REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2109 OF 2009

YOMESHBHAI PRANSHANKAR BHATT **Appellant (s)**

VERSUS

STATE OF GUJARAT **Respondent(s)**

J U D G M E N T

GANGULY, J.

Heard learned counsel for the parties.

Some important questions have come up for consideration in this case.

This appeal is against the concurrent finding of both the courts convicting the appellant under Section 302 IPC and sentencing him to suffer imprisonment for life. The judgment of the Trial Court was rendered by the Additional Sessions Judge at Vadodara in Sessions Case No. 275 of 2001 by judgment and order dated 16.8.2001. The High Court by judgment and order dated 17.3.2009 in Criminal Appeal No. 815 of 2001 affirmed the same.

At the stage of SLP, this Court by an order dated 27.7.2009 issued notice only confined to the question as to

whether the petitioner is guilty for commission of an offence under any of the parts of Section 304 of the Indian Penal Code and not under Section 302 thereof.

Learned counsel for the appellant urged that though at the time of issuing notice, this Court limited its rights to raise points only within the confines of Section 304 of Indian Penal Code, the Court is not bound at the time of final hearing with that direction given while issuing notice and the appellant is entitled to urge all questions including his right to urge that he should have been acquitted in the facts and circumstances of the case. Before examining the correctness of the aforesaid submission, we are inclined to look into the rules of this Court. The Supreme Court Rules, 1966 (hereinafter referred to as "the rules") which have been framed under Article 145 of the Constitution are relevant in connection with this inquiry. It has been held by this Court that the power of Supreme Court to make Rules to regulate its own procedure is only subject to two limitations:

(i)**These rules are subject to laws made by Parliament. [See Rodemadan India Ltd., v. International Trade Expo Centre Ltd., (2006) 11 SCC 651.]**

(ii)**These rules, being in the nature of subordinate legislation, cannot override the Constitutional provision. [See Prem Chand Garg and another v. Excise Commissioner, U.P. and others, AIR 1963 SC 996]**

However, these rules are intended to govern the practice and procedure of this Court.

Article 145 of the Constitution provides that subject to the provisions of any law made by Parliament, the Supreme Court,

may from time to time, with the approval of the President, make rules for regulating the general practice and procedures of the court including the matters which are enumerated as follows:-

(a) rules as to the persons practising before the Court;

(b) rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered;

(c) rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III;

(cc)[rules as to the proceedings in the Court under [article 139A];

(d) rules as to the entertainment of appeals under sub-clause (c) of clause (1) of article 134;

(e) rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered;

(f) rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein;

(g) rules as to the granting of bail;

(h) rules as to stay of proceedings;

(i) rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay;

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We are not concerned here with other sub-articles of Article 145. The rules which have been thus framed by this Court under the constitutional provision must be read in understanding the scope of its power under Article 142 of the Constitution. Article 142 of the Constitution provides as follows:-

> **142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc. (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribed.**
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> **2. Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.**

The provision of Article 142 of the Constitution have been construed by this Court in several judgments. However, one thing is clear that under Article 142 of the Constitution, this Court in exercise of its jurisdiction may pass such decrees and

may make such orders as is necessary for doing complete justice in any case or matters pending before it. It is, therefore, clear that the court while hearing the matter finally and considering the justice of the case may pass such orders which the justice of the case demands and in doing so, no fetter is imposed on the court's jurisdiction except of course any express provision of the law to the contrary, and normally this Court cannot ignore the same while exercising its power under Article 142.

An order which was passed by the court at the time of admitting a petition does not have the status of an express provision of law. Any observation which is made by the court at the time of entertaining a petition by way of issuing notice are tentative observations. Those observations or orders cannot limit this court's jurisdiction under Article 142.

If we look at the rules, it is also clear from the Order XLVII Rule 6, that the inherent powers of the Court are saved under the Rules. The provision of Order XLVII Rule 6 are set out to demonstrate the same.

> **"Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."**

Order XLVII Rule 1 is almost to the same effect and is set out below:-

> **"The Court may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these rules, and may give such**

directions in matters of practice and procedure as it may consider just and expedient."

In view of this position under the rules and having regard to the constitutional provision under Article 142, we do not think that this Court at the time of final hearing is precluded from considering the controversy in its entire perspective and in doing so, this Court is not inhibited by any observation in an order made at the time of issuing the notice.

Observation to that effect has been made in a judgment of this Court in the case of State of Uttaranchal vs. Alok Sharma and others reported in 2009(7) SCC 647. In paragraph 31 at page 658, this Court, after making an express provision to Article 142 held as follows:-

> **"So far as civil appeal arising out of SLP(C) No. 6451 of 2005 and civil appeal arising out of SLP(C) no. 8239 of 2005 are concerned, although limited notice having been issued confining the case to back wages, but keeping in view the order passed in the other cases, we are of the opinion that the said order shall be recalled and leave on all points should be granted. The respondents being placed similarly should not, in our opinion, be treated differently. This order is being passed in exercise of our jurisdiction under Article 142 of the Constitution of India. However, we make it clear that if any amount has been paid to the said respondents, the same should not be recovered. The appeals are allowed with the aforementioned directions. No costs."**

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By way of analogy we may refer to the provision of Section 100 of Civil Procedure Code. Section 100 runs as follows:-

> **100. Second Appeal. (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.**
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> (2) **An appeal may lie under this section from an appellate decree passed *ex-parte*.**
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> **(3) In an appeal under this Section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.**
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> **(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.**
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> **(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:**

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

Proviso to Section 100 of the Code makes it clear that

the powers of High Court cannot be fettered to hear a second appeal on a question which was not formulated by it at the time of admitting a second appeal, if the case involves any other question. So far as the High Court is concerned, the same has been statutorily recognised under Section 100 in the case of Second Appeal. In the case of this Court, the same has been constitutionally provided in Article 142.

We are, therefore, entitled to consider the plea of the appellant for acquittal despite the fact that at the time of issuing notice, it was limited in terms of the order dated 27.7.2009.

We, however, make it clear that this cannot be a universal practice in all cases. The question whether the Court will enlarge the scope of its inquiry at the time of final hearing depends on the facts and circumstances of the case. Since in the facts of this case, we find that the appellant should be heard on all points, we have come to the aforesaid conclusion.

Now, coming to the facts of the case, we find that broadly in the case against the appellant, there is no eye-witness. The facts are that the deceased was working in the house of the appellant as a maid. She was absent from her duties and the appellant went to her house, which is at a nearby area from the house of the appellant, to call her to join her duties as a maid. It is nobody's case that the appellant went to the house of the deceased, being armed with any weapon or he was carrying any inflammable substance. Therefore, any pre-meditation on the part of the appellant in causing any bodily harm or injury to the deceased is admittedly ruled out.

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The appellant went to the house of the deceased being accompanied by one Alpesh. In the house of the deceased, an altercation ensued between the appellant and the deceased as the deceased was refusing to come and join her work as a maid presumably on the ground that the amount of Rs. 375/- per month which was paid by the appellant to the deceased by way of remuneration was very low. The appellant had stated by way of defence that the deceased had taken a loan of Rs. 10,000 from the appellant and the appellant wanted the deceased to return the same. However, this defence has not been accepted either by the trial court or the High Court. Admittedly, an altercation followed and it is alleged that the appellant on the spur of the moment, went to the deceased and gagged her mouth. The further prosecution case is that the deceased was cooking at the time when the appellant went to her house. A can of kerosene was lying nearby and the appellant almost emptied the can of kerosene on the deceased and lit the match stick. Surprisingly, Alpesh who accompanied the appellant to the house of the deceased ran away before the incident of burning had taken place and he was not examined by the prosecution at all. The only two other witnesses in this case are PW 1 husband of the deceased and PW 2 the elder sister-in-law of the deceased. PW 2 came to the place of occurrence after hearing the shouts of the deceased and made arrangements for taking the deceased to the doctor for treatment. Both PW 1 husband of the deceased and PW 2 Kanta Ben, who made arrangements for taking the deceased for medical treatment were declared hostile. PW 1, the husband of the deceased, in his evidence submitted that the deceased had suicidal tendencies in the past.

The case is, therefore, entirely based on circumstantial evidence and the statement of the deceased in more than one dying declarations. The first dying declaration appears to have been

recorded when PW 2 Kanta Ben took the deceased to hospital at 0330 hours wherein the doctor said that the deceased was fully conscious and had informed the doctor that the appellant had sprinkled kerosene on her at 0200 hours at her residence when she was doing her work and set her on fire with a match stick. The second was recorded by PSI which is Exh. 27 and the third one was by the Executive Magistrate (Exh. 31). Virtually, there is no inconsistency between these dying declarations of the deceased recorded at the interval of few hours on the day of the incident. The prosecution evidence is that the deceased survived for six days after the date of the incident and lost her consciousness and did not regain her consciousness till she was alive. The evidence of PW 1 is that he was informed of the incident and he came to see the deceased on the date of the incident and found her unconscious. The learned counsel for the appellant further submitted the doctor had not given his written opinion that the deceased was fit enough to give her statement. Though orally, the doctor said so. Relying on this part of the evidence especially the evidence of the husband of the deceased, the learned counsel for the appellant submitted that even though the husband may have been declared hostile, the law relating to appreciation of evidence of hostile witnesses is not to completely discard the evidence given by them. This Court has held that even the evidence given by hostile witness may contain elements of truth.

This Court has held in State of U.P. vs. Chetram and others, AIR 1989 SC 1543, that merely because the witnesses have been declared hostile the entire evidence should not be brushed aside. [See para 13 at page 1548].

Similar view has been expressed by three-judge Bench of this Court in Khujji alias Surendra Tiwari vs. State of Madhya

Pradesh, [AIR 1991 SC 1853]. At para 6, page 1857 of the report this Court speaking through Justice Ahmadi, as His Lordship then was, after referring to various judgments of this Court laid down that just because the witness turned hostile his entire evidence should not be washed out.

Apart from that, the learned counsel submitted that the statement of the appellant under Section 313 was accompanied by written document. There the appellant had taken a defence plea that he wanted to save the deceased and in the process got his right hand burnt.

However, neither the Trial Court nor the High Court had considered this aspect of the case. The learned counsel for the appellant has further submitted that the case of the prosecution as presented is totally improbable. He had strenuously urged that it was impossible for one individual to hold in one hand, a woman, who was struggling desparately to free herself from his grasp and to pour by the other hand three litres kerosene on her from a can with a small opening and then lit the matchstick, which requires the involvement by both the hands. The courts should have considered this aspect of the matter which would show the inherent improbability in the prosecution case.

It cannot be denied, as it has come on evidence, that as the deceased was wearing a polyster saree, the burn injuries were aggravated which could not have been so if she would have been wearing a cotton dress. The fact that she was wearing a polyster saree is not disputed by the prosecution. The learned counsel submitted that considering the aforesaid facts into consideration by this Court, the case cannot come under Section 302 IPC.

The learned counsel appearing for the State submitted

that the case of the appellant was twice considered by the Trial Court and also by the High Court and both the courts have found concurrently against him and overruled the aforesaid contentions.

Learned counsel further submitted that the case falls squarely under Section 300, thirdly of IPC.

We have considered the relevant submission. We are of the view that in a case relating to circumstantial evidence, the Court should see the circumstances very carefully before arriving at a finding of guilt of the person concerned and yet if there is any doubt which is inconsistent with the innocence of the accused, the benefit should go to the accused.

In the instant case, it is clear that the appellant had no pre-meditation to kill the deceased or cause any bodily harm or injury to the deceased. Everything has happened on the spur of the moment. The appellant must have lost self-control on some provocative utterances of the deceased. These possibilities cannot be ruled out, having regard to the evidence of PW.1. However, the fact that kerosene was sprinkled on the deceased by the appellant possibly cannot be disputed, in view of concurrent finding by both the courts and having regard to the materials on record.

But whether the case falls under Section 300, thirdly of IPC, is very doubtful. Having regard to the facts and circumstances of the case and in the light of defence of the deceased, this Court holds that the case falls under Section 304 Part II and the appellant has already suffered imprisonment for 11 years 2 months. In that view of the matter, this Court holds that the sentence which has already been undergone by the appellant is more than sufficient under Section 304 Part II.

However, the sentence of fine is set aside.

Having regard to our finding, that the case falls under Section 304 Part II, the appeal is allowed to the extent indicated above. The appellant should be released forthwith, if not required in any other case.

.....J.
(ASOK KUMAR GANGULY)

.....J.
(DEEPAK VERMA)

NEW DELHI

MAY 19, 2011.

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