

(2008) 09 GUJ CK 0010
In the Gujarat High Court
Case No : Criminal Appeal No. 293 of 2003

Jivanbhai Vithalbhai Chavda

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 19-09-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 376

Citation : (2008) 3 GLH 418 : (2009) 1 GLR 646

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

Bench : Division Bench

Advocate : Yogesh S. Lakhani and Gondalia, for the Appellant; Mukesh A. Patel, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

A.L. Dave, J.—The appellant came to be convicted for the offence punishable u/s 376 of the Indian Penal code by the learned Additional Sessions Judge, Fast Track Court, Rajkot by judgment and order dated 29th January, 2003 in Sessions Case No. 115 of 1999. The appellant is sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 10,000/-, in default, to undergo rigorous imprisonment for one year.

2. The prosecution case, in brief, can be stated thus:

2.1 The first informant Ramaben Dhirajbhai and her husband Dhirajbhai Shamjibhai Chavda were engaged in embroidery work while staying at Rajkot. Since, the business was not going on well, they thought of consulting the appellant-accused, who was also working as a priest, besides serving in Postal Department and staying at Jetpur. P.W. 2 - Dhirajbhai Shamjibhai, therefore, contacted Shamjibhai Karshanbhai to get in touch with the appellant, who, in turn, introduced Dhirajbhai to the appellant. After listening to the facts of Dhirajbhai, it is the case of the prosecution that the appellant said that some rituals have to be performed at the residence of Dhirajbhai. For that purpose, the

appellant, along with Shamjibhai Karshanbhai, went to the house of Dhirajbhai located at Ashapura Nagar, Street No. 10/1, Rajkot. After some time, it is the case of the prosecution that, Shamjibhai Karshanbhai left and the appellant remained at the house of Dhirajbhai, as rituals were to be performed at night. At about 10-30 p.m. on 24th May, 1998, it is the case of the prosecution that the appellant took bath. He had insisted that the rituals were to be performed with the help of the prosecutrix - first informant Ramaben, wife of Dhirajbhai Shamjibhai. She, therefore, also took bath and both of them went to the pooja-room in the house of Dhirajbhai Shamjibhai. It is the case of the prosecution that the appellant insisted on performing rituals in that room by remaining alone with the prosecutrix. He, therefore, locked the door of the pooja-room from inside. The rituals were over by 1-30 a.m. on 25th May, 1998.

2.2. It is the case of the prosecution that while the appellant and the prosecutrix were alone in the room, the appellant started chanting "mantras" and then he made the prosecutrix to drink milk thrice, to which some ash was added. The milk was administered in stainless-steel bowl. It is the case of the prosecutrix that on consuming the milk, she lost orientation and became almost unconscious. She could only see the accused-appellant. It is her case that the accused thereafter got rid of the towel, which was the only cloth wrapped around him and then he removed her clothes as well and had intercourse with her against her will. According to the prosecutrix, she could not resist or speak because of the effect of the drug administered to her in the milk. She gives the version in the F.I.R. that she was raped twice. She says that she regained her consciousness on the next day and on regaining consciousness, she informed her husband about what was done to her by the accused-appellant.

2.3. As per the prosecution case, on being informed by the prosecutrix about the incident, her husband Dhirajbhai Shamjibhai talked to his brother and then both of them went to Shamjibhai Karshanbhai. There they were insulted by Shamjibhai Karshanbhai, and therefore, they went to a lawyer and got prepared an application addressed to the Commissioner of Police. The said application was tendered to the Commissioner of Police, but they were directed to go somewhere-else, where they went and F.I.R. came to be registered against the present appellant and Shamjibhai Karshanbhai. On the basis of that F.I.R., investigation was made and the investigating agency, having found sufficient material against the accused, filed charge-sheet against the appellant-accused in the Court of J.M.F.C, Rajkot. The case was committed to the Court of Sessions, as the charges levelled against the accused were triable exclusively by the Court of Sessions and Sessions Case No. 115 of 1999 came to be registered.

3. Charge was framed against the accused-appellant at Exh. 5. The accused pleaded not guilty to the charge and claimed to be tried.

3.1. The Sessions Court, after considering the evidence led by the prosecution, explained the circumstances/evidence against the accused and recorded his statement, below Exh. 5-Charge, u/s 313 of the Code of Criminal Procedure,

wherein the accused stated that he has been falsely implicated and the allegation is by way of a counter-blast.

4. The Sessions Court, after considering the evidence led by the prosecution, came to the conclusion that the prosecution was successful in establishing the charge of rape, and therefore, recorded conviction and awarded sentence, as stated above. Aggrieved by the said judgment and order, the present appeal is preferred.

5. We have heard learned Senior Advocate Mr. Yogesh S. Lakhani, appearing with learned Advocate Mr. Gondalia, for the appellant, and Mr. Mukesh A. Patel, learned Additional Public Prosecutor for the State. We have also examined the record and proceedings.

6. Learned Senior Advocate Mr. Lakhani submitted that if the evidence of the prosecution is seen, it is a case of sheer concoction and imagination. He submitted that the deposition of the prosecutrix and her F.I.R. go contrary to each other and create a doubt about the whole of the prosecution case. It creates doubt about the events and sequence of events. Mr. Lakhani submitted further that the F.I.R. was given late by three days. It was given after consulting a legal expert and getting it typed. Mr. Lakhani further submitted that if the language employed in the F.I.R. and its tenor are seen, it is clear that it could not have been given by the prosecutrix as it purports to have been done. He submitted that the thumb impression, which is affixed below the F.I.R., is not identified by any one. Over and above this fact, some writing is scored out just beneath the thumb impression, which creates doubt about its authenticity. Mr. Lakhani submitted that the F.I.R. was lodged after the complaint was lodged by Shamjibhai Karshanbhai Chavda against the husband of the prosecutrix and his brother and this aspect is not disclosed in the F.I.R. lodged in the present case.

6.1. Mr. Lakhani submitted further that as per the overall evidence of the prosecutrix herself, the bowl, in which she was made to consume milk, allegedly containing diazepam, was washed after the incident and was made use of before it was seized. This aspect is revealed in the panchnama as well. Mr. Lakhani submitted that in spite of this, F.S.L. report finds presence of diazepam in the bowl and this aspect is not explained. Mr. Lakhani submitted that even the panchnama of seizure indicates that nothing was visibly found in the bowl.

6.2. Mr. Lakhani submitted that there is no evidence whatsoever on the question of effect of diazepam, on the quantity required for creating effect alleged by the prosecutrix, time required therefor, test of diazepam etc.

6.3. It is also contended that there is no medical evidence to support the case of rape.

7. On the other hand, learned A.P.P. Mr. Patel has opposed this appeal. According to him, there is ample evidence to show that the appellant misused his position as a Priest and committed rape on the prosecutrix under the guise of performing

rituals. He submitted that when the prosecutrix herself deposes about the occurrence, there is no need to look for corroboration to her evidence. Mr. Patel submitted that the nature of crime is heinous and will have a direct impact on the standard of morality in the society. The trial Court has recorded conviction on the basis of legally acceptable evidence and the same, therefore, may be confirmed. Mr. Patel submitted that there is no reason to discard the evidence of F.S.L. Mr. Patel submitted that even in his statement u/s 313 of Cr. P.C., the appellant admits to have administered milk, may be as a "prasadi", but the fact remains that he did administer milk.

8. We have considered rival side submissions. We find that the incident occurred on 24-5-1998 allegedly after 22-30 hours and before 1-30 hours on 25-5-1998 in the house of the prosecutrix in the pooja-room. According to the prosecutrix, she became almost unconscious upon consuming milk, which was given to her thrice by the appellant. In the F.I.R. she says that after this situation arose, the appellant raped her twice after removing his and her clothes in totality. She has stated in the F.I.R. that she regained consciousness in the next day morning at about 11-00 a.m. and then she informed her husband about the occurrence. Her husband then talked to his brother and both of them went to Shamjibhai Karshanbhai "to ascertain the truth in the say of the victim", where they were ill-treated and abused. They, therefore, then went to the house of the accused-appellant and upon inquiring about the appellant from the wife of the appellant, the wife asked them not to lodge complaint for the sake of their children and that the appellant is in the habit of committing such acts. By that time, the appellant arrived at the home and the husband of the prosecutrix asked him as to why did the appellant behave in this manner with the prosecutrix. He was told by the appellant that this was a command of Goddess and then said that he has performed such acts at many places and they can do their worst. They, therefore, went back to Rajkot, talked to relatives and were advised to lodge complaint to protect the female folk of the community from such future acts.

9. In comparison of the F.I.R., if the deposition of the prosecutrix recorded at Exh. 22 is seen, she says that since her husband's business was not going on well, her husband got in touch with the appellant through Shamjibhai Karshanbhai, and the appellant said that he would perform rituals at his house, and accordingly, on the date of the incident, the appellant came to the house of the prosecutrix along with Shamjibhai Karshanbhai, who left after sometime. The appellant indicated that the rituals are to be performed at night. He, therefore, took bath at 10-00 p.m. and as advised by him, the prosecutrix also took bath and then, both of them went to the pooja-room. The appellant had only a towel wrapped around his person. The prosecutrix was wearing usual dress of sari, blouse and petticoat. The appellant insisted that only they both should be in the pooja-room and nobody should enter the pooja-room. They entered the pooja-room and then locked it from inside, whereupon the prosecutrix stated that she had never stayed alone with any other male, whereupon the appellant stated her that there is nothing to worry about it. The appellant called for milk from her. He

mixed some material like ash in the milk and started chanting "mantras". He made the prosecutrix to consume the milk in small quantity thrice. On consumption of the milk, according to the prosecutrix, she became non-plussed and she could not see anything, except the appellant. She says that thereafter the appellant got rid of the towel wrapped around his person and became nude totally. Thereafter, he pushed her to the floor and committed rape. She says that it was a forced complete intercourse. Thereafter, he opened the door and went away. She says that thereafter she and her family had a sleep during the night, but she had no capacity to speak. On the next day i.e. 25-5-1998 at about 11-00 a.m., she told her husband about the incident. Therefore, her husband and his brother went to the house of the appellant. They came back from Jetpur and told her that according to the appellant, he acted as per the orders of the Goddess. Her husband told her that the appellant's wife told him that the appellant is in the habit of doing so, and therefore, they should not take any action for the sake of their children and if at all he wants, he himself can have intercourse with her. According to the prosecutrix, they thereafter went to a lawyer, got the complaint prepared and typed. She affixed her thumb impression on it and went to the Office of the Police Commissioner, from-where they were directed to go to some other Office, where they went and lodged complaint against the present appellant and Shamjibhai Karshanbhai.

9.1. What emerges from her cross-examination is that she admits that the rituals were over at about 1-30 a.m. of 25-5-1998 and she went out of the pooja-room and prepared tea, which was taken by the appellant and her mother-in-law. She also admits that she had cleaned the bowl as well as towel, which was wrapped by the accused against his person.

10. If the panchnama of recovery of the bowl (Exh. 24) is seen, it emerges that the prosecutrix had stated before the panch-witnesses that the said bowl was cleaned by her after the incident and was being used thereafter for the household requirements. It also emerges that the clothes worn by the prosecutrix at the time of the incident were also washed by the prosecutrix before they were seized under the said panchnama drawn on 30-5-1998 between 17-30 and 18-15 hours. In this context, it is recorded in the said panchnama that there were no visible signs of any intoxicant or other type of substance in the bowl.

10.1. In the above context, if the F.S.L. report (Exh. 21) is seen, it says that the bowl was tested and diazepam could be detected in the contents (washing of steel bowl) of the said exhibit mark "C\\ i.e. the steel bowl allegedly used in the incident.

11. We are unable to reconcile ourselves as to how the F.S.L. report could have detected the presence of diazepam in the washed bowl when the bowl was admittedly cleaned after the incident and was being used in the household purposes even thereafter till it was seized after 5 days of the incident. It is nobody's case that anybody had any effect of diazepam after the incident when

the bowl was used for the household purpose. The panchnama also says that no substance was found in the bowl, and therefore, we say that we are unable to reconcile with the situation. The prosecution has not come up with any explanation in this regard.

12. Apart from this, the F.S.L. report at Exh. 31 does not speak of the presence of any blood or semen on the clothes of the prosecutrix.

13. Now, going to the main incident, it is the case of the prosecutrix that on consuming the milk given to her by the appellant, in which the appellant had mixed up some ash like powder, she became almost unconscious and could see only the appellant.

13.1. In this regard, it is sought to be conveyed by the evidence of F.S.L. that the appellant had mixed up diazepam in the milk to have that intoxicating or intoxicating type of effect on the prosecutrix, of which the appellant took disadvantage and committed rape on her. But, we do not find any evidence to know the effect of diazepam, the quantity which would be required to be administered for obtaining a particular effect of the drug, the time that would be taken for the prosecutrix to be influenced by the drug and the time for which the consumer or the prosecutrix would remain under the influence of the drug. There is not an iota of evidence in this regard. It is, therefore, difficult to accept the prosecution case that the appellant by administering drug on the prosecutrix, made her semi-conscious and took disadvantage of her semiconsciousness.

14. The evidence of the prosecutrix and her version in the F.I.R. run contrary to each other. In her F.I.R., she says that she was raped twice, in her deposition she speaks of forcible coitus only once.

14.1. She says that she became unconscious or semi-conscious and regained consciousness only on the next day at about 11-00 a.m., whereafter she informed her husband about the incident, but, it emerges from her deposition during the cross-examination that she had come out of the room along with the appellant, had prepared tea, which was taken by the appellant as well as her mother-in-law. Therefore, her story that she became unconscious and regained consciousness only on the next day at about 11-00 a.m. becomes doubtful.

15. Likewise, she says that before the rape was committed, the appellant had removed her clothes. It is nobody's case that she was either found lying in the room in that condition when the appellant left the pooja-room or that the appellant left pooja-room alone, nor is it anybody's case that the prosecutrix came out of the pooja-room without clothes on her person. Therefore, her story that she became unconscious after consuming milk becomes doubtful.

16. It is also to be noted that the appellant came to the house of the prosecutrix only upon an invitation by her husband and her husband met the appellant through Shamjibhai Karshanbhai. The allegations are also levelled against Shamjibhai Karshanbhai, but for whatever reason, he was not charge-sheeted. It

is, therefore, not the case of the prosecution that the appellant, of his own volition, went to the house of the prosecutrix for performing rituals and took disadvantage of this situation or that he went to the house of the prosecutrix with a view to take such disadvantage.

17. We notice, as is rightly argued by Mr. Lakhani, that the F.I.R. is lodged belatedly. As per the case of the prosecutrix, she informed her husband at about 11-00 a.m. on 25-5-1998, whereafter her husband talked to his brother Ashokbhai, and both of them then, strangely went to ascertain the truth in the matter and on being ill-treated by the appellant, came back to Rajkot, consulted the Advocate, got the complaint drafted and went to the Police Station for lodging the F.I.R.. But, in fact, if we see, the F.I.R. is lodged on 27-5-1998. Therefore, either the story, which is given by the prosecutrix is not correct or that the prosecutrix has remained silent or inactive for three days i.e. from 24-5-1998 to 27-5-1998. Either way, the delay would certainly raise doubt, particularly when there are so many defects found in the prosecution case, as discussed above.

18. We also notice that the F.I.R. Exh. 23, if read, would go to indicate that it was upon dictation or instructions of a male, as can be seen from the language employed in the F.I.R. and its tenor. It was drafted by an Advocate. It was drafted after an F.I.R. was lodged against the husband of the prosecutrix by Shamjibhai Karshanbhai, and significantly the F.I.R. is silent about that incident. Last but not the least, the F.I.R. purports to contain thumb mark of the prosecutrix, which is not identified by any one and it is put on some writing, which is scored out. These factors render the F.I.R. itself doubtful.

19. The medical evidence, so far as rape is concerned, is absolutely "nil". The F.S.L. report indicates that there was presence of sperms in the vaginal swab. However, there is no evidence to show that these sperms were of the group of the appellant and as is rightly observed by the trial Court, the prosecutrix being married, it could be because of her relationship with her husband. But, the presence of sperms in vaginal swab of the prosecutrix will not advance the case of the prosecution any further towards the appellant.

20. In our view, therefore, the prosecution case is not founded on a firm footing. The F.I.R. is doubtful, the deposition of the prosecutrix is doubtful, the F.S.L. report becomes doubtful, the conduct of the prosecutrix and her husband, soon after the incident, is doubtful, the F.I.R. is belated, there is lack of evidence to know the effect of diazepam, there is no explanation coming on the question as to how the bowl could have contained diazepam when it was cleaned and used for about five days. So, in sum and substance, the very substratum of the prosecution case loses its credibility. Therefore, the trial Court, in our view, erred in recording conviction. For the foregoing reasons, we allow this appeal by setting aside the judgment and order of conviction and acquitting the appellant of the charge levelled against him. Fine, if any, paid to be refunded to the appellant. The appellant be released from jail forthwith, if not required in any

other case.

21. For the reasons aforementioned, we do not find any infirmity in the impugned judgment. The appeal is dismissed accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs.