IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL (AGAINST CONVICTION) NO. 1314 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE A.S. SUPEHIA Sd/-
and
HONOURABLE MR. JUSTICE VIMAL K. VYAS Sd/-

==

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

==

JAGATSINH PUNJESINH PARMAR
Versus
STATE OF GUJARAT

==

Appearance:
MR PV PATADIYA(5924) for the Appellant(s) No. 1
MR RONAK RAVAL, APP for the Opponent(s)/Respondent(s) No. 1

==

CORAM:**HONOURABLE MR. JUSTICE A.S. SUPEHIA**
and
HONOURABLE MR. JUSTICE VIMAL K. VYAS

Date : 03/05/2024
CAV JUDGMENT
(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)

1. The present appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 (for short "the Cr.P.C.) emanates from the judgement and order dated 06.08.2015 passed by learned 3rd Additional Sessions Judge, Sabarkantha at Modasa

Downloaded on : Mon May 06 14:43:32 IST 2024

in Sessions Case No.32 of 2014 convicting the appellant-original accused for the offence punishable under Sections 302 of the Indian Penal Code, 1860 and sentencing him for life imprisonment.

2. The facts leading to the appeal are as under:

3. It is the case of the prosecution that on 06.04.2015 at about 17:25 hours, the accused has murdered his children (minor) by administering poison in tea, biscuits and water. The complaint was given by the wife PW-1, Dakshaben Jagatsinh Parmar and the trial Court, after examination of 21 witnesses and documentary evidence has convicted the appellant and sentenced, as mentioned hereinabove.

SUBMISSIONS ON BEHALF OF ACCUSED

4. Learned advocate Mr.Patadiya has submitted that the trial Court has erred in convicting the appellant for the serious offence like murder without appreciating the evidence in its true perspective. He has submitted that there is no eye witness to the incident and most of the witnesses have turned hostile including the complainant. It is submitted that the appellant, who was the father of the minor children had no enmity or ill-will and hence, the prosecution has miserably failed in establishing the motive of

Downloaded on : Mon May 06 14:43:32 IST 2024

the crime. It is submitted that the prosecution has failed to prove the presence of the accused at the place of incidence and hence, the conviction of the appellant is illegal. Further, it is submitted that the doctor has opined that if the poison is administered, there are all chances of diarrhea however, nothing in this regard was found from the clothes of the children. It is submitted that all the panchas have turned hostile and evidence of other witnesses are hearsay. He has finally submitted that there is no evidence, which suggests that the children have died due to poison administered through tea and biscuits since the medical evidence does not refer to it but refers to some yellowish substance found from the stomach of the children-victims. Thus, it is urged that the present appeal may be allowed.

SUBMISSIONS OF LEARNED APP

5. Vehemently opposing the present appeal, learned APP has submitted that in fact, the medical evidence more particularly Post Mortem report of the victims concludes that both the minors have died due to poisoning. He has referred to Exh.18 i.e. PM report of minor Dhavalsinh and Exh.19 i.e. PM report minor Radhaben. He has referred to the evidence of PW-8, Lalsinh Kesarisinh Parmar at Exh.30, who has

Downloaded on : Mon May 06 14:43:32 IST 2024

supported the case of the prosecution. It is submitted that his evidence reveals that the complainant i.e. wife of the accused and mother of the children had told him that her children have died due to poison administered to them in tea and biscuits. He has also referred to the evidence of PW-9, Vijaykumar Ranjitsinh Parmar at Exh.31, who immediately rushed to the scene of offence after he was informed by the complainant and who has also supported the case of the prosecution. Further, he has referred to the FSL report at Exh.73 and has submitted that the same reveals that both the minors were murdered by administering poison. Thus, it is urged that the present appeal may not be entertained.

ANALYSIS OF EVIDENCE

6. Heard the learned advocates for the respective parties and also perused the documents as pointed out by them.

7. The case of the prosecution, as per the charge at Exh.3, is that on 06.04.2014, at around 9 o'clock the accused has administered poison to his minor children (son Dhavalsinh aged 3 years and daughter Radhaben aged 2 years) through tea, biscuits and water.

Downloaded on : Mon May 06 14:43:32 IST 2024

8. At the outset, we may refer to the PM report of the children, which reveals following findings:

> *"The final cause of death is due to organophospharus (Non thio) poisoning."*

9. We may also refer to the FSL report at Exh.73. The same reveals that the samples at C, E, F, G, I, K, L1, L2, L3, M1, M2 and M3 contain organophospharus (Non thio) and dichlorvos poisoning. PW-2, Dr.Manishaben Rathod, who has undertaken the post mortem of the minor is examined at Exh.17, and has proved the findings of the post mortem report. She has categorically stated that both the minors have died due to poison, which had spread in various parts of their body.

10. The abovementioned are the samples of vomit collected from the scene of offence i.e. the samples of rice (khichdi), clothes, bloods, viscera (part of lever), lungs, kidney, L3 viscera, part of stomach and small intestine, steel glass. From the aforesaid medical evidence, unquestionably, it is established that both the minors, who were 2 and 3 years of age have died due to poison administered to them.

11. PW-1, the complainant, is the wife of the accused and also the mother of the children is

Downloaded on : Mon May 06 14:43:32 IST 2024

examined at Exh.15. It is very shocking and disturbing to note that she has not supported the case of the prosecution. We may at this stage, refer to her complaint at Exh.16. In her complaint dated 06.04.2014, she has narrated the incident to the effect that the accused, who is her husband, is a drunkard and after marriage, she was blessed with children Dhavalsinh and Radhaben and were staying at her in-laws’ house. It is narrated by her that her husband was staying idle and she used to time and again ask him to do some work, but he would not do so and frequently quarreled with her. She has further stated that in-laws and family members also used to time and again ask her husband to do some work however, he did not improve and hence, after quarrel with her husband, 4 days before the incident, she went to her parental house with both the children. It is narrated by her that in the evening at 7 o'clock, the accused had come to her parental house and had stayed at the night. It is narrated that on the day of the incident at around 8 o'clock, her brothers, sister and mother had gone for doing labour work and her father had gone to Modasa and she was at her home with her two minor children alongwith the accused-husband and at around 9 o'clock, her husband went to the shop and brought biscuits, which he gave to her children alongwith tea, and thereafter, gave them water to drink. It is stated by her that, after

Downloaded on : Mon May 06 14:43:32 IST 2024

few moments, her children started vomiting and she suspected poisoning and accordingly, she immediately inquired from her husband as to what he has given them to eat however, he immediately left from the home to the village. It is stated that when her children were vomiting, she raised alarm and from the neighbour, her aunt-Masi Laluben Rajusinh parmar, her uncle-Masa Rajusinh Sardarsinh Parmar as well as other villagers had gathered and immediately, she alongwith her children went to Modasa dispensary however, both the children had passed away on the way. She has further stated that accordingly, her parents had come home and informed the police about the death of the children. She has admitted that she has compromised with the accused. Though her evidence reveals that she has turned hostile and not supported the case of the prosecution, she has admitted that she had also taken tea along with her children, which was brought by her husband. Such admission has been made by her to mislead the trial court.

12. The prosecution has thereafter, examined PW-8, Lalsinh Kesarising Parmar at Exh.30. In his deposition before the trial Court, he has categorically deposed that when he returned from the field, he saw her nephew-first informant crying and she informed that something has happened to her children and she urged to go to

Downloaded on : Mon May 06 14:43:32 IST 2024

the hospital and accordingly, both the children were taken to the hospital and they were examined by Dr.Vishnubhai however, he refused to do so and thereafter, they had taken them to further dispensary and her daughter was constantly vomiting. He has deposed that during the treatment, both the children had passed away and at that time, on inquiring from the complainant, she had specifically stated that *"my husband Jagatsinh has administered poison to her children through biscuits"*. He has also deposed that the accused was a habitual drunkard and used to regularly assault his nephew-complainant and hence, she was staying at her parental home. He has further deposed that one day prior to the incident and on the very same day in the evening, the accused came to Gajan village, where the complainant was staying. We do not find any major contradiction or over implication in his deposition and he has proved himself to be a trustworthy witness.

13. Next is PW-9 Vijaykumar Ranjitsinh Parmar at Exh.31, who is also a relative of the complainant. He has deposed that the accused was a habitual drunkard and used to quarrel with the complainant and hence, she had returned to her parental home at village Gajan. He has stated that on the day of incident, he was present at shop near the house of the complainant and at

Downloaded on : Mon May 06 14:43:32 IST 2024

that time, the complainant while crying had approached him and informed him that something has happened to her daughter Radhaben and it is stated that at that time, he along with PW-8, Lalsinh Parmar had taken her daughter on motorcycle to Modasa dispensary and after an initial treatment, daughter Radhaben passed away and they returned to village with her dead body. He has stated that the complainant had informed him that the accused had administered poison to her children through tea and biscuits, which was given to them by him. He has also referred that the accused had come to the village one day prior to the incident at the evening. He has supported the case of the prosecution and we find him as reliable witness.

14. PW-7, Laluben Rajusinh Parmar, who is the real aunt of the complainant and is also the neighbour. She has deposed that the accused was present at her sister’s home (Shardaben-mother of the first informant) on the day of the incident. She has stated that both the minor had started vomiting. She has stated that the minor girl was taken to the hospital, whereas the minor boy died at home, and the accused went away from the home. She has thereafter, deposed that she is not aware that how the incident has occurred. She has been declared hostile. Though, she is declared hostile

Downloaded on : Mon May 06 14:43:32 IST 2024

from her evidence it can be culled out that the accused was present, when the incident has occurred, and he has left thereafter.

15. The medical evidence indubitably reveals that both the children have died due to poison, which was administered to them. It is also revealed that the accused was present at the parental home of the complainant and stayed at night. Though the complainant has turned hostile, the evidence of PW-8 and PW-9 become very relevant and the same require acceptance under the provision of Section 6 of the Evidence Act, 1872 by invoking the principle of *Res Gestae*. At this stage, We may refer to the decision of the Apex Court in case of *Balu Sudam Khalde Vs. State of Maharashtra*, 2023 AIR SC 1736. The Apex Court in context of principle of *Res Gestae* embodied in Section 6 of the Evidence Act has held thus:

> ***"47*** *The reason for referring to the aforesaid a piece of evidence is that the PW 3 Nasir Rajjak Khan (Exh. 10) could be termed as a res gestae witness. This principle of res gestae is embodied in Section 6 of the Act 1872:*
>
> > *"6. Relevancy of facts forming part of same transaction.Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and place."*
>
> ***48*** *In the case of Sukhar v. State of U.P. reported in (1999) 9 SCC 507, this Court noticed the position of law with regard to Sections 6 & 7 resply of the Act 1872 thus:*

Downloaded on : Mon May 06 14:43:32 IST 2024

"6. Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of res gestae, must have been made contemporaneously with the acts or immediately thereafter. The aforesaid rule as it is stated in Wigmore's Evidence Act reads thus:

> *"Under the present exception [to hearsay] an utterance is by hypothesis, offered as an assertion to evidence the fact asserted (for example that a car-brake was set or not set), and the only condition is that it shall have been made spontaneously, i.e. as the natural effusion of a state of excitement. Now this state of excitement may well continue to exist after the exciting fact has ended. The declaration, therefore, may be admissible even though subsequent to the occurrence, provided, it is near enough in time to allow the assumption that the exciting influence continued."*

7. Sarkar on Evidence (Fifteenth Edition) summaries the law relating to applicability of Section 6 of the Act 1872 thus:

> *"1. The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto unless such facts are part of a transaction which is continuous.*
>
> *2. The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past.*
>
> *3. The declaration and the act may be by the same person, or they may be by different persons, e.g., the declarations of the victim, assailant and bystanders. In conspiracy, riot, the*

Downloaded on : Mon May 06 14:43:32 IST 2024

> *declarations of all concerned in the common object are admissible.*
>
> *4. Though admissible to explain or corroborate, or to understand the significance of the act, declarations are not evidence of the truth of the matters stated.""*

> ***49.*** *The rule embodied in Section 6 is usually known as the rule of res gestae. What it means is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. To form particular statement as part of the same transaction utterances must be simultaneous with the incident or substantial contemporaneous that is made either during or immediately before or after its occurrence."*

16. The Apex Court has held that to form particular statement as part of the same transaction, the utterances must be simultaneous with the incident or substantial contemporaneous that is made either during or immediately before or after its occurrence. In the instant case, both of them had immediately rushed to the scene of offence. PW-8 had specifically stated that when he asked the complainant about the death of the children, she had specifically narrated that they had died due to the poison administered by the accused in tea and biscuits, which was given by him to the children. Thus, the evidence of both the aforesaid witnesses cannot be ignored, and they become very relevant for establishing the complicity of the accused in offence.

17. The conduct of the accused is also required to be taken into consideration under the

Downloaded on : Mon May 06 14:43:32 IST 2024

provisions of Section 8 of the Evidence Act. By virtue of section 8 of the Evidence Act, the conduct of the accused is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. Unquestionably, the evidence establishes the presence of the accused at the home of the first informant. He was present, when his minor children started vomiting however, he fled away from the scene of offence leaving his children in abysmal illness. He did not make any attempt to see that his minor children are immediately attended medical help. Thus, his conduct of fleeing away after leaving his children in such a dire condition is a relevant fact, which goes against him.

18. Thus, on the overall appreciation of the evidence, we are of the firm opinion that the appellant has committed a heinous offence of murdering his minor children without any motive, reason or any type of instigation. The children have suffered immense agony on their final journey of life, which has been cut short by the accused. The appellant is not worthy of any leniency; hence we find that the trial court has precisely convicted the accused for heinous offence of double murder of his children. The case of the appellant will squarely fall under clause thirdly of section 300 of IPC which defines murder, hence resultant, it will attract

Downloaded on : Mon May 06 14:43:32 IST 2024

the punishment prescribed under section 302 of IPC.

19. We have seriously noted the atrocious conduct of the complainant- PW-1, Daxaben Parmar, the mother of minors. She has taken total *volte face* while giving the evidence before the trial court and has resiled from her initial statement. She has admitted that she has compromised with her husband. Being a mother of two she appears to be ignorant of spirit of creation. In our opinion, the trial court should have resorted to the provisions of section 344 or 340 of Cr.PC for committing perjury. We are also conscious of the fact that the merely a witness has made a contradictory statement is not by itself sufficient to justify prosecution under Sections 193 of the Penal Code, but it must be shown that the witnesses examined by the prosecution have intentionally given a false statements or fabricated false statements. In the case on hand, we are, *prima facie*, convinced that the witnesses deliberately resiled from their previous statements only with a view to save the accused-husband and gave false evidence. Hence, in the interest of justice, appropriate proceedings are required to be initiated against her.

20. In view of the above, we direct learned Additional Sessions Judge, Sabarkantha at Modasa

Downloaded on : Mon May 06 14:43:32 IST 2024

to initiate criminal proceedings against the PW-1, Daxaben Jagatsinh Parmar under the appropriate provisions for intentionally giving contradictory and false statements on oath before the Court.

21. The Registry is directed to forward a copy of this judgment to learned Additional Sessions Judge, Sabarkantha at Modasa to act in accordance with the directions issued in paragraph No.20 hereinabove.

22. Under the circumstances, and in light of the aforementioned facts, the present appeal fails.

Record & Proceedings to be sent back.

Sd/-
(A. S. SUPEHIA, J)

Sd/-
(VIMAL K. VYAS, J)

NVMEWADA/73

Downloaded on : Mon May 06 14:43:32 IST 2024