
(2009) 04 GUJ CK 0032
In the Gujarat High Court
Case No : Criminal Appeal No. 362 of 2005

Jashwant Ramanbhai Naika Patel

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 23-04-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 363, 366, 376

Citation : (2009) 04 GUJ CK 0032

Hon'ble Judges : J.C. Upadhyaya, J

Bench : Single Bench

Advocate : Zubin F. Bharda, for the Appellant; K.L. Pandya, APP for Opponent 1, for the Respondent

Judgement

J.C. Upadhyaya, J.—The challenge in this appeal is to the judgment and order rendered by the Ld. Addl. Sessions Judge, Navsari, on 8/12/2004 in Sessions Case No. 13/2004, whereby the Ld. Trial Judge was pleased to record conviction of the appellant, who happened to be original accused No. 1 in the aforesaid Sessions Case for the offence punishable u/s 376 of the Indian Penal Code [IPC] and the appellant was sentenced to undergo simple imprisonment [SI] for 7 years and fine of Rs. 1,000/- and in default of payment of fine, SI for 3 months. He came to be acquitted from the charges of offences punishable under Sections 363 and 366 read with Section 114 of the IPC. There were 3 co-accused who came to be tried along with the appellant and the Ld. Trial Judge recorded their acquittal.

2. The prosecution case, in nutshell, is as under:

2.1. The incident occurred on 24/10/2003 at about 17.00 hours in village Nogama Gamtal, district Navsari and it is alleged that the appellant kidnapped minor daughter of first informant Mervanbhai Hansjibhai Naika, who was aged about 15 years, from the lawful guardianship taking help of the original accused Nos. 2, 3 and 4. It is further alleged that the appellant confined the daughter of the first informant Mervanbhai and raped her. First informant Mervanbhai Naika,

the father of the victim prosecutrix, lodged FIR in Chikhali Police Station regarding the incident and the offence came to be registered. Investigation was started. The prosecutrix was sent to hospital for medical examination. Appellant came to be apprehended. Statements of material witnesses came to be recorded. Clothes of the prosecutrix and the appellant were seized and were sent to FSL for examination. After collecting required material for the purpose of lodgement of charge-sheet, charge-sheet came to be filed in the Court of Ld. Judicial Magistrate First Class, Chikhali. Since the offence was exclusively triable by the Court of Sessions, the Ld. Magistrate committed the case to the Court of Sessions, Navsari, which came to be registered as Sessions Case No. 13/2004.

3. The trial Court framed charge at exh. 1 against the appellant and 3 co-accused persons for the offences punishable under Sections 363, 366 and 376 read with Section 114 of the IPC, to which along with the appellant, all the accused persons did not plead guilty and claimed to be tried. The trial Court thereafter, recorded the evidence adduced by the prosecution. After the prosecution concluded its oral evidence, the trial Court recorded further statement of the appellant and other co-accused persons, to which they denied generally all the allegations levelled against them by the prosecution and the appellant further stated that he was in love with the prosecutrix and, therefore, he was falsely implicated in this case.

4. After considering the evidence on record and after considering the submissions made on behalf of both the sides, the trial Court recorded acquittal of the remaining 3 accused persons who were original accused Nos. 2, 3 and 4, but recorded conviction of the appellant, who was original accused No. 1, for the offence punishable u/s 376 of the IPC and hence the appeal.

5. Ld. Advocate Mr. Bharda for the appellant submitted that so far as the age of the prosecutrix at the time of the incident is concerned, the prosecution has adduced cogent and convincing evidence to show that at the time of the incident, the prosecutrix was under 16 years of age. Ld. Advocate Mr. Bharda therefore, submitted that technically the prosecution can be said to have proved the offence. Therefore, it is difficult for the appellant to assail the order of conviction recorded by the trial Court. Therefore, the conviction is not challenged.

5.1. However, Ld. Advocate Mr. Bharda submitted that considering the evidence of the prosecutrix herself recorded at exh. 14, she outright admitted in her evidence about her love and affection for the appellant. She outright admitted that she along with the appellant left their house and went to Bombay and stayed there and with her consent there was a sexual intercourse. However, it is submitted that so far as the consent part is concerned, since she was under 16 years of age, the appellant is not entitled to any benefit of her consent and, therefore, though technically the offence punishable u/s 376 of the IPC can be said to have been constituted.

5.2. However, Ld. Advocate Mr. Bharda submitted that even after the appellant

came to be convicted and was in jail, he was granted furlough on 1-4-2006 for 14 days. However, thereafter till 23/3/2009 he did not surrender to jail and in between the time, on 6/10/2008 after the prosecutrix became major, the appellant married the prosecutrix and in support of such contention, the affidavit of the prosecutrix herself together with copy of marriage registration is tendered in this appeal as additional evidence which may kindly be considered for the purpose of reduction of sentence.

5.3. Ultimately Ld. Advocate Mr. Bharda submitted that the conviction part is not challenged but the sentence may be appropriately reduced by allowing the appeal.

6. Ld. APP Mr. Pandya for the respondent - State opposed the appeal.

7. I have examined the record and proceedings in context with the submissions made by the rival side.

8. Considering the evidence of the prosecutrix along with the evidence adduced by the prosecution regarding the age of the prosecutrix at the time of the incident, it clearly transpires that at the time of the incident, the prosecutrix was under 16 years of age. Exh. 49 is the certificate of birth registration, which reveals that the birth date of the prosecutrix is 27/6/1989 and the incident occurred on 24/10/2003. Therefore, she was aged about 14 years and 3 months at the time of the incident. Further more, considering the evidence of the prosecutrix as well as Dr. Faldu examined at exh. 22 and the medical certificate, the prosecution successfully proved the offence of rape. Thus, considering the cogent and convincing evidence adduced by the prosecution about the age of the prosecutrix and about the rape, the Ld. Trial Judge rightly recorded conviction of the appellant for the offence punishable u/s 376 of the IPC and under such circumstances, on behalf of the appellant, the appeal is rightly not pressed on the question of conviction.

9. Ld. Advocate Mr. Bharda submitted that when the appellant married the prosecutrix, this is a fit case for reducing the sentence. Considering the affidavit of the prosecutrix, she stated on oath that she married the appellant on 6/10/2008. In support thereof, copy of marriage registration certificate is annexed with her affidavit. As stated above, even during the course of evidence, the prosecutrix admitted her love and affection for the appellant and that they both eloped voluntarily and stayed in Bombay for sometime. Thus, I find force in submission made by Mr. Bharda that this is a case of love affairs which ultimately turned into a marriage between the prosecutrix and the appellant. Examining the record, I also find that the element of criminality is not reflected in the conduct of the appellant. The offence stands constituted because of technicality. It further transpires that at the time of the incident, even the appellant was aged about 23 years. Thus, the conduct of the appellant reflects misconceived or misguided action on his part.

9.1. Considering the proviso attached to Section 376 of the IPC, it is provided

that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than 7 years. The appellant comes from a lower strata of society where education and finance are at lower level. Under such circumstances, I am of the opinion that a harsh view is not required to be taken in this case.

9.2. However, this Court also takes into consideration a very disturbing fact emerges from the record that with effect from 1-4-2006 the appellant was granted furlough leave for 14 days. However, he did not surrender to jail after the end of his furlough leave, but remained absconding for quite sometime and he voluntarily surrendered before the jail authority on 23/3/2009. Thus, the actual period he remained in jail pending the trial and after his conviction comes to about 2 years and 3 months. Under such circumstances, I am of the opinion that the sentence of period undergone, which comes to 2 years and 3 months, if awarded, will not be in the ends of justice. However, Ld. Advocate Mr. Bharda submitted that for his absconding, the jail authority has initiated separate proceedings against him and, therefore, considering the facts and circumstances of the case, this is a fit case to award, by way of sentence, the period actually undergone by the appellant in jail. However, considering the facts and circumstances of the case and the fact that he remained absconding for quite sometime and thereafter he surrendered to the jail authority, is the event which shall have to be taken into consideration while fixing the quantum of sentence.

10. Therefore, considering the above discussion, though the sentence of SI for 7 years is required to be reduced, but the appropriate sentence would be SI for 4 years. The order of fine is required to be maintained.

11. For the foregoing reasons, the appeal is partly allowed. The conviction of the appellant for the offence punishable u/s 376 of the IPC recorded by the Ld. Addl. Sessions Judge, Fast Track Court, Navsari, by judgment and order dated 8/12/2004 in Sessions Case No. 13/2004 is hereby confirmed. However, the sentence of imprisonment awarded by the trial Court for the offence punishable u/s 376 of the IPC of SI for 7 years and fine of Rs. 1,000/- and in default of payment of fine, SI for 3 months is altered to one SI for 4 [four] years without any change in the fine. The appellant shall be entitled to the set off.