

(2016) 04 GUJ CK 0103
In the Gujarat High Court
Case No : Criminal Appeal No. 1357 of 2011

Harishbhai Kalabhai Bagda

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 22-04-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374
Penal Code, 1860 (IPC) — Section 114, 363, 366, 376

Citation : (2016) CriLJ 4217

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

Bench : Single Bench

Advocate : Mr. F.B. Brahmabhatt, Advocate, for the Appellant No. 1; Ms. Hansa Punani APP, for the Respondent No. 1

Final Decision : Partly Allowed

Judgement

Mr. Rajesh H. Shukla, J.(Oral)—The present appeal is filed by the appellant original accused under Section 374 of the Code of Criminal Procedure, 1973 challenging the impugned judgment and order rendered in Sessions Case No.81/2010 by the Sessions Judge, Amreli dated 21.07.2011 recording conviction and sentence as stated in detail in the impugned judgment.

2. The fact of the case briefly summarised are as follows:-

2.1 On 09.06.2010 at about 02:00 p.m., the appellant-accused along with other co-accused is said to have enticed away the complainant aged about 16 years from the lawful custody of the parents with an intention to marry and/or to have intercourse and thereby committed the offence as stated in detail under Sections 363, 366 read with Section 114 and also for the offence under Section 376 read with Section 114 of the Indian Penal Code. The complaint came to be lodged by the complainant-victim being C.R.No.I-86/2010 for the alleged offences under Sections 363, 366, 376 read with Section 114 of the Indian Penal Code with Amreli Taluka Police Station.

2.2 On the basis of the complaint, the investigation was made and charge-sheet came to be filed. However as the offences were triable by the Court of Sessions, it was committed to the Court of Sessions.

2.3 Thereafter, the Court below proceeded with the trial and recorded the evidence of the prosecution witnesses.

2.4 After recording of the evidence of the prosecution witnesses was over, the Court below recorded further statement of the appellant-original accused no. 1 under Section 313 of the Code of Criminal Procedure, 1973.

2.5 After hearing learned APP as well as learned advocate for the defence, the Court below recorded conviction of the appellant-original accused no.1 for the offence under Sections 363, 366 and 376 of the Indian Penal imposing sentence as stated in the impugned judgment and recorded acquittal of original accused nos. 2 and 3.

3. It is this judgment and order which has been assailed in the present appeal on the grounds stated in the memo of appeal.

4. Heard learned advocate, Shri F.B. Brahmbhatt for the appellant-accused and learned APP Ms.Hansa Punani for the respondent-State.

5. Learned advocate, Shri Brahmbhatt referred to the charge at Exh.3 and also testimony of Dr.Gondaliya, PW-1 at Exh.9. He also referred to the medical certificate at Exh.12 regarding the age and submitted that on examination, he has opined that the age of the victim would be between 15-17 years. Learned advocate, Shri Brahmbhatt also referred to the birth certificate produced at Exh.64 and submitted that the date of birth is 06.02.1994 and the date of incident is 09.06.2010, meaning thereby, the victim was aged more than 16 years. Learned advocate, Shri Brahmbhatt, therefore, submitted that as it transpires from the testimony of the victim, PW-2 at Exh.18, it is a case of affair, where she had voluntarily left though she has stated about the act against her will and, hence, it has to be considered with reference to the medical evidence. For that purpose, learned advocate, Shri Brahmbhatt referred to the testimony of Dr.Jadav, PW-3 at Exh.21 and submitted that as referred to in the case papers, Exh.24, there are no marks of injuries found. Learned advocate, Shri Brahmbhatt, therefore, submitted that absence of any mark of external injury would suggest that there was no resistance offered and the act was with consent. He submitted that therefore history, which has been recorded by the doctor as stated by the victim that it was against the will, may not be accepted at the face value. He submitted that in fact, the history could have been given by the parents. Learned advocate, Shri Brahmbhatt also referred to the testimony of PW-4, mother of the victim at Exh.26 and submitted that it has been clearly stated as to what transpired and it has also been stated that there was some compromise arrived at and they had decided not to lodge any complaint. He submitted that as it was a case of love affair, initially the complaint was not filed and, thereafter admittedly, the complaint came to be filed after 15-16 days. He

pointedly referred to the aspect that it has been admitted by the witness that lawyer was consulted and, thereafter, the complaint was filed. He therefore submitted that it is a case of affair and false implication. Learned advocate, Shri Brahmbhatt also referred to the statement of the appellant-original accused no.1 recorded under Section 313 of the Code of Criminal Procedure, 1973, where also he had stated about the affair and false implication as it was not approved by the parents of the victim.

6. Learned advocate, Shri Brahmbhatt submitted that as the age of the victim is admittedly more than 16 years, the ingredients for the offence under Section 376 of the Indian Penal Code would not be fulfilled and the conviction which has been recorded is erroneous and may be set aside.

7. Learned advocate, Shri Brahmbhatt also submitted that as it was a case of love affair, where the victim had voluntarily accompanied even if the Sections 363 and 366 of the Indian Penal Code provide for the age of 18 years for the female, the background of the facts and observations made by the Hon'ble Apex Court in a judgment in case of *S. Varadarajan v. State of Madras*, reported in AIR 1965 SC 942 may be considered.

8. In alternate, he submitted that if the conviction for the offence under Sections 363 and 366 of the Indian Penal Code is maintained, at-least sentence may be modified as the appellant-original accused is also young. He, therefore, submitted that the sentence may be modified to the extent of sentence undergone as he has already undergone more than three years.

9. Learned APP Ms. Punani referred to the testimony of PW-2, victim and submitted that she has stated that when she was going, the accused is said to have insisted that she may seat with him in two-wheeler and, thereafter on the threat of knife, she has been raped, therefore, the conviction recorded is just and proper. She submitted that the age of the victim is more than 16 years, which may be considered for the purpose of consent. However in the facts of the case, it is not a consent and she has been raped under the threat and, therefore, age would not be relevant.

10. Learned APP Ms. Punani also referred to the other evidence including the testimony of Dr. Jadav, PW-3 at Exh.21 and submitted that while giving history, the victim is said to have stated to him about the act against her consent. Learned APP Ms. Punani, therefore, submitted that it cannot be presumed that there was any consent, which has been emphasized. It was submitted that once the consent is not there and if the act is committed without her consent even if she is major, the offence would be attracted. She therefore submitted that as there was no consent, the offence under Section 376 of the Indian Penal Code is committed.

11. Moreover, learned APP Ms. Punani also submitted that for the offence under Sections 363 and 366 of the Indian Penal Code, the age of 18 years is provided for the female and, therefore, consent would not be relevant. In any case, the

offence under Sections 363 and 366 of the Indian Penal Code is established even if it is assumed that it was a love affair and the victim had accompanied the accused. She submitted that as provided in Section 363 of the Indian Penal Code, enticing away has been considered by the Courts and if the female is below the age of 18 years, the consent of the guardian is relevant as the minor may not be able to appreciate about the consequence of the act. It was submitted that therefore even on appreciation of material and evidence, the consent of the victim cannot be said to be a free and voluntary consent for the purpose of offence under Sections 363, 366 and also 376 of the Indian Penal Code. Learned APP Ms.Punani, therefore, submitted that the impugned judgment and order recording conviction is just and proper.

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

13. In order to appreciate the rival submissions, the relevant undisputed facts are required to be considered like the age of the victim. Admittedly the victim is more than 16 years of age and, therefore, for the offence under Section 376 of the Indian Penal Code, the aspect of consent could be decided with reference to the age of the victim. Jowitt's Dictionary on English Law has defined consent in the following words:

"Consent supposes three things, a physical power, a mental power and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise or undue influence, it is to be treated as a delusion and not as a deliberate and free act of the mind."

14. Moreover, a useful reference can be made to the judgment of the Hon''ble Apex Court in the case of Uday v. State of Karnataka, reported in (2003) 4 SCC 46, where it has been observed,

"The courts in India have by and large adopted these tests to discover whether the consent was voluntary or whether it was vitiated so as not to be legal consent."

15. Therefore the question is whether it could be said to be a free and voluntary consent. In the facts of the case as referred to, the accused is said to have enticed away or taken away the victim on threat of knife. However, the testimony of PW-4, mother refers to some compromise arrived at, for which, the complaint was not filed initially. Again though the victim has stated that she was enticed away or taken away on threat of knife, admittedly it was two-wheeler, where it cannot be readily believed that she could be taken away as she would always have chance to jump out or raise shout for help. Therefore without any further elaboration, this aspect clearly suggests about her conduct and her testimony cannot be accepted at the face value.

16. However for the purpose of other offence under Sections 363 and 366 of the Indian Penal Code, the age of the female provided is 18 years. The Hon''ble Apex

Court in a judgment in case of State of Haryana v. Raja Ram, reported in (1973) 1 SCC 544 referred to this aspect to taking or enticing away the minor. It has been observed,

"The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the keeping of the lawful guardian without the consent of such guardian.

On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial : it is only the guardian's consent which takes the case out of its purview."

17. Therefore admittedly when the victim is below the age of 18 years, what would be relevant is consent of guardian and not the consent or voluntariness of the victim. The Legislature has provided that the minor may not be competent to give consent as she may not have that maturity of understanding the consequences of the act. It is in these circumstances, the judgment and order recording conviction for the offence under Sections 363 and 366 of the Indian Penal Code cannot be said to be erroneous. However as the victim is above the age of 16 years as stated above and by conduct suggesting the consent, conviction for the offence under Section 376 of the Indian Penal Code may not be sustained.

18. Moreover, while scanning the evidence the court has to consider and appreciate the evidence as to whether the manner in which it is said to have been committed or the incident has taken place inspires confidence and whether it sounds logical with the conduct of a young human being in the given circumstances. There may not be any straight-jacket formula on this aspect to ascertain about the consent as to whether it is free consent or not. It has been further observed in the case of Uday (supra)

19. "...there is no strait-jacket formula for determining whether consent given by the prosecution to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offences, absence of consent being one of them."

20. However while maintaining conviction for the offence under Sections 363 and 366 of the Indian Penal Code, the alternate submission made by learned advocate, Shri Brahmabhatt regarding the modification or reduction in the sentence requires to be considered in background of the facts and circumstances. As stated here in above, the conviction for the offence under Section 376 of the

Indian Penal Code cannot be sustained and deserves to be quashed and set aside. At the same time, the conviction for the offence under Sections 363 and 366 of the Indian Penal Code deserves to be maintained.

21. Therefore while considering the alternate submission regarding the modification of the sentence, the Court has to balance the impact of the crime on society and the proportionality in punishment. There are many philosophies behind such sentencing justifying these penal consequences. The philosophical/jurisprudential justification can be retribution, incapacitation, specific deterrence, general deterrence, rehabilitation, or restoration. It could be a combination of any of them, which could be a goal sentencing policy. The Courts have therefore evolved the doctrine of proportionality in sentence. A useful reference can be made to the judgment of the Hon''ble Apex Court in case of Narinder Singh v. State of Punjab, reported in (2014) 6 SCC 466. It has been observed,

Whereas in various countries, sentencing guidelines are provided, statutorily or otherwise, which may guide Judges for awarding specific sentence, in India we do not have any such sentencing policy till date.

22. However as stated above, the doctrine of proportionality in sentence has been evolved, where it is left to the discretion of the Court depending upon the facts and circumstances. Again the discretion would suggest judicial discretion. The Hon''ble Apex Court in a judgment in case of Aero Traders (P) Ltd. v. Ravinder Kumar Suri, reported in (2004) 8 SCC 307, wherein it has been observed,

"6.According to Black''s Law Dictionary "judicial discretion" means the exercise of judgment by a Judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court''s power to act or not act when a litigant is not entitled to demand the act as a matter of right. The word "discretion" connotes necessarily an act of a judicial character, and, as used with reference to discretion exercised judicially, it implies the absence of a hard-and-fast rule, and it requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair and just determination,....."

23. Therefore while considering the totality of the facts and circumstances, the alternate submission regarding the modification of the sentence deserves consideration and sentence deserves to be reduced to the extent of sentence undergone.

24. Therefore, the present appeal stands allowed partly. The impugned judgment and order recording conviction for the offence under Section 376 read with Section 114 of the Indian Penal Code is hereby quashed and set aside. However, the impugned judgment and order recording conviction for the offence under Sections 363 and 366 is maintained. However the sentence imposed for the said offences shall stand modified to the extent of the sentence already undergone. The appellant accused is on bail and, hence, his bail bond stands cancelled.