

(2007) 06 GUJ CK 0039

In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 5719 of 2007 in Cri. Appeal No. 220 of 2005

Jakir Ishakbhai Nat

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 20-06-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 389, 389(1)
Penal Code, 1860 (IPC) — Section 363, 366, 376

Citation : (2007) CriLJ 4172

Hon'ble Judges : K.M. Mehta, J

Bench : Single Bench

Advocate : N.N. Prajapati and Chetnaben Joshi, for the Appellant; Public Prosecutor, for the Respondent

Judgement

K.M. Mehta, J.—Jakir Ishakbhai Nat, applicant-original accused has filed this application u/s 389(1) of the Criminal Procedure Code for suspension of sentence imposed by the learned Additional Sessions Judge, Fast Track Court No. 4, Surat in Sessions Case No. 66 of 2004 vide judgment and order dated 27 12-2004.

2. Heard Mr. N. N. Prajapati, learned advocate for the applicant -original accused. He has stated that the learned Judge by impugned judgment, has convicted the accused under Sections 363 (punishment for kidnapping), 366 (kidnapping, abducting or inducing woman to compel her marriage etc.) and 376 (punishment for rape) of the Indian Penal Code for three years and for seven years respectively. The accused is in jail since 27-12-2004. Prior to that also for about ten months, he was in jail. So on that aspect he has prayed for suspension of the sentence in this behalf. For the same, the learned advocate has relied upon the Division Bench judgment of this Court (Coram : R.P. Dholakia and H.N. Devani, JJ.) in the case of Asgarali Onali Lokhandwala and Anr. v. The State of Gujarat dated 11-5-2007 in Criminal Misc. Application No. 2755 of 2007 in Criminal Appeal No. 29 of 2007, where the Division Bench of this Court has observed that it has been consistently held by the Hon"ble Apex Court that in case where a

convicted person has been sentenced to a fixed period of imprisonment, ordinarily the sentence should be suspended and rejection should be only by way of exception for which reasons should be put forward.

3. On the other hand, Mr. K. C. Shah, learned APP has strongly objected for the bail. He has stated that in this case, it was the case of the complainant before the Trial Court that on 8-1-2004 at about 7.00 a.m., the complainant Sayrabibi-wife of Shaikh Salim Yasin had gone for work and her children were at home. When she came at home, her elder daughter aged fifteen years and six months was not present in the house. She asked to her children about the girl i.e. victim and children replied that they did not know and thereafter, she inquired in the area but her daughter was not found. Thereafter, she called her husband and her husband had stated that when he had gone at 8.00 a.m., she was at home. Thereafter, complainant, her husband and other members of the area had inquired about the victim and they came to know that her daughter was kidnapped by one Mohammad Jakir Nizamkhan, originally residing near Hero Honda Agency, Zansi Road, Chatrapur, Madhya Pradesh and was residing near their area in house No. 395 in street No. 18. It was believed that by giving promise to marry with her, he kidnapped her and committed rape and hence police complaint has been filed on 13-1-2004 at Salabatpura Police Station and evidence was recorded. The learned Judge by his judgment and order dated 27-12-2004, pleased to convict the accused for the offences committed under Sections 363, 366 and 376 of the Indian Penal Code for seven years. When the matter was presented before this Court, this Court has admitted the appeal on 17-2-2006. Thereafter, bail application was also filed. This Court has rejected the said application for bail vide order dated 14-3-2006.

3.1 Thereafter, present application has been filed. The learned APP Mr. K.C. Shah has further stated that it is no doubt true that the Division Bench of this Court (Coram : R.P. Dholakia and H. N. Devani, JJ.) has passed an order in the case of Asgarali Onali Lokhandwala and Anr. v. The State of Gujarat dated 11-5-2007 in Criminal Misc. Application No. 2755 of 2007 in Criminal Appeal No. 29 of 2007, where the Division Bench of this Court has observed that it has been consistently held by the Hon''ble Apex Court that in case where a convicted person has been sentenced to a fixed period of imprisonment, ordinarily the sentence should be suspended and rejection should be only by way of exception for which reasons should be put forward so, in this case, special reasons are there. In support of the same, he has stated that incident took place on 8-1-2007 and on the date of incident, the victim was fifteen years and six months i.e. less than sixteen years. Moreover, the accused took the girl, gave her some food and made her unconscious and took for some days with him and thereby continuously committed rape on her. From the copy of the Judgment, it appears that ultimately the girl was also conceived out of said action and she had about seven weeks pregnancy on the date of Judgment in this behalf. These are the special circumstances in this behalf. The learned Judge has considered entire evidence on record including statement of victim. The learned Judge has not only relied

upon the statement of victim but also relied upon the medical evidence and other evidence on record in this behalf. Doctors evidence has also been recorded in this behalf. Even the age of the girl was also determined. From the evidence,, it has been recorded that the accused has kept the girl for one month and twenty days and approximately committed rape for about nine to ten times during that period. The learned Judge has held that even if there is no other evidence, the evidence of victim is sufficient to establish that the accused has committed the offences under Sections 363, 366 and 376 of the Indian Penal Code.

3.2 He has further stated that serious offence of rape has been committed by the accused on young girl and therefore, this Court should take serious view of the matter and should not allow the present application u/s 389 of the Criminal Procedure Code. For the same, the learned APP has relied upon the order of this Court (Coram : J.R. Vora, J.) in Criminal Misc. Application No. 5811 of 2005 in Criminal Appeal No. 1051 of 2005 in the matter of Ishvarbhai Bhagvanbhai Padhiar v. State of Gujarat dated 25-7-2005 wherein the learned Judge has relied upon the judgment of the Hon''ble Supreme Court in the case of State of Rajasthan Vs. N.K.-The Accused, wherein the Hon''ble Apex Court in para 17, observed as under:

17. xxx The victim of rape stating that on oath that; she was forcibly subjected to sexual intercourse or that the act was done without her consent, has to be believed and accepted like any other testimony unless there is material available to draw an inference as to her consent or else the testimony of prosecutrix is such as would be inherently improbable. xxx

3.3 Thereafter, after considering the Hon''ble Supreme Court judgment in para 6, the learned Judge of this Court has observed as under:

Therefore, when prosecutrix comes with the case that she is raped, her say must ordinarily be believed unless there are other circumstances which leads to contrary inference. Merely because the prosecutrix stated in her deposition that she caused some injuries on the body of the accused and merely because the medical expert did not find such injuries on the person of the accused, would not lead to disbelieve the story of the prosecutrix which is otherwise found credit worthy in this case. The witness turned hostile is also not material because when the evidence of prosecutrix is found trustworthy, it would be a futile exercise to turn for the corroboration. On the contrary, if any corroboration is needed, it is found from the evidence of PW-1 doctor when first time the prosecutrix reveals history and is found aged lady. A female having three children would not implicate falsely any person in a case wherein her reputation would be at a stake. At this stage of considering bail during the pendency of Appeal, when the evidence of the prosecutrix is appreciated, there is very strong prima facie case against the present applicant, and in such case, bail should not be granted to such applicant during pendency of appeal. The imprisonment of 7 years which is minimum inflicted upon the applicant appears not that too short sentence as to entitle him for granting bail. Further in short sentence matters also when the bail

has wider and far reaching implications on society, the bail should be refused. Without further going into the merits, suffice it to say that the application deserves to be dismissed on going through the record of the case and especially Having regard to impeachable testimony of the prosecutrix.

Mr. K. C. Shah, the learned APP has further relied upon (1) judgment of the Hon''ble Apex Court in the case of Kamalanantha and Others Vs. State of Tamil Nadu, where the Hon''ble Apex Court has held that accused having dominion or control over proseeutrix physically, mentally and spiritually and many of them believed him to be God in the circumstances held, there was no reason why prosecutrix should depose falsely against the accused on facts, testimony of the prosecutrix reliable and also corroborated by medical and other contemporaneous evidence hence conviction rightly based on evidence of the prosecutrix. (2) judgment in the case of State of Uttar Pradesh Vs. Pappu alias Yunus and Another, in the rape case u/s 376 the Court has held that conviction can be based on the testimony of prosecutrix. In this case, the Hon''ble Apex Court has further held that a prosecutrix complaining of having been victim of the offence of rape is not an accomplice after the There is no rule of law that her testimony cannot be acted upon 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 bath while in the former it is to the physics 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. Assurance, short of corroboration as understood in the context of an accomplice, would do. (3) judgment on the same line in the case of State of Rajasthan Vs. Biram Lal, . (4) judgment of the Hon''ble Apex Court in the case of State of Himachal Pradesh v. Asha Ram reported in (2005) 13 SC 766 : 2006 Cri LJ 139 and (5) judgment in the case of Om Prakash Vs. State of U.P., . I have considered all the facts and circumstances of the case. I have also considered the judgment of this Court (Coram: J.R. Vora, J.) (supra) and other judgments of the Hon''ble Supreme Court in this behalf. I have also considered the judgment of the Division Bench of this Court in the case of Asgarali Onali Lokhandwala and Anr. v. The State of Gujarat (supra). Considering all these, this Court is of the view that the application of the applicant is required to be rejected on the following grounds:

5(A). The age of the girl was less than six- teen years.

5(B). The accused gave certain food and made the girl unconscious and thereby forcibly kept her for long time with him and committed rape for considerable time and ultimately in view of this action, the girl was conceived and she had a pregnancy of seven weeks at the time of trial.

5(C). Judgments of the Hon''ble Supreme Court have supports the case of the respondent herein and victim has also given very clear and cogent reasons. There are other evidence also which supports the case of the respondent herein.

5(D). Order of this Court (Coram : J.R. Vora, J.) in the case of Ishvarbhai Bhagvanbhai Padhiar v. State of Gujarat dated 25-7-2005 also supports the case of the respondent herein.

All these shows that the accused is not entitled to get bail in this behalf. Even the order of my brother Justice Mr. J.R. Vora also supports the view which I am taking in this behalf. So, there are special circumstances have been shown so that grant of bail to the applicant-accused can be refused in pending appeal. In view of the same, the application of the applicant is rejected.

In view of the same, the office is directed to prepare the paper-book immediately preferably by 13-7-2007 and the main appeal to be placed for final hearing in the week of 16-7-2007 as this Court has not granted bail, pending appeal in view of the special circumstances shown in this behalf.