not do. When you suddenly came to my house then seeing me and Mohmmed Shaikh (Valisan) and hearing our conversation and from our conduct you had become suspicious, in this regard I had confessed before you on the same day, that is my relationship with Mohmed and Mohmed had said that my brother-in-law Dr. Hemu Vaghela (Valrao) I had illicit relations with both these persons, and he had immoral relations with me two to three times. You had said that do what you please, from today our relationship of brother-sister

is over. At that time I had given you promise that I will not have any relations with any of these two, and I will not allow them to enter into my house, and on finding the time and occasion I will confess this to Master. At that time you had agreed to have and continue the relationship of brother-sister, and if after this day if these persons come to my house then you will inform Master, therefore I had said yes, and secondly when you came to know that the Solanki of Kalol had immoral relationship with me at Kadi Government Guest House. At that time I had only informed you that yes Master and Solanki had home relations, therefore since I was in need of money I had demanded and I had gone to get the money on my own, at that time he had cheated me and called me to the Government Guest House and gave the money and forcibly took advantage of my helplessness and informed others, at that time I had only told you not to call Solanki hereafter, and I will also not call him, at that time you became calmed. But, on Tuesday you and Solanki suddenly met in the bus and when he had called me that you had become annoyed and informed the entire incidence to Master but you had not seen the time and circumstances, therefore Master was annoyed so you keep patient and peaceful. When the truth is understood by you then he will call you and please pardon me, and if you do not pardon then if you do not keep relations with me then I will commit suicide and die.

Written by, Yours,

Kamlaben M. Parmar

Vamaj, Date : 15/2/92

9. A cumulative reading of these two documents far from showing any illicit relationship between the appellant and the deceased, shows a close family relationship. In Ex.31 the deceased refers to the appellant as her brother and also fondly says "what you have done for me perhaps a real brother may not do". This document also indicates that the deceased was involved in several relationships and when this document is read in the context of Ex.22 it becomes clear that the appellant had been advising the deceased to desist from her activities and in case she did not do so he would reveal all to "master" i.e. her husband. To our mind, therefore, these documents do not, in any way, advance the case of the prosecution and on the contrary they indicate that the allegation of an attempted rape of the deceased, whom he regarded as his sister, was a story created long after the incident by PW7 in order to take compensation. The finding of the High Court, therefore, that the appellant's conduct in dousing the flames, and rushing her to hospital in a commandered Jeep, was a subterfuge in order to allay suspicion away from him, does not appear to be correct. On the contrary, it is indicative of a person trying desperately to save someone he cared for.

10. Mr. Laud has however, pointed out that a reading of the (Panchnama) Ex.38 along with the statement of Dr.Vijay PW18, and the post-mortem report would support the view that the story that the appellant had poured kerosene oil and then set her on alight was borne out.

11. We have examined the statement of the Doctor. He had found several injuries on the dead body, mostly on the front of the body which could be caused if kerosene oil had been sprinkled on the person and then set alight. He was, however, forced to admit that he had not recorded any such fact in the post-mortem report and further clarified in cross-examination that he had not observed any smell

of kerosene oil and further that if there was indeed a smell from the body, he would have recorded such fact in the Post-Mortem Report. In the light of this statement of the Doctor, the Panchnama looses much of its significance. Concededly in this document there is a reference to the fact that there was a smell of kerosene on the burnt saree as well as on the carpet in the room. It also noted the presence of a tin with some kerosene oil in it and a primus stove with the cap of the oil receptacle lying open. This document to our mind in no way advances the prosecution story as it is more compatible with the version of accidental death than homicide and explains the sudden flare up of the oil. In the light of the discussion above, we find absolutely no evidence of homicide in this case. We must, accordingly, endorse the findings of the trial court that the deceased suffered an accidental death.

12. Before parting with the judgment, we must re-administer an oft repeated caution. It has repeatedly been held that interference by the High Court in an appeal against acquittal should be minimal and only in cases where the trial court judgment is perverse or does not flow from the evidence. We must record that the judgment of the High Court has completely ignored this basic principle. The judgment of the Additional Sessions Judge based on a correct appreciation of the evidence, was completely in accordance with law. This did not warrant interference by the High Court. We, accordingly allow this appeal, set aside the judgment of the High Court, and order the appellant's acquittal.