

(2015) 02 GUJ CK 0044
In the Gujarat High Court
Case No : Criminal Appeal No. 1358 of 2011

Dineshbhai Somabhai Prajapati

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 20-02-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374(2)
Evidence Act, 1872 — Section 35
Penal Code, 1860 (IPC) — Section 114, 361, 363, 366, 366A

Citation : (2015) 02 GUJ CK 0044

Hon'ble Judges : Z.K. Saiyed, J.

Bench : Single Bench

Advocate : Bhavesh J. Patel and Radhesh Y. Vyas, for the Appellant; Hardik Soni, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Z.K. Saiyed, J.—The present conviction Appeal has been filed by the appellant-original accused, under Section 374(2) of the Cr.P.C., against the Judgment and order dated 30.09.2011 passed by the learned Additional Sessions Judge, Navsari, in Sessions Case No. 32 of 2010, whereby the appellant-accused was convicted for the offence punishable under Section 363 of the Indian Penal Code and sentenced to undergo 3 years simple imprisonment with fine of Rs. 500/-, in default of payment of fine, further simple imprisonment of 1 month and for the offence punishable under Section 376 of the IPC and sentenced to undergo 7 years simple imprisonment with fine of Rs. 2,000/-, in default of payment of fine, further simple imprisonment of 3 months.

2. According to the prosecution case, one Bhurabhai Prajapati-complainant, resident of Mithilanagar, Rustamvadi Road, Taluka and District Navsari was living with the family members and working in a factory. He has two daughters and 2 sons. Daughter Varsha was round about 15 years old and studied upto standard 6th. Another daughter Sukhiben was 18 years old and two sons were staying. On

28.03.2010, when he came back from the factory for lunch, his wife Vadliben informed him that Versha was present in the morning, but after 10:30 to 11:00, she was missing. Further, her friend, Daksha, daughter of Velabhai Bhagabhai Prajapati came to her and after talking with Versha, she went away. So, complainant and his wife went to Velabhai's home to inquire about Versha, where Daksha was present. When Dakhas was asked regarding Versha, she replied that she never come to her and she did not know whereabouts of Versha. Then, Velabhai and his wife Gangaben told them that her daughter Versha was taken away by nephew-Dineshbhai-accused herein of Velabhai and Gangaben. Therefore, the complainant and his wife inquired through relatives and they came to know that one Dineshbhai Somabhai Prajapati, resident of Chholpur, Taluka: Revghar, District: Shihori, Rajasthan took away her daughter by tempting her from the legal guardianship of them. Efforts were made by the complainant to find out her daughter Versha, but as all efforts gone in vain, the complainant filed complaint on 12.04.2010 against the appellant-accused before the Navsari Rural Police Station bearing I-C.R. No. 41 of 2010. Thereafter, the investigation was carried out and statements of witnesses and victim were recorded. It came to the knowledge of the Investigating Officer that Dineshbhai took away victim Versha with the help of friend Mr. Ravtabhai at Rajasthan. Thereafter, ASI, Hasmukhbhai Tandel, found out the appellant-accused and victim from Rajasthan, but Ravtabhai could not be traced out. Then, statement of the victim was recorded and clothes of the victim and appellant-accused were sent to the hospital for medical check-up. Then, birth certificate of the victim obtained from the school and statement of the Principal was also recorded. Then, recovered muddamal were sent to the FSL and medical certificates were of both accused and victim were obtained from Medical Officer. Then, offence under Section-376 of the Indian Penal Code was added. Then, Investigating Officer gave details for warrant under Section-70 to declare Ravtabhai as absconder. Panchnama of place of offence was drawn and tagged with the papers. On receipt of report from FSL, a charge-sheet was filed against the appellant-accused for the offence punishable under Sections-363, 366A, 376 and 114 of the Indian Penal Code before the learned Judicial Magistrate First Class, Navsari. As the said case was exclusively triable by the Court of Sessions, learned Judicial Magistrate First Class, Navsari, committed the case to learned Additional Sessions Judge, Navsari, which was thereafter, numbered as Sessions Case No. 32 of 2010.

3. On the basis of above allegations, charge was framed against the appellant-accused vide Exh.1 and read-over and explained to the appellant-accused for the offences punishable under Sections 363, 366A, 376 and 114 of the Indian Penal Code. Then plea was recorded, wherein, appellant-accused pleaded not guilty to the charge and claimed to be tried.

4. In support of the prosecution case, prosecution has examined following oral evidences:--

5. In support of the prosecution case, the prosecution has produced several

documentary evidences like complaint at Exh.7, report of radiologist of victim at Exh.10, MLC report of victim at Exh.11, medical certificate of victim at Exh.13, medical certificate of accused at Exh.14, panchnama of recovery of clothes of victim at Exh.18, panchnama of physical condition and recovery of clothes of accused at Exh.19, panchnama of scene of offence at Exh.21, xerox copy of school general register at Exh.23, certificate of Bural Primary School at Exh.24, letter of school No. 4 of Nagar Primary School at Exh.25, copy of station diary at Exh.27, primary reports given by scientific officer at Exh.30 and 31, ravangi note of muddmal sent to FSL at Exh.32, letter of FSL at Exh.33, report of FSL with serological examination at Exh.34 and report of woman protection cell.

6. Thereafter, after filing closing pursis by the prosecution, further statement of appellant-accused under Section 313 of the Code of Criminal Procedure, 1973 was recorded, wherein, it is admitted by the appellant-accused that the victim joined with him with her consent and physical relation was made by him with her consent. He further admitted that he was innocent and he has not committed any offence and was wrongly charge-sheeted. The appellant-accused has denied the case of the prosecution and submitted that a false case is filed against him.

7. After considering the oral as well as documentary evidence and after hearing the parties, learned Additional Sessions Judge, Navsari vide impugned judgment and order dated 30.09.2011 held the appellant-accused guilty to the charges levelled against him under Sections 363, 366A, 376 and 114 of the Indian Penal Code, and convicted and sentenced the appellant-accused, as stated above.

8. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence of learned Additional Sessions Judge, Navsari, the present appellant-accused has preferred this appeal.

9. Heard Mr. Radhesh Vyas, learned advocate for the appellant-accused, and Mr. Hardik Soni, learned Additional Public Prosecutor for the respondent-State.

10. Mr. Radhesh Vyas, learned advocate for the appellant-accused read the charge and contents of the complaint and argued that complainant filed the complaint after 15 days. He further contended that delay in filing the complaint is not disclosed by the complainant and the same can be fatal to the case of the prosecution. Mr. Vyas, further read the evidence of PW-1, Bhurabhai Satabhai Prajapati, father of the victim and contended that he had no personal knowledge regarding the offence committed by the accused. He further contended that through evidence produced on record, the defence could not prove main ingredient of Sections-363, 366 and 376 of the IPC. He then contended that as far as the offence under Section-376 of IPC is concerned, complainant had no knowledge. In the evidence of PW-2 prosecutrix victim, examined at Exh.8, she did not disclose before the PW-1 complainant that the present appellant-accused committed rape on her against her will and consent. He further contended that recovered muddamal i.e. clothes of accused and victim were sent to FSL and in the report of FSL, produced at Exh.34 alongwith serological report, "B" blood

group was shown and blood group of the victim was also of "B" group. Looking to the circumstantial evidence produced on record, the prosecution could not prove its case beyond reasonable doubt. He further read the evidence of the Principal of school and contended that she did not disclose anything regarding the age of the prosecutrix and she had no personal knowledge and could not be able to disclose that who gave the admission to victim. She also could not be able to say that at the time of admission of the victim, which document was produced in support of the age of the victim. He further contended that as per the evidence of other witnesses, this is a case of lover affair and prosecution filed bogus case against the appellant-accused. He read the panchnama of recovered muddamal as well as evidence of the doctor and argued that during the medical check-up of the victim, nothing was found and therefore, through evidence of medical expert, prosecution could not establish that appellant-accused committed rape on victim. He read the judgment and order of the learned trial Judge and contended that learned trial Judge committed a grave error and present appellant-accused wrongly convicted for the alleged offence. Mr. Radhesh Vyas, further contended that present appellant-accused is 21 years old poor person and bread earner of the family and hence, sentence imposed by the learned trial Judge may be reduced. Lastly, he prayed to quash and set aside the judgment and order of conviction.

11. Per contra, Mr. Hardik Soni, learned APP, Mr. Soni, contended that when the prosecutrix was taken away by the appellant-accused from the legal guardianship of the parent, she was 14 years 7 months and 25 days. He further contended that it is admitted by the appellant-accused and victim before the doctor in case history that the victim was taken away by the appellant-accused at different places and made physical relation with the victim. He argued that from the case history of accused and victim, it is established beyond reasonable doubt that at the time of offence, the prosecutrix was below 15 years. He further contended that even defence argued that there was a love affair between appellant-accused and victim, eventhough when the prosecutrix was below 16 yeas, her consent cannot be considered. He then argued that from the evidence of the victim and other witnesses, it is prima-facie established that the victim was forcefully taken away by the appellant from the legal guardianship and she moved with the appellant-accused at different places like Ambaji and in forest area of Ambaji, the appellant-accused committed sexual intercourse forcefully without her consent. He argued that looking to the age of the victim which was below 16 years, at the time of offence, consent of the victim is no defence available to the accused. Lastly, he prayed to dismiss the appeal.

12. I have perused the documentary as well as oral evidence produced on record. First of all, I have perused the oral version of PW-1-Bhurabhai Satabhai Prajapati, examined at Exh.6. As per his evidence, at the time of incident, he was not present at his house and when he came back from factory for lunch, his wife informed him that from 10:30, her daughter Versha-the victim was missing. He was further informed that Daksha, a friend of Versha came to her and talked to

her. Then, he and his wife went to uncle and aunt's home of accused i.e. Velabhai's to inquire about Versha, where Daksha was present. When Daksha was asked regarding Versha, she replied that she never come to her and she did not know whereabouts of Versha. Uncle and aunt of the accused disclosed that nephew Dinesh took away the victim and hence, he filed complaint and contents of the complaint at Exh.7 get substantiated through oral version of the father of the victim-complainant. No doubt, learned counsel Mr. Vyas, argued that complaint was filed after 15 days from the incident, but as per the evidence of father, it is established that they were trying to find out the accused and victim and when their all efforts gone in vain, on 12.04.2010, the complainant filed complaint. I have perused the evidence of the victim at Exh.8 as PW-2. As per her evidence, Daksha was her friend and they frequently used to visit their respective houses and at that time, appellant-accused Dinesh also used to come Daksha's house and due to such visit, she known to him. Further, she stated once elder brother of Dinesh came to her house and she assured her father that she would never talk with Dinesh. Thereafter, they shifted to Mithila Nagri from Dandiwad. When we were living at Dandiwad, as per the say of his elder brother, I tied Rakhi on Dinesh's hand-accused herein. After the incident took place, the complainant tried to find out accused and victim and when he failed, he filed a complaint and therefore, it cannot be said that late filing of complaint can be fatal to the case of the prosecution. Even it is not argued before the learned trial Judge and no question was asked to complainant by the prosecution.

12.1 I have perused evidence of doctor PW-4 Jagdishprasad Ramsingh Gupta, examined at Exh.12, wherein, he deposed that victim and appellant-accused were produced before him and after medical check-up he found that semen was found from the body of the victim and appellant-accused. I have minutely perused the case history given by appellant-accused as well as victim, wherein, it was admitted by the victim and appellant-accused that victim was taken away by the accused from the legal guardianship of the parent, but defence never made any attempt to establish that case history was not given by them. I have perused the evidence of other witnesses and from these all witnesses, contents of panchnama of recovery of clothes of victim and accused, panchnama of physical condition of the accused and panchnama of scene of offence, are proved beyond reasonable doubt. Prosecution examined Principal of the school and she produced copy of general register of the school at Exh.23, certificate of Bural Primary School at Exh.24 and letter of Nagar Primary School No. 4 at Exh.25. As per her evidence, victim was studied in the said school and her birth date is 10.08.1995. I have calculated the actual age of the prosecutrix which was at the time of incident. I have compared birth date of victim i.e. 10.08.1995 with the date of incident i.e. 20.03.2010. It is clear that at the time of incident, the prosecutrix was 14 years 7 months and 25 days old. Now, as far as evidence regarding the birth date of the victim is concerned, I have also perused Rules-128 and 130 of the Bombay Primary Education Rules, which reads as under:--

"128. Admissions of pupils:

(1) No approved school shall admit-

(a) a child who has not completed the 5th year of age on the date of admission.

(b) children suffering from any infectious or contagious disease:

(c) any child after the lapse of two months from the beginning of the school year except with the special permission of the Administrative Officer.

(2) A pupil shall pay the fees, if any, for the month in which he is admitted irrespective of the date of admission."

"130. Age certificate:- Every child seeking admission for the first time into an approved school shall produce a certificate of age signed by its parent. In the case of illiterate parents, the certificates shall bear their thumb impression attested by a literate person other than a teacher of the school to which the child seeks permission. The date of birth given in this certificate shall be entered in the school (General) Register. No subsequent change or alteration therein shall be made except with the sanction of the School Board Chairman. In the case of transfer of pupils from one place to another, the age given in the leaving certificate shall be entered in the register of the new school. "

12.2 In cross-examination of Principal-Kalpanaben Chandubhai Patel, who made the certificate of birth of the victim, a question was asked to her regarding age of the victim that on the basis of which document, the entry was made in the register, she replied that the register did not contain the column that on the basis of which document, the entry was made. Further she was unable to say that on the basis of which document, entry of birth date was made in school living certificate, but this is a simply cross-examination and attempt made by the learned counsel for the appellant-accused to establish that birth date of the victim is not proved beyond reasonable doubt. But as far as the evidence of PW-8 is concerned, she was a public servant and as per the provision of Section-35 of the Indian Evidence Act, any certificate issued by such public servant is purely admissible and therefore, certificate of age of the victim issued by the Principal can be considered as purely admissible. Section-35 of the Indian Evidence Act reads as under:--

"35. Relevancy of entry in public record, made in performance of duty:--

An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact." Hence, from the cross-examination also, the defence could not establish that at the time of incident, the victim was more than 16 years.

12.3 I have further perused FSL report and serological report, which show that semen was found from the clothes of the victim and appellant-accused, which was never challenged by the present appellant-accused. Learned trial Judge

considered that in the evidence of victim herself, she stated that she was taken away by the accused from the legal guardianship of parents. I have perused provision of Section-361 of the Indian Penal Code, which provides that if minor girl is under 18 years, and if any person without consent of such minor, kidnap her from lawful guardianship, then main ingredients of Section-361 of IPC is satisfied and proved under Section-363 of IPC.

12.4 In the present case, through document produced on record at Exh.23 to 25, age of the victim is proved and established without any shadow of doubt that she was below 16 years. In the evidence of victim herself, she fairly admitted that she was taken away by the present appellant-accused from the legal guardianship of her parents and she moved with the appellant-accused at different places and in forest area of Ambaji, appellant-accused committed rape on her without her consent. No doubt, Mr. Vyas, learned counsel for the appellant-accused contended that there was a consent of the victim and on her own will, she joined with the appellant-accused and moved with him, but looking to the age of the victim, though there was consent, the same cannot be considered in favour of the appellant-accused. Evidence of the victim speaks that appellant-accused made physical relation and in light of provision of law, it should be considered that appellant-accused committed rape on minor girl below 16 years. From the above observation and circumstantial documents produced on record, learned trial Judge rightly considered that victim was taken away by the appellant-accused and committed an offence under Section-376 of IPC. No doubt, Mr. Vyas, prayed to reduce the sentence as the appellant-accused is 21 years poor boy and he is in jail since long, but I have not found any specific reason to accept the prayer made by Mr. Vyas, learned counsel for the appellant-accused. In view of the above observation, learned trial Judge has rightly considered the ingredients of the alleged offence. I have not found that learned trial Judge has committed any grave error to convict the present appellant-accused. In the result, I am in full agreement with the judgment and order of conviction of the learned Trial Court.

13. In the result, this appeal is dismissed. The impugned judgment and order of conviction and sentence dated 30.09.2011 passed by the learned Additional Sessions Judge, Navsari, in Sessions Case No. 32 of 2010, is hereby confirmed. Bail bond, if any, stands cancelled. R and P to be sent back to the trial Court, forthwith.