Bava Dolatgiri Itavagiri Vs. State of Gujarat

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Court : Gujarat

Decided On : Dec-01-1966

Reported in : AIR1968Guj296; 1968CriLJ1549

Judge : Vakil and; A.D. Desai, JJ.

Acts : Evidence Act, 1872 - Sections 32; Indian Penal Code (IPC), 1860 - Sections 304

Appeal No. : Criminal Appeal No. 633 of 1965

Appellant : Bava Dolatgiri Itavagiri

Respondent : State of Gujarat

Advocate for Def. : G.T. Nanavati, Asst. Govt. Pleader

Advocate for Pet/Ap. : A.S. Quereshi, Adv.

Judgement :

Vakil, J.

1. The appellant and two other persons were tried as accused in Sessions Case No. 57 of 1964, for having committed various offences, in the Sessions Court of Junagadh. The other persons were acquitted of all the charges but the appellant was convicted for having committed offences punishable under sections 457, 392 read with section 397 and section 304 Part II, Indian Penal Code, and sentenced to suffer rigorous I. P. C. And to 7 years' rigorous imprisonment for each of the offences under section 392 read with sections 397, 304, Part II Indian Penal Code. The sentences were ordered to run concurrently.

2. The prosecution case was that deceased Amichand Damodar originally resided in a village called Dadar in Taluka Visavadar of the District of Junagadh and he had shifted to the village Setranj Vadala which was at a distance of about one mile from Dadar since about 4 months prior to the incident as a result of which he lost his life. He had purchased a small house and was doing some small business in the said premises and also resided therein. He was a bachelor aged about 60 and no one was staying with him, but had his first cousin Jagjivan residing in Setranj Vadala in a separate premises and his other cousins named Ratilal and Chunilal stayed at Dadar. On the night between the 4th and 5th of September 1964, some time at midnight, it was alleged, that appellant and two other accused, in furtherance of their common intention to commit an offence of robbery, death etc., entered into the shop of Amichand and robbed him of property worth about Rs. 460/- including currency notes and some ornaments and during the course of that robbery had inflicted fatal injuries

on Amichand which resulted in the death of Amichand on the 9th of September 1964 at Government Dispensary at Visavadar. The injuries were alleged to have been caused with a dagger or knife by the appellant. It appears that one Koil China Jeran came to know about this occurrence and he contacted the police Patel Jivraj Devshi. The police patel arrived on the scene and at that time witnesses Shama Bhima, Dana Jeita and Bachu Masri who met the police patel on his way to the scene of offence, joined him and they all arrived at the residence of the deceased. Then they found that one wooden box was lying open and things were lying helter skelter. Amichand was sitting at that time on his cot and had bleeding injuries in his abdomen. When they enquired of Amichand as to what had happened, it is the version of the prosecution that Amichand told them to call Ratilal and Jagjivan, his cousins. There is some discrepancy in the evidence of the prosecution on his aspect as to whether at this first contact Amichand had told the police patel and those who had accompanied him, the details of the incident including the name of the appellant or whether he did so only on the arrival of his two cousins. We shall deal with this aspect at its proper place. But proceeding with the version, it was that Jagjivan could not be found because he had gone to Junagadh. Therefore, his other cousins Ratilal and Chunilal were called from Dadar and when they arrived they had a look round the ship. They found Amichand injured, who informed them that three persons had entered his house from the place where the wall had fallen down due to heavy rainfall and which he had temporarily blocked up with thorns and kutcha bricks. These miscreants had entered his house sometime at midnight. He had kept the lamp burning in his room and he saw these three persons proceeding toward the big box and fiddle with it to break it open and so he went near them. The appellant No. 1 took him in his grips, made him fall on the cot and as the lap was burning at that time, he could identify him. The deceased gave his name to be Bavaji Doltgiri Itvargiri. The miscreant had then gagged him and then stabbed him with a knife in his abdomen. Thereafter the three persons decamped with Rupees 270/- in currency notes, some packets of Taj Brand cigarettes, a gold ring etc. Then the police patel dictated this information that he received from the deceased himself to Ratilal. Then Ratilal, the police patel himself and the three others who were present at that time signed the same and thereafter that report was sent with Dana Jeta with instructions to give it at Monpari village, which was at a distance of two miles and he was further instructed that if there was nobody there, he should carry the report to Sarsai Police Outpost at a distance of about six miles. Dana Jeta handed that report, which is Exhibit 7 on the record, to witness Champaklal Shamalji, who in his turn handed it over to one Natvarsi or Natubhai, a police constable to be carried to the police station at Visavader which was at a distance of about 10 miles Police Jamader of Sarsai happened to be at that time at village Setranj vandala and on seeing people collected at the place of Amichand, inquired as to what had happened, and having learnt about the incident, he recorded the complaint of Amichand which is Exhibit 8 and has been treated on the record as a dying declaration of Amichand, he having died subsequently. In the meantime, Danajeta returned after handing over Exhibit 7 and, therefore, this complaint or statement, Exhibit 8, of the deceased was given to him to be sent to Sarsai through Champaklal Shamalji. It appears that both these documents were carried by Champaklal Shamlji and police constable Natvarsing, both of whom have been examined as witness, to Visavdar Police Station, Sagunrai Ratilal, another witness examined by the prosecution, was in charge of the police station and having received both the documents simultaneously, he first read Exhibit 8, being the complaint of the deceased himself and having been sent by the police constable Maganlal and then immediately read Exhibit 7, the occurrence report, sent by the police patel. He then registered the offence on the basis of Exhibit 8, the complaint of

the deceased. Thereafter the investigation started and the First Information Report was sent by him, which is Exhibit 47. He arrived at the scene of offence, carried on the investigation and arrested accused No. 1 on the 6th of September 1964 in the evening and accused Nos. 2 and 3 on the 7th September 1964. In due course, the charge sheet was submitted against all these three accused who were ultimately committed for trial in the Sessions Court at Junagadh.

3. As we are not concerned with the persons who were originally tired as accused Nos. 2 and 3, we shall be confining our discussion and consideration to the evidence so far as it concerns accused No. 1, i.e., the present appellant. At the trial, the defence of the appellant was one of total denial. In short, according to him, he had not entered the house of the deceased as was alleged nor had he committed any of the offences for which he was charged. His version was that, various witnesses had falsely involved him because of some one or the other reason for which they bore enmity against him. We shall examine this part of his case also at its proper place. The learned Judge, after duly weighting the evidence, came to the conclusion that there was no evidence whatever to show or justify to come to the conclusion that there was common intention between the three accused to commit the various offences for which they stood charged. He further held that there was no evidence whatever to come to the conclusion that accused Nos. 2 and 3 were the two of the miscreants who had entered the house of the deceased as alleged by the prosecution and acquitted them as stated hereinabove. But as regards accused No. 1, the present appellant, the learned Judge came to the conclusion that the oral dying declarations relied upon by the prosecution were duly proved. He found them to be reliable and he was inclined to based the conclusion of guilt so far a the appellant was concerned, on these dying declarations themselves, particulars the dying declaration Exhibit 8, and he further came to the conclusion that the prosecution case received support from other circumstances such as the alleged discovery of the dagger by the appellant and the recovery of Rs. 100/- in currency notes of Rs. 10/- denominations and five packets of cigarettes, which were established by reliable oral evidence and, as a result, he convicted and sentenced the appellant as aforesaid.

4. The prosecution had no eye-witnesses to offer and the questions that demand our attention for consideration are mainly as follows:

1. Are all or any of the alleged dying declarations, oral and written, reliable so as to entitled the Court to base a conviction of the appellant thereon as is done by the trial Court or whether corroborations is needed to support the conviction?

2. If corroboration is required, is there any corroborative evidence on the record to support the dying declaration?

3. Is there any satisfactory proof of the identity of the appellant as one of the three miscreants and the one who caused the injuries to the deceased?

We now proceed to deal with these questions.

5. The law regarding the nature, scope and value as a piece of evidence of oral and written dying declarations is now fairly well crystal by judicial decisions. A dying declaration, before it could be relied upon, must pass a test of reliability as it is a statement made in the absence of the accused and there is no opportunity to the accused even to put it through the fire of cross-examination to test its genuinity or

veracity. The Court has, therefore, to subject it to close scrutiny. But once the Court is satisfied that it is a truthful version as to circumstances in which the death resulted and the persons causing injuries, law does not expect that there should be corroborations before it could be relied upon. However, if there are infirmities and the Court does not find it safe to base any conclusion on it without some further evidence to support it, the question of corroboration arises. No inherent infirmity as such attaches to a dying declaration as a piece of evidence.

6. In the present case, the version of the prosecution is that, deceased Amichand had, before his death, related at four different stages the facts concerning the incident and had disclosed the name of the appellant as one of the three miscreants and the person who had caused all the injuries to him that were found on his body. These four stages are (1) when the police patel Jivaraj Devshi (Exhibit 4) went to the place of incident in company with Vallabh Jeram (Exhibit 13) Shama Bhima (Exhibit 35), Dana Jaita (Exhibit 10) and Bachu Masri (Exhibit 11); (2) when the cousins of the deceased viz. Ratilal (Exhibit 9) and Chunilal (Exhibit 19) arrived at Amichand's place; (3) when the police constable Magnalal Jadavji (Exhibit 44) came who reduced to writing what the deceased said in the form of his complaint (Exhibit 8) and (4) when dr. Divakaraj (Exhibit 40) examined him at Nani Monpari oustkirts and enquired of him. We now proceed to examine the evidence the prosecution led to prove their case in respect of the dying declaration. In the present case, there is hardly and dispute that the incident happened in the house of deceased Amichand on that fateful night when his house was raided by miscreants and he received injuries at the hands of one of them. The only serious dispute raised is whether it was appellant No. 1 who was one of them. The only serious dispute raised is whether it was appellant No. 1 who was one of the three persons alleged to have entered the house of the deceased and whether it was he who caused him the injuries. The other facts which were duly established by the prosecution and have also remained unchallenged as we shall point out in due course, are that Amichand as conscious and was in a position to talk and convey to others what had happened and that Exhibit 8 is his own statement which was reduced to writing in the morning of the 5th. Amichand having died, under law, it assumed importance as his written dying declaration. If we find that this satisfied us as regards its veracity and no infirmities are shown, then there can hardly be any ground for us to interfere in this appeal. Therefore, when we examine the evidence we shall have to keep in mind mainly the question as to whether this written dying declarations is such as inspires confidence that its general version is a true one and whether the presence of the appellant and the part alleged to have been played by him in the said dying declaration is believable in the light of other evidence on the record. We shall, therefore, have to see whether when the prosecution alleged that even at earlier and subsequent stages the deceased has told his story in presence of other persons, these statements are consistent in material particulars with the written dying declaration or they cast and shadow thereon or create infirmities therein. With these factors in mind, we go to examine the prosecution version about the first utterances of the deceased after the incident.

7-29. (After discussing the evidence His Lordship proceeded.)

We believe, therefore, that the deceased had made the oral dying declaration tried to be relied upon by the prosecution before his two brothers and the other witnesses and which gets further corroborated from the written dying declaration Exhibit 8. We have examined carefully this written dying declaration Exhibit 8 and the evidence which may have any effect on the veracity thereof. We are satisfied that the written

dying declaration represents the true version from the mouth of the deceased about the circumstances under which the miscreants had entered his house, what happened at that time and who was his assailant, who caused him the injures as a result of which he died. We see no reason to seek corroboration and we find that the conviction could be based on this dying declaration of the deceased.

29. Over and above the dying declaration, there were certain circumstances which were brought on the record by the prosecution to support their case. One of them was that the appellant had discovered the knife. The relevant evidence is of Panch-Witness Amritlal Gaurishanker (Exhibit 25) and the Panchnama (Exhibit 34). It appears the learned Judge has relied upon this discovery as the circumstance to support and corroborate they dying declaration. We find it difficult, however, to agree with the learned Judge. We do not propose to discuss the evidence in details but it is apparent that this evidence cannot go to prove any discovery on the part of the applicant which could be considered to be an incriminating circumstance against him. Admittedly the knife was in a trunk in his own house, admittedly the knife had no blood on it. Therefore, the evidence does not at all connect this knife with the offence. Nobody has identified this knife. Therefore, we are not at all satisfied that it may be considered to be a discovery under section 27 of the Evidence Act so as to support the prosecution case. The next circumstances relied upon is the recovery of Rs. 100/- in notes of Rs. 10/- denomination. The panchnama is Exhibit 28 and the panch witness is the same Amritlal Gaurishanker (Exhibit 25.). (After discussing evidence. His Lordships proceeded)

Therefore, this circumstances were are afraid cannot be considered to be such a circumstance as would positively connect this appellant with this crime. At the same time, we do note as observed above and as we shall point out hereinafter in respect of the other circumstance, that the accused did try to give a false explanation and adverse inference could be made against him.

30. The other circumstances is the recovery of five packets of cigarettes. The panchnama in respect of this is Exhibit 29 and the same panch witness has proved it. (After discussing the evidence His Lordship proceeded.)

We are, therefore, inclined to hold the version given by the witness to be a true version. But this also suffers from the same lacuna and our observation made hereinabove as regards Rs. 100/- stands good for this circumstance also.

31. That brings us to the most important point raised by Mr. Qureshi which requires our anxious consideration and that is as regards the fact of identity of the appellant. Mr. Quershi had based this point of identify on two grounds. Firstly on the ground that the evidence of the witnesses was not consistent as regards the disclosure of the name of the appellant by the deceased. He had tried to show that his name was not disclosed at the earlier stage and the there was some sort of improvement at a later stage. We have already seen that the oral evidence is not such and it is consistent on the ground that the deceased had disclosed the name of the appellant as the assailant. There is ample satisfactory evidence on this record. But then it was argued by Mr. Quershi that even if it is taken that there has been a consistent statement on the part of the deceased as regards his having identified the appellant, the Court has still to see whether the evidence, as it stands, conclusively proves beyond a reasonable doubt that the deceased had, as a matter of fact, an opportunity to identify the appellant. In order to support his contention Mr. Quershi submitted that

he evidence as it stands does not conclusively prove that even if there was any lamp burning. When was that lamp put out. According to Mr. Quershi the evidence is hazy on this aspect. The statement is Exhibit 8 on this important point, according to him is vague. He , therefore, submitted that the evidence as it stands did not establish beyond a reasonable doubt that the lamp was allowed to remain burning so as to enable the deceased to identify the appellant as his assailant. This necessitates us to turn to the evidence again. While discussing the evidence of various witnesses, we have in passing pointed out how they have made a reference to the lamp was told to them by Amichand. First, if we turn to Exhibit 8, the statement is as follows:

' The tin lamp which was kept on the box near my cot was burning. It was put of by one of the two persons standing near the box. So I could not know them as to who were the two others'.

Mr. Quershi's argument is that this statement does not definitely show that the lamp was put off at any subsequent stage of the incident. He also tried to support his submission by arguing that the natural instinct of the burglars or robbers would be to first put off any light that may exist in the room to avoid being identified by any person whom may be there. But as regards this argument of natural instinct, we are not much impressed because it would be equally natural depending upon the circumstances of each case as to whether when they first enter, the robbers would not like to actually locate the situation of the place and also try to find out the object which they had to tackle. There is nothing here in this particular case to indicate that the miscreants did not required nay such opportunity of themselves first having a look round the room with the help of the light. It does not show that it was the say of the deceased that the lamp was put out immediately the persons came into his house. As a matter of fact the stage where he talk s about the lamp being put out is the one after he has made the recital of his having been attacked by appellant No. 1 and his having identified him as his assailant.

32. Mr. Quershi then tried to seek help from the statement of witnesses. (After discussing the evidence His Lordship proceeded.)

33. We are, therefore, satisfied that as the evidence stands on the record, it does not create any reasonable doubt as to the fact of the lamp light being there at the time of assault by appellant No. 1 by which the deceased claimed to have identified him when he actually sat on him and throttled him and gave the blows. We cannot also forget the fact that he was a persons of his own village who was known to him and he was near enough to be identified by the deceased, particularly when he had sat on him and assaulted him and gave those blows his full attention would be focused on the assailant and there is no difficulty for us in accepting the evidence of the prosecution that the deceased was in a position to identify appellant No.1

34. Lastly, Mr. Quershi urged that even if the whole evidence as it stands, is accepted and it is found that it was the appellant who was one of the three miscreants and who had actually assaulted and caused the injuries to the deceased, the offence under section 304 part II could not be said to have been committed by him and this is a case where he could be a convicted only under S. 323 and punished as such. The main stay of the argument was that the doctor has described the injuries on the persons of the deceased as has been stated hereinabove and it clearly showed that none of the injuries was either fatal nor was it too serious and that the incised wounds were also superficial. The injuries that we have noted hereinabove do show that none of the

injuries was fatal in the sense that it could cause immediate death. Mr. Quershi also relied upon the statement of the doctor that he was also of the opinion that the injuries were not serious and that he had said that, had it not been for the bad luck of the man and his condition of asthma, heart trouble and old age, the man would have survived as, in his opinion, pulmonary oedema might not have been cause. We are unable to agree with MR. Quershi, on this submission also. The doctor's opinion has to be read as a whole again. The doctor has definitely said that though the injuries were not fatal nor serious, the deceased was in a precarious condition even at the time when he examined him, most probably on the next day. These observations of the doctor as regards old age, heart trouble and asthma also cannot come to the help of the appellant having regard to the explanations to section 299. Explanation No. 1 clearly lays down that a person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death. Now, if we have regard to the evidence of that doctor on which Mr. Quershi himself relied, there is no doubt that the doctor's opinion was that the death was caused by pulmonary oedema which was the direct result of the injuries caused because of his condition which indicated certain disorder, his death was accelerated. Even apart from that, explanation 2 is also a complete answer to the argument of Mr. Quershi wherein it is provided that where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skillful treatment the death might have been treatment the death might have been prevented. There is no doubt that, had these injuries been not caused, his condition was not such, ; in the opinion of the doctor, that it would have resulted in death and it was only because of the injuries that ultimately caused the death of Amichand within about four days of his receiving those injuries. We are, therefore, of the view that the conviction under section 304 part II cannot be said to be an illegal conviction or a conviction not according to law.

35. And lastly Mr. Qureshi appealed to us on the point of the sentence. He urged that after all he is a young man and urged that the injures that were caused were very superficial and, therefore, the sentence of seven years was too harsh. Having regard to all the facts and circumstances in this case, we do not find any ground whatever to interfere in the sentence passed by the learned Judge who has in his discretion thought fit to sentence him to seven years' rigorous imprisonment on both the counts and has ordered the sentences to run concurrently.

36. As a result of this train of reasoning, the appeal cannot stand. The appeal is dismissed and the order of conviction and sentence passed by the trial Judge is confirmed.

36. Appeal dismissed.