
(1985) 10 GUJ CK 0030
In the Gujarat High Court

Gajanand Maganlal Mehta

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 17-10-1985

Acts Referred:

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

Citation : (1987) CriLJ 374

Hon'ble Judges : J.P. Desai, J;A.P. Ravani, J

Bench : Division Bench

Judgement

A.P. Ravani, J.—Human weakness or wickedness; either of the two or both of them together may be the cause of sexual offences. If the offence is on account of wickedness, the accused naturally deserves no sympathy.

2. The appellant-accused was charged for offence u/s 376, Penal Code, on the allegation that on the night of 24-4-1983, between 9.00 and 10.30 p.m. he committed rape on the prosecutrix "S" (P. W. 1, Exh. 12) on the boundary of village Doliya, district Surendranagar and thereby committed offence u/s 376, Penal Code. The learned Sessions Judge held the accused guilty of the offence charged against him and ordered him to undergo R. I. for seven years. The appellant-accused has challenged the legality and validity of the judgment and order of conviction and sentence in this appeal.

3. It was the prosecution case that the prosecutrix "S" (P. W. 1), at the relevant time was aged about 16 years and was studying in 9th standard and was staying at Wadhwan Vikas Vidhyalaya. She belonged to village Vakhatpar, and the accused, who was at the relevant time serving as a Teacher, also belonged to the same village Vakhatpar. At the time when the incident took place, the accused was serving at village Mota Madhad which is at a distance of about 10 kms. from village Vakhatpar. However, he was staying at village Vakhatpar and was coming and going to village Mota Madhad on bicycle. It was the prosecution case that the prosecutrix "S" (P. W. 1) was admitted in Wadhwan Vikas Vidhyalaya in the

year 1981. As disclosed in the evidence, the prosecutrix had two brothers, namely, Hariram and Mayaram. Both of them were serving at Rajkot. Mayaram, (P. W. 10, Exh. 45) has been examined in the case. He was working as truck driver at Rajkot for the last about 10 years. The mother of the prosecutrix, i.e., Shantaben (P. W. 7, Exh. 27) has also been examined in the case. Shantaben was aged about 65 years and the father of the prosecutrix, who is blind and deaf, was aged about 70 to 75 years. The prosecutrix has two sisters. Both of them are married. She studied up to 7th standard at village Vakhatpar and thereafter she was admitted at Wadhvan Vikas Vidyalaya in the year 1981. As disclosed in Exh. 13, a post card written by the accused and addressed to the prosecutrix, and also as per the evidence of prosecutrix "S" (P. W. 1) and Shantaben (P. W. 7), the accused helped in getting admission for the prosecutrix in Wadhvan Vikas Vidyalaya. Since there was no other able bodied male member in the family of the prosecutrix to look after the affairs of the house and other work the mother of the prosecutrix took the help of the accused in several matters. As disclosed in Exh. 13, since the year 1981 the accused was in close contact with the family and with the prosecutrix. In Exh. 13 it is stated by the accused that on Saturday-Sunday he could not come, but she (i.e. the prosecutrix) should not worry. As and when Bhavna arrived, she should take the uniform and even if she did not get the uniform she should not worry herself. That her parents were in good mood and that he would surely come on next" Saturday-Sunday. In paras b and 7 of the deposition of the prosecutrix, P. W. 1 (Exh. 12), it is clearly stated that on every Saturday the accused was coming to see her. It is also stated that the letter Exh. 13 was written by the accused. On this point there is no cross-examination. As disclosed in the prosecution evidence, the examination of the prosecutrix was going on. April 21, 1983 was holiday. In the afternoon of April 20, 1983 the accused had gone to Wadhvan Vikas Vidyalaya and had met the prosecutrix and had told her that her father was not keeping well and she should accompany him and should come to village Vakhatpar. One Arunaben of the Vikas Vidyalaya was present when this talk took place. On this ground (rather pretext) the prosecutrix was taken by the accused with him from the Vidyalaya. They left the Vidyalaya by rickshaw at about 5 p.m. They came up to Ratanpur from where they boarded a public carrier and got down near the Dolia boundary at about 8 to 9 p.m. Village Vakhatpar was at a distance from Dolia boundary and therefrom after walking for some distance, the prosecutrix was taken off the road by the accused and at some distance away from the road, she was sexually assaulted by the accused. She tried to raise shouts, but she was told by the accused that there was none to hear her shouts and the accused threatened her that if she disclosed this to anyone, she would be further defamed. Thereafter, the accused took her to village Vakhatpar where they reached at about 11 O'clock in the night. At the house of the prosecutrix when the door was knocked, her mother opened the door. The accused left the prosecutrix at the house and went away. The prosecutrix asked her mother as to how was the health of her father. Her mother said that there was nothing wrong with the health of her father. Then she told that on that pretext she was brought there and she told her

mother that on the way she was sexually assaulted by the accused and she wept. Her mother consoled her, washed the petticoat which was stained with blood. As disclosed in the evidence, her mother told that it was better to hush up the matter, otherwise it would ruin her career. Again the prosecutrix went to Wadhwan and appeared in the remaining papers of the examination. After the examination was over, she had come back. Few days thereafter when the prosecutrix was alone and was doing some work in the kitchen in her house, the accused had come in the house and had tried to outrage her modesty. At that time the mother of the prosecutrix came and the accused had run away. Thereupon, mother Shantaben asked "S" (prosecutrix) to write letter to Mayaram, brother of the prosecutrix, to come to village Vakhatpar. In response to the letter written by her, Mayaram came to village Vakhatpar where he was apprised about the incidents by his mother and also by the prosecutrix. It appears that before about a week of filing of the F. I. R. (i.e. on July 24, 1983), Mayaram met the accused and had told him not to misbehave. This is apparent from Exh. 52, the complaint filed by the accused against Mayaram. In this complaint it is stated that on the date of the complaint, when the "accused was repairing his bicycle in front of his house, Mayaram came and told him that on the previous Sunday (which would be July 24, 1983), he had let him go, but on that day he was not to be allowed to escape and he was to be finished and Mayaram took out knife and told the accused to come out. At that time, the wife of the accused intervened and other persons also intervened and that is how the accused escaped. Thereafter the accused had gone to Sayla Police Station and lodged the complaint. Exh. 52, as stated hereinabove. Pursuant to the said complaint filed by the accused. Police interrogated Mayaram. Thereupon, he told the correct facts that the accused had sexually assaulted his sister "S" (Prosecutrix) and the complaint filed against him was false. Thereupon the Police recorded the complaint of "S" on July 31, 1983 and the same has been produced at Exh. 14 in the case. The accused had been arrested on 16-8-1983. Necessary investigation was made by the Police and then the accused was charge-sheeted for the offence as stated above. The case was committed to the court of session. On trial the learned Sessions Judge found the accused guilty of the offence charged against him and therefore convicted and sentenced him to undergo R. I. for seven years.

4. The prosecution mainly relied upon the evidence of prosecutrix "S" (P. W. 1), her mother Shantaben (P. W. 7), her brother Mayaram (P. W. 10), Vimlaben (P. W. 8), a neighbour of Shantaben and also relied upon the evidence of medical officers and other witnesses. The learned Sessions Judge in the facts and circumstances of the case held that the evidence adduced by the prosecution was reliable and the accused was guilty of the offence charged against him.

5. The learned Counsel for the appellant-accused mainly contended that there was inordinate delay in filing the complaint and there were certain omissions in the F. I. R. and the prosecution case was improved upon by the prosecutrix and her mother in their deposition before the court. Moreover, it was submitted that

the witnesses Arunaben and Harichhaben of Wadhvan Vikas Vidyalaya, who were referred to in the evidence of the prosecutrix and were alleged to be present at the time when the accused went to Wadhvan on 29-4-1983, have not been examined and, therefore, adverse inference should be drawn against the prosecution. Moreover, it was submitted by the counsel for the appellant-accused that in view of the medical evidence, " if at all there was sexual intercourse by the accused with the prosecutrix, it was by consent of the prosecutrix and the accused should be given benefit of doubt.

6. Be it noted that the family of the prosecutrix belongs to a backward class community, i.e. Bhavaji, and the prosecutrix belongs to an extremely poor strata of the society. Two of her brothers were compelled to leave village in search of employment and both of them were working at Rajkot for last about eight years. Her father was blind and deaf and was usually staying in the temple. Even his food was being sent there at times. The family was being looked after by the accused. The accused was instrumental in seeing that the prosecutrix gets admission at Wadhvan Vikas Vidyalaya and pursues her further studies. The fact that the accused and the family of the prosecutrix were closely connected with each other and that the accused was looking after the ordinary needs of the family and was helping the family in many matters, is amply established by the evidence of prosecutrix "S" (P. W. 1) and her mother Shantaben (P. W. 7). It is also established by Exh. 13, a post card dated 22-12-1981 written by the accused himself and proved by the evidence of "S". Moreover, Exh. 43, is a letter of request for duplicate school leaving certificate addressed to the Headmaster of the Girls' High School at Vakhatpar, where the prosecutrix was studying. On this letter the thumb impression of Shantaben (P. W. 7), is purported to have been placed. The thumb impression is identified by the accused. The accused has admitted this letter in his statement u/s 313, Criminal P.C. It is also admitted by the accused in his statement u/s 313 of the Code that he was instrumental in getting admission to the prosecutrix in Wadhvan Vikas Vidyalaya and that he had accompanied her and her mother to Wadhvan Vikas Vidyalaya. This is also proved by Exh. 38 which is an admission form and it bears the signature of the accused as guardian of the prosecutrix. There are other two letters Exhs. 35 and 36 which were produced in the case at the request of the accused. Both these documents are addressed to the authorities of Wadhvan Vikas Vidyalaya. These letters also show that the accused was acting as guardian of the prosecutrix. As per Exh. 36 it is clear that the accused was working as such even in the month of April 1983. In the background of this relation with the accused and in view of the fact that there was no other able-bodied male member in the family at Vakhatpar, the mother of the prosecutrix thought it fit to hush up the matter. And as disclosed in the evidence, she had a talk with one Vimlaben and one another neighbour and they also told that it would be better not to rake up the matter further and forget about the incident. In this background the mother might have been tempted to hush up the unhappy chapter and no one would have come to know about the incident. But the accused persisted in following the prosecutrix

and went to the house of the prosecutrix few days after the incident and thereupon the mother of the prosecutrix was forced to call her son from Rajkot. At that time also the attitude of the family was to see that the accused should behave properly on being rebuked or on being told by Mayaram. As disclosed in Exh. 52, (the complaint filed by the accused against Mayaram,) Mayaram did meet the accused on the previous Sunday, i.e. on July 24, 1983. Instead of behaving properly, the accused appears to have taken an affront and filed a complaint against Mayaram. Be it noted that in this complaint, Exh. 52, no reason whatsoever is stated as to why Mayaram wanted to assault him and finish him. Thus, only after the complaint, Exh. 52, was filed by the accused against Mayaram, and when the police went to interrogate Mayaram the true facts came to light. Thus, delay is sufficiently explained. Counsel for the appellant-accused submits that it was on account of the complaint, Exh. 52, filed by the accused, that the entire story has been cooked up by the prosecutrix; "S\\ her mother Shantaben and Mayararri.

7. The submission, to say the least, surpasses our imagination. It is difficult to believe that the brother of prosecutrix who is aged about 16 years and her mother, would invent a story which would tarnish the character of the girl and would impair the future chances of her marital life and would leave a permanent stigma on her character. They would never have intended a story which would injure themselves and their entire family and would-ruin the career of the girl. The suggestion made by the defence is against the probabilities in Indian life and society. Moreover, there is nothing in the complaint, Exh. 52, filed by the accused against Mayaram, to indicate that it was on any such ground that Mayaram had tried to assault him. On the contrary, the case of the defence, as disclosed in the written reply submitted by the accused (Exh. 54) was that it was on account of the fact that he had enmity with one Thakarsi who was an ex-Sarpanch. According to him the entire case was cooked up against him by Mayaram and Thakarsi. .Said Thakarsi had illicit relations with Sharda, the elder sister of the prosecutrix and later on said Thakarsi had developed illicit relations with prosecutrix also. That Mayaram had a suspicion that the accused was spreading rumours about this illicit relations and, therefore, with a view to rake up vengeance against the accused, said Thakarsi and Mayaram had filed false complaint against him. According to the defence, the aforesaid story off illicit relations between Thakarshi and Sharda as well as with the prosecutrix, was known to the village people.

8. The defence story is highly improbable and it also appears to be absurd and not supported by any evidence whatsoever. On this point no suggestion whatsoever has been made to the prosecutrix or Mayaram. Some suggestion appears to have been made to Shantaben, but the same is very vague. The other witnesses, namely, Vimlaben, Ganpat-gar, Vitthal Danji and Jaisinh Motibhai, have been examined in the case. They belong to the same village. To none of them any such suggestion has been made by the defence. Therefore, the plea raised by the defence that the prosecution case has been cooked up at the

instance of Mayaram and Thakarshi, because the accused filed complaint against Mayaram on July 30, 1983, cannot be believed. On the contrary, the prosecution case as the accused persisted to misbehave, Mayaram having been called from Rajkot by his mother and after having been apprised about the incident, he having gone to the accused, and rebuked him and the accused instead of repenting or apologising, took a belligerent attitude and filed the complaint, Exh. 52, against Mayaram, which led to the unfolding of the entire case, appears to be most reasonable, natural and probable. Thus, the argument based on delay in filing the complaint has no merit and it has got to be rejected.

9. Counsel for the appellant-accused submitted that there were several improvements in the deposition of both "S" prosecutrix (P.W.I) and Shantaben (P. W. 7). According to the counsel for the appellant-accused, "S" the prosecutrix did not state in F. I. R. that she had told her mother about the incident immediately. It is also alleged that there was some discrepancy with regard to letter being written by her to her brother Mayaram for coming to village and this fact was not mentioned in the F. I. R. According to the defence, even the story with regard to Gajanand the accused having accompanied "S" and Shantaben for leaving "S" at Wadhvan Vikas Vidyalaya is not stated in the F. I. R. Nor the details with regard to the examination on 20-4-1983 has been mentioned and the details regarding the threats having been given, have not been given in the F. I. R. The aforesaid comments made on the evidence of the prosecutrix have no merits whatsoever. The further statement of prosecutrix has been recorded on the same day, i.e., July 31, 1983, the day on which the F. I. R. was recorded. There is nothing to show in the evidence that any improvement or embellishment has been made by the witness as far as the story narrated by her in police statement is concerned. In the F. I. R. a witness might or might not have given certain details. There is no suggestion whatsoever in cross-examination of the prosecutrix to show that the witness had omitted to give details or had omitted to state material facts in her statement before the Police. In this view of the matter, no importance whatsoever can be attached to the omissions to state certain facts in F. I. R. and alleged improvements. In this connection reference may be made to the decision of the Supreme Court in the case of Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, , wherein the Supreme Court has observed:

Overmuch importance cannot be given to minor discrepancies. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore, cannot be annexed with undue importance. More so when the all important "probabilities factor" echoes in favour of the version narrated by the witnesses.

10. Similar view is taken by the Supreme Court in the case of State of U.P. Vs. M.K. Anthony, . In para 10 of the judgment, the Supreme Court has observed that while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. The

infirmities, deficiencies and drawbacks are pointed out in the evidence as a whole, they may be kept in background; but if they are not against the general tenor of the evidence given by the witness, the evidence cannot be rejected. The Supreme Court has observed:

Minor discrepancies on trivial matters not touching the core of the case, by a pertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

In view of the aforesaid principles laid down by the Supreme Court, it is difficult to agree with the submission made by the counsel for the appellant-accused and discard the evidence of the prosecutrix.

11. Counsel for the appellant-accused has criticised the evidence of Shantaben (P. W. 7) on the same line. According to him, she has committed mistake in calculating the days after the main incident of 20-4-1983. In his submission, the calculation given by her does not fit in with the exact calculations which may be made on the basis of the two terminal dates, i. e. 20-4-1983 and July 31, 1983, meaning thereby, the date of incident and the date of filing of the F. I. R. respectively. Similarly he has drawn our attention to certain alleged omissions regarding the petticoat having not been washed and the story having not been narrated to others immediately. On the basis of the same principle laid down in Bhoginbhai's case (1983 Cri U 1096) (supra) by the Supreme Court these alleged discrepancies cannot be given overmuch importance particularly when the circumstance whether the clothes were washed or not has no significance whatsoever because the complaint itself has been filed after a period of about 3½ months. Moreover, the discrepancy in calculation of days has also no bearing whatsoever. It must be realised that the witness Shantaben mother of the prosecutrix was aged about 65 years. That she is an illiterate lady staying in a small village and leading the life in abject poverty. Again referring to the observations made by the Supreme Court in Bhoginbhai's case (supra), a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on. This alleged discrepancy with regard to the days only indicates that the witness being an illiterate lady is not in a position to calculate the days properly. Hence the comments made by the counsel for the appellant-accused on the evidence of Shantaben have also no merits and we see no reason why the evidence of Shantaben, the mother of the

prosecutrix, should not be accepted.

12. Counsel for the appellant-accused submitted that the evidence of Mayaram, the brother of the prosecutrix, should also not have been accepted on the same footing. That he also made certain omissions while narrating the story before the police and had made improvements in his deposition before the court. According to the defence, the witness had not given details with regard to the letter alleged to have been written by prosecutrix and received by him. The learned Counsel for the appellant-accused has also pointed out some discrepancy with regard to the arrival of Mayaram at village Vakhatpar. According to the evidence of Shantaben, he had come to village Vakhatpar on 29-4-1983 while it appears from other evidence that he came before about 10 days from the date of filing of the complaint. Again these discrepancies do not touch the basic fabric of the prosecution case and are of minor significance. Furthermore, it appears from the complaint, Exh. 52, filed by the accused against Mayaram that Mayaram was in village Vakhatpar at least on the previous Sunday, i.e. c.i July 24, 1983. This circumstance fits in with the prosecution case which stands to reason and accords with probabilities.

13. The evidence of neighbour of Shantaben and the prosecutrix has been criticised on the ground that the accused had strained relations with the husband of Vimlaben and therefore she was deposing against the accused. This witness only states that she had a talk with Shantaben about the sexual assault by the accused on Sarasvati and that she had told that it would be better if the matter was hushed up. The witness does not say anything against the accused. On the contrary, she told that the matter should have been hushed up. Therefore, it cannot be said that the witness has come to depose anything against the accused. The evidence of this witness is most natural and, therefore, we see no reason to differ with the reasoning given and conclusion arrived at by the learned Sessions Judge in respect of the evidence of this witness. Even if the evidence of this witness is kept aside, the prosecution case does not get in any way impaired. Therefore also the allegation against the evidence of this witness made by the accused pales into insignificance.

14. The learned Counsel for the appellant-accused submitted that the evidence of Jasumatiben, P. W. 9, who was working as "Grah Mata" in Wadhvan Vikas Vidyalaya, should have been accepted by the court in its entirety. Jasumatiben (P. W. 9) has deposed that at the relevant time she was "Grah Mata" of Wadhvan Vikas Vidyalaya and the prosecutrix was studying and staying at Wadhvan Vikas Vidyalaya. That there were about 700 pupils studying in the institution. She had brought register, Exh. 33, in which the presence of all the pupils was being marked. She stated that from 17-4-1983 onwards, the prosecutrix was not present in Vikas Vidyalaya. On this basis it was submitted by the defence that the entire story of the prosecution that on 20-4-1983, the accused had gone to Wadhvan Vikas Vidyalaya and had taken away the prosecutrix and on the way committed sexual assault on her should be disbelieved. On scrutinising the

evidence of Jasumatiben (P. W. 9), it is very clear that absence from 17-4-1983 onwards has been marked subsequently. According to her own evidence, initially it was noted that the girl was present in Vikas Vidyalaya. To indicate presence figure T was being written. She has admitted that in the column of April 17 to 30th April 1983, subsequently figure T was converted into "2", indicating the absence of the pupil. She does not say on which specific date she had made corrections and on what basis. She only states vaguely that subsequently when she came to know that during the aforesaid days the prosecutrix was absent, she converted figure T into "2" indicating her absence. No source of information is indicated. The counsel for the appellant-accused submits that the evidence of this witness should be accepted in its entirety. This submission cannot be accepted. But we do rely on the evidence of this witness in part. The evidence of the witness discloses that initially it was noted in the register that the prosecutrix "S" was present in Vikas Vidyalaya on April 20, 1983. At least after 30-4-1983 figure T has been changed. On which date this has been done is not indicated in the evidence. It appears that Jasumatiben has tried to help the accused by converting the figure "1" into "2". If her evidence is properly scrutinised, the fact remains that initially the register did disclose that the prosecutrix was present in Vikas Vidyalaya. This part of the evidence is required to be accepted. The law on this point is very well settled that the testimony of a witness can be accepted in part and can be rejected in part. It is not that the prosecution is bound down by the evidence of all the witnesses that may be examined by the prosecution. The evidence of a prosecution witness can be accepted in part and the rest which does not inspire confidence of the court can be rejected. By implication this is what has been done by the learned Sessions Judge and for the aforesaid reasons, we believe and hold that witness Jasumati has tried to help the accused when the figure T was converted into "2". This circumstance may be examined from another angle also. According to the defence, "S" was staying at the place of one D. K. Bhatt, who happened to be the relative of the accused. The story regarding the accused having come to Vikas Vidyalaya and asking the girl to accompany him to village Vakhatpar as her father was ill, has been narrated by the prosecutrix right from the beginning. If at all she wanted to concoct a story, she would not concoct something which would be falsified by the record of Wadhvan Vikas Vidyalaya. On the other hand, the suggestion made by the accused that she was staying at the place of D. K. Bhatt has remained a vague suggestion only. Of course, the accused had tried to support this plea by letter Exh. 36 dt. 17-4-1983. In this letter it is requested that during examination time, "S", who was studying in 9th standard, should be permitted to stay at Surendranagar and that she would stay at the place shown thereinbelow. The letter does not bear the signature of, or any mark made by, the Secretary or any one on behalf of Wadhvan Vikas Vidyalaya. There is nothing to show that the letter was ever received by Vikas Vidyalaya or if at all received when and on what particular date. Had it been received by the authorities of the Vikas Vidyalaya, then some endorsement indicating either the grant or refusal of the request by the authority would have been there. Even assuming for a moment that such a

letter was given to the authorities of Vikas Vidyalaya, there is nothing to show that the permission was granted as requested therein. It is highly improbable that a student will be permitted to stay elsewhere during the days of examination. Ordinarily it would be convenient for a student to be in the Vidyalaya and appear at the examination. Therefore, this letter appears to have been subsequently introduced in the record of the Wadhvan Vikas Vidyalaya. Further this letter appears to have been written by the accused himself. But there is no proof of the handwritings, because Jasumatiben, in her deposition, does not say that she knew the handwriting of the accused. Therefore, it cannot be said that it has been legally proved. Hence it cannot be read as evidence. Even assuming for a moment that it is properly admitted in evidence, there is nothing to show that the letter was submitted to the Wadhvan Vikas Vidyalaya and the request made therein was granted.

15. This brings us to the contention raised by the counsel for the appellant-accused with regard to the non-examination of two witnesses, namely, Arunaben and Haricchbaben of Wadhvan Vikas Vidyalaya. On this point the counsel for the appellant-accused has relied upon the following decisions of the Supreme Court:

- (1) Sawal Das Vs. State of Bihar, .
- (2) Thulia Kali Vs. The State of Tamil Nadu, .
- (3) State of U.P. and Another Vs. Jaggo alias Jagdish and Others, .

The principle laid down in the aforesaid decisions is that the prosecution should examine all the witnesses so as to unfold the prosecution case and should not drop any prosecution witness with an oblique motive to shut out the defence. This principle is well settled. The question is, has the prosecution not examined the aforesaid two witnesses for any such purpose, First of all, it is an admitted position that the prosecution did not cite Smt. Arunaben and Hariichhaben as witnesses for the prosecution. Simply because their statements were recorded by the Police, it cannot be said that the prosecution relied upon their evidence. The recording of statement of a witness by Police and reliance placed on the statement by the prosecution are two different things. In this case, the prosecution never cited the aforesaid two persons as witnesses. Moreover, there is nothing to show that the prosecution did not wish to unfold the prosecution case and did not cite these witnesses with an oblique motive to shut out the defence. The most important thing was the record of Wadhvan Vikas Vidyalaya and that has been got produced by the prosecution with the evidence of Jasumatiben. Therefore the argument raised on the basis of the non-examination of Arunaben and Hariichhaben who were alleged to be present at the time when the accused went to Wadhvan Vikas Vidyalaya on 20-4-1983 and took away the girl with him, has no bearing and the same has got to be rejected.

16. Counsel for the appellant-accused submitted that as per the medical evidence, the girl was used to sexual intercourse and, therefore, it should be held that the sexual intercourse by the accused was with the consent of the girl.

The argument has its roots in the notions prevailing in male dominated society having feudal traits. It is not understood how it can even be suggested that on the basis of the circumstance that a woman, used to sexual intercourse, would be a consenting party to "a forcible sexual assault and intercourse". This argument may be tested by counterposing a question : If an accused, a male, able bodied person, is used to sexual intercourse, and is charged of an offence of some sexual assault, can it be inferred or can it be argued that because he is used to sexual intercourse, he must have committed sexual assault or intercourse against the will of the girl or woman. If this circumstance cannot be taken against a male person, then it is not understood, how a similar circumstance can be advanced as an argument to show that the girl must be a consenting party to the forcible sexual intercourse? Therefore, the circumstance that as per the medical evidence the girl was used to sexual intercourse, by itself does not carry the matter either way. A girl or a woman, either married or unmarried, may be promiscuous in her sexual behaviour and relations. Even so, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone. Once a girl or woman is used to sexual intercourse, she does not become a vulnerable object or prey for being sexually assaulted. Because she is promiscuous, it cannot be inferred that she must have given consent to the alleged forcible sexual intercourse. At the most it is a relevant circumstance which has to be taken into consideration by the court.

17. Now, in the background of the facts and circumstances of this case, the argument may be examined. First of all, this was not the case put forth by the defence. The defence was that of total denial and the defence alleged that the entire prosecution case was cooked up because of the enmity with one Thakarshi, who made Mayaram, the brother of the girl "S" and the girl herself, instruments in filing the false case against the accused. It is true that this submission cannot be rejected on the ground that the defence was that of total denial. But the defence of the accused can have bearing while considering this argument advanced on behalf of the accused.

18. As discussed hereinabove, the accused was in a position of a de facto guardian of the prosecutrix. He was looking after the family of the girl because there was no able bodied male member in the family at village Vakhatpar. Both the brothers of the girl were staying at Rajkot. The family was in need of the help of some male person who could guide them with regard to the education of the girl and with regard to other matters. It was the prosecution case that the accused played trick and induced the girl to accompany him to come to village Vakhatpar. This is the background in which the question of consent has got to be examined. The accused was in the dominating position. The accused at the relevant time was aged about 45 years while the prosecutrix had hardly completed 16 years of age. On the date of the incident, she was 16 years and 2 months old. (Her date of birth is 4-1-1967 as disclosed in the birth register Exh. 20 read with the deposition of Jesing, Exh. 19, and vaccination register, Exh. 21). If a person aged about 45, who was in touch with the family for last

about two to three years before the date of the incident and who was acting almost like a father of the girl, induces her to accompany him under the pretext that her father was ill and that she was required to visit her father even in the midst of the examination and while on the way to village Vakhatpar during night time at about 10-30 or 11.00, if she is made a victim of sexual assault, it may be that she might not have resisted or she might have even passively suffered the assault. This would not by any stretch of reasoning amount to free consent. On the contrary, it would amount to obtaining consent by deception. Therefore, the argument based on the ground that the girl may be a consenting party to the sexual intercourse and therefore the accused should be given the benefit of doubt has also no merit.

19. Counsel for the appellant-accused has submitted that the possibility of false charges of rape being made cannot be ruled out. He has relied on a passage under the caption "False Charges" from Modi's Medical Jurisprudence and Toxicology (20th Edition, p. 339). The learned author has referred to certain incidents of false charges of rape. The counsel for the appellant has relied on these incidents and submitted that in this case it should be held that the girl has made false charge against him. This is a refined or sophisticated version of the argument which was raised before the learned Sessions Judge by the accused. Before the learned Sessions Judge it was argued by the counsel for the defence that the prosecutrix belonged to backward class and, therefore, she would easily make false allegations against the accused. In para 47 of the judgment, the learned Sessions Judge has dealt with this argument and has rejected the same. The learned Sessions Judge has rightly stated that there was no evidence to show that the girl was of loose character and that there were any complaints against her on such count either before the Wadhvan Vikas Vidyalaya or before her parents.

20. The aforesaid argument regarding false charges being made by the prosecutrix reflects the squint-eyed and/or coloured glass approach of the upper elites of the society towards the poor and backward class people of the country. It may be noted that moral character and such other virtues are not the monopoly of rich, educated and so-called upper caste elites in the society. The backward class people are generally poor in material resources, but usually very rich in terms of character. For them violation of law or that of social norms is not the culture of their life. They are afraid of violating social norms and traditions. They do not know what the law is and they never dream of breaking the law. They cannot afford to lead the life, or behave in any manner disregarding the social sanctions. Violation of social norms and disregard of the social sanctions may be possible for the few fortunates rolling into wealth because they can win the respect of others with the help of their money power while this is not possible for backward and poorer class of people. In the instant case, the prosecutrix and her family members belong to extremely poor strata of the society. They are staying in a village. They belong to a tradition bound society. Her brothers are leading honest life by engaging themselves as labourers. The family is trying to

give education to the youngest daughter, the prosecutrix in the case. Why should the family make false charge and thereby invite injury upon itself and ruin the career of the girl? In the instant case, the observations made by the Supreme Court in *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat*, are more appropriate. As observed by the Supreme Court, in Indian conditions, rarely will a girl or a woman make a false allegation of sexual assault on account of any such factors which may be possible in the context of advanced societies of western world. The Supreme Court has observed: "Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites". Such is not the case of the prosecutrix and her parents and brother. It is highly improbable that the girl and her relatives would ever invent false charges against the accused by inviting dishonour and disgrace on herself and on the family. Such a course would mar her future career. By inventing false charges, she would inflict injury on herself. No sane person would adopt such a course, even for the purpose of wreaking vengeance if there be any. Therefore, reliance placed on the aforesaid passage of *Medical Jurisprudence and Toxicology* by Modi and the argument advanced by the counsel for the appellant-accused on that basis has got to be rejected.

21. No other contention is raised with regard to the merits of the case.

22. However, lastly, the counsel for the appellant-accused submitted that this Court should take a lenient view and the sentence imposed on the accused should be reduced. In the facts and circumstances of the case, we see no reason to reduce the sentence imposed on the accused. The accused was in the position of a de facto guardian of the girl. He has misused the position and the confidence reposed in him by the parents of the girl. The root cause of the offence does not seem to be human weakness, but it appears to be "wickedness". Therefore, the accused deserves no sympathy.

23. In the result, the judgment and order of conviction and sentence passed by the trial court is confirmed and the appeal filed by the accused is ordered to be dismissed and the same is hereby dismissed.