

**ABC 2019 (II) 90 GUJ
ACQUITTAL & BAIL CASES
HIGH COURT OF GUJARAT**

(J.B. Pardiwala & A.C. Rao, JJ.)
R/Criminal Appeal No. 1063 of 2018

With

R/Criminal Appeal No. 1 of 2019

Decided on 15 February, 2019

NAYNABEN ASHOKBHAI GAMIT

- Appellant(s).

Versus

STATE OF GUJARAT

- Respondent(s).

Law Covered :- Indian Penal Code, 1860 – Section 302 r/w 114 – Conviction under – Dying declaration – Condition of the deceased – was speaking gibberish & difficult to understand – No other corroborative evidence to support the dying declaration – Held, the surrounding circumstances create doubt about the capacity of the victim to say anything to the complainant – acquittal. (Para 30)

Held :- Considering the rival submissions and considering the fact that all the witnesses have stated in their cross examination that it was difficult to understand what victim was speaking and also he has fully regained consciousness, while other witnesses had stated that when the victim was brought out from the canal, he was unconscious and he was not able to even speak and move. As per the witnesses, after half an hour, the ambulance had appeared at the place of incident and the victim died before he could reach to the hospital. Even the father of the deceased - PW No.1 Ramanbhai Chimanbhai Gamit has admitted in his deposition that his son was speaking gibberish and with a difficulty, he could make out what was he speaking. There is no other corroborative evidence to support the dying declaration. The surrounding circumstances creates doubt about the capacity of the victim to say anything to the complainant. (Para-30)

Counsel:- For Appellant(s): Mr. Mr Bijal M Patel, Advs.

For Respondent(s): Mr. Ronak Raval, Mr Ronak Raval, Advs.

JUDGMENT

A.C. RAO, J.: - 1. The appellant of Criminal Appeal No.1 of 2019 - original accused No.1 and the appellant of Criminal Appeal No.1063

May 2019

a of 2018 - original accused No.3, have preferred both these appeals challenging the judgement and order of conviction and sentence passed by the Principal District & Sessions Judge, Vyara, District Tapi in Sessions Case No.2/2016 dated 22.1.2018 in connection with the FIR registered with Ukai Police Station bearing registration No.18/2015 dated 11/10/2015.

b 2. Both the accused along with other five accused were tried for the offence punishable under section 302 read with Section 114 of IPC and Section 135 of the Gujarat Police Act. The other five co-accused were acquitted while the appellants - original accused nos.1
c and 3 are convicted for the offence punishable under sections 302 read with section 114 of Indian Penal Code and sentenced to undergo life imprisonment with fine of Rs.10,000/- each, and in default, sentenced to undergo further imprisonment for a period of six months. The trial
d court acquitted appellants - original accused Nos.1 and 3 for the offence punishable under section 135(1) of the Gujarat Police Act. Hence, the appellants have preferred both these appeals challenging the judgement and order of conviction and sentence.

3. The case of the prosecution in nutshell is as under:-

e 4. That the complainant - Ramanbhai Chimanbhai Gamit of Bhimpura, Taluka Songadh, District Tapi, lodged the FIR being CR No.I-18 of 2015 on 11/10/2015 for the offence punishable under sections 302 read with section 114 of Indian Penal Code and under
f section 135(1) of the G.P. Act on 11.10.2015, alleging inter-alia that the he had received a message from one Mohanbhai Divaliyabhai Gamit on his mobile that his son is lying near the 'Navi' canal, nearby the road to 'Navi' Ukai. When he reached to the place of incident, Mohanbhai and other persons were taking his son in the ambulance. His nephew Nitinbhai Limjibhai Gamit and Kinsukhbhai Bhikhubhai
g Gamit were also present. On the way to the Songadh Government Hospital in ambulance, his son had regained consciousness and informed the complainant that his wife Naina, accused No.3 had beaten him with wooden stick while her cousin Gulalbai had also
h beaten him. Thereafter, his son Ashok lost his consciousness on the way of Songadh Hospital. When the ambulance reached near Vyara petrol pump, Doctor in the ambulance van had declared his son as dead. Thereafter, his son was taken to the Government Hospital, Vyara. The Doctor of Vyara Government Hospital had also declared his son as dead.

5. After lodgement of the FIR, investigating officer started investigation, recorded statements of the witnesses, prepared inquest panchnama, panchnama of the scene of offence, got performed postmortem report of the deceased etc. **a**

6. After completion of investigation, the investigating officer filed chargesheet against the accused under section 173 of the Code of Criminal Procedure in the court of competent Judicial Magistrate, First Class for the offence punishable under section 302 read with section 114 of IPC and under section 135 of Gujarat Police Act and the case was registered as Criminal Case. **b**

7. Since the case was triable by the Court of Sessions, the Judicial Magistrate, First Class, Songadh after providing copies of the chargesheet papers to the accused under section 208 of the CrPC, committed the case to the Sessions Court under section 209 of the Cr.P.C. and the case was registered as Sessions Case No.2 of 2016 in the Sessions Court, Vyara District Tapi. **c**
d

8. After verifying that the accused have received papers of the Chargesheet, the Sessions Court frame Charge at Ex.15 and Plea of the accused were recorded at Ex.Nos.16 to 22. The accused pleaded not guilty and therefore, the Sessions Court proceeded further with the trial in accordance with law. **e**

9. The prosecution adduced oral evidence and examined in all 20 witnesses and also produced 12 documentary evidence.

10. At the end of trial, the Sessions Court acquitted other accused, however, convicted the appellants herein - original accused Nos. 1 and 3 for the offence punishable under sections 302 read with section 114 of IPC and under section 135(1) of G.P. Act and sentenced them to undergo life imprisonment with fine of Rs.10,000/- each, and in default, sentenced to undergo further imprisonment for a period of six months. The trial court acquitted appellants - original accused Nos.1 and 3 for the offence punishable under section 135(1) of the Gujarat Police Act. **f**
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11. Against the judgement and order of conviction and sentence, the appellants - original accused Nos.1 and 3 have preferred both these appeals. **h**

12. Mr. Bijal Patel, learned counsel appearing for the appellant - original accused No.3 in Criminal Appeal No.1063 of 2018 and Mr.Prakash Pandya, learned counsel appearing for the appellant -

a original accused No.1 in Criminal Appeal No.1 of 2019, have vehemently submitted that though the prosecution has failed to prove the charge levelled against the appellants beyond reasonable doubt, the trial court has convicted the appellants erroneously. They have submitted that there is dying declaration but the same is full of doubt. They submitted that there is no independent evidence and the conviction cannot be based on oral dying declaration. They have submitted that the evidence of the witnesses are contradictory, some of the witnesses have stated that it was difficult to understand what victim was speaking, while others have stated that the victim had fully regained consciousness. Some of the witnesses have stated that when the victim was brought out of the canal, he was unconscious and he was not able to even speak and move and after half an hour, the ambulance had come at the place of incident and the victim had died before he could reach to the hospital. Thus, it is the case of the appellants that it would not be possible that victim had regained unconscious and told about the incident to the complainant and two witnesses. It is the case of the appellants that the dying declaration is surrounded by the doubt and not believable. They have submitted that there are contradictions in oral dying declaration. There is no other independent evidence to support the case of prosecution. They have submitted that the case is not proved against the appellants beyond reasonable doubts. Therefore, they have requested to quash and set aside the impugned judgement and order of conviction.

f 13. Per contra, learned APP Mr.Ronak Raval appearing on behalf of the respondent - State has vehemently opposed both these appeals. He has submitted that the trial court has convicted both the appellants after appreciating the evidence on record and the same is not perverse and therefore, no interference at the hands of this Court is required. He has submitted that there is also dying declaration of the deceased. The deceased has given dying declaration before the complainant and two witnesses. He has submitted to dismiss the appeal.

h 14. On perusal of the evidence on record, the following facts have emerged :-

15. The complainant PW-1 - Ramanbhai Chimanbhai Gamit is examined at Ex.40. In his cross examination, he has stated that his son had talked with him in gibberish and with a difficulty, he had made out that what his wife and Gulalbhai had done this. In the cross

examination by accused No.3, he has also admitted that he could not correctly understand what his son said as his son was semi conscious when he had talked with him. a

16. PW-2 Kinsukhbhai Bhikhabhai Gamit, who is examined at Ex.42, has admitted that when he reached to the place of incident, the victim was unconscious and in a serious condition. It took half an hour to reach the ambulance at the place of incident. He has also admitted that the victim - Ashok was in the canal and he was brought out from the canal. He has admitted that till the ambulance came, he was unconscious. In the cross examination, he has admitted that the victim had remained unconscious in the ambulance. b c

17. PW-3 Nitinbhai Limjibhai Gamit, who is examined at Ex.43, has admitted that when the victim was brought out from the canal and the till ambulance had reached, the victim was unconscious. He has denied in his cross examination that it is not true that the victim had not regained consciousness and he had not informed the complainant and him that who had inflicted injuries to him. d

18. PW-4 - Daudbhai Rupjibhai Gamit and PW-5 - Ramilaben Jalamsing Gamit, who are examined at Ex.Nos.44 and 45, respectively, and are the eye witnesses to the incident. However, they have not supported the case of the prosecution and they are declared hostile. e

19. PW-6 - Ankitbhai Amarsingbhai Gamit, who is examined at Ex.46, has stated that he was present at the place of offence when the deceased was taken to the hospital in the ambulance. So his evidence is not helpful to the prosecution. In his cross examination, he has stated that when he reached the place of offence, the victim was unconscious and he was not speaking or moving. f

20. PW-7 Mittalben Ashokbhai Gamit, who is examined at Ex.47, is daughter of the victim, was not present at the place of incident. g

21. PW-8 - Anilbhai Jalamsingbhai Gamit, who is examined at Ex.48, has not supported the case of the prosecution and is declared hostile. h

22. PW-9 - Pinalben Dipakbhai Gamit, who is examined at Ex.49, is owner of the motorbike which is allegedly used in commission of the alleged crime. He has only stated that the police has taken the custody of his motor cycle.

a 23. PW-10 - Dilesh @ Dilipbhai Gombhai Gamit, who is examined at Ex.50, has not supported the case of prosecution and he is declared hostile.

b 24. PW-11 - Jagubhai Surjibhai Gamit, who is examined at Ex.51, had reached the place of offence and he has found that the victim was unconscious and when the ambulance came, he was taken into the ambulance.

c 25. PW-12 - Ravibhai Navliyabhai Gamit, who is examined at Ex.52, has not supported the case of prosecution and he is declared hostile.

c 26. The evidence of PW-13 Ankitbhai Somabhai Gamit is hearsay evidence and not admissible in the eye of law.

d 27. PW-14 - Shankerbhai Nimbabhai Chauhan, PW-15 Kiranbhai Dilipbhai Chauhan, PW-16 Vikasbhai Somabhai Gamit and PW-17 Mohanbhai Divaliyabhai Gamit, who are examined at Ex.Nos.54, 57, 59 and 61, respectively, are panch witnesses and all of them have not supported the case of prosecution and they are declared hostile.

e 28. PW-18 Aalokkrushna Shrikrushna Chandak, who is examined at Ex.64, is a Doctor, who has performed the Postmortem of the deceased and according to his deposition, there were 11 external injuries and the cause of death of the victim was head injury and loss of blood. In his cross examination, he has admitted that if some one f jumped in a canal and dashed with the stone, such type of injury can be sustained.

g 29. PW-19 Naginbhai Dalabhai Chaudhary, who is examined at Ex.69, is a PSO who had registered the complaint while PW-20 Suryalal Mohanbhai Sadhu is Investigating Officer, who is examined at Ex.75.

h 30. Considering the rival submissions and considering the fact that all the witnesses have stated in their cross examination that it was difficult to understand what victim was speaking and also he has fully regained consciousness, while other witnesses had stated that when the victim was brought out from the canal, he was unconscious and he was not able to even speak and move. As per the witnesses, after half an hour, the ambulance had appeared at the place of incident and the victim died before he could reach to the hospital. Even the father of the deceased - PW No.1 Ramanbhai

Chimanbhai Gamit has admitted in his deposition that his son was speaking gibberish and with a difficulty, he could make out what was he speaking. There is no other corroborative evidence to support the dying declaration. The surrounding circumstances creates doubt about the capacity of the victim to say anything to the complainant. a

31. Under the circumstances, we find substance in the submission of the learned advocate appearing for the appellants that it would not be possible that victim had regained unconscious and told about the incident and the accused to the complainant and two witnesses. The dying declaration is surrounded by the doubt. In this regard, we would like to quote the judgment in the case of *Heikrujam Chaoba Singh v. State of Manipur reported in AIR 2000 SC 59* wherein Hon'ble Supreme Court has held as under: - b c

"An oral dying declaration no doubt can form the basis of conviction, though Court seek for corroboration as a rule of prudence. But before the said declaration can be acted upon, the Court must be satisfied about the truthfulness of the same and that the said declaration was made by the deceased while he was in a fit condition to make the statement. The dying declaration has to be taken as a whole and the witness who deposes about such oral declaration to him must pass the scrutiny of reliability." d e

32. Applying the above principle and considering the facts of the case on hand, we are of the view that the judgement and order conviction passed by the trial Court cannot sustain and benefit of doubt is required to be extended to the present appellants. f

33. Both the appeals are allowed. The impugned judgment and order of conviction and sentence passed by the Principal District & Sessions Judge, Vyara in the Sessions Case No.2 of 2016 dated 22/1/2018 is hereby quashed and set aside. The appellants herein - original accused Nos.1 and 3 are acquitted for the offences punishable under Sections 302 and 114 of the IPC. The appellants - accused be set at liberty forthwith if not required in any other case. g h

Result:- Appeals allowed.