MANIBEN

v.

STATE OF GUJARAT

(Criminal Appeal No. 658 of 2002)

AUGUST 7, 2009

[DALVEER BHANDARI AND DR. MUKUNDAKAM SHARMA, JJ.]

Penal Code, 1860: s.304 (Part II) – Accused threw burning wick made of rags on the deceased – Since deceased was wearing terylene clothes, it aggravated fire causing burn injuries – 60% burn injuries – During course of treatment deceased developed septicemia which became main cause of her death – Trial court convicted accused under s.304 Part II – High Court altered conviction to s.302 – On appeal, Held: From evidence on record it cannot be said that accused had intention that action on her part would cause death or such bodily injury to deceased sufficient in ordinary course of nature to cause death of deceased – Her case was covered under s.304 Part II – Conviction order of trial court restored.

Prosecution case was that on the fateful day, the deceased went to fetch water. When she was returning, appellant who was her mother-in-law threw a burning wick made of rags on the deceased and thereby set fire to the terylene clothes put on by the deceased. She underwent treatment and died on eighth day. Trial court convicted the appellant u/s. 304 Part II IPC. High Court altered conviction to s.302 IPC. Hence the present appeal.

Partly allowing the appeal, the Court

HELD: 1. The post-mortem report of the deceased

A was placed on record during the trial and doctor who conducted the post-mortem examination was also examined as a witness in the trial. The said documentary and oral evidence of the doctor, that he treated the patient and also conducted the post-mortem examination made B it crystal clear that the deceased remained under treatment in hospital and died after 8 days. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It C is, therefore, established that during the period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries. [Para 13] [760-D-F]

2. It is established from the dying declaration of the D deceased that she was living separately from her mother-in-law, the appellant for many years and that on the day of incident she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter E came to fetch water and when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries. There is also F evidence on record to prove and establish that the action of the appellant in throwing the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the evidence on record, it cannot be said that the appellant had the intention that such action on G her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, the case cannot be said to be covered under clause (4) of Section 300 of IPC. The case of the appellant is

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covered under Section 304 Part II of IPC. [Para 14] [760-G-H; 761-A-C] A

3. The view taken by the trial court was a cogent and plausible view and, therefore, the conviction and sentence imposed by the trial court is justified. Considering the totality of the circumstances and the fact that the appellant is of 85 years of age and had undergone the sentence imposed by the trial court under the provisions of Section 304 Part II of IPC, the conviction and sentence of the appellant imposed by the High Court is set aside and the judgment and order passed by the trial court is restored. [Para 15] [761-D-F] B C

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 658 of 2002. D

From the Judgment & Order dated 03.04.2001 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 1198 of 1995.

M.R. Challa, Lalit Chauhan, Somnadari Gaud, Pallavi Sharma (for Parekh & Co.) for the Appellants. E

Ms. Vibha Dutta Makhija, Jesal (for Hemantika Wahi) for the Respondents.

The Judgment of the Court was delivered by F

Dr. MUKUNDAKAM SHARMA, J. 1. The present appeal is filed against the judgment and order passed by the High Court of Gujarat holding that the case of the appellant herein is covered under Clause (4) of Section 300 of the Indian Penal Code (for short 'the IPC') and, consequent thereto convicting her under Section 302 of IPC for murder of her daughter-in-law –Santokben alias Muktaben and sentencing the appellant to imprisonment for life. However, by the said order, imposition of the fine of Rs. 3,000/- by the Sessions Court was set aside. Earlier the Sessions Court held the appellant guilty for the G H

A offence of Section 304, Part II of IPC and convicted and sentenced her for 5 years imprisonment and fine of Rs. 3,000/- and in lieu to undergo further imprisonment of one year.

2. In order to appreciate the rival contentions advanced by the parties and issues involved, it would be necessary to set out brief facts of the case which gave rise to the present criminal appeal.

Deceased Santokben was married to Parshottambhai Patel of village Jamvadi, Taluka Gondal, District Rajkot. After the marriage she gave birth to three children, who were all girls. The appellant herein, who is the mother-in-law of Santokben, was dissatisfied with Santokben because she was not able to bear a boy. According to prosecution on 29.11.1984 at about 7.00 a.m. the deceased with her youngest daughter Minaxi had gone to fetch water and while she was returning with water pot on her head and carrying Minaxi with the other hand, the appellant came and threw a burning wick made of rags on the deceased and thereby set fire to the terylene clothes put on by the deceased. The deceased brought down her minor daughter whom she was carrying and managed to reach her house with the burn injuries.

3. After reaching her house the deceased summoned her daughter Nita who had gone to attend her school. Nita in turn informed witness Babulal Liladhar and the deceased was taken to Gondal Government dispensary at about 9.35 a.m. At Gondal Government dispensary the deceased was examined by Dr. Hareshkumar N. Savaliya, who was a Medical Officer at the said dispensary and on finding that the deceased has sustained more than 60% burns, he advised the persons accompanying her to remove her to Rajkot Hospital. At about 11.00 a.m. on that day an information was conveyed by Mr. Ghanshyambhai, who was police constable on duty at Gondal hospital, to Umiyashanker Jivram, P.S.O. at Gondal Taluka Police Station about the deceased having been admitted in the hospital for treatment of her burn injuries. Mr. Umiyashanker had

in turn asked Jamadar Sultan Siddi at about 11.00 a.m. to go to the dispensary and record the complaint. Accordingly, Jamadar Sultan Siddi went to the Gondal hospital and recorded the complaint of the deceased at about 12.45 p.m., which is the First Information Report. After reducing the complaint/FIR of the deceased into writing, he obtained the thumb impression of the deceased thereon (Exhibit 46). Meanwhile at about 11.20 a.m. witness D.P. Trivedi, who was on duty at that time as Deputy Mamlatdar sent a report to Executive Magistrate that the deceased was admitted to hospital with burn injuries and he should record her dying declaration. Accordingly, Mr. D.P. Trivedi, Executive Magistrate had gone to Gondal Hospital and after verifying from Dr. Savaliya that deceased was conscious and in a fit state of mind to make statement, recorded her dying declaration. Thereafter, the deceased was removed to Rajkot Government hospital. During the course of treatment the deceased died on 07.12.1984. At the instance of Head Constable C.D. Vyas, Dr. Tarlikaben H. Shah performed autopsy on the dead body of the deceased. Necessary investigation into the case was made by Mr. L.S. Chavda, P.S.I., of Gondal Taluka, Police Station. Mr. Vijay J. Menad, who was then appointed as probationer P.S.I, assisted Mr. Chavad.

4. After conclusion of the investigation, the appellant was charge-sheeted for the offence punishable under section 302 of IPC. As the offence under Section 302 of IPC was exclusively triable by the Court of Sessions, the case was committed to the Court of learned Additional Sessions Judge, Gondal, District Rajkot, for trial. Charges were framed against the appellant under section 302 of IPC, to which she pleaded not guilty.

5. The prosecution examined 20 witnesses and also produced documentary evidence such as postmortem report of the deceased, dying declaration of the deceased recorded by Mr. Trivedi, complaint lodged by the deceased, different panchnamas etc. to prove its case against the appellant. After

recording of evidence of prosecution witnesses, the learned Judge recorded the statement of the appellant under Section 313 of the Criminal Procedure Code. The appellant denied the case of the prosecution, but did not examine any witness in support of her case.

6. The trial court held that the prosecution proved that the deceased died a homicidal death. The trial court found the FIR as well as dying declaration reliable and trustworthy. The trial court concluded that though it was proved that the appellant had set the deceased on fire, the medical evidence established that the injuries sustained by the deceased were not sufficient in the ordinary course of nature to cause her death and, therefore, the appellant committed offence punishable under Section 304 Part-II of IPC. Accordingly, by judgment and order dated 15.06.1985, the appellant was sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs. 3,000/-, in default, rigorous imprisonment for one year.

7. Being aggrieved by the Judgment and Order of conviction passed by the Hon'ble Additional Sessions Judge, Gondal in Case No. 15 of 1985, the State of Gujarat preferred an appeal being Criminal Appeal No. 1198 of 1985 under Section 378 of the Criminal Procedure Code before the High Court of Gujarat with contention that the intention of the appellant was to cause the death of the deceased as she very well knew that her act of setting fire to the terylene clothes put on by the deceased was so imminently dangerous that it would, in all probability, cause death of the deceased or such bodily injury as was likely to cause death of the deceased and, therefore, the appellant could not have been convicted for a lesser offence punishable under Section 304 Part-II of IPC but should have been convicted under Section 302 of IPC.

8. The High Court by its judgment and order dated 03.04.2001 held that the learned Additional Sessions Judge had misconstrued the provisions of Section 300 and Part-II of Section 304 of IPC and thereby arrived at a wrong finding that

the case of the appellant was a case within the meaning of Part II Section 304 of IPC. The High Court also held that the case of the accused is covered under Clause (4) of Section 300 of IPC and, therefore, passed an order of conviction of the appellant under Section 302 IPC for murder of her daughter-in-law and sentenced her to imprisonment for life. However, the fine of Rs. 3,000/- imposed by the Sessions Court was set aside. Hence, the appellant filed the present appeal.

9. Mr. M.R. Calla, learned senior counsel appearing for the appellant submitted that neither Section 302 of IPC nor clause (4) of Section 300 of IPC is applicable to the case as the appellant had no intention to inflict that particular bodily injury which, in the ordinary course of nature, was not sufficient to cause the death of the deceased. He submitted that the High Court should not have relied upon the dying declaration as the same was not recorded according to law nor did it comply with all the requirements so as to be the basis of conviction. He further submitted that the deceased did not die of burn injuries but died due to septicemia, which was not the direct result of the bodily injury received by the deceased.

10. The learned counsel for the State, on the other hand, supported the order of conviction and sentence passed by the High Court. He submitted that the High Court was correct and justified in relying upon the aforesaid dying declaration, which was duly and properly recorded by the Executive Magistrate.

11. Having heard the learned counsel appearing for the parties, we now proceed to analyse the entire material on record so as to ascertain whether or not the conviction and sentence passed against the appellant would and could be upheld.

12. After a careful analysis of the facts and circumstances of the case we find that it is not in dispute that the alleged incident took place in the morning of November 29, 1984 when the deceased was coming back with water pot on her head and

A her daughter on her waist. The allegation is that the appellant set her on fire with a burning wick made of rags consequent whereupon the deceased suffered burn injuries on the whole body and succumbed to her injuries on 07.12.1984 during the course of treatment. The dying declaration of the deceased, B which is produced by Mr. Trivedi, Executive Magistrate, at Exhibit 15 indicates that while deceased was returning home after fetching water, the appellant had set her terylene clothes on fire by means of a burning wick of rags. The factum of recording of the FIR as also the dying declaration is also not C disputed. As per the Judgment and Order of the Additional Sessions Judge, Gondal, the appellant/accused was taken into custody on 15.6.1985 to undergo the sentence and was released on 07.09.1989 on expiry of the sentence.

13. The post-mortem report of the deceased was placed D on record during the trial and Dr. Tarlikaben, who conducted the post-mortem examination was also examined as a witness in the trial. The said documentary and oral evidence of the doctor, as adduced, that he also treated the patient and conducted the post-mortem examination made it crystal clear E that the deceased remained under treatment in hospital for 8 days and died after 8 days of the incident in question. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the F deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

G 14. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and H

when she was returning, the appellant came and threw a burning tonsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tonsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC.

15. We find that the view taken by the trial court was a cogent and plausible view and, therefore, we hold that the conviction and sentence imposed by the trial court is justified. Considering the totality of the circumstances and the fact that the appellant is of 85 years of age and had undergone the sentence imposed by the trial court under the provisions of Section 304 Part II of IPC, we set aside the conviction and sentence of the appellant imposed by the High Court of Gujarat and restore the judgment and order passed by the trial court. Since the appellant has already undergone the sentence imposed by the trial court she shall not be re-arrested unless required in connection with any other case. Bail bonds shall stand discharged. This shall not be the precedent for other cases.

16. The appeal is allowed to the aforesaid extent.

D.G. Appeal partly allowed.