Koli Chunilal Savji & Anr vs State Of Gujarat on 29 September, 1999

Equivalent citations: AIR 1999 SUPREME COURT 3695, 1999 (9) SCC 562, 1999 AIR SCW 3727, 1999 (10) SRJ 156, 1999 CRILR(SC MAH GUJ) 773, 2000 (1) UJ (SC) 437, 2000 UJ(SC) 1 437, 1999 (6) SCALE 267, 2000 (3) LRI 134, 2000 SCC(CRI) 432, 1999 (8) ADSC 426, 1999 CRIAPPR(SC) 513, 1999 CRILR(SC&MP) 773, 1999 ADSC 8 426, (1999) 7 JT 568 (SC), (1999) 4 CURCRIR 74, (1999) 3 CHANDCRIC 24, (2000) MATLR 70, (1999) 4 RECCRIR 594, (1999) SC CR R 926, (2000) 4 GUJ LR 3298, (1999) 2 GUJ LH 859, (1999) 3 SCJ 437, (1999) 8 SUPREME 717, (1999) 26 ALLCRIR 2231, (1999) 6 SCALE 267, (1999) 39 ALLCRIC 835, (2000) 1 ALLCRILR 696, (1999) 4 CRIMES 280, AIRONLINE 1999 SC 705

Author: M.Srinivasan

Bench: M.Srinivasan

PETITIONER:
KOLI CHUNILAL SAVJI & ANR.

Vs.

RESPONDENT:
STATE OF GUJARAT

DATE OF JUDGMENT: 29/09/1999

BENCH:
G.B.Pattanaik, N.Santosh Hedge, M.Srinivasan

JUDGMENT:

PATTANAIK, J.

These two appeals arise out of Judgment dated 21/24.6.1996 of the High Court of Gujarat at Ahmedabad in Criminal Appeal Nos. 236 and 105 of 1989 and are being disposed of by this common Judgment. The two appellants were tried for having committed an offence under Section 302/34 IPC on the allegation that on 28.6.84 at 4 A.M., while deceased Dhanuben was sleeping on her bed, the two accused persons namely her husband and mother-in-law poured kerosene and set fire with match box. Along with the deceased, her son Ajay was also there and both, the deceased and Ajay

were burnt. They were taken to the hospital for treatment. In the hospital, Police recorded the statement of Dhanuben which was treated as F.I.R. and then after registering the case, investigation started. In the hospital, both Dhanuben and her son Ajay died and as such the accused persons stood charged for offence under Sections 498A and 302/34 of the IPC. Apart from the statement by deceased Dhanuben to PW 14, which was treated as F.I.R., a Magistrate also recorded her statement which was treated as a dying declaration. On scrutiny of the prosecution evidence, the learned Sessions Judge did not rely upon the dying declaration made by the deceased Dhanuben and in the absence of any other evidence to connect the accused appellants with the murder of the deceased, acquitted them of the charge under Section 302/34 IPC. The learned Sessions Judge however came to the conclusion that the offence under Section 498A has been established beyond reasonable doubt and as such convicted them under the said Section and sentenced them to rigorous imprisonment for two years and imposed a penalty of Rs.250/-, in default, further imprisonment for two months. The State of Gujarat preferred an appeal against the acquittal of the accused persons of the charge under Section 302/34 IPC and the accused persons preferred appeal against their conviction under Section 498A. The High Court by the impugned Judgment set aside the order of acquittal, relying upon the two dying declarations Exh. 45 and Exh. 41 and convicted the appellants of the charge under Section 302/34 IPC and States appeal was allowed. The appeal filed by the accused persons, assailing their conviction under Section 498A however stood dismissed and the conviction under Section 498A and the sentence passed thereunder was maintained. It may be stated that while admitting the appeal of the accused persons against their conviction under Section 498A, the High Court had suo motu issued notice as to why the sentence imposed for the offence punishable under Section 498A should not be enhanced. But while disposing of the criminal appeals, the High Court did not think it proper to enhance the sentence and accordingly notice of enhancement stood discharged.

On the basis of the post-mortem report conducted on the dead bodies of Dhanuben and her son Ajay and the evidence of doctor PW9, who conducted the autopsy over the dead bodies, the conclusion is irresistible that both the persons died on account of burn injuries but the defence however raised a contention that the two persons died on account of suicide and the house was set fire by the deceased herself. The prosecution witnesses to whom deceased had made oral dying declaration, implicating the accused persons, did not support the prosecution during trial and, therefore, with the permission of the Court the Public Prosecutor cross- examined them. The High Court accordingly, placed no reliance on their testimony. The High Court however examined the two dying declarations namely Exh.45, recorded by the Sub-Inspector PW14 and the dying declaration Exh.41, recorded by the Magistrate PW12 and came to the conclusion that both these dying declarations are truthful and voluntarily made and, therefore, can safely form the basis of conviction of the accused persons under Section 302/34 IPC. With the aforesaid conclusion the order of acquittal passed by the learned Sessions Judge of the charge under Section 302/34 was set aside and the accused appellants were convicted of the said charge and were sentenced to imprisonment for life. The High Court also relying upon the dying declaration and other materials, further came to the conclusion that the prosecution case, so far as the charge under Section 498A IPC is concerned, has been proved beyond reasonable doubt and, therefore, upheld the conviction and sentence passed thereunder by the learned Sessions Judge.

Mr. Keshwani, the learned counsel appearing for the appellants argued with vehemence that the two dying declarations cannot be relied upon inasmuch as the doctor was not present while the dying declaration was recorded by the Magistrate and further, there is no endorsement by the doctor, indicating the mental condition of the deceased to the effect that she was in a fit condition to make the statement. The learned counsel also further urged that the doctor himself has not been examined in this case which makes the position worse. Mr. Keshwani also made a submission that the deceased was surrounded by her own relations before the dying declaration was recorded by the Magistrate and as such had sufficient opportunity to be tutored and consequently the dying declaration recorded by the Magistrate becomes vitiated. Mr. Keshwani also submitted that the incident having taken place at 4 A.M. and the dying declaration having been recorded by the Magistrate at 9 A.M., five hours after the occurrence, there has been gross delay which makes the dying declaration doubtful and as such should not have been accepted. Mr. Keshwani lastly submitted that the learned Sessions Judge having recorded an order of acquittal, the same should not have been interfered with by the High Court without justifiable reasons and on this score also the conviction of the appellants under Section 302/34 IPC cannot be sustained.

The learned counsel appearing for the respondent State, on the other hand submitted that the dying declaration which has been relied upon by the High Court in the facts and circumstances, has been rightly held to be truthful and voluntary one and, therefore, in law, can form the sole basis of conviction. She also contended that though endorsement of the doctor and presence of the doctor is ordinarily looked for but merely on that score the dying declaration recorded by the Magistrate cannot be held to be an untruthful one. Besides, the learned counsel submitted that the doctor did make an entry in the Police yadi, indicating that the deceased was in a fit condition to make any statement and it is he, who took the Magistrate to the deceased and non-endorsement by the doctor on the statement recorded by the Magistrate cannot be held to be fatal nor can any doubt arise on that score. The learned counsel further contended that the power of the High Court against an order of acquittal is the same as against an order of conviction and while setting aside an order of acquittal, it is necessary for the Appellate Court to look at the reasoning given by the trial Judge and be satisfied whether those reasoning are just and proper or not. The reasoning given by the learned Sessions Judge to discard the two dying declarations having been found by the High Court to be wholly unreasonable and, therefore, the High Court was fully entitled to interfere with the conclusion of the learned Sessions Judge and no infirmity can be found out on that score.

Coming to the affirmation of conviction under Section 498A, while Mr. Keshwani, appearing for the accused appellants submitted that on this scanty evidence, the Courts could not have convicted the accused persons of the said charges, the learned counsel for the respondent submitted that both the Courts have analysed the evidence fully and having found that the charge under Section 498A IPC has been proved beyond reasonable doubt, question of interfering with the said conviction does not arise.

In view of the rival submissions made at the Bar, two questions really arise for our consideration. (1) Whether the two dying declarations can be held to be true and voluntary and can be relied upon or can be excluded from consideration for the infirmities pointed out by Mr. Keshwani, appearing for the appellants. (2) Whether the High Court exceeded its jurisdiction in interfering with the order of

acquittal, recorded by the learned Sessions Judge.

Coming to the first question, the answer to the same would depend upon the correctness of the submission of Mr. Keshwani, that in the absence of doctor while recording the dying declaration, the said declaration loses its value and cannot be accepted. Mr. Keshwani in this connection relies upon the decision of this Court in the case of Maniram vs. State of Madhya Pradesh, AIR 1994 SC 840. In the aforesaid case, no doubt this Court has held that when the declarant was in the hospital itself, it was the duty of the person who recorded the dying declaration to do so in the presence of the doctor and after duly being certified by the doctor that the declarant was conscious and in senses and was in a fit condition to make the declaration. In the said case the Court also thought it unsafe to rely upon the dying declaration on account of aforesaid infirmity and interfered with the Judgment of the High Court. But the aforesaid requirements are mere a rule of prudence and the ultimate test is whether the dying declaration can be held to be a truthful one and voluntarily given. It is no doubt true that before recording the declaration, the concerned officer must find that the declarant was in a fit condition to make the statement in question. In Ravi Chander and Ors. vs. State of Punjab, 1998 (9) SCC 303, this Court has held that for not examining the doctor, the dying declaration recorded by the Executive Magistrate and the dying declaration orally made need not be doubted. The Court further observed that the Executive Magistrate is a disinterested witness and is a responsible officer and there is no circumstance or material on record to suspect that the Executive Magistrate had any animus against the accused or in any way interested in fabricating the dying declaration and, therefore, the question of genuineness of the dying declaration recorded by the Executive Magistrate to be doubted does not arise. In the case of Harjit Kaur vs. State of Punjab 1994(4) SCALE 447, this Court has examined the same question and held:

> ..As regards the condition of Parminder Kaur, the witness has stated that he had first ascertained from the doctor whether she was in a fit condition to make a statement and obtained an endorsement to that effect. Merely because that endorsement was made not on the Dying Declaration itself but on the application, that would not render the Dying Declaration suspicious in any manner.
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> In view of the aforesaid decisions of this Court, we are unable to accept the submission of Mr. Keshwani that the two dying declarations cannot be relied upon as the doctor has not been examined and the doctor has not made any endorsement on the dying declaration. With regard to the condition of the deceased, the Magistrate who recorded the dying declaration has been examined as a witness. She has categorically stated in her evidence that as soon as she reached the hospital in the Surgical Ward of Dr. Shukla, she told the doctor on duty that she is required to take the statement of Dhanuben and she showed the doctor the Police yadi. The doctor then introduced her to Dhanuben and when she asked the doctor about the condition of Dhanuben, the said doctor categorically stated that Dhanuben was in a conscious condition. It further appears from her evidence that though there has been no endorsement on the dying declaration recorded by the Magistrate with regard to the condition of the patient but there has been an endorsement on Police yadi, indicating that Dhanuben was fully conscious. In view of the aforesaid evidence of the

Magistrate and in view of the endorsement of doctor on the Police yadi and no reason having been ascribed as to why the Magistrate would try to help the prosecution, we see no justification in the comments of Mr. Keshwani that the dying declaration should not be relied upon in the absence of the endorsement of the doctor thereon. In this particular case, the police also took the statement of the deceased which was treated as F.I.R., and the same can be treated as dying declaration. The two dying declarations made by the deceased at two different point of time to two different persons, corroborate each other and there is no inconsistency in those two declarations made. In this view of the matter, we have no hesitation to come to the conclusion that the two dying declarations made are truthful and voluntary ones and can be relied upon by the prosecution in bringing home the charge against the accused persons and the prosecution case must be held to have been established beyond reasonable doubt. Consequently, we have no hesitation in rejecting the first submission of Mr. Keshwani. In this connection, it may be appropriate for us to notice an ancillary argument of Mr. Keshwani that there has been an inordinate delay on the part of the Magistrate to record the dying declaration and, therefore, the same should not be accepted. As we find from the records, the incident took place at 4 A.M. and the Magistrate recorded the dying declaration at 9 A.M., in our opinion, it cannot be said that there has been an inordinate delay in recording the statement of the deceased. Mr. Keshwani had also urged that when the Magistrate recorded the dying declaration, the deceased had been surrounded by her relations and, therefore, it can be assumed that the deceased had the opportunity of being tutored. But we fail to understand how this argument is advanced inasmuch as there is no iota of evidence that by the time the Executive Magistrate went, the deceased was surrounded by any of her relations. No doubt the Magistrate herself has said that three or four persons were there near the deceased whom she asked to go out but that they were the relations of the deceased, there is no material on record. We, therefore, have no hesitation to reject the said submission of Mr. Keshwani.

Coming now to the second question, the law is well settled that the power of the High Court while sitting in appeal against an order of acquittal is the same, as the power while sitting in appeal against the conviction and the High Court, therefore would be fully entitled to re-appreciate the materials on record and in coming to its own conclusion. The only compulsion on the part of the Appellate Court is to bear in mind the reasons advanced by the learned Sessions Judge, while acquitting the accused and indicate as to why those reasons cannot be accepted. This being the parameter for exercise of power while entertaining an appeal against the order of acquittal and in view of our conclusion and finding that the two dying declarations were truthful ones and voluntarily made, we see no infirmity with the impugned judgment of the High Court in setting aside an order of acquittal. On going through the Judgment of the Sessions Judge, we find that the learned Sessions Judge erroneously excluded the two dying declarations from purview of consideration and therefore, the High Court was justified in interfering with the order of acquittal. If the order of acquittal is based upon the grounds not sustainable, the Appellate Court would be justified in

interfering with the said order of acquittal. Consequently, we are of the opinion that in the facts and circumstances of the present case, the High Court was fully justified in interfering with the order of acquittal recorded by the Sessions Judge and as such the conviction of the appellant under Section 302/34 IPC is unassailable. Coming to the question of conviction under Section 498A IPC, as has been stated earlier, the learned Sessions Judge also convicted the appellant of the said charge and the High Court on re-appreciation, has affirmed the conviction and sentence passed thereunder and nothing has been brought to our notice to take a contrary view. In the net result, therefore, these appeals fail and are dismissed.