

(1998) 08 GUJ CK 0043
In the Gujarat High Court
Case No : Criminal Appeal No. 960 of 1992

Dilip alias Alamzeb Shantilal Thakkar

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 14-08-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235(1)
Penal Code, 1860 (IPC) — Section 34, 363, 366, 376, 392

Citation : (1999) CriLJ 704 : (1999) 2 GLR 445

Hon'ble Judges : J.N. Bhatt, J;Arunkumar Kantilal Trivedi, J

Bench : Division Bench

Advocate : P.J. Yagnik, for the Appellant; K.P. Rawal, Asstt. Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Trivedi, J.—The appellant has filed the present appeal from jail to challenge the order of conviction and sentences passed by learned Asstt. Sessions Judge, Vadodara on 16-9-1992 in the proceedings of Sessions case No. 59/92.

2. The appellant (hereinafter referred to as accused No. 1 for short) along with one Hemant Kumar Tribhuvandas Trivedi alias Indori (accused No. 2) and Ajitbhai Gulamrasul Vohra accused No. 3 were charged in the Sessions case No. 59/92 of Sessions Court, Vadodara for having committed offences made punishable u/s 392 read with Section 34 of IPC. The accused No. 1 is also charged for having committed offences made punishable under Sections 363, 366 and 376 of Indian Penal Code (for short "IPC"). That the accused No. 2 was further charged for having committed offences made punishable Under Sections 363, 366, 354 read with Section 34 of IPC. That vide impugned judgment and order, the accused No. 1 is convicted for the offences made punishable u/s 376 of IPC and was ordered to suffer R.I. for 10 years and to pay fine of Rs. 500/- in default further R.I for 3 months. That the accused No. 1 is also convicted for the offences made punishable u/s 392 read with Section 34 of IPC and was ordered to suffer R.I. for

3 months and to pay fine of Rs. 50/- in default R.I., for 15 days. That substantive sentences were ordered to run concurrently. It may be noted that vide impugned judgment and order the accused No. 2 was convicted for the offences made punishable u/s 376 read with Section 34 of IPC and was ordered to suffer sentence of R.I. for 2 years and to pay fine of Rs. 200/- in default R.I. for 2 months. That the accused No. 3 was convicted for the offences made punishable u/s 392 and was ordered to suffer sentence of R.I. for 3 months and to pay fine of Rs. 50/- in default R.I. for 15 days.

3. That no appeal against the order of conviction and sentence has been preferred either by accused No. 2 or accused No. 3. That the accused No. 1 is provided services of advocate Mr. P. J. Yagnik by way of legal aid.

4. That the profile of the prosecution case as apparent from the record could be set out as under:-

Teenagers Truptiben and Manish were the residents of same locality at Vadodara. That on account of friendship with the brother of Truptiben, Manish used to visit the house of Trupti and as such developed intimacy. That both of them desired to enter into marriage. However, they were unable to disclose the said facts to their parents.

That on 19-1-89 Manish and Trupti left the parental home and proceeded to Haridwar by train on the apprehension that the parent of Trupti were desperately arranging for marriage of Trupti with some other boy of their caste. That at Haridwar, Trupti and Manish performed ceremony of marriage before a priest by exchanging garlands and stayed there about 10 days. That on 30-1 -1989 they returned to Vadodara by train around 5.00 p.m. in the evening. That they had decided to go to the house of Manish and pray for the blessings of their parents. However, they thought it wise to wait till the late night so as to avoid the confrontation by the curious neighbours and that thereby they visited a movie at Rajeshri cinema in the show of 6.00 p.m. to 9.00 p.m. and thereafter were sitting in front of milk bar in Kamatibaigh to pass the time. That the accused Nos. 1 & 2 moved around Trupti and Manish at that lime. That on finding strangers near them, Trupti and Manish got up and started towards the main gate of the garden. However, the accused Nos. 1 & 2 intercepted them and made enquiries, posing themselves as police personnel. That they enquired about die name and status etc. of Manish and Trupti. In the mean while the accused No. 3 also came there and told Manish that Manish has kidnapped a girl and a complaint is filed against him and told him that if they wanted to save themselves from the police case, they should pay Rs. 1000/-. Manish having no extra money told them that he lias only Rs. 100/- with him. That the accused No. 3 snatched away the amount of Rs. 100/- from Manish and shared the amount with accused No. 1 retaining Rs. 50/- with him and went away. That thereafter the accused Nos. 2 & 3 told Manish and Trupti that they are the persons of confidence of one Sodhasaheb, the police officer and that they would be able to settle the police case if Manish and Trupti would accompany them.

The accused No. 1 & 2 took Manish and Trupti to village Por on the same night. That accused took them to a room of "Dharmshala" (Inn) opposite temple of "Baliabapji". That the accused No. 1 Look Trupti to one side in the Dharmshala and told her that Manish has no money and he would not be able to save her. That he asked Trupti to enter into marriage with him. That on refusal by Trupti, accused No. 1 was enraged and abused Trupti and thereafter told accused No. 2 to hold Manish and forced Trupti to enter into the room. That the accused Nos. 1 & 2 threatened Trupti and Manish that if they would shout, Manish would be killed. That thereafter accused No. 1 forcibly made Trupti to lie on the floor of the room and pulled down her trousers and undergarments. The accused No. 1 undressed himself and thereafter forcibly committed sexual intercourse with Trupti against her will and without her consent. That thereafter accused No. 1 dressed himself and came out of the room and told accused No. 2 to commit rape on Trupti. In the mean time, Trupti had dressed herself and she-had also come out. As the accused No. 2 was approaching Trupti, she threatened them that she will shout for the help if accused No. 2 misbehaved with her. That thereby accused Nos. 1 & 2 went outside the room keeping Trupti and Manish alone there. That Trupti and Manish having found themselves at unknown place at the time of after midnight, were helpless and thereby they sat on the "ota" outside room waiting for day light. That accused Nos. 1 & 2 returned there around 4-30 a.m. in the morning and took them back to Vadodara by Rickshaw near Sayaji Garden, That on enquiry as there was no facility of public toilet for taking bath, accused asked Manish and Trupti to accompany him and took them along with accused No. 2 to the residence of his brother in Budhhadev Colony. That brother of accused No. 1 in Budhhadev Colony refused permission to enter into the house and told the accused No. 1 that he has been in habit of bringing girls and that he would not permit him to enter into the house. That thereby all of them went back and arrived near Urkarsh Petrol Pump, from where at the instance of accused No. 1, Manish telephoned to his maternal uncle who told them to wait there. That after some time the maternal uncle of Manish came there. That the accused Nos. 1 and 2 told them that they should go to Karolbaug Police Station at around 11-00 a.m. That maternal uncle of Manish took Manish and Trupti to his house at Gotri village, where Trupti took bath, cleaned herself and thereafter in the company of Manish and his uncle went to Kareli Baug police station, where Manish surrendered himself. That Trupti gave complaint against the accused whereby an offence was registered and transferred to Sayajigunj Police Station, for investigation of the offences alleged against the accused Nos. 1, 2 & 3 in the complains of Trupti who were arrested and produced before Chief Judicial Magistrate, Vadodara along with chargesheet.

5. That the accused pleaded "Not-guilty" to the charges framed by the trial Court and claimed to be tried. That all the accused have raised the defence of "total denial" at trial. That on completion of trial, the trial Court vide judgment and order dated 16-9-92 convicted and sentenced the accused as stated hereinabove which is challenged by accused No. 1 in the present appeal.

6. The prosecution has produced documentary evidence and Mudamal collected during the investigation and to substantiate the charge had examined the following witnesses :

----- PW-1
Uday Purandar Ex. 30 - Medical Officer
PW-2 Uttambhai Bhaggbhai Ex. 17 - Dy. Mamalatdar who held T.I.P. of Accused
PW-3 Keshavbhai Kashibhai Ex. 19 - Panch (Hostile)
PW-4 Prakashbhai Jadavji Ex. 21 - Panch
PW-5 Ramanbhai Mithabhai Ex. 23 - Panch
PW-6 Pankaj Rameshbhai Ex. 25 - Panch
PW-7 Manish Ex. 26 - Victim boy
PW-8 Trupti Bansilal Soni Ex. 28 - Complainant Victim girl
PW-9 Kirtikumar M. Joshi Ex. 33 - PSI - I.O.
PW-10 Rarnesh Sharma Ex. 34 - PSI - I.O. That the panch case of identification parade is produced vide Ex. 18 and the Medical certificate of complainant Trupti and accused No. 1 are produced vide Exs. 14 & 15 respectively and report of Forensic Science Laboratory at Ex. 36

7. It has been contended on behalf of appellant/accused No. 1; that, in the absence of any marks of violence on the body of complainant (PW 8) and accused -No. 1; as per medical certificates Exh. 14 and 15; respectively; the trial Court: ought not to have relied on the sole testimony of complainant without any corroboration; to convict the accused No. 1; for such a serious offence. That to support the contention reliance is also placed on the observations made by this Court vide para 6 of the judgment rendered in the matter of State of Gujarat v. Mahamad alias Manno Usmanbhai Chauhan, reported vide 1996 GLR (37) 821 : 1996 Cri LJ 3400 and in para 9 of the judgment rendered in the matter of Mohanlal Amarji Marwadi Vs. State of Gujarat, of the same volume.

8. As against that Id. APP Shri K. P. Raval countered the submissions urged on behalf of appellant by relying on the deposition of PW. 7 and PW. 8 and relevant pan of the impugned judgment of the trial Court. That to counter the contention the Id. APP; has relied on the observations made by the Supreme Court in the matter of Harpal Singh and Another Vs. State of Himachal Pradesh, and followed by Bombay High Court in the matter of State of Maharashtra v. Savala Sagu Kokare reported vide 1997 Cri LJ 786.

9. We have carefully construed the depositions of complainant Trupti (PW. 8) Exh. 27 and of Manish (PW. 7) Exh. 26; in the context of facts and circumstances apparent from the record and in our considered view the submissions urged on

behalf of appellant, could hardly be merited for more than one reasons. It is true that; the medical certificates Exh. 14 and 15 of complainant girl Trupti and accused No. 2 respectively do not disclose the fact of any external injury on the body and particularly on the private parts of either of the complainant or the accused No. 1. That the FSL report Exh. 36 disclose the facts that stains of human semen were found on the under garments of complainant as well as of accused No. 1; but the groupings of said semen could not be determined. Thus the medical evidence produced on record is of no assistance to test the veracity of the version deposed by com-complainant Exh. 27 (PW. 8) and the defence raised by the accused No. 1. However, the medical evidence is ultimately, merely a corroborative piece of evidence. That by way of ordinary prudence the Court may insist upon the medical evidence to convict the accused of sexual offence. But it is not. a hard and fast rule to accept the version deposed by the prosecutrix. That even in the absence of medical evidence; if the evidence of prosecutrix is found to be otherwise dependable; the conviction could be founded on the sole testimony of the prosecutrix (para 9.1 of Mohanlal Amarji Marwadi Vs. State of Gujarat, . It may also be noted that; in the matter of Harpal Singh and Another Vs. State of Himachal Pradesh, the Apex Court has held that the absence of injury on the private parts of the prosecutrix should not rule out her being subjected to rape. That the said proposition of law is also followed by the High Court of Bombay in the matter of The State of Maharashtra Vs. Savala Sagu Kokare and another, . That in the instant case, the trial Court has rightly followed the dictum of Apex Court stated in the matter of State of Maharashtra Vs. Chandraprakash Kewalchand Jain, while appreciating the evidence of PW. 8: the prosecutrix. That the Apex Court has observed vide para 16 of the said matter as under (at page 895 (of Cri LJ)).

...Ordinarily the evidence of prosecutrix must carry the same weight as is attached to an injured person, who is a victim of violence; unless there are special circumstances; which call for greater caution, in which case, it would be safe to action her testimony; if there is independent evidence lending assurance to her accusations....

Furthermore; the Apex Court has also observed in the above stated matter that; evidence of prosecutrix should be judged in the back-drop of the particular fact-situation in which, she was placed. That, absence of resistance by the prosecutrix is required to be viewed in the context of the sense of owe attached to the authority and her helplessness. Generally, an Indian woman would not make false allegations of rape against any person, so as to attach stigma to her character and disrepute to her family.

10. That in the instant case; the accused Nos. 1 and 2 have had posed themselves as police personnel and had demoralized the complainant Trupti (PW. 8) and Manish (PW. 7) under the threat of police case filed against Manish by the father of Trupti. That the accused Nos. 1 and 2 had used deceitful means to tempt Manish and Trupti to accompany them from Kamatibag garden, Vadodara

to Por village at the place of incident. That PW. 7 Manish and PW. 8 Trupti; were not only eager to avoid the arrest of Manish in the said police case; but they were anxious to see that said police case is settled as suggested by accused Nos. 1 and 2; in their misrepresentation. Under such circumstances it was quite natural and probable for Manish and Trupti to accompany the accused Nos. 1 and 2 to the, scene of offence without any protest or raising alarm. That PW. 8 Trupti in her deposition Exh. 27; has given graphic description of the incident. That the version deposed by her is consistent with the FIR Exh. 25; which was lodged by her at the earliest opportunity. That at test identification parade held by PW. 2 as per Exh. 17 and panehnama Exh. 18; the accused Nos. 1 and 2 are identified by PW. 7 Manish and PW. 8 Trupti. That during cross-examination of PW. 8 Trupti; nothing adverse is revealed except minor contradictions and insignificant discrepancies. Thus the evidence of prosecutrix Exh. 29 is clear; cogent and convincing. It is corroborated by evidence of PW. 7 Manish Exh. 26 and various incriminating circumstances apparent from the proved facts on record. That in the absence of proved motive or enmity against the accused Nos. 1 and 2 to implicate them falsely, we do not find any reason to disbelieve the same. In our considered opinion, the trial Court has rightly come to the conclusion on appreciation of evidence placed on record by the prosecution that accused. No. 1 is guilty for the offences made punishable u/s 376 as well as Section 392 r/w 34 of the IPC.

11. That as regards the order of sentence; in the facts and circumstances of the present case; we do not find that the sentence imposed on accused No. 1; is unjust improper or excessive. Before recording conclusion it is necessary to note that; the accused No. 1; was also charged for having committed offences made punishable u/s 363/366 r/w 34 of the IPC. That while recording findings on the charge; the trial Court has observed vide para 37 that; no offence against accused Nos. 1 and 2 u/s 363/366 has been established by the prosecution and as such the finding of point No. 2 is given in negative. That while passing final orders the trial Court has omitted to state any thing regarding said charge u/s 363/366 r/w 34 of the I PC That while giving negative finding of point No. 2; the trial Court has assigned the reasons that prosecution has failed to produce cogent evidence regarding age of the nrosecutrix Trupli. That in the facts and circumstances of the present case; said finding cannot be said to be just proper or legal. That the provisions of Section 366, IPC; prescribe punishment for the offence which includes kidnapping as well as abduction of any woman and as such the age of the prosecutrix has no significance in establishing the offence. That in the facts and circumstances of the present case, the trial Court should have given the positive finding to point No. 2 and should have recorded the conviction u/s 366 r/w 34 of the IPC of accused Nos. 1 and 2 while passing the final order u/s 235(1) of Cr. P.C., 1973. It may be noted that; after the charge is framed, the accused has to be found guilty or not guilty of the charge; otherwise, it would amount to error of law as held by High Court of Delhi in the matter of Prakash Chander Vs. The State, , para 29. That the trial Court having sentenced

accused No. 1 for R.I. often years in respect to conviction u/s 376, IPC; no miscarriage of justice has occurred. That in the absence of any acquittal appeal on the said point; this Court cannot rectify the said error in the present proceedings; and hence nothing is required to be done.

12. In view of aforesaid discussions; we hold that present appeal being meritless; deserves rejection and accordingly stands disposed of as dismissed.