
(2008) 11 GUJ CK 0048
In the Gujarat High Court
Case No : Criminal Appeal No. 1070 of 2004

Jamalahmed Nazirahmed Ansari	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 11-11-2008

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 294(B), 323, 341, 342

Citation : (2008) 11 GUJ CK 0048

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

Bench : Division Bench

Advocate : N.B. Tiwari, for the Appellant; K.C. Shah, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

A.L. Dave, J.—The appellant came to be tried by the City Sessions Court, Ahmedabad, in Sessions Case No. 173/2003, for the offences punishable under Sections 498A, 376, 342 & 506 of the Indian Penal Code, along with co-accused Jalalahmed Nazirahmed Ansari and Zubedabanu Nazirahmed Alijan Ansari, his brother and mother, respectively.

2. The case of the prosecution is that the appellant was staying in a joint family along with the co-accused. The wife of co-accused Jalalahmed Ansari lodged a complaint dated 8.11.2001 (Exh.21) with the Assistant Commissioner of Police, "H" Division, Bapunagar, Ahmedabad, against three accused persons, for the offences punishable under Sections 498(A), 323, 294(B), 376, 366, 506(2), 341 & 114 of the Indian Penal Code, alleging that after her marriage with accused Jalalahmed, she delivered a son, Mohmed Irfan. However, she was meted out with harassment and cruelty by her brother-in-law, Jamal Ahmed (appellant) and mother-in-law Zubedabanu. In the said complaint, she also alleged that on 2.11.2001, when the family members had gone to offer Namaz at 1.30 P.M, and there was no one in the house or in the neighbouring houses, the appellant came home from his work, and noticing that the complainant was all alone in the

house, he shut down the door of the house from inside and intimidated her with knife and raped her and threatened her that she should not disclose this to anyone, or she would be done to death.

2.1 The said complaint was forwarded to the concerned Police Station, on the basis of which, offence was registered and investigated. The charge sheet was filed in the Court of learned Metropolitan Magistrate and the case was committed to the Court of Sessions and Sessions Case No. 173/2003 came to be registered.

3. The Court framed charge at Exh.2, to which the accused persons pleaded not guilty and claimed to be tried.

3.1 After recording the evidence, the trial Court came to the conclusion that the prosecution was successful in establishing the charges for the offences punishable under Sections 376 & 506(2) IPC against the appellant and convicted him therefore by judgment and order dated 31.5.2004. The Court sentenced him to undergo R.I, for 10 years and to pay a fine of Rs. 15,000/-, in default, to undergo S.I, for one year, for the offence punishable u/s 376 IPC, and ordered R.I, for two years and a fine of Rs. 3000/-, in default, S.I. for six months, for the offence punishable u/s 506(2) IPC. The Court also found that the prosecution was successful in establishing the charge against co.accused Jalalahmed and Zubedabanu for the offence punishable u/s 341 IPC; whereas it acquitted them for rest of the charges. The trial Court awarded a fine of Rs. 500/- to said accused Jalalahmed and Zubedabanu, and ordered that in the event of default, they shall undergo S.I, for 15 days.

3.2 Accused Jalalahmed and Zubedabanu have paid fine. The present appeal is preferred by accused convict Jamalahemd Ansari, who is convicted for the offences punishable under Sections 376 & 506(2) IPC.

4. We have heard learned advocate Mr. N.B. Tiwari for the appellant, and learned Additional Public Prosecutor Mr. K.C. Shah for the respondent-State. We have also examined the record and proceedings.

5. Learned advocate Mr. Tiwari submitted that the version of the prosecutrix, as emerging from her first complaint, her history before the Doctor and her deposition, is inconsistent. He submitted that there is a delay of about 8 days in lodging the FIR. He also submitted that the case of the prosecutrix gets no corroboration from any other pieces of evidence. Mr. Tiwari submitted that the conduct of the prosecutrix, at the time of the incident, is remarkable. Though she claims to have been raped by the appellant, she has raised no shouts for help, nor does she claim to have offered any resistance. He submitted that even after the incident, she has stayed in the same house with the appellant and divulged the incident to her parents after 8 days although they are staying in the vicinity. Mr. Tiwari submitted that similarly, the conduct of the accused, after the incident, is also remarkable. He has not tried to escape or run away from the place. He continued to stay and behaved normally even after the incident. Mr. Tiwari further submitted that the incident has occurred in a thickly populated area of

the Chawl and no neighbour has been examined. The medical evidence also does not support the prosecution case. The prosecutrix is reported to be used to intercourse and there was absence of marks of any injury or material to show recent intercourse. Mr. Tiwari submitted that an attempt is made to explain the delay in lodgment of the FIR by saying that the prosecutrix was not permitted to leave the house and the trial Court has accepted the same. However, it has come from the evidence that the house, in which the prosecutrix was staying, is not self-contained and one has to go out to attend the nature's call. The prosecutrix could have taken advantage of the situation and informed her parents or anybody-else, which she has not done. The delay, therefore, cannot be said to have been properly explained. Mr. Tiwari submitted that the appellant is a handicapped person. He has lost one lower limb and he is using artificial limb. It has also come in the evidence that if a push is given to him, he may fall down. Such a person could not have used force for committing rape on the able-bodied prosecutrix. There ought to have been some marks of violence on the person of the prosecutrix or the appellant, which is absent. Mr. Tiwari submitted that accused Zubedabanu is an old lady, who is visually impaired and she could not have confined the prosecutrix to her house. Mr. Tiwari has relied on the decisions rendered by the Apex Court in the cases of (1) Ramdas and Others Vs. State of Maharashtra, and (2) Pratap Misra and Others Vs. State of Orissa, Mr. Tiwari, therefore, submitted that the trial Court has overlooked these major defects in the prosecution case and has recorded the conviction. The appeal may, therefore, be allowed.

5.1 Mr. Tiwari submitted that the appellant was on bail during the trial. He got married during this period and has become father of a child. He is in jail since 31.5.2004. He submitted that in the event the Court is not inclined to entertain this appeal, the appellant's case may be sympathetically considered on the aspect of quantum of punishment. He submitted that the appellant is in jail since 31.5.2004 and has suffered sufficiently. His family has also suffered sufficiently. The appellant should be sentenced with the imprisonment which he has undergone.

6. On the other hand, the learned Additional Public Prosecutor has opposed this appeal. According to him, the prosecutrix is an illiterate lady, who was aged 19 years at the time of the incident, had a young child and was staying in a family at the mercy of the accused persons and lodging of FIR would have resulted into enormous socio-economic complications. Apart from that, she would have been required to muster courage to act against her in-laws, and delay in lodgment of FIR, therefore, may be viewed from this angle. The learned A.P.P, further submitted that the prosecutrix has no reason to falsely implicate her brother-in-law or her husband or her mother-in-law at the costs of her self-respect and her social and matrimonial life. The learned A.P.P, also submitted that the prosecutrix could not have raised any shouts for help, as her mouth was gagged. He also submitted that she had no option, but to stay in the same house, as it was her matrimonial house and she did not stay with the appellant alone after the

incident. She continued to stay in the family till she mustered courage to go to her parents and tell them about the incident. The learned A.P.P, submitted further that the medical examination of the prosecutrix took place long after the incident, i.e., after about 20 days, and obviously, there would be no marks of any intercourse or injury. It is not even the case of the prosecutrix that she suffered any physical injury or that she was raped violently. Mr. Shah, learned A.P.P., submitted that the conduct of the prosecutrix has to be seen. She has taken the first opportunity of going to her parents under the pretext of calling her son, who was with her parents on account of cheek-bite by the appellant, and immediately she informs her parents about the incident. It is not her case that the prosecutrix did not inform anybody-else. She informed her husband and mother-in-law immediately after the incident, but, they chose to support the appellant and asked her not to disclose to anyone. Mr.Shah submitted that the history recorded by the Doctor in the case papers also reveals the details of occurrence. The history is written down twice by the Doctor, once in her own language and the second time in the language of the Doctor, as was told to him by the prosecutrix. This would completely tally with the case of the prosecutrix. The trial Court has taken into consideration all these aspects and then awarded punishment. The learned A.P.P, submitted that the learned trial Court has taken into consideration the fact that the appellant has married and has become the father of a child, which would indicate his physical capacity. The learned A.P.P.submitted that so far as the quantum of punishment is concerned, the circumstances, in which the incident had occurred, go to show that the appellant has taken disadvantage of his position. There is no mitigating circumstances to award lesser punishment than the minimum prescribed by law. The learned A.P.P.submitted that sympathy is sought to be invoked by the appellant on the aspect of quantum of punishment on the ground that he is a handicapped person and has a family to support. Mr. Shah submitted that the appellant chose to get married during the course of trial and his wife willingly chose to marry him while he was facing a trial and, therefore, no sympathy is called for once the case is proved against the appellant. The trial Court has considered all these relevant aspects while awarding punishment. The appeal may, therefore, be dismissed.

7. The prosecutrix is examined at Exh.8 as PW.1. She has stated that she was staying in the joint family with her in-laws. Appellant Jamal Ahmed is her brother-in-law and was engaged in embroidery work. He is physically handicapped and using artificial limb. She has stated that initially she was taunted for household work. She was also taunted about her inability of productivity. It was only after she conceived, her harassment on that count was reduced. About the incident, she says that it was a Friday, she was alone in the house, her family members had gone to offer Namaz, she was eating in the kitchen when the appellant came, gagged her mouth, took her in the adjoining room and closed down the door and committed rape on her. He had a knife with him at that point of time and because her mouth was gagged, she could not do anything. After committing rape, he threatened her that if she would tell to anyone-else about this, she

would be killed. She says that she told her husband about the incident, but, he asked her that she should not tell this to anyone-else. She says that her son was with her parents at the time of the incident. After the incident, she was not permitted by her in-laws to leave the house. She says that she went to her parents and told about the incident and, ultimately, this complaint was lodged. She was subjected to cross-examination. It is revealed that she is totally illiterate and there is no sign to have any sense of proportion of distance. We can take a judicial notice of the geographical fact that her house and the trial Court are located at a far distance of about 6 Kms., whereas she says that it is only at a distance of 2 Kms. It is admitted during the cross-examination that the appellant was not married at the time of the incident. She admits that the house is not self-contained and one has to go out to attend nature's call. She also admits that the complaint was got prepared by her father, but, her statement was recorded by the police. She indicates that she had not disclosed about the incident to the neighbours. It is revealed from her answers to the questions put by the Court that the appellant used to wear artificial limb while going to job. He used to return home alone walking. He used to do all his household work himself. She also states that after she came to her parents' house, after the incident, she had not gone to her matrimonial home and the relationship with her husband stood snapped. The medical case papers are at Exh.11, where history is recorded in her own words, where she says that she was raped by her brother-in-law while she was drying clothes, by showing a knife and had threatened her. The same is reflected in the history recorded by the Doctor in the diary, which runs as under:

History given by patient herself.

On 2.11.01 at 2.00 p.m., when patient was doing her household work, her younger brother-in-law came to her room where he found that patient was all alone.

He locked the door from inside. He stuffed her mouth with handkerchief and threatened her with knife if she dared to speak up.

He forcibly stripped her & raped her.

She then reported the incident to her husband & mother-in-law. They threatened her to kill her if dared to speak up.

Since her child was with her parents, she was asked to fetch the child. She escaped from her in-laws' house on this ground.

She reported the matter to her parents and her parents got an FIR registered against her in-laws.

7.1 In the first complaint given to the police on 8.11.2001, she says that when she was alone, the appellant came from job and noticing her to be alone in the house, he closed the door, showed her a knife and raped her against her will and then threatened her.

7.2 What emerges from these pieces of evidence is that in the first complaint she does not say as to what she was doing when the appellant came home. In the history before the Doctor, she says that she was drying clothes and in her deposition she says that she was eating in the kitchen. But, so far as her version on the main incident is concerned, it is consistent and, therefore, inconsistent part argued by the learned advocate for the appellant cannot be considered as a favourable factor. The deposition has to be read as a whole, the evidence has to be judged as a whole and not to be seen word by word.

7.3 So far as the delay in lodgment of FIR is concerned, it is the fact that it was lodged after 8 days of the incident, but, that delay is explained by indicating that she was intimidated and was not permitted to leave the house. It was only when she was permitted to go to her father's house for fetching her son, she intimated her parents and the complaint came to be lodged. There is ring of truth in her version because it has come through the answer of the prosecutrix to the query that after 8 days of the incident she left her matrimonial home and her relationship with her husband stood snapped.

7.4 We may also record that co-accused Jalalahmed and Zubedabanu have been convicted by the trial Court for the offence punishable u/s 341 of IPC and there is no challenge to that order. That order has attained finality. This would lend credence at this stage to the version of the prosecutrix that she was not permitted to leave the house.

7.5 It has also to be not lost sight of that at the time of the incident, the prosecutrix was aged 19 years, she had a young child and if she would have taken any hasty step, her matrimonial life would be disturbed, her child's future would also be affected and, therefore, she was required to consider the consequences and other pros and cons before taking any drastic action. She is an illiterate lady and, therefore, could not have acted so boldly or promptly in her social background and economic condition. Still, she has, however, informed her husband and mother-in-law about the incident, who, instead of helping her, took the side of the appellant and asked her not to disclose it to anyone-else. This situation has rightly been appropriately appreciated by the trial Court and the delay in lodging the complaint is accepted to have been appropriately explained. We are also in agreement with the said view.

8. So far as the absence of marks of injury or marks of intercourse during the medical examination of the prosecutrix is concerned, it may be noted that she was examined on 28.11.2001, i.e., after a lapse of about 25 days and, therefore, it would not be reasonable to expect any medical evidence regarding intercourse. It is not her case that she was raped violently, nor is it her case that she offered strong resistance. Intercourse took place in the house and, therefore, it is also not reasonable to expect any marks of injury. But, mere absence of marks of injury on the person of the prosecutrix or the accused, cannot be inferred to show her consent to the intercourse, as is sought to be canvassed and argued by the learned advocate for the appellant. The prosecutrix has, in term, stated that

as her mouth was gagged, she could not raise any shouts for help, she could not offer any resistance because of fear or shock which may be very common, considering the fiduciary relationship with the appellant. A lady would not sacrifice her respect by falsely implicating her brother-in-law, nor would she risk her matrimonial life and her child's future by falsely implicating her brother-in-law, as in fact has happened, which can be seen from her deposition. She left after 8 days of the incident, lodged the complaint, and her relationship with her husband stood snapped.

8.1 It is also to be noted that, factually, it is true that the appellant is a handicapped person and wearing an artificial limb, but, is capable of attending his daily chores. He works as an embroidery draftman, goes independently and returns independently and wears artificial limb at that time. Therefore, when the incident occurred, he had just returned from his work, he was wearing artificial limb making him almost normal and, therefore, the defence that because the appellant was handicapped, he could not indulge in the act alleged against him, cannot be accepted.

9. Non-examination of neighbours cannot be a factor going against the prosecution. When the prosecutrix says that she had not disclosed the incident to any of the neighbours, the neighbours could not have stated anything about the incident. When the incident had occurred in a house, then the neighbours could not have known about it. Therefore, this contention cannot be accepted. The trial Court has taken into consideration all these various aspects, and we are in complete agreement with the reasonings adopted by the trial Court.

10. Now, we may refer to the decisions relied on by the learned advocate for the appellant in support of his arguments.

10.1 Learned advocate for the appellant has relied on the decision in the case of Pratap Misra and Ors. (supra). He relied on the observations made in paragraphs 6 to 8 of the said judgment to canvass that in absence of injury on any of the accused or on the prosecutrix, except some blood from vagina, would lead to an inference of consent of the prosecutrix. In our view, the said judgment cannot help the appellant for the reason that it has not come in evidence that there was a forcible and violent sexual intercourse with the prosecutrix, as was the case before the Apex Court. Further, in the case before the Apex Court, the case of the prosecutrix was that of a gang rape by three persons, in quick succession, with force and violence. In the case on our hands, the prosecutrix alleges rape against her will, but, not violence. She does not even speak of resistance by her and rightly so, considering her position at the time of the incident. The said decision, therefore, cannot help the appellant.

10.2 In the decision in the case of Ramdas and Ors. (supra), relied on by the learned advocate for the appellant, the benefit of doubt was given to the accused person on account of delay in lodgment of FIR. A close reading of the judgment indicates that the conviction was founded on the sole testimony of the

prosecutrix. The Court, in the facts of the case, found that the prosecutrix did not appear to be a witness of sterling quality on whose sole testimony a conviction could be sustained. Besides, regarding delay in lodgment of FIR, it was found that she tried to conceal facts from the court, deviated from the case narrated in the FIR and her explanation about inordinate delay in lodging FIR was unsatisfactory, and as an overall effect, benefit of doubt was given to the accused. In the instant case, delay has been appropriately explained. There is no reason to doubt the testimony of the prosecutrix. Her version is supported by independent contemporaneous record maintained by the hospital authorities, where history given by her has been recorded in her own words. Under the circumstances, the said judgment also cannot help the appellant.

For the foregoing reasons, we do not find any merits in the appeal. The appeal, therefore, must fail. Stands dismissed.