

(2015) 09 GUJ CK 0035
In the Gujarat High Court

Case No : Criminal Appeal (Against Conviction) No. 2741 of 2008

Dilipbhai Laljibhai Vadhel

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 10-09-2015

Acts Referred:

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

Citation : (2015) 09 GUJ CK 0035

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

Bench : Single Bench

Advocate : Ashish M. Dagli, Advocate, for the Appellant; H.L. Jani, APP, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh H. Shukla, J.—The present Appeal is directed against the judgment and order in Sessions Case No. 73 of 2007 by the learned Sessions Judge, Surendranagar dated 14.7.2008 recording the conviction of the Appellant - Original Accused for the offence under Sections 363 , 366 and also for the offence under Section 376 of the Indian Penal Code and imposing the sentence as recorded in the impugned judgment.

The facts of the case briefly summarized are as follows.

2. It is the case of the prosecution that the complainant - victim was studying in Vikas Vidyalaya and was staying in the hostel. The accused who is a relative of the victim, came to the hostel between 11 to 12 pm and took the victim with him on the ground that the mother of the victim had a snake bite. The warden of the hostel made the inquiry. However, considering the ground mentioned, she took the application Exh. 14 from the accused and allowed the victim to go with the accused. Thereafter the accused took the victim to the hotel near the bus stand at Surendranagar and committed the offence. Thereafter, on the next day he left the victim near the railway track from where the victim returned to the hostel

and disclosed the incident, which is produced on record at Exh. 15. Thereafter, the parents of the victim were summoned and the complaint was registered with Vadhvan police station which has been registered as FIR I-CR No. 100/2007 for the alleged offence under Sections 363 , 366 and 376 IPC.

3. After the investigation was over the charge sheet was filed and the case was committed to the Court of Sessions.

4. In order to bring home the charges levelled against the accused the prosecution examined the witnesses including the victim and other witnesses and also produced the documentary evidence which shall be referred to hereinafter in the judgment.

5. After the recording of the evidence of the prosecution witnesses was over, the learned Sessions Judge, Surendranagar recorded the further statement of the accused under Section 313 of Cr.P.C.

6. After hearing the learned APP as well as learned Advocate for the defence, the learned Sessions Judge, Surendranagar recorded the conviction imposing the sentence as stated in the impugned judgment and order which has led to the present Appeal.

7. Heard learned Advocate Shri Ashish M. Dagli for the Appellant and learned APP Shri H.L. Jani for the Respondent State.

8. Learned Advocate Shri Ashish M. Dagli for the Appellant referred to the testimony of victim PW-1 at Exh. 13 and tried to submit that the victim had accompanied the accused voluntarily. He tried to submit that after she was taken, they had gone to the hotel/guest house and she could have raised the objection when she was taken to the hotel or the guest house instead of taking her to her mother. He therefore tried to submit that she had voluntarily accompanied the accused. Further, he referred to the cross-examination and submitted that as stated in the cross-examination by the victim, it has been admitted that in the letter she has not stated about having any sexual intercourse by the accused. Similarly he referred to the testimony of PW-2 father of the victim at Exh. 18 as well as the testimony of PW-4 Warden at Exh. 20. He submitted that normally the contact number of the parents is maintained and therefore no such verification was made and the evidence of the witness may not be accepted. Similarly, he referred to the testimony of PW-14 Dr. Pranav Narendrabhai at Exh. 41 who has examined the accused and submitted that history is not recorded and there is no injury. Learned Advocate Shri Ashish M. Dagli has referred to the testimony of PW-15 Dr. Ashvin R. Rathod at Exh. 46 and submitted that this witness as a medical officer had examined the victim and it has been clearly stated that there was no marks of any injury and if there was any forcible intercourse then she could have admitted that there could be an injury. He therefore emphasized the testimony of this witness to support that there was no penetration and therefore no offence is committed. Alternatively, it was submitted referring to the evidence that there was a consent as there was

no injury found. In support of his submission, he has referred to and relied upon the judgment of the Hon''ble Apex Court reported in Zindar Ali SK Vs. State of West Bengal and Another, . He has also referred to and relied upon the judgment of the Hon''ble Apex Court reported in (2006) 9 SCC 590 - Ravinder v. State of M.P. He emphasized that the relation of the accused and the time of taking the victim at night from her hostel is required to be considered for the purpose of ascertaining the motive or the intention of the accused. Further, the ground which has been stated about the snake bite to the mother of the victim and on that basis letter Exh. 14 which was also given by the accused stating about the same clearly reflect about his intention.

9. Learned APP also pointedly referred to the testimony of the warden PW-4 at Exh. 20 and submitted that she has explained that the ground mentioned about the snake bite and the death of the mother of the victim led to such permission and as it was a late night intimation was not given to the superior. He submitted that in any case even if there is any lapse or the procedural requirement, it does not make any difference so far as the motive of the accused is concerned. He also referred to the testimony of the Secretary of the Vidyalaya PW-5 at Exh. 21 and submitted that she has stated about the condition of the victim and the victim has written down as to what has transpired at Exh. 15 which is placed on record. He therefore submitted that it is required to be considered with reference to the mental condition and agony of the victim who is minor for the purpose of appreciation of evidence. Learned APP therefore submitted that the submission with regard to the omissions in the cross-examination of the victim would not be much relevant.

10. Learned APP Shri H.L. Jani also referred to the testimony of Dr. Ashvin Rathod PW-15 at Exh. 46 who examined the victim and has recorded the history which has also been stated in his testimony as to what as transpired. He submitted that the victim while giving the history has clearly stated about the threat and pressure under which the act was committed and therefore the submissions about the consent is misconceived. Further, learned APP Shri Jani submitted that the documentary evidence produced at Exh. 49 records the history. He submitted that the emphasis given by learned Advocate that there are no marks of injury or sign does not show any penetration is misconceived. He submitted that though in the cross-examination PW-15 Dr. Ashvin R. Rathod has stated that there were no marks of injury and in his opinion there was no penetration, may not be sufficient to brush aside the direct evidence of the victim. He submitted that the penetration is not always necessary. In support of this submission he has referred to and relied upon the judgment of the Hon''ble Apex Court reported in Aman Kumar and Another Vs. State of Haryana, and also the judgment of the Hon''ble Apex Court reported in Wahid Khan Vs. State of Madhya Pradesh, .

11. Learned APP Shri Jani submitted that it is well accepted that the conviction can be based on the sole testimony of the victim if it is found to be reliable. In

support of this submission learned APP referred to and relied upon the judgment of the Hon''ble Apex Court reported in Santhosh Moolya and Another Vs. State of Karnataka, and also the judgment of the Hon''ble Apex Court reported in Mukesh Vs. State of Chhattisgarh, . Similarly, he submitted that the injury on the body of the victim is not sine qua non. Learned APP Shri Jani referred to and relied upon the judgment of the Hon''ble Apex Court reported in Dastagir Sab and Another Vs. State of Karnataka, and also the judgment of the Hon''ble Apex Court reported in State of Karnataka Vs. Puttaraja, submitted that the report of the public analyst or the opinion of the Doctor is not conclusive and it can be used as a corroboratory evidence. However, when there is a direct evidence of the victim, the same would prevail rather than medical evidence in the form of the opinion.

12. In view of this rival submissions, it is required to be considered whether the present Appeal deserves consideration.

13. As could be seen from the background of the fact that the victim is minor aged about 13 years studying in school and was residing in the hostel, she has been taken away by the accused who is relative on the ground of snake bite to the mother of the victim at late night with the permission of the warden which is given in the peculiar circumstances. As stated by PW-4 - warden in her testimony she had not informed the higher authority in peculiar facts of the case at late night and after taking the application Exh. 14 from the accused allowed the victim to accompany the accused who was stated to be her relative. Further, as could be seen from the history recorded in the medical case paper Exh. 49 as well as the testimony of PW-15 Dr. Ashvin R. Rathod at Exh. 46 wherein also he has recorded and stated about the history given by the victim. The victim clearly stated that the accused committed the offence against her will and was put under the pressure or the threat. Thus the submissions made by learned Advocate for the Appellant - Accused about the consent is thoroughly misconceived as the victim was minor. Therefore the consent of the minor would not be relevant coupled with the fact that she has stated that there was no consent and that the act was committed forcibly under a threat.

14. The another facet of the submissions which have been emphasized referring to the medical case papers as well as the testimony of the PW-15 Dr. Ashvin R. Rathod at Exh. 46 that there are no marks of injury and there is no penetration as stated by the Doctor in his testimony at Exh. 46 and therefore the offence is not committed is misconceived. As could be seen from the papers and the testimony of the victim, the act was committed forcibly against her will or consent. Further, she was minor and therefore in any case the consent would have no relevance. Therefore the mere fact that there are no injuries found would not necessarily imply the consent as the injury is not sine qua non in all cases. In a given case the victim may have been overpowered or put under pressure and therefore even if there is no injury the consent cannot be implied. In any case the victim was minor and therefore it is not relevant. The Hon''ble

Apex Court has also made the observations in case of *Dastagir Sab and anr. v. State of Karnataka* (supra) that the injury is not a sine qua non in every case. It is to be considered with the background of the facts and the circumstances in each case. Similarly, much emphasis given on the aspect of penetration has also no relevance for the purpose of establishing the guilt of the accused as the medical evidence is a corroborative piece of evidence. It is well accepted that the direct evidence of the victim in such cases has to be preferred over the medical opinion in the form of the expert opinion. The Hon"ble Apex Court in a judgment reported in *Aman Kumar and Another Vs. State of Haryana*, has made the observations:

"It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the Court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony."

Similarly, in this judgment, it has also been observed that to constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Further, the submission with regard to the variance with the testimony of the victim and the medical evidence has been considered by the courts and it is well accepted that the direct evidence of the victim has to be considered as the medical evidence would be an opinion. A useful reference can be made to the observations made by the Hon"ble Apex Court in a judgment reported in *Mukesh v. State of Chhattisgarh* (supra) which in turn has also referred to the earlier judgment reported in *State of U.P Vs. Chhoteylal*, . Therefore, when there is a direct evidence of the victim the conviction based on such testimony of witness cannot be questioned when such testimony is found to be reliable and trustworthy. It is well accepted by catena of judicial pronouncements that conviction can be based solely on the testimony of the victim if it is found to be trustworthy and reliable. The Hon"ble Apex Court in a judgment reported in *Md. Iqbal and Another Vs. State of Jharkhand*, has again reiterated:

"There is no prohibition in law to convict the accused of rape on the basis of sole testimony of the prosecutrix and the law does not require that her statement be corroborated by the statements of other witnesses."

In another judgment reported in *Narender Kumar Vs. State (NCT of Delhi)*, , it has been observed:

"...The conviction can be based on sole testimony of the prosecutrix provided it lends assurance to her testimony. However, in case the court has reason not to accept the version of the prosecutrix on its face value, it may look for

corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix's case becomes liable to be rejected.

The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation...."

15. Further, in a judgment reported in *State of Punjab Vs. Gurmit Singh and Others*, , the observations have been made with regard to the appreciation of evidence of the victim with care and also laid down the guidelines with regard to the need for corroboration if her evidence is not found acceptable then the corroboration may be looked for. Again the court has made the observations about dealing such cases with sensitivity and appreciate the evidence with the probability and not get swayed by insignificant discrepancies. As it has been observed in judicial pronouncements that the corroboration is sometimes looked for as a matter of prudence.

16. A useful reference can be made to the observations made by the Hon''ble Apex Court in a judgment reported in *Sakshi Vs. Union of India (UOI) and Others*, wherein the focus is given to the modern jurisprudence to look at the rape as a humiliation and violation of the human rights and dignity and has further observed that the restrictive interpretation defeats the very purpose of the intent of the provision of punishment for a rape. Further, a useful reference can be made to the observations made by the Hon''ble Apex Court reported in *Rajinder @ Raju Vs. State of H.P.*, :

"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 assault - it is often destructive of the whole personality of the victim. The murderer destroys the physical body of his victim. Rapist degrades the very soul of the helpless female." [*State of Punjab Vs. Gurmit Singh and Others*,]

17. Further, the Hon''ble Apex Court in a judgment reported in case of *Wahid Khan v. State of Madhya Pradesh (supra)* referring to the aspect of the medical jurisprudence, which has been quoted from the *Medical Jurisprudence and Toxicology* (22nd Edn.) at p. 495 has observed:

"Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical only."

18. Therefore, the moot question is whether the testimony of the victim can be said to be trustworthy or reliable. In the facts and the circumstances which have been revealed herein above that the accused who is a relative has taken her on the pretext of snake bite to the mother of the victim at late night and then under

pressure or threat commits an offence cannot be overlooked merely because of lack of injury or some discrepancy. The victim has stated while giving the history to the Doctor and also when she returned to the hostel to the warden which has been taken in her own handwriting produced at Exh. 15. She has narrated as to what has transpired. Again it has to be considered with sensitivity regarding the condition of the victim inasmuch as a minor victim may not be in a state of mind to comprehend the things in the orderly manner and there could be some discrepancy. However the testimony of PW-5 - Secretary of the hostel at Exh. 21 has clearly stated about the state of condition of the victim when she returned to the hostel and has clearly stated that she was feared and was not even able to talk properly and therefore she was asked to take down on a piece of paper. This itself would suggest her condition that it was such that she was not in a position to even express what has transpired and therefore she was asked to put it in writing which is produced at Exh. 15. The Hon''ble Apex Court in a judgment reported in State of Punjab Vs. Gurmit Singh and Others, has observed:

"A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Court, there fore, shoulders 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."

Further it has been observed:

"The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.... Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances."

Therefore, considering the aforesaid broad guidelines laid down by the Hon''ble Apex Court with regard to the appreciation of evidence in such cases, the submissions made by the learned Advocate cannot be accepted.

The same aspect has been reiterated by the Hon''ble Apex Court in a judgment reported in Wahid Khan Vs. State of Madhya Pradesh, as well as in a judgment reported in Rajinder @ Raju Vs. State of H.P., and it has been clearly observed in this judgment that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private

parts of the victim can be construed as evidence of consent. Therefore considering the above discussion it can hardly be said that the testimony of the victim is not reliable or trustworthy.

19. One more aspect which has been emphasized by learned Advocate Shri Ashish M. Dagli that the age of the accused may also be considered is required to be considered.

The court below while awarding the sentence has considered this aspect and has awarded only the minimum sentence of 10 years. Therefore the submission that while maintaining the conviction the sentence may be reduced is also misconceived. Too lenient view in such matters could be counter productive and the message should go in the society. It cannot be said that the sentence awarded is disproportionate to the offence particularly when the victim is minor. The social impact of such offence would not justify any lenient view and it would be a counter productive. The Hon"ble Apex Court in the case of *Siriya @ Shri Lal Vs. State of Madhya Pradesh*, has observed:

"7. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges....

8. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in *Sevaka Perumal, etc. Vs. State of Tamil Nadu*, "

20. Therefore the present appeal cannot be entertained and deserves to be dismissed and accordingly stands dismissed.