
(2020) 01 GUJ CK 0042
In the Gujarat High Court
Case No : R/Criminal Appeal No. 7 Of 2020

Anshuben Siddheshvar Upadhyay

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 07-01-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 209, 372
Indian Penal Code, 1860 — Section 90, 375, 376

Citation : (2020) 01 GUJ CK 0042

Hon'ble Judges : Bela M. Trivedi, J;A. C. Rao, J

Bench : Division Bench

Advocate : Viral V Dave, C. M. Shah

Final Decision : Dismissed

Judgement

Bela M. Trivedi, J

1. The appellant-original complainant has preferred the present appeal under Section 372 of Cr. P.C., challenging the judgement and order dated 27.09.2019 passed by the 3rd Additional Sessions Judge, Sessions Court, Surat (hereinafter referred to as "the Sessions Court") in Sessions Case No.302 of 2015, whereby the Sessions Court has acquitted respondent no.2- original accused from the charges levelled against him for the offences under section 376 of the Indian Penal Code.

2. The case of the prosecution in the nutshell was that victim- complainant had lodged one complaint on 06.02.2014 before the Limbayat Police Station alleging inter alia, that in the year 2000 she had married to one Bablubhai Visram Chobe at Bihar and thereafter she had come to Surat with her husband. Out of their wedlock, she had conceived two children. She and her husband were staying in a rented premise, whose owner was Suresh Shukla, however, some dispute had taken place between her and the son of the owner of the house. The respondent-accused had intervened and had asked complainant to make settlement.

Accordingly, the settlement had taken place. The accused had also helped the complainant in making payment of outstanding dues. It was further alleged that the accused thereafter used to lure the complainant and had made false promises of marrying her and under the guise of said promises had started having physical relations with her. As a result thereof, the complainant had given birth to one child named Aashish. However, thereafter, the accused had not married her and not fulfilled his promises, and had also not made complainant owner of the said flat, as promised. Therefore, the complaint was lodged by the complainant. The Investigating Officer, after completing the investigation and collecting sufficient evidence had laid the charge-sheet before the Court of Judicial Magistrate First Class, Surat, which was registered as the Criminal Case No.22558 of 2014. The offence being triable by the Court of Sessions, the said case was committed to the Sessions Court, Surat under Section 209 of Cr.P.C., where it was registered as Sessions Case No.302 of 2015.

3. In the instant case, the prosecution to prove the charges levelled against the respondent- accused had examined as many as 15 witnesses and produced documentary evidence, however, the charges against the accused having not been proved beyond reasonable doubt, the Sessions Court has acquitted the respondent-accused.

4. It is sought to be submitted by learned Advocate Mr.Viral Dave for the complainant that the complainant was victimized by the respondent- accused by giving false promises of marrying her and exploiting her on the ground that he would help her husband financially. He also submitted that the appellant had not resisted nor had given any complaint as she was threatened by the respondent-accused of dire consequences.

5. Having regard to the evidence on record and considering the findings recorded by the Sessions Court, it appears that the complainant- victim was staying with the respondent-accused out of her own volition and she had also given birth of child through the accused in the year 2014. It further appears that the victim had lodged complaint in the year 2014 only when some dispute with regard to the ownership of the flat, in which they were staying had taken place. The appellant- complainant had not filed any complaint as regards alleged rape having been committed by the accused till then. Under the circumstances, it could not be said that the respondent-accused had forcibly committed rape on complainant-victim.

6. The Sessions Court after appreciating the entire evidence adduced by the prosecution has rightly acquitted the accused giving him benefit of doubt. It is needless to say that when two views are possible, the view taken by the Trial Court should not be disturbed by the Appellate Court in the appeal against acquittal. At this juncture, it is pertinent to note that the Supreme Court has observed in the case of State of Rajasthan versus Ram Niwas reported in (2010) 15 SCC 463 as under:

"6. This Court has held in *Kalyan v. State of U.P.*, (2001) 9 SCC 632 :

"8. The settled position of law on the powers to be exercised by the High Court in an appeal against an order of acquittal is that though the High Court has full powers to review the evidence upon which an order of acquittal is passed, it is equally well settled that the presumption of innocence of the accused persons, as envisaged under the criminal jurisprudence prevalent in our country is further reinforced by his acquittal by the trial court. Normally the views of the trial court, as to the credibility of the witnesses, must be given proper weight and consideration because the trial court is supposed to have watched the demeanour and conduct of the witness and is in a better position to appreciate their testimony. The High Court should be slow in disturbing a finding of fact arrived at by the trial court. In *Kali Ram V. State of Himachal Pradesh*, (1973) 2 SCC 808, this Court observed that the golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The Court further observed:

"27. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiration. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether. It may in this connection be apposite to refer to the following observations of Sir Carleton Allen quoted on page 157 of "The Proof of Guilt" by Glanville Williams, second edition:

"I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos."

28. The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was

stressed by this Court in the case of Shivaji Sahebrao, (1973) 2 SCC 793, as is clear from the following observations:

"Certainly it is a primary principle that the accused must be and not merely, may be guilty before a court, can be convicted and the mental distinction between 'may be' and 'must be' is long and divides vague conjectures from sure considerations."

9. The High Court while dealing with the appeals against the order of acquittal must keep in mind the following propositions laid down by this Court, namely, (i) the slowness of the appellate court to disturb a finding of fact; (ii) the non-interference with the order of acquittal where it is indeed only a case of taking a view different from the one taken by the High Court."

7. It is further pertinent to be noted that the Supreme Court in the case of Dr. Dhruvaram Murlidhar Sonar Vs. State of Maharashtra and Ors. reported in AIR 2019 SC 327 while dealing with the definition of rape under section 375 of the Indian Penal Code has observed as under:

"14. Section 375 defines the offence of rape and enumerates six descriptions of the offence. The first clause operates where the woman is in possession of her senses and, therefore, capable of consenting but the act is done against her will and the second where it is done without her consent; the third, fourth and fifth when there is consent but it is not such a consent as excuses the offender, because it is obtained by putting her, or any person in whom she is interested, in fear of death or of hurt. The expression "against her 'will'" means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of.

15. section 90 of the IPC defines "consent" known to be given under fear or misconception:-

"Section 90:

Consent known to be given under fear or misconception.- A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception"

Thus, Section 90 though does not define "consent", but describes what is not "consent". Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after

having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances."

8. In the instance case, the appellant- victim having stayed with the respondent-accused willingly, it could not be said that the accused had sexual relationship without her consent. There being no infirmity in the findings recorded by the Sessions Court, the present appeal deserves to be dismissed.

9. In that view of the matter, the Court does not find any substance in the present appeal. The appeal is, therefore, dismissed. The judgement and order of acquittal passed by the 3rd Additional Sessions Judge, Surat on 27.09.2019 in Sessions Case No.320/2015 therefore deserves to be confirmed and is hereby confirmed.