

(2008) 04 GUJ CK 0033
In the Gujarat High Court
Case No : Criminal Appeal No. 189 of 2006

Arvind Karsanbhai Baria

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 11-04-2008

Acts Referred:

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

Citation : (2008) 04 GUJ CK 0033

Hon'ble Judges : Akil Kureshi, J

Bench : Single Bench

Advocate : P.K. Shukla, for the Appellant; Hansa Punani, APP for Opponent 1, for the Respondent

Final Decision : Dismissed

Judgement

Akil Kureshi, J.—The appellant is the original accused. By impugned judgement and order dated 13.1.2006 passed by learned Additional Sessions Judge, Vadodara, in Sessions Case No. 260/2005, he was convicted for offences punishable under Sections 376 and 506(2) of the Indian Penal Code. For offence u/s 376 of the Indian Penal Code, he was sentenced to rigorous imprisonment for seven years and ordered to pay fine of Rs. 5000/-. For offence u/s 506(2) of the Indian Penal Code, he was sentenced to rigorous imprisonment for two years and ordered to pay fine of Rs. 2000/-. Both the Sentences were made concurrent.

2. As per charge-exh.6, it was alleged against the accused that 10 days before Holi festival in the year 2005, he had taken the victim girl "P" aged about 12 years when she was playing under a tree in the afternoon at about 2 O" Clock and, thereafter, under threat and coercion had sexual intercourse with her.

3. Mother of "P", Shantiben Budharam Verma-PW1 was examined at exh.11. She stated that her daughter P was aged 12 years at the time of incident. The incident had taken place 10 days before Holi. She had gone for labour work at that time. There was nobody at home and house was locked. When she returned

in the evening, her elder daughter told her that "P" was bleeding and bleeding was not stopping and her underwear was getting soaked with blood. She had informed that when her daughter "P" was playing under a tree, accused who was staying opposite their house had come there and under the pretext of giving ice-candy, had taken "P" at an isolated spot and after slapping her couple of times, asked her to remove her clothes and, thereafter, committed forcible intercourse with her. This was informed to the witness by her elder daughter as well as "P" herself. She had tried to treat "P" in the hospital. Accused had disappeared for 15 days after the incident. When the witness tried to speak to him she was driven away. She had not given complaint immediately because of the social concerns.

4. Victim girl "P" PW2 herself was examined at exh.13. Learned Presiding Judge after satisfying himself that she was able to fully comprehend the questions being put to her and was able to give proper answers, permitted her examination.

4.1 In her chief, she stated that her mother did agricultural labour work and her father was a mason. She identified the accused before the Court as the person who had committed rape on her. On the date of incident when she was playing outside her house, the accused had promised her to give ice-candy and taken her to a place under pipal tree which was surrounded by fields which had standing crops of castor at that time. It was at about 2 to 2:30 in the afternoon. She was asked to remove her panties which she refused, upon which the accused slapped her twice, removed her panties and removed his pant also and, thereafter, committed rape on her. She had started bleeding from her private parts. She however, did not inform her mother immediately fearing that mother might beat her up. She had informed her sister about it.

4.2 In the cross examination, she did agree that her parents and Arvindhbai i.e. the accused had a quarrel about Arvindhbai encroaching a portion of their land behind their house.

5. Urmilaben Budharam Verma-PW3, sister of the victim girl "P" was examined at exh.14. She stated that incident had taken place 10 days before Holi. The accused had raped her sister. Her sister had narrated the incident to her.

6. Budharam Pujaji Verma-PW6 was the father of the victim girl "P" was examined at exh.18. He stated that the incident had taken place 10 days before Holi. At that time he had gone to work at Anand and returned on the day of Holi. Her elder daughter Urmila informed him about the incident.

6.1 In the cross examination, he however, denied that he had any quarrel with the accused.

7. Dr. Minaxi Chimanbhai Chauhan-PW8 was examined at exh.21. She stated that on 8.6.2005, when she was discharging duties as medical officer at SSG Hospital, Vadodara, victim girl was brought to her for treatment. In the history, it was stated that the girl was bleeding since three months. She had examined the

girl and found that drops of blood were oozing from her private part. She had referred her for further examination by gynecologist and radiologist. Gynecologist had opined that she had not yet started mensuring. Upon local examination she found that her hymen was torn and one finger could pass through it. Radiologist opined that girl was aged about 12 years. Certificate to this effect was also given.

7.1 In the cross examination, she admitted that no ossification test of the victim girl was carried out. She agreed that normally a girl would start mensurating between the age of 12 to 15 years.

8. Kalubhai Valjibhai Vahaniya-PW129exh.30) was the Investigating Officer who had carried out the investigation.

9. This in the nutshell was the deposition of important witnesses examined by the prosecution.

10. From the evidence on record, it can be clearly seen that the victim girl was aged barely 12 years on the date of incident. This has come in the deposition of mother of the victim girl Shantiben Budharam Verma-PW1. This also gets corroboration from the medical evidence of Dr. Minaxi Chimanbhai Chauhan-PW8 which referred to the report of the Radiologist who assessed the age of girl at about 12 years. Though it is true that Dr. Minaxi Chimanbhai Chauhan-PW8 opined that no ossification test was carried out, she also had stated that girl had not entered mensuration cycle and that normally a girl would start mensurating between the age of 12 to 15 years.

11. In view of the other evidence on record, it is not necessary for me to judge with precision the exact age of the victim girl. Suffice to note that it is undeniable that girl was of extremely tender age.

12. Insofar as act of sexual intercourse committed by the appellant and the lack of consent on part of the victim girl are concerned, I find that there was sufficient evidence led by the prosecution to establish both these factors. First and foremost, the victim girl PW2 had clearly described the entire incident as it had happened. As already noted, she had stated before the Court that about 10 days before Holi when she was playing under a tree outside the house, the accused had taken her to an isolated spot promising an ice-candy. He asked her to remove her panties and when she refused, he slapped her twice and, thereafter had intercourse with her against her wish. In the cross examination, there are no material contradictions extracted by the defence. There is no reason why the testimony of the girl as young as 12 years of age and who successfully stood the scrutiny of lengthy cross examination should be discarded. She comes across as as reliable, intelligible and truthful witness. In the cross examination, contrary to what her father stated before the Court, she admitted that her parents and accused did have quarrel in the past about some encroachment allegedly made by the appellant. During the entire evidence of the victim girl-PW2 i.e. examination in chief as well as cross examination, one forms a clear opinion that the young girl had given cogent evidence regarding the incident as it

took place.

13. It is true that present case hinges substantially on the sole eyewitness account of the victim girl herself. However, when I find that the victim girl had given evidence which was reliable and believable, there is no reason to shy away from recording the conviction on the basis of such an account.

14. As already noted, the girl was of extremely tender age. Despite this, she not only gave full and detailed account of the incident, the manner in which it had happened but also stood the test of a fairly lengthy cross examination at the hands of defence counsel. Her evidence gets support from that of her sister Urmilaben-PW3 to whom the victim girl had narrated the incident on the very date. Dr. Minaxi Chimanbhai Chauhan-PW8 also noticed recurring problem of bleeding when the victim girl was taken to her for examination and treatment. She had also noticed that her hymen was ruptured and there was space enough to permit entry of one finger. All these would further strengthen the prosecution case of the appellant having forcibly had intercourse with the victim girl.

15. As noted it is true that there is no concrete proof about the exact age of the girl on the date of incident. However, there is sufficient evidence to establish that she was of extremely tender age. This coupled with my conclusion that the appellant had intercourse with the victim girl against her wish, renders the requirement of deciding age of the girl with precision wholly redundant. To put it differently, there is sufficient evidence on record to suggest that victim girl was barely aged about 12 years or thereabout. In any case considering her tender age and the force and coercion exercised by the appellant before committing the act of sexual intercourse, her precise age becomes wholly irrelevant. It cannot be forgotten that the appellant himself was aged about 50 years on the date of incident.

16. It is true that the complaint was lodged some two months after the incident. However, that by itself would not be fatal to the prosecution. The witnesses particularly, mother of the victim girl-PW1 as well as her father, PW-6 had explained the delay in lodging the complaint by suggesting that initially they tried to treat the girl for her bleeding by private doctors. The accused himself had disappeared for 15 days after the incident. When he returned and when the family of the victim girl tried to contact him they were rebuked. Additionally, the witnesses have also stated that out of fear of social stigma, they had not straightway lodged the complaint. All these would sufficiently explain the delay in lodging the complaint with the police. In case of State of Punjab Vs. Gurmit Singh and Others, the Apex Court observed that:

In our opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same had not only been properly explained by the prosecution but in the facts and circumstances of the case was also natural. The Courts cannot over-look the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the

prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. The prosecution has explained that as soon as Trilok Singh PW6, father of the prosecutrix came to know from his wife, PW7 about the incident he went to the village sarpanch and complained to him. The sarpanch of the village also got in touch with the sarpanch of village Pakhowal, wherein the tubewell Kotha of Ranjit Singh rape was committed, and an effort was made by the panchayats of the two villages to sit together and settle the matter. It was only when the Panchayats failed to provide any relief or render any Justice to the prosecutrix, that she and her family decided to report the matter to the police and before doing that naturally the father and mother of the prosecutrix discussed whether or not to lodge a report with the police in view of the repercussions it might have on the reputation and future prospects of the marriage etc. of their daughter. Trilok Singh PW6 truthfully admitted that he entered into consultation with his wife as to whether to lodge a report or not and the trial Court appears to have misunderstood the reasons and justification for the consultation between Trilok Singh and his wife when it found that the said circumstance had rendered the version of the prosecutrix doubtful. Her statement about the manner in which she was abducted and again left near the school in the early hour of next morning has a ring of truth. It appears that the trial Court searched for contradictions and variations in the statement of the prosecutrix microscopically, so as to disbelieve her version.

14. Under the circumstances, the analysis of the evidence on record would lead to the conclusion that learned Judge committed no error in convicting the appellant for offence punishable under Sections 376 and 506(2) of the Indian Penal Code. His conviction and sentence are therefore, upheld. The appeal is dismissed.