
(2008) 11 GUJ CK 0009
In the Gujarat High Court
Case No : Criminal Appeal No. 175 of 2005

Ganpatbhai Ravjibhai Bariya	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 25-11-2008

Acts Referred:

Evidence Act, 1872 — Section 114A
Penal Code, 1860 (IPC) — Section 376, 376(2)

Citation : (2008) 11 GUJ CK 0009

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

Bench : Division Bench

Advocate : U.S. Brahmabhatt, for the Appellant; U.R. Bhatt, APP, for the Respondent

Final Decision : Dismissed

Judgement

A.L. Dave, J.—The appellant came to be tried by Sessions Court, Panchmahals, at Godhra, for an offence punishable u/s 376 of the Indian Penal Code and came to be convicted therefor. He was sentenced to rigorous imprisonment for ten years and to pay a fine of Rs. 1000/-, in default, to undergo simple imprisonment for one month by the Trial Court, by virtue of a judgment and order rendered on 1.1.2005 in Sessions Case No. 116 of 2004.

2. As per the prosecution case, the appellant committed rape on daughter of Nanjibhai Bariya on 30th September, 2003, at about 16.00 hours while she was gracing cattle in the forest area along with her uncle, Malabhai, and his son, Parul Shanker. It is the case of the prosecutrix that the accused came with an axe in his hand and had a quarrel with her uncle and his son and, thereafter, he chased her and committed rape and, thereafter ran away with the axe. According to the prosecutrix, she was wearing a green petticoat, blouse and underwear. The rape was committed by the accused after removing her underwear and the zip of his trouser. According to the prosecutrix, she was aged 13 years at the time of the incident. She, after recovering from the shock, went home and

informed about the incident. Thereafter, they went to police and lodged an F.I.R. She was taken to doctor and was examined. On the basis of the F.I.R., offence was registered and investigated. Thereafter, on the basis of the material found and collected by the Investigating Officer, charge sheet was filed in the Court of learned Judicial Magistrate, First Class, Santrampur, who, in turn, committed the case to the Court of Sessions and Sessions Case No. 116 of 2004 came to be registered.

2.1 Charge was framed against the accused at Exhibit 2 and he pleaded not guilty to the charge and claimed to be tried. On the basis of the evidence led by the prosecution, the Trial Court found that the charge against the accused appellant was proved and, therefore, recorded his conviction and sentenced him, as stated in the earlier part of this judgment. It is against the said judgment and order that the present appeal is preferred.

3. We have heard learned Advocate, Mr. Brahmbhatt, for the appellant and learned Additional Public Prosecutor, Mr. Bhatt, for the respondent-State. We have also examined the record and proceedings.

4. Learned Advocate, Mr. Brahmbhatt, submitted that the age of the prosecutrix is not properly established. He submitted that the prosecutrix has deliberately stated that she is illiterate before the doctor as well as before the Court, but her uncle has admitted in his deposition that she was studying at the time when the incident occurred. The Investigating Agency has not made any investigation in the direction of age of the prosecutrix. The investigation is, therefore, faulty and the benefit ought to have been given to the appellant. He submitted that the appellant has been falsely implicated because of animosity between the parties. The appeal may, therefore be allowed.

5. Learned Additional Public Prosecutor, Mr. Bhatt, has opposed this appeal.

6. Considering the facts of the case, the relevant evidence would be of the prosecutrix, her uncle, who is an eye-witness, and the doctor. The prosecutrix is examined at Exhibit 29, her uncle is examined at Exhibit 25 and the doctor (P.W.1) is examined at Exhibit 5.

6.1 The prosecutrix has, in terms, stated that the accused came to the forest area when she was grazing her cattle in company of her uncle and his son. According to her, the appellant quarrelled with her uncle and his son and then chased her with the axe and then, after pushing her on the ground and removing her underwear, committed rape. Because of the fear of the appellant, her uncle and his son had run away. After the rape, the appellant went away with his axe. She says that her clothes were stained with blood. The prosecutrix has been cross-examined, but the evidence becomes more and more clinching as a result of the cross-examination.

6.2 The uncle of the prosecutrix, Malabhai, is examined at Exhibit 25. He says that the appellant came to the forest area while he and the prosecutrix were

grazing cattle and threw the prosecutrix on the ground. He says that since the appellant rushed against him with an axe, he ran away. He says that while running away, he saw the accused in a mounted condition over the prosecution. He says that, thereafter, when the prosecutrix was coming therefrom walking slowly, he took her to her parents. He says that her clothes were stained with blood. In cross-examination, the suggestion was that he was supporting the prosecution case as the prosecutrix is his niece. Certain contradictions were also pointed out, which are denied by the witness. Those contradictions are not proved by putting them to the Investigating Officer, Jabbarbhai Hamirbhai Zalu (Exhibit 39).

6.3 P.W.1-Dr. Rameshchandra Harjivan Shrimali is examined at Exhibit 5. He says that he had examined the prosecutrix at 01.00 hours on 1st October, 2003 and was given a history that Ganpatbhai Ravjibhai Bariya (the appellant) had raped her at around 4.00 P.M. on 30th September, 2003, in the forest area. According to the doctor, the patient was conscious, but had difficulty in walking. There were no marks of injury on her face, chest or hands. There were no internal injuries, but her clothes were stained with blood. She had not entered the menstrual cycle and had 28 teeth. The doctor says that there were blood stains on her private parts and there was vaginal bleeding. There was no injury on the vagina, but there was complaint of pain in the inner thighs. There was no vaginal tear. There was no injury on labia majora or minora. Vaginal examination indicated one finger tightly admitted with pain in vagina. There was abrasion on vaginal wall on both the sides. There was mark of tenderness on vaginal wall, there was tenderness present on vaginal wall and there was rupture of hymen. The doctor opined that there was sexual intercourse within twenty four hours. The doctor issued medical certificate, which is at Exhibit 6. The medical papers in respect of the prosecutrix are at Exhibit 8, which also reveal the history given to the doctor and the findings stated in the certificate and the deposition.

6.3.1 The Doctor says that he examined the accused on 17th February, 2004 around 12.30 P.M. and he found no injuries on his person. The clothes were not torn. There was no injury on either thighs or internal organs. The pubic hair were not blood stained. There was no injury on face and there was no complaint of any pain or abrasion. Smegma was present. He could not have entered into intercourse in last twenty four hours. The doctor has been cross-examined at length, where a suggestion was put that vaginal smear was not taken. The case papers were sought to be referred. The deposition was adjourned and, ultimately, after looking at the case papers, the doctor has given further deposition and the case papers were also admitted in the evidence.

7. From the above pieces of evidence, it is clear that involvement of the appellant is established beyond any manner of doubt in the offence of rape. The prosecutrix complains of the incident within hours of the incident. She has been examined by the doctor within hours thereof and she is found to be bleeding from vagina. There were abrasions in the vaginal walls and her petticoat was

blood stained. This supports her version about the incident. She has no reason to falsely implicate the appellant except that, according to the appellant, they were on enmical terms. The defence of animosity may cut both the ways. It is a double edged sword and, therefore, the other circumstances will have to be gone into. In this regard, it may be noted that the version of the prosecutrix is supported by her uncle and the prosecutrix or her uncle would not falsely implicate the appellant and let go the real culprit because the factum of rape is already established beyond any manner of doubt. The suggestion is only to the effect that there was animosity. What was the cause therefore and where did the roots lie are not suggested. The suggestion has been denied.

7.1 Apart from the above aspects, what is required to be considered is the subsequent conduct of the appellant. He escapes from the place and remains absconding for nearly six months. He came to be arrested only on 16th February, 2004. This would automatically explain absence of injury on his person and presence of smegma. This would also lend support to the version of the prosecutrix about the incident. The appellant, otherwise, had no reason to be away. He has not tendered any explanation for his non-availability for six months.

8. The contention raised by learned Advocate for the appellant that there is no investigation on question of age of the prosecutrix is of no relevance once the intercourse is established and the defence is not that of consent of the prosecutrix. The prosecutrix, in terms, has stated that she was forced into coitus by the appellant and it is nowhere the defence that it was with her consent that the relationship was established. The age, therefore, would be of no relevance. We may now refer to the provision contained in Section 114A of the Indian Evidence Act, which runs as under:

114A. Presumption as to absence of consent in certain prosecutions for rape: In a prosecution for rape under Clause (a) or Clause (b) or Clause (c) or Clause (d) or Clause (e) or Clause (e) or Clause (g) of Sub-section (2) of Section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

The above provisions also will come to into play in this case.

9. In the light of the foregoing discussion of evidence, we are of the view that the Trial Court cannot be said to have committed any error in recording conviction of the appellant. We do not, therefore, deem it proper to exercise our appellate jurisdiction in this case. The appeal must fail and stands dismissed.