

(2016) 03 GUJ CK 0215
In the Gujarat High Court
Case No : Criminal Appeal No. 118 of 2012

Arjunbhai Dalsukhbhai Vasava

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 28-03-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Penal Code, 1860 (IPC) — Section 376, Section 504, Section 506(2)

Citation : (2016) 03 GUJ CK 0215

Hon'ble Judges : Rajesh H. Shukla, J.

Bench : Single Bench

Advocate : HCLS Committee and Pratik B. Barot, Advocate, for the Appellant;
Hansa B. Punani, Addl. Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh H. Shukla, J.—1. The present appeal is directed against the impugned judgment and order rendered in Sessions Case No. 87 of 2010 by the learned 3rd Addl. Sessions Judge, Bharuch, camp at Ankleshwar, dated 13.7.2011 recording conviction of the appellant-original accused for the offence under sections 376 of IPC and imposing sentence as stated in detail in the impugned judgment and order.

2. The facts of the case, briefly summarised, are as follows:

"2.1 The victim is a married woman. On 8.4.2010, the victim had gone to the canal for washing clothes and when she was returning, the accused is said to have concealed himself in the bushes and caught her and thereafter committed the act. The husband of the victim on hearing the shouts of the victim came there and the accused is said to have threatened the husband and ran away. Thereafter, on 25.4.2010 the panch had gathered and the accused is said to have agreed to give Rs. 11,000/- by way of compensation for which some writing was executed which is also placed on record and the victim had gone to her parental house. At that time, on 30.4.2010, when she was at her parental house, the

accused accompanied by two other persons is said to have threatened that as she had called the panch and got him fined they would kill the husband and ran away. Therefore, a complaint being C.R. No. I-85/2010 came to be registered with Jhagadia Police Station for the offence under sections 376, 504 and 506(2) of IPC

2.2 After the investigation was over, the charge sheet came to be filed before the court of Magistrate. However, as the offences are triable by the Court of Sessions, it was committed to the Court of Sessions, Bharuch.

2.3 In order to bring home the charges levelled against the appellant-accused, the prosecution examined the witnesses including the complainant and other witnesses.

2.4 The learned Addl. Sessions Judge, Bharuch camp at Ankleshwar, proceeded with the trial and recorded the evidence of the prosecution witnesses. After recording of the evidence of the prosecution witnesses was over, the statement of the accused under sec. 313 of CrPC was recorded.

2.5 After hearing the learned APP as well as the learned advocate for the accused, the learned Addl. Sessions Judge, Bharuch recorded conviction of the accused as stated hereinabove and also imposed the sentence and fine.

2.6 It is this judgment and order which has been assailed by the appellant in the present appeal on the grounds stated in the memo of appeal."

3. Heard learned advocate Shri Pratik Barot for the appellant-accused and learned APP Ms. Hansa Punani for the respondent State.

4. Learned advocate Shri Barot submitted that the court below has failed to appreciate that the victim is a married woman aged about 35 years and she was matured enough to understand. The accused was in relationship with the victim prior to the date of incident. He tried to submit that as stated by the accused in his Further Statement under sec. 313, the victim is said to have insisted to the accused that she would otherwise consume poison. Therefore, learned advocate Shri Barot submitted that considering the totality of the facts and circumstances, the consent could be inferred, though the victim in her testimony at exh. 16 may not have stated expressly about her consent, but it has to be gathered from the appreciation of the material and evidence. Learned advocate Shri Barot referred to the testimony of the victim at exh. 16. He further submitted that there is a consistent theory suggested in the testimony of the witnesses that there was some settlement arrived at which is also placed on record. He submitted that this would also indicate about the relationship and some compromise or settlement arrived at between the parties. He therefore submitted that it is a case of false implication.

5. Learned advocate Shri Barot further submitted that the testimony of the victim does not appear to be that of a "sterling witness" and therefore while appreciating her evidence, it may not be accepted as a Gospel truth. He again

tried to emphasise about the conduct and the aspect of consent. In support of his submissions, he has referred to and relied upon the judgment of the Hon''ble Apex Court reported in , (2012) 8 SCC 31 in the case of Rai Sandeep alias Deepu v. State (NCT of Delhi) [para 22].

6. Learned advocate Shri Barot alternatively submitted that some indulgence may be granted for reduction of the sentence.

7. Learned APP Ms. Punani, however, resisted the submissions and submitted that looking at the background of the facts and while appreciating the evidence, the entire background of the facts and evidence has to be considered. For that purpose, she referred to the testimony of the victim, PW-1 at exh. 16, and her complaint at exh.17. Learned APP Ms. Punani submitted that as stated in detail in the complaint, the victim in her testimony has clearly narrated about the incident that she was dragged into the bushes and how the act was committed. She has specifically explained about her effort for resistance and clearly explained as to what transpired and she could not offer resistance though she had made the effort.

8. Learned APP Ms. Punani, therefore, submitted that her evidence is genuine and inspires confidence coupled with the fact that the accused has admitted about the act. She submitted that the submission that the victim was in relationship and there was consent which could be inferred is misconceived. She submitted that consent admittedly is not there as stated in her testimony and there is no question of inference of the consent in this background. She also pointedly referred to the background of facts that the incident had occurred and thereafter there was some settlement through the panch and the victim is said to have gone to her parental house. The accused accompanied by two other persons is said to have gone there and threatened her with consequences as she had complained to the panch where the accused was fined. This itself reflects the conduct and she submitted that the next day the husband was found dead. She submitted that as there is no enhancement appeal filed by the State, she may have limitations and the charges are also not framed. She, therefore, submitted that while appreciating the evidence of the victim which is inspiring confidence, the totality of the background of facts may be considered and the present appeal may not be entertained.

9. In view of these rival submissions, it is required to be considered whether the present appeal deserves consideration.

10. The first aspect which has been much emphasised by learned advocate Shri Barot referring to the relationship of the victim with the accused and the submission that consent may be inferred though the victim may not have expressly stated about her consent in her testimony is required to be examined. A close look at her testimony at exh. 16 rules out any such suggestion regarding consent. She specifically stated about the forceful act that she was dragged into the bushes and thereafter when she tried to offer resistance, what has

transpired. Had there been consent, she would not have said all this and in fact she has in detail explained about the circumstances including how she was overpowered. Therefore, the testimony of the victim is natural and inspiring confidence and it cannot be said that her evidence has no sterling quality as sought to be canvassed not inspiring any confidence. Further, it is well-accepted that when the testimony of the victim is genuine and inspiring confidence, the conviction can be based solely on the testimony of the victim and corroboration is not a matter of rule but a matter of prudence. It is in this background while appreciating the testimony of the victim she has clearly explained about what has transpired and the sequence of events like when the panch was called and the accused was fined it has further enraged him and he had gone to the parental house of the victim where she had gone with the children to stay for some time. The accused is said to have threatened her with consequences and in fact the husband is found dead the next day.

11. A useful reference can be made to the judgment of the Hon"ble Apex Court reported in , (2003) 4 SCC 46 in the case of Uday v. State of Karnataka. It has been observed,

"The courts in India have by and large adopted these tests to discover whether the consent was voluntary or whether it was vitiated so as not to be legal consent."

There may not be any straight-jacket formula on this aspect to ascertain about the consent as to whether it is free consent or not. It has been further observed in the case of Uday (supra)

"....there is no strait-jacket formula for determining whether consent given by the prosecution to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offences, absence of consent being one of them."

12. Reference can also be made to the Jowitt's Dictionary on English Law which has defined the word "consent" as follows:

"Consent supposes three things, a physical power, a mental power and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise or undue influence, it is to be treated as a delusion and not as a deliberate and free act of the mind."

13. Thus, consent has to be inferred from the background of facts of each case.

In the facts of the present case, though the submissions have been made about inferring the consent on the basis of the testimony of the victim, it can hardly be believed or accepted

14. Another submission about the panch or the settlement also does not help the appellant as, if it is read along with the further statement of the accused under sec. 313, it confirms about the act and in fact some kind of fine by the panch which supports her version about the offence of rape committed on her. Therefore, it is rather a corroboration of the version stated by the victim. The aspect of delay which has been emphasised by learned advocate Shri Barot has to be considered in background of the facts and circumstances. It is required to be noted that initially the panch was called and it had considered the issue and fine was also imposed on the accused. This may have consumed some time and therefore it may have given some cause for the delay in filing the complaint. It is required to be stated that it was only after the fine was imposed by the panch, the accused got angry and had gone to the parental house of the victim and had threatened her with dire consequences. Therefore, merely because there is some delay in filing the complaint by itself is not fatal to the prosecution case and other evidence cannot be overlooked or brushed aside. Suggestions were put to the witnesses about the relationship which has been denied like the deposition of PW-3 at exh. 20. Suggestion was put to the witness about the relationship between the accused and the victim and the quarrel between the victim and her husband. Exhibit 33 which is a medical certificate of the Medical Officer, Civil Hospital, Bharuch which has been emphasised by learned advocate Shri Barot for inference of the consent also would not help inasmuch as it cannot be believed to be a free consent. As stated above, the consent has to be free consent out of her own volition and then only it can be said to be a valid consent. The consent which has been under some threat or compulsion is not a free consent.

15. The submission which has been made by learned advocate Shri Barot about the delay in filing the FIR or the version of the victim about the incident are thoroughly misconceived and it cannot be said that the testimony of the victim does not inspire confidence. The submission made by learned advocate Shri Barot relying upon the judgment of the Hon"ble Apex Court in the case of Rai Sandeep alias Deepu (supra) about sterling quality of the testimony of the victim and witnesses is also misconceived. The background of the facts as narrated in detail in the said judgment was totally different as it has been also observed in para 29 with regard to the facts of the case before the Hon"ble Apex Court. Such facts do not exist in the present case and it cannot be said that the victim has not supported her own version nor the other witnesses have supported the version of the prosecution. There are no contradictions and in fact as stated above the writing or settlement which is said to have been arrived at by the panch would corroborate about the version of the victim that led to fine by the panch to the accused.

16. It is in these circumstances the court has also to bear in mind the aspect of

sensitiveness while appreciating the evidence. The Hon"ble Apex Court in the case of State of Punjab v. Gurmit Singh, reported in , (1996) 2 SCC 384, has made the observations,

"Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman"s rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim"s privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration require in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

Therefore, as the State has not filed any appeal, the court would rest here with the dismissal of the appeal.

17. The present appeal, therefore, deserves to be dismissed and accordingly stands dismissed.