

(2008) 11 GUJ CK 0030
In the Gujarat High Court
Case No : Criminal Appeal No. 801 of 2003

Dashrathbhai Shankerbhai Thakor

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 24-11-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 363, 366, 376

Citation : (2008) 11 GUJ CK 0030

Hon'ble Judges : J.C. Upadhyaya, J;A.L. Dave, J

Bench : Division Bench

Advocate : U.S. Brahmabhatt, for the Appellant; U.R. Bhatt, Assistant Public Prosecutor, for the Respondent

Judgement

J.C. Upadhyaya, J.—The appellant, who was the original accused in Sessions Case No. 122/2002, has preferred this appeal challenging his conviction recorded by the learned Presiding Officer, FTC-2, Ahmedabad (Rural), on 6.5.2003, for the commission of the offences punishable under Sections 363 366 & 376 of the Indian Penal Code.

2. The appellant-accused came to be convicted and sentenced to undergo R.I for four years and fine of Rs. 500/-, in default to undergo S.I for three months for the offence punishable u/s 363 IPC, and R.I for five years and fine of Rs. 500/-, in default, to undergo S.I for three months, for the offence punishable u/s 366 IPC, and R.I for seven years and three months, and fine of Rs. 500/-, in default, to undergo S.I for three months, for the offence punishable u/s 376 IPC. All the sentences were ordered to run concurrently.

3. The prosecution case, in brief, is that on 23.12.2001 at about 23.00 hours, during the night, while victim Gitaben, aged 15 years, daughter of first informant Naraji Hiraji, was sleeping inside her house, situated in village Chosar, Taluka : Dascroi, District : Ahmedabad, the appellant-accused kidnapped her from the lawful guardianship of the first informant, with a view to rape her. It is alleged

that the accused took Gitaben to different places and she was raped by the appellant-accused. In connection with this offence, Naraji Hiraji, the father of Gitaben, lodged FIR before Vatva Police Station, which was registered by the police. The investigation was commenced. Police recorded statements of material witnesses. Victim Gitaben and the accused were sent to Hospital for their medical examination. The clothes of the victim and that of the accused were recovered by drawing necessary panchnamas. After collecting the relevant evidence, police filed charge-sheet in the Court of learned J.M.F.C., Ahmedabad (Rural). As the offence punishable u/s 376 IPC is exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions, Ahmedabad (Rural).

4. The trial Court framed charge against the accused at Exh.1, to which the accused did not plead guilty and claimed to be tried. Thereupon, the prosecution adduced oral as well as documentary evidence. After completion of the evidence adduced by the prosecution, the learned trial Judge recorded further statement of the accused u/s 313 of the Code of Criminal Procedure. In his further statement, the accused denied generally all the allegations levelled against him by the prosecution and stated that he was falsely implicated in this case, as the victim is his wife and she is major.

4.1 After appreciating the evidence on record and considering the submissions made on behalf of both the sides, the learned trial Judge delivered the impugned judgment and order recording conviction of the accused and awarded sentence, as stated hereinabove. Aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence, the present appeal is preferred by the appellant-accused.

5. We have heard the learned advocate Mr. U.S. Brahmbhatt for the appellant and learned A.P.P. Mr. U.R. Bhatt for the respondent-State. We have also examined the records and proceedings of the trial Court.

6. On behalf of the appellant, learned advocate Mr. Brahmbhatt submitted that the defence of the accused, from the very beginning, was that he married Gitaben and at the time of marriage, Gitaben was major. However, the prosecution by leading oral and documentary evidence, in the form of school-leaving-certificate, proved that the date of birth of victim Gitaben is 22.7.1987. The date of the incident is 23.12.2001 and, therefore, at the time of the incident, Gitaben was, in fact, aged about 14 years & 5 months. Thus, she was under 16 years of age. However, the accused produced an affidavit of Gitaben, wherein it is stated that she married the accused. In her testimony, Dr.Parul Vaghela, who examined Gitaben, has stated that in the history given by victim Gitaben before her, she stated that she was knowing the accused since last five years and they both used to meet each other and on 23.12.2001, they both left their respective houses together and went to Vasad and Karamsad and she had gone with the accused on her own will and they had physical relationship. It is submitted by Mr. Brahmbhatt that, however, Gitaben, in her testimony recorded at Exh.14, has

denied the suggestion about having any love affair and marriage with the accused. That, the accused in his history given before Medical Officer Dr. Shaikh, who examined him, has stated that he was knowing the girl since last five years and they both used to meet each other, they had physical relationship and they both had left their respective houses. However, it is submitted by Mr. Brahmbhatt that technically speaking, Gitaben was under 16 years of age at the relevant time and, therefore, he does not seriously challenge the conviction recorded by the learned trial Judge, but, considering the facts and circumstances of the case, lenient view may be taken on the aspect of quantum of sentence. It is submitted that the accused was arrested in connection with this offence on 25.1.2002 and was released on bail pending trial on 27.2.2002. He came to be convicted and sentenced by the trial Court vide judgment and order dated 6.5.2003 and since then he is in jail and, therefore, since last 5 years & 6 months he is in jail. It is further submitted by Mr. Brahmbhatt that in the Proviso to Section 376 IPC it is provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term less than seven years. Therefore, it is submitted by learned advocate Mr. Brahmbhatt that the sentence imposed by the learned trial Judge be appropriately altered.

7. Learned A.P.P. Mr. Bhatt for the respondent-State has opposed this appeal, and submitted that the prosecution successfully proved its case against the accused. It is submitted that while convicting and awarding sentence for the offence punishable u/s 376 IPC, the learned trial Judge awarded minimum sentence of imprisonment for seven years and, therefore, there is no reason whatsoever to take recourse to the Proviso attached to Section 376 IPC for taking any lenient view in this matter. It is submitted by the learned A.P.P. that, therefore, the conviction and sentence awarded by the learned trial Judge be maintained and the appeal be dismissed.

8. Perusing the record of the trial Court, it clearly transpires that by examining the witness from the school, wherein victim Gitaben was studying, evidence regarding the date of birth of Gitaben is adduced by the prosecution, wherein the date of birth of Gitaben is indicated as 22.7.1987. In the impugned judgment, appreciating the evidence adduced by the prosecution regarding the age of Gitaben, the learned trial Judge came to the conclusion that at the time of the incident, Gitaben was aged 14 years & 5 months. Thus, the learned trial Judge came to the conclusion that at the time of the incident, Gitaben was under 16 years of age.

8.1 Gitaben, who is examined at Exh.14, has in her testimony, stated that during the night hours while she was sleeping in her house, the accused came near her cot and she was awakened and was called outside the house. The accused asked her to accompany him, or else, he will kill her parents, and therefore, she went with the accused. It is further stated by Gitaben that the accused took her to Karamsad and she stayed there with the accused for 15 days. She has stated that she was raped regularly everyday by the accused. She

has further stated that they both were found out by the police from Karamsad and were brought to the Police Station. She was cross-examined at length, wherein she denied the suggestion of the accused that they both were in love and that they married.

8.2 Dr. Parulben Vaghela, who is examined at Exh.48, has stated in her deposition that on 25.1.2002 she had examined victim Gitaben. Dr.Parulben has stated that in the history given by Gitaben before her, she stated that she was knowing the accused since last five years and they used to meet each other, that on 23.12.2001 at about 11.00 p.m., during night hours, she left her house with the accused and that they had physical relationship. Her medical examination reveals that there were no marks of any injury on her body or on her private parts. Hymen was torn and two fingers examination was possible, and Gitaben was pregnant.

9. Thus, appreciating the testimony of Gitaben and that of Medical Officer Dr. Parulben Vaghela, the learned trial Judge arrived at the conclusion that the prosecution successfully proved the charges levelled against the accused-appellant. The appellant was medically examined by Dr. Shaikh, whose testimony is recorded at Exh.35. In the history given by the accused before Dr. Shaikh, the accused stated that he was knowing the girl since last five years and they used to meet each other and had physical relationship. The age of the accused was stated to be 25 years. There were no marks of any external injury on any part of his body and smegma was found absent.

9.1 The investigating police officer P.I. Mr.Damor is examined at Exh.15. In his cross-examination, he stated that he recorded the statement of victim Gitaben, wherein she stated that she was knowing the accused since last 5 years and that they both used to meet each other. She also stated in her statement that on 23.12.2001 during night hours, while she was in her house, the accused had come and they both left their houses and that the accused had told her that he would marry her. A copy of declaration-cum-affidavit, alleged to have been signed by Gitaben, is produced at Exh.37, wherein it is stated that she was major and that she and the accused voluntarily left their respective houses, and that on 14.1.2002 they married.

10. However, as stated above, the prosecution successfully proved that at the time of the offence, Gitaben was under 16 years of age and, therefore, the learned trial Judge rightly convicted the accused for the offences punishable under Sections 363 366 & 376 IPC. However, on merits the conviction was not seriously challenged by the appellant. The only request made by the learned advocate for the appellant was to take a lenient view, so far as sentence awarded by the learned trial Judge is concerned. The trial Judge awarded R.I for 4 years and R.I for 5 years and fine of Rs. 500/- each, for the offences punishable under Sections 363 & 366 IPC respectively. We do not deem it expedient to disturb the sentence of imprisonment and the order of fine imposed by the trial Court for the aforesaid two offences. So far as the offence punishable u/s 376 IPC is

concerned, the learned Judge awarded R.I for 7 years & 3 months and fine of Rs. 500/-, in default, to undergo S.I for 3 months. As stated above, Gitaben, in her testimony before the Court, has denied the suggestion regarding having any physical relationship with the accused. But, the Investigating Police Officer, in his testimony, has stated that, in her statement before him, Gitaben stated that she was knowing the accused and that they voluntarily left their houses and the accused had told her that he would marry her. Even in the history before the Medical Officer Dr.Parulben Vaghela, victim Gitaben admitted having physical relationship with the accused. The accused-appellant at the relevant time was aged 25 years. Considering the facts and circumstances of the case, we find substance in the submissions made by learned advocate Mr.Brahmbhatt for the appellant that this is a fit case to take a lenient view regarding the quantum of sentence for the offence punishable u/s 376 IPC by taking recourse to the Proviso attached to it. The appeal, therefore, deserves to be partly allowed.

11. For the foregoing reasons, the appeal is partly allowed. The conviction and sentence recorded by the learned Presiding Officer, FTC-2, Ahmedabad (Rural), in Sessions Case No. 122/2002 for the offences punishable under Sections 363 & 366 IPC is hereby confirmed. However, while confirming the conviction u/s 376 IPC, the sentence is altered from seven years & three months" R.I., to the period of imprisonment already undergone by the accused-appellant, without disturbing the order of fine. The sentences are to run concurrently.