

(2016) 01 GUJ CK 0066
In the Gujarat High Court

Case No : Criminal Appeal (Against Conviction) No. 1045 of 2008

Kiranbhai Harjibhai Parmar

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 11-01-2016

Acts Referred:

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

Citation : (2016) 166 AIC 601 : (2016) 2 GCD 1464 : (2016) 3 GLR 1828

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

Bench : Single Bench

Advocate : HCLS Committee and Madansingh O. Barod, Advocates, for the Appellant; Mr. H.L. Jani, APP, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Rajesh H.Shukla, J.(Oral) - The present Appeal is directed against the impugned judgment and order rendered in Sessions Case No. 166 of 2007 by the City Civil and Sessions Court, Ahmedabad dated 29.1.2008 recording conviction of the Appellant/Original Accused No. 1 for the offence under Sections 363, 366 and 376 of the Indian Penal Code imposing the sentence as stated in detail in the impugned judgment and order.

The facts of the case briefly summarised are as follows.

2. As it transpires from the background of the facts and the material and evidence, the complainant victim aged about 15 years was studying in the school and when she was returning from the school on 4.1.2007, the Appellant/Original Accused No. 1 is said to have stated to sit in his rickshaw as he was knowing her and when she has declined he is said to have threatened her and took her to one Mall where there are such eatery joints with separate area for the couples. The Appellant/Original Accused No. 1 is said to have committed the offence which led to the filing of the complaint being FIR No. 4/2007 at Meghaninagar Police Station for the aforesaid offence under Sections 363, 366 and 376 IPC.

3. As the offences are triable by the Court of Sessions, it was committed to the court of Sessions. The Sessions Court proceeded with the trial and examined the witnesses including the complainant victim.

4. After hearing learned APP as well as learned Advocate for the Accused, the City Civil and Sessions Court as stated above recorded the conviction on appreciation of material and evidence. It is this judgment and order which has been assailed by the Appellant/Original Accused No. 1 in the present Appeal on the grounds stated in detail in the memo of Appeal.

5. Heard learned Advocate Shri Madansingh O. Barod for the Appellant/Original Accused No. 1 and learned APP Shri H.L.Jani for the Respondent - State of Gujarat.

6. Learned Advocate Shri Barod for the Appellant/Original Accused No. 1 has referred to the testimony of witnesses including the testimony of the victim PW-2 at Exh.16. Learned Advocate Shri Barod submitted that the manner in which it is narrated, it is not believable that she boarded the rickshaw on the say of the Appellant/Original Accused No. 1 inasmuch as she could have raised the shout if she was not inclined. Learned Advocate Shri Barod referred to the injury certificate of the victim at Exh.13 and also the testimony of the Doctor PW-1 at Exh.12 who examined the victim. Learned Advocate Shri Barod submitted that it was an affair and the victim had joined the Appellant/Original Accused No. 1 and therefore the offence is not made out or established which has not been appreciated.

7. Learned Advocate Shri Barod also referred to the other evidence including the testimony of PW-9 at Exh.51 and submitted that though the date of birth of the victim is 8.9.1992, the test is carried out by the Doctor PW-1 as stated in the testimony at Exh.12 that the age could be around 16-17 years though there could be some variation here or there. Learned Advocate Shri Barod pointedly referred to the aspect of the teeth to emphasise that when she was having 14 teeth on both sides and when the genital parts were developed, at least the victim could be said to have attained the age of discretion. He therefore submitted that the accused who has been examined by the Doctor who has recorded the history. He pointedly referred to the said injury certificate of the Appellant/Original Accused No. 1 wherein the Accused is said to have given the history about the affair between them since about one and half year. Learned Advocate Shri Barod submitted that there are marks of injury either on the victim or on the Appellant/Original Accused No. 1 which would strengthen the aspect of consensual intercourse and therefore the impugned judgment and order recording the conviction is erroneous.

8. Learned Advocate Shri Barod submitted that though it is recorded that the victim was minor as stated above, the Doctor has given the opinion about her age coupled with the fact that she has attained the age of understanding or discretion and therefore her consent could have been considered while deciding

the aspect of the offence under Section 376 IPC. Lastly, learned Advocate Shri Barod submitted that considering the manner in which the incident has occurred, at least, the sentence may be modified as the Appellant/Original Accused No.1 has served substantially for about 7 to 8 years and therefore while maintaining the conviction, sentence may be reduced.

9. Learned APP Shri H.L. Jani referred to the papers including the testimony of the victim PW-2 at Exh.16. Learned APP Shri Jani submitted that the victim in her testimony has specifically stated about the manner in which she was under pressure and the act was committed against her will and without consent. Learned APP Shri Jani submitted that the birth certificate of the victim is produced at Exh.18 which records her birth date as 8.9.1992. Learned APP Shri Jani submitted that if the date of birth is considered with the date of incident, she would not have even completed 15 years and therefore as per the provisions of Section 375 and 376 IPC, the offence is committed. Learned APP Shri Jani submitted that the father PW-3 has stated in his testimony at Exh.22 about the date of birth. In fact as recorded in the testimony of the father PW-3 at Exh.22, the Accused is said to have given some application on the basis of which the birth certificate is produced which is taken on record and the date of birth as per the said certificate is 8.9.1992. Learned APP Shri Jani also referred to the testimony of PW-8 at Exh.48 who is the clerk of the school who brought the register regarding the entry for the date of birth recorded in the register. Learned APP Shri Jani submitted that he has stated that the date of birth of the victim is 8.9.1992 as recorded in the general register of the school and therefore the extract was produced at Exh.49 and the certificate is at Exh.50. The entry in the school register has been made on the basis of the certificate at Exh.18. Learned APP Shri Jani therefore submitted that there is a specific evidence with regard to the date of birth of the victim. Learned APP Shri Jani submitted that as per this certificate and the evidence placed on record, the date of birth of the victim is 8.9.1992 and she would be less than 16 years of age and therefore as she was minor, the aspect of consent would be irrelevant. Learned APP Shri Jani therefore submitted that the submission made about the consent or the victim having the discretion is totally misconceived once the victim is proved to be a minor. Learned APP Shri Jani referred to the judgment of the Hon'ble Apex Court in a judgment reported in (2011) 3 SCC 85 in case of B.A. Umesh v. State of Karnataka, and also the judgment of the High Court in a judgment reported in 2000 (3) GLR 1925 in case of Trikambhai @ Tiko Ravajibhai Thakor v. State of Gujarat and submitted that as discussed in this judgment referring to Section 24 of the Evidence Act, 1872, an extra judicial confession before the Doctor would be admissible. Learned APP Shri Jani submitted that in fact the Appellant/Original Accused No.1 while giving the history before the Doctor has admitted about the act which would be an extra judicial confession. Learned APP Shri Jani submitted that therefore once the act is admitted the aspect of consent is required to be considered with reference to the age of the victim. Learned APP Shri Jani submitted that as referred to above, the victim was minor and therefore the

consent would not be relevant. Learned APP Shri Jani therefore submitted that the impugned judgment and order recording conviction may not be disturbed. Learned APP Shri Jani also submitted that the submission based on the so called election card is misconceived as the victim and the witnesses have clearly clarified that though the necessary steps for the purpose of election card were taken but when her photo was taken and examined it is found that it has not been issued to her validly and in fact the election card is not reliable as the victim has clearly stated that she has never gone and it has never been issued to her. Learned APP Shri Jani therefore submitted that the present Appeal may not be entertained and the judgment and order recording the conviction and sentence may not be disturbed. Learned APP Shri Jani further submitted that even the alternate submission regarding the sentence, the court may consider the nature of offence and therefore the conviction and sentence may be sustained.

10. In view of the rival submissions and having examined the material and evidence at length, it is required to be considered whether the impugned judgment and order calls for any interference and whether the present Appeal deserve consideration.

11. As could be seen from the background of the facts, the victim PW- 2 in her testimony at Exh.16 has narrated about the incident and the manner in which it has occurred. She has clearly stated in her testimony that the act was committed against her will and without her consent.

12. The submission made by learned Advocate Shri Barod referring to the history given by the Appellant/Original Accused No.1 about the affair cannot be readily accepted even assuming that there was such an affair or feeling would hardly have any relevance considering the age of the victim who is a minor. The date of birth of the victim is 8.9.1992 as reflected in the certificate at Exh.18. PW-8 who is examined by the prosecution had brought the register of the school and has stated in his testimony at Exh.48 about the entry regarding the date of birth of the victim. He has clearly stated that the date of birth recorded is 8.9.1992 and on the basis of the certificate the school leaving certificate has been issued. Thus, there is an ample evidence with regard to the date of birth confirming the date of birth of the victim. Therefore when there is a specific evidence with regard to the age and date of birth of the victim, the medical evidence or the certificate issued on the basis of her medical examination could be considered only as an opinion. It is required to be stated that such medical evidence based on the examination of the victim could be considered in the absence of any evidence. However, in the facts of the present case when there is a specific evidence as stated above coming from the proper custody, there is no reason to overlook or discard the same. Therefore, if the date of birth as recorded is accepted, she would be less than 16 years of age on the date of the incident. Therefore, once the victim is said to be a minor below the age of 16 years, her consent would not be relevant.

13. A useful reference can be made to the Jowitt's Dictionary on English Law, which has defined the word 'consent'. This aspect has been considered by the Hon'ble Apex Court in a judgment reported in (2003) 4 SCC 46 in case of Uday v. State of Karnataka and it has been quoted:

"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."

Therefore, it is required to be considered whether the 'consent' can be said to a free and voluntary consent. Moreover as the victim is minor, the consent would not be relevant. In fact the law presumes that the minor would not have the understanding of the consequences and therefore is not considered competent to give consent. Therefore, once it is clearly established that the victim was less than 16 years of age, it would establish the offence of rape under Section 376 IPC. Therefore, the submissions which have been sought to be made referring to the election card also has no merit as the victim has clearly stated that she has not gone and it has not been issued validly. In fact it reflects the attitude of the Appellant/Original Accused No.1 to make use of such document. Moreover, the FSL report confirms about the act and therefore the submissions made by learned Advocate Shri Barod about the consent are misconceived.

14. The another facet of the submission made by learned Advocate Shri Barod that while maintaining the conviction, the conviction may be modified or reduced, is also without any merit considering the background of the facts as well as the nature of the offence. The doctrine of proportionality in sentence evolved by the courts by judicial pronouncements has expressed a word of caution about undue sympathy either in convicting or while sentencing the accused. The different theories like deterrent retributive may have a different role while considering the aspect of penology. It has a reference to the aspect of sentence or the punishment on establishment of the guilt of the Accused. Therefore, it has a reference to the nature of the offence or the gravity of the offence, the manner in which it is made and other relevant factors, to be considered for the purpose of adequate sentence. The doctrine of proportionality in sentence obliges the courts to impose the adequate sentence referring to the nature of offence and the manner in which it has been committed. Any undue sympathy or soft pedalling will be a counter productive and it would be sending a wrong signal in the society for criminal justice system. The right of the accused and the right of the victim as well as the society collectively has to be considered in the interest of justice if the rule of law is to survive. Therefore, such submission with regard to modification cannot be readily accepted in such offence.

15. A useful reference can be made to the judgment of the Hon'ble Apex Court reported in AIR 2008 SC 2314 in case of Siriya alias Shri Lal v. State of M.P. It has been observed referring to the doctrine of proportionality:

"8. Therefore, undue sympathy to impose inadequate sentence would do more

harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in *Sevaka Perumal etc. v. State of Tamil Nadu*, 1991(3) SCC 471."

16. It is in these circumstances, the present Appeal deserves to be dismissed and accordingly stands dismissed.