

(2008) 05 GUJ CK 0059
In the Gujarat High Court
Case No : Criminal Appeal No. 48 of 2005

Anil Chitarmal Samariya

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 01-05-2008

Acts Referred:

Penal Code, 1860 (IPC) — Section 363, 366, 376

Citation : (2008) 05 GUJ CK 0059

Hon'ble Judges : Akil Abdul Hamid Kureshi, J

Bench : Single Bench

Advocate : Shailesh C Sharma, for the Appellant; Hansa Punani, APP for Opponent 1, for the Respondent

Final Decision : Dismissed

Judgement

Akil Kureshi, J.—Appellant is original accused. By the impugned judgment and order dated 17.04.2004 passed by the learned Additional Sessions Judge, Ahmedabad Rural in Sessions Case No. 68 of 2003, the appellant was convicted for offence punishable u/s 363 366 and 376 of the Indian Penal Code (IPC). For offence u/s 363 and 366, the appellant was sentenced to R.I. for five years each and for offence u/s 376, he was sentenced to seven years of R.I. Fine has also been imposed against him. Substantive sentences were made concurrent.

2. As per charge Ex.7, it was alleged against the appellant that on 26th December 2002, he had taken the victim girl "B" aged about 16 years from the lawful guardianship of her parents without their consent. He had thus kidnapped the girl with an intention of having sexual intercourse outside marriage. Between 26th December 2002 and 4th January 2003, he had stayed with the victim girl in a guest house at Hyderabad and had sexual intercourse with her without her consent.

3. Hasmukhbhai, PW-1, complainant, father of the victim girl was examined at Ex.13. He stated that the date of birth of his daughter "B" is 3.9.87. On 26th

December 2002, she had left home to go to school in the morning. When she did not return in the afternoon after school hours, mother of the girl went to the school to inquire and it was learnt that she had not gone to the school at all. In the afternoon, it was told to the witness by his wife. In the evening, they had filed janva jog entry before the Police Station. He had received a phone call from his daughter after a few days telling him that she wants to return home, but he should not beat her up. He lodged a formal complaint before the Police Station on 30th or 31st December. His daughter and the accused were arrested by the police and the Kalupur Police Station handed over the custody of his daughter to him.

In his cross-examination, he admitted that the accused stays opposite to his house with family, that the two families had good relation before the incident and members of both families would visit each other. He stated that the date of birth of his daughter "B" was recorded as per the record of the hospital.

4. Mother of the victim girl "B", Kailashben was examined as PW-2 at Ex.15. She had inquired about "B" at the school when after school hours, she did not return home on 26th December 2002.

5. Victim girl "B" herself was examined as PW-9 at Ex.40. She stated that the accused used to meet her and had proposed friendship and stated that he had fallen in love with her. He had threatened that if she did not love him, he would commit suicide. Due to this threat, she had agreed. Accused used to call her to restaurant. He told her to go with him. He instructed to meet him at Sarthak petrol pump in the morning of 26th December 2002. When she went there, he was present. They took an auto-rickshaw and went to Kalupur Railway station. From there, they went to Dadar Station and then to Mumbai Central. From there, they took a train to Hyderabad and stayed at Midland restaurant in room No. 306. She stated that the accused had tried to contact agents, but later on did not follow it up. In fact, they had sold her ornaments to raise money. The accused had sexual intercourse with her forcibly.

In the cross-examination, she admitted that on 23rd December 2002, when the accused met, there was no pressure on her. Accused told her that his parents have come to know about the affair and he wants to leave his house. She had agreed to join him. In her statement dated 6.1.03, she had stated that accused had not had intercourse with her. She had also stated that she informed the accused that she had spoken to her father at Ahmedabad. He had called them back and agreed to get them married.

6. PW-6, Krishnaben Kailashbhai was examined at Ex.30. She is a friend of victim girl "B". She stated that "B" was moving around with the accused since one year. On 26th December 2002 at 12.30 in the afternoon, "B" had come to her house to give her school uniform. "B" had told that she is going to Pavagadh with the accused. B's mother had come to her house on the same day to whom the witness had handed over the clothes of "B".

In the cross-examination, she stated that though she did not know that there is love affair between accused and "B" for a long time, she knew about such affairs since one year.

7. Dr.Vinodchandra Acharya, PW-3, Ex.17 had examined both the victim girl as well the accused on 6th January 2003. Upon physical examination of the girl, he found that pubic hair were underdeveloped. Her reproductive organs were in the state of development. Her breasts were also under developed. He had collected vaginal swab, etc. and sent for analysis. He had found that there was old tear in the hymen. He had assessed the age of the girl between 16 to 17 years. He had found no marks of injury on the victim girl or on the accused.

8. Police had also collected the clothes of the victim girl as well as the accused and sent the same for analysis.

9. To prove the age of the girl, prosecution examined the school record as well as the municipal record regarding her date of birth.

10. Shobhnaben, PW-5, Ex.26 was the Senior Clerk in the school in which "B" was studying. She produced the school record to show that the date of birth of "B" recorded was 3rd September 1987.

11. One Vinodbhai Parekh, PW-8, Ex.36, who was the Clerk in the Municipal Corporation produced the extracts of Municipal record as well as birth certificate of "B" in which also, her date of birth of 3rd September 1987 was recorded. He stated that the said date was entered on the basis of the statement received from Dr.A.B.Amin Maternity Home.

12. One T.Suryaprakash, PW-7, Ex.33 who was the General Manager of the Midland Hotel at Hyderabad was examined to show that as per the record of the said hotel, room No. 306 was occupied by the couple from 27th December 2002 to 4th January 2003 in the name of Sanjay Shah and Shaily Shah. It may be recalled that "B" in her deposition had stated that the accused and she had stayed at the hotel in the name of Sanjay and Shaily Shah.

13. It is on the above evidence that the prosecution sought to sustain the charges.

14. Insofar as the alleged incident of the accused taking away "B" with him on 26th December 2002 and the two having stayed at Hyderabad for several days in a guest-house and accused having sexual intercourse with "B" during the said period, there is hardly any doubt possible. There was ample evidence on record to establish that after "B" left her home for school in the morning of 26th December 2002, she did not return home. Her mother, initially inquired with school and was told that "B" had not come to the school at all. The complainant, father of "B" was informed in the afternoon who lodged janva jog entry with the police in the evening. B's friend, Krishna, PW-6 also corroborated by suggesting that "B" had come to her to hand over her school uniform saying that she would be going with the accused. The victim girl "B" herself narrated the manner in

which the two left home in the morning. Both met at a petrol pump and then went to Kalupur Railway Station and thereafter to Mumbai and then to Hyderabad.

15. With respect to the act of sexual intercourse also, victim girl "B" had in her deposition stated that accused had intercourse with her. Though in the police statement, she had denied this, in the medical evidence, it is clearly emerged that vaginal swab of the victim girl indicated presence of blood as well as semen.

16. It is true that the victim girl "B" had tried to make out a case of the accused forcing her to leave the house and also having sexual intercourse against her wish, it clearly appears to be an afterthought. The entire incident as is emerging from the record clearly shows that "B" and the accused had an affair and the two were going around for at least a year before the incident. "B" voluntarily joined the accused at a petrol pump instead of going to school. From the evidence of PW-6, Krishna also, it clearly emerges that accused and "B" had an affair. Even otherwise, two had traveled by public transport from place to place before reaching Hyderabad where they stayed in a hotel for several days. At no point of time, "B" complained to anyone about any force or coercion even if there was any. The story of the accused threatening to commit suicide by consuming pills is also totally imaginary. "B" stated before the police that she had spoken to her father on telephone during her stay at Hyderabad and he agreed to get the two married. It thus remains conclusively proved that "B" had joined the accused on her own and the two had on account of previous affair, left their houses to go to Hyderabad.

17. In the facts of the present case, however, question of consent of the victim girl is not quite important. It has come on record that the date of birth of the girl was 3rd September 1987. The incident took place on 26th December 2002. The girl was just over 15 years of age at the relevant time. Even the medical evidence suggests that she had not physically achieved full maturity. In this regard, age of the accused also becomes relevant. He was about 26 years of age on the date of the incident. Thus he was of matured age. His act of eloping with a minor girl barely aged 15 years therefore has to be viewed from this context.

18. Insofar as kidnapping and rape are concerned, looking to the very tender age of the girl, looking to the fact that the accused was of matured age, I find his complexity and seriousness involved in the commission of offence cannot be taken lightly. Taking overall facts and circumstances of the case into account, this is not a case where punishment below the minimum prescribed u/s 376 of IPC can be imposed. No adequate or special reasons are emerging from the record to enable me to reduce the sentence. It may, however, be noted that fleetingly, the victim girl tried to suggest that the accused had also contacted agents possibly for raising money through the girl, however, no evidence in this regard is produced by the prosecution. Testimony of victim girl on certain aspects being not entirely reliable, this factor needs to be discarded. This, however, does not make any material change so far as the ultimate conviction and sentence of the

accused are concerned.

19. In the result, I find that there is no merit in the appeal. Conviction and sentence recorded by the learned Judge by the impugned order are, therefore, confirmed. Appeal is dismissed.