
(2003) 08 GUJ CK 0029
In the Gujarat High Court
Case No : Criminal Appeal No 104 of 1996

Mahendra Murtiyan Madrasi

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 07-08-2003

Acts Referred:

Penal Code, 1860 (IPC) — Section 109, 363, 366, 380

Citation : (2004) CriLJ 539 : (2004) 2 RCR(Criminal) 913

Hon'ble Judges : M.S. Shah, J;D.K. Trivedi, J

Bench : Division Bench

Advocate : Yogesh S Lakhani and Tanha Parikh, for the Appellant; KC Shah, APP, for the Respondent

Judgement

M.S.SHAH, J.—This appeal is a telling example of how the delay in hearing of a conviction appeal deprives a convict of his right to persuade the Court to reduce the sentence, if not the right to declare him as innocent, and thus render the right of appeal illusory. The appellant has already been released on 11.10.2002.

2. This appeal is directed against the judgment and order dated 11.10.1995 rendered by the learned Assistant Sessions Judge, Jamnagar in Sessions Case No. 55 of 1995 convicting the appellant-accused of the offences punishable under Sections 363, 366, 366A and 376 IPC and sentencing the appellant to undergo RI for 3 years and fine of Rs.5,000/- in default RI for one year for the offence punishable u/s 363 IPC; RI for 3 years and fine of Rs.5,000/- in default RI for one year for the offence punishable u/s 366A IPC; and RI for 8 years and fine of Rs.10,000/- in default RI for 2 years for the offence punishable u/s 376 IPC. The learned Sessions Judge also directed that all the sentences shall run concurrently. The learned Sessions Judge further directed that compensation of Rs.15,000/shall be paid to victim Madhuben, if fine is recovered. The learned Sessions Judge, however, acquitted the appellant of the offence punishable u/s 380 read with Section 109 IPC.

3. By charge-sheet dated 8.9.1995, the appellant was charged with the aforesaid

offences on the basis that when the appellant was residing at Mithapur, Taluka Okha, on 15.12.1994 at about 9 O'clock in the evening, the appellant had kidnapped a girl called Madhuben, aged 14 years, who was residing in the neighbourhood, from lawful guardianship of her father Ghela Vala without the consent of the said guardian. The appellant was further charged that Madhuben, daughter of Ghela Vala, was aged about 14 years and the appellant kidnapped her on the aforesaid date and time with intent that she may be forced or seduced to illicit intercourse or that the appellant knew it to be likely that Madhuben will be forced or seduced to illicit intercourse. The appellant was also charged that the appellant had committed rape on Madhuben, aged 14 years, without her consent and after inducing her to believe that the appellant will marry her, the appellant had committed rape on Madhuben twice at Ahmedabad and Baroda. The appellant was further charged with the offence of abetting Madhuben in committing theft of Rs.3,000/- from her house.

4. The appellant pleaded not guilty to the offences with which he was charged. The prosecution led oral evidence of Madhuben Ghelabhai (Exh. 9), her father Ghelabhai Valabhai (Exh. 18), Sushilaben R Jani (Exh.31), Principal of the school where Madhuben had studied for sometime and, therefore, the school had issued the School Leaving Certificate showing her birth date as 5.3.1981, Vinodkumar Maganlal, employee of Mithapur Hospital for producing the live birth report showing that a girl was born to Ghelabhai Valabhai and Pami Vala on 5.4.1981. The prosecution also examined Dr Navinchandra Kanjibhai Kariya (Exh. 10) and Dr AU Mehta (Exh. 20) who had examined Madhuben, both were to ascertain whether Madhuben was subjected to any sexual intercourse and who had also conducted the radiological examination of Madhuben to ascertain her age. Investigating Officer Rameshchandra Bhikhamdas, PSI at the Okha Police Station was examined at Exh. 26. PW 12 Bhanushankar K Joshi (Exh.38) was examined who produced the FSL report indicating the analysis of the semen stains on the clothes of Madhuben and the appellant.

5. The appellant was examined u/s 313 of Cr.PC wherein he denied commission of any offence. The appellant did not lead any evidence, but the defence suggested on behalf of the appellant was to the effect that Madhuben was the consenting party to the entire episode and, therefore, the appellant had not committed any offence.

6. After hearing the learned counsel for the parties, the learned Sessions Judge held that Madhuben had completed 14 years of age as per the school record and the hospital record and that discrepancy of one month between the hospital record and the school record was of no consequence. The learned Sessions Judge also found that as per the medical evidence on the basis of the radiological examination, Madhuben had completed 14 years of age, but had not completed 17 years of age. The learned Sessions Judge further held that Madhuben was below 18 years of age at the time of incident and she was compelled by the appellant to leave the lawful custody of her father without the father's consent.

The learned Sessions Judge further held that the appellant had induced Madhuben to leave the lawful custody of her father and that force had continued till they returned. The learned Sessions Judge further held that the appellant had committed rape on Madhuben twice and that Madhuben had to accompany the appellant to various places without her consent as she was under the threat of danger given by the appellant. Ultimately, the learned Sessions Judge rendered the above judgment and order of conviction. On the question of sentence, the learned Sessions Judge referred to the fact that the appellant-accused was a young person aged only 19 to 20 years and the only son of his parents and that the appellant had not been previously convicted for any offence nor was he involved in any crime, but the learned Sessions Judge held that no lenient view was required to be taken as Madhuben was a girl of tender age of only 14 years. Accordingly, the above order of sentence came to be passed. It is the aforesaid judgment and order which is under challenge in this appeal.

7. Mr Yogesh Lakhani with Ms Tanha Parikh, learned counsel for the appellant have made the following submissions :-

(i) It is clear from the evidence that Madhuben had left the house with Rs.3,000/- and she had paid for the travelling charges and the guest house charges when Madhuben and the appellant had stayed out of Mithapur for a week. The appellant was also aged only 19 years. Therefore, it could not be said that the appellant had taken or enticed Madhuben out of the lawful custody of her father.

(ii) The learned Sessions Judge has erred in holding that Madhuben was taken by the appellant to various places by force and that Madhuben was not willing to go to all those places because the appellant had used force and Madhuben was under the threat of danger.

(iii) Madhuben was about 19 years of age and the learned Sessions Judge has erred in relying upon the school leaving certificate and the hospital record which contain an apparent contradiction in the matter of birth date of Madhuben. In the school leaving certificate, it is shown as 5.3.1981, but in the hospital record it is shown as 5.4.1981 and such documentary evidence was not reliable. In the guest house register, which was produced by the Guest House Keeper of Ahmedabad, the age of Madhuben was shown as 19 years old. In the medical evidence also it was indicated that Madhuben was physically well developed. As far as radiological examination is concerned, her age is shown to be between 14 and 17 years. There could also be a variation in age by a year or two.

(iv) Without prejudice to any of the above contentions, the sentence imposed by the learned Sessions Judge is too harsh and that in any view of the matter, the learned Sessions Judge could not have imposed the sentence of fine and that too with the default clause of imprisonment for four years in default of total fine of Rs.20,000/-.

Strong reliance is placed on the decision of the Apex Court in *S. Varadarajan Vs.*

State of Madras, .

8. On the other hand, Mr KC Shah, learned Additional Public Prosecutor has supported the judgment of the learned Sessions Judge and has submitted that when there is documentary evidence regarding the age of the victim, no further evidence was required to be produced, when then victim was shown less than 16 years of age.

9. Having heard the learned counsel for the parties, we are of the view that while the conviction of the appellant for the offence punishable u/s 376 IPC cannot be faulted with, even from the prosecution case itself, there was no warrant for conviction of the appellant for the offences punishable u/s 366A IPC. Before advertng to the said aspect, we would like to add that even while we are inclined to confirm the conviction of the appellant with the offence punishable u/s 376 read with Section 375 Clause sixthly, it is not possible for us to agree with the entire reasoning given by the learned Sessions Judge for convicting the appellant with the aforesaid offences.

10. First and foremost we would refer to the contention dealing with the age of Madhuben as that is one of the most important ingredients for the offences punishable under Sections 363, 366 and also for the offences punishable u/s 376 read with Section 375 Clause sixthly.

Ghelabhai, father of Madhuben, had been residing at Mithapur. Madhuben was also born at Mithapur. As per the Mithapur Hospital register (Exh. 37), the relevant extract of which was produced before the trial Court, and on the basis of which the live birth report (Exh. 37) was issued by the Medical Officer of the Mithapur Hospital, a girl was born to Ghela Vala and Pami Ghela on 5.4.1981. Of course, the name of the child was not shown, but the Court can take judicial notice of the fact that, in our society, the child is ordinarily not given the name immediately. However, the prosecution has got placed on record the school leaving certificate at Exh. 32 and an extract from the general register of the school at Exh. 33. The said documents were produced by Sushilaben R Jani, Principal of the Mithapur Kanya Shala. The relevant extract of the school register and the school leaving certificate (Exh. 32) issued on the basis of Exh. 33 clearly indicated that Madhuben was born at Mithapur on 5.3.1981. Madhuben was admitted to the said school in the first standard on 5.8.1986, but she left the school on 9.9.1986. Nothing has been pointed out on behalf of the appellant to shake the credibility of the school record. The only submission made by the learned counsel for the appellant is that since the school record indicates the birth date as "5.3.1981" and the hospital record indicates the birth date as "5.4.1981", neither of them could be relied upon.

11. We are not in a position to accept the above submission. There is no reason why the Principal of Mithapur Kanya Shala would produce any incorrect record. As regards the discrepancy, it is only of one month. Although the hospital record does not show the name of the child, looking to the local customs and traditions,

it cannot be said that there is anything unusual regarding the absence of the name of the child in the hospital record. Moreover, the fact that the difference in the birth date in the hospital record and the one in the school record is of only one month, would clearly show that the two records could not have been in respect of two different children, when the names of the same parents are shown in both the record. In any view of the matter, whether Madhuben's birth date is shown as 5.3.1981 or 5.4.1981, considering the fact that the offence in question took place between 15th and 23rd December 1994, it is clear that Madhuben was just 14 years of age and, therefore, she was certainly below the age of 16 years.

As regards the medical evidence on the question of age, the medical certificate Exh. 14 contains the following endorsement :-

"Age of patient is more than 14 years but less than 17 years."

Dr Amiya Udayan Mehta (Exh. 20) who had conducted the radiological examination has opined that on perusal of the x-ray plate (Exh. 15), there was no fusion of radius and ulna and, therefore, Madhuben was aged less than 17 years. In his cross examination, the said doctor further stated that Madhuben's sex organs had partially developed and she had not started menstruation. Upon perusal of the aforesaid evidence, therefore, it is clear that the documentary evidence of the age of Madhuben in the form of school leaving certificate is not in consistent with the documentary evidence regarding the birth of Madhuben in the form of hospital record both of which indicate that Madhuben had completed 13 years, but not completed 14 years of age in December, 1994. Hence, we see no reason to interfere with the finding given by the learned Sessions Judge that Madhuben was just aged about 14 years at the time of commission of offence.

12. Once the aforesaid basic issue is resolved, three questions required to be examined are -- whether the appellant had taken or induced Madhuben out of the lawful custody of her father without the consent of the father, whether the appellant had done so with the intent that Madhuben may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse and whether the appellant had sexual intercourse with Madhuben.

13. As far as the first two questions are concerned, the learned counsel for the appellant vehemently submitted that since the appellant was only aged 19 years and the case of Madhuben when the police first examined her was that her father was going to betroth her to another person against her wish and that she was not taken away by the appellant forcibly and also considering the fact that no weapon or even knife was recovered from the appellant when the appellant and Madhuben returned to Mithapur on 24.12.1994, the learned Judge has erred in convicting the appellant for the offences punishable under Sections 363, 366 and 366A IPC.

14. On the aforesaid questions, having carefully gone through the evidence, we are inclined to accept the submission made on behalf of the appellant that the

appellant had not used any force in taking Madhuben out of her house or even for going from Mithapur to various places like Jamnagar Bedi, Ahmedabad, Baroda and Sikka. Apart from the fact that no weapon, much less even knife, was recovered from the appellant when the appellant and Madhuben returned to Mithapur, the important fact is that Madhuben herself had taken Rs.3,000/- from her house for going with the appellant. The appellant had no money of his own and the travelling charges as well as the guest house charges were paid from out of the said amount. The evidence of the Investigating Officer as well as the statement of Madhuben recorded during investigation reveal that Madhuben's father was going to betroth Madhuben to another boy against Madhuben's wish and further that even the Investigating Officer was convinced right from the outset that the appellant and Madhuben had eloped. In view of the aforesaid material, we have no hesitation in setting aside the finding given by the learned Sessions Judge that the appellant had used force for taking Madhuben out of the lawful custody of her father or that the appellant had used any force for taking Madhuben to various places or that the appellant had used any force while having sexual intercourse with Madhuben.

15. Even so, when one turns to the language of Sections 361, 363 and 366 IPC, it is not necessary that force or duress is an essential ingredient of the offence of kidnapping. Even enticement to take or induce any minor female child under 18 years of age out of the lawful custody of her guardian without the consent of such guardian is sufficient to constitute an offence of kidnapping. A girl on the onset of the puberty at the tender age of 14 years would be susceptible to such enticement which the appellant aged 19 years had induced to. As per the analysis which has been rightly applied by the learned Sessions Judge, even if the girl of such tender age is induced to surrender her body to the accused in consequences of persuasion, flattery or blandishment, the offence of Section 366 would be complete. The prosecution, however, must show that it was the accused who had taken or induced the minor girl out of the lawful custody of the guardian against the consent.

16. As held by the Apex Court in *S. Varadarajan Vs. State of Madras*, taking or enticing away a minor out of the keeping of lawful guardian is an essential ingredient of the offence of kidnapping. There is a distinction between "taking" and allowing a minor to accompany a person. Where the minor leaves her father's protection knowing and having capacity to know the full import of what she is doing, voluntarily joins the accused person, the accused cannot be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

17. While there is no dispute about the fact that the father of minor Madhuben had not given any consent, the prosecution has not shown beyond reasonable doubt that it was the appellant who took or induced Madhuben out of the lawful

custody of her father. From the facts narrated, it transpires that it was Madhuben who left the lawful custody of her guardian in order to go with the appellant and, therefore, she had taken Rs.3,000/- from her house and all the travelling charges and guest house charges for a period of seven days at various places were paid out of the said amount as the appellant had no money of his own. In view of the said finding, we are inclined to set aside the conviction of the appellant for the offences punishable u/s 363 and 366 IPC.

18. As far as the offence punishable u/s 366A IPC is concerned, we are surprised to find that the learned Sessions Judge has convicted the appellant of the said offence when it was not even the prosecution case that the appellant had any intent that Madhuben may be forced or seduced to illicit intercourse with another person.

Sections 366 and 366A IPC read as under :-

"Kidnapping, abducting or inducing woman to compel her marriage, etc.

366. Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.

Procurator of minor girl.

366A. Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine."

When the language of Section 366A is contrasted with the language of Section 366, it is clear that Section 366A will be attracted only when the accused induces a minor girl to go from any place with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person, meaning thereby with a person other than the accused. The prosecution has not even alleged any such case, much less led any evidence, to show that the appellant had induced Madhuben to go from Mithapur with intent that Madhuben may be forced or seduced to illicit intercourse with another person. As already indicated earlier, in our view, the appellant had not induced Madhuben to leave her father's custody, but Madhuben had gone on her own.

Hence, even otherwise, there could not be any question of applying the provisions of Section 366A.

19. The offence which remains to be discussed is the offence punishable u/s 376. In view of the material on record and the aforesaid findings, it has to be held that Madhuben had gone on her volition when the appellant had sexual intercourse with her during the period between 15 and 23 December, 1994. However, the act will fall in clause sixthly of Section 375 which reads as under :-

"Rape

375. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :-

... ..

Sixthly.- With or without her consent, when she is under sixteen years of age."

In view of our finding that Madhuben was under 16 years of age when the appellant had sexual intercourse with her, even though it was with her consent, the appellant had committed the offence of rape as defined by Section 375 read with clause sixthly. Hence, we have no other alternative, but to convict the appellant of the offence punishable u/s 376 IPC as defined by Section 375 clause sixthly.

20. Coming to the question of sentence, once the appellant has been found to be guilty of offence punishable u/s 376 IPC, the learned Sessions Judge could have imposed the sentence of imprisonment for a period of not less than seven years or upto ten years or even for life and also to impose fine.

The learned Sessions Judge has imposed the sentence of eight years and has also imposed fine of Rs.10,000/- for the offences punishable u/s 376 and Rs.5,000/- each for the offences punishable under Sections 363 and 366A. As already indicated above, conviction for the offence punishable under Sections 363, 366 and 366A IPC is not sustainable and, therefore, the question of imposing any fine would not survive. However, we cannot help observing that in the facts and circumstances of the case where the girl himself had left the house with a sum of Rs.3,000/- and the appellant had no money of his own, there was no justification for imposing the fine of Rs.20,000/- and to impose the sentence of four years in default for non payment of fine of Rs.20,000/-. In the facts and circumstances of the case, where the appellant-accused had no means and had no money even to take the girl he loved to another place with his own money, imposing such a fine and also passing the order of sentence of four years in default for non payment of fine meant that the learned Sessions Judge had imposed the sentence of 12 years on a 19 year old boy who was joined by a girl aged 14 years on her own as indicated earlier and who was a consenting party. Though her consent would not absolve the appellant of the criminal liability for the statutory offence, that did have relevance to the sentence to be inflicted on

the appellant.

21. The appellant was arrested on 23.12.1994. The learned Sessions Judge passed the order of sentence on 11.10.1995. The present appeal was preferred on 30.1.1996 and while admitting the appeal on 28.2.1996, this Court had passed the following order :-

"Admit. Bail refused. Having regard to the facts and circumstances of the case, the trial Court is directed to prepare the paper book on or before 31.10.1996 and forward the same to this Court on or before the said date and on receipt of the same, the office is directed to enlist this appeal on the final hearing board."

In compliance with the aforesaid order, the paper book was prepared and furnished on 26.8.1996. It was, therefore, expected that the appeal was required to be listed before the end of the year 1996. Unfortunately, however, although the appeal is shown to have been listed on the final hearing board 43 times, the appeal was not taken up for early hearing. Had the appeal been taken up for final hearing earlier, this Court could have considered the question of reducing the sentence from 8 years to 7 years and also setting aside the order for imposition of fine or atleast setting aside the order imposing the sentence of 4 years in default for non payment of fine of Rs.20,000/-. Fortunately for the appellant, he has earned remission of 4 years, 2 months and 11 days and has, therefore, been released from jail on 11.10.2002. This case is, therefore, a sad reminder of the necessity to ensure that such appeals are heard at an early date so that the convicts who deserve to be released earlier are able to earn their freedom without languishing in jail for even a day longer than required or warranted by law.

22. In view of the above discussion, we pass the following order :-

The appeal is partly allowed. The conviction of the appellant for the offences punishable u/s 363, 366 and 366A IPC is set aside. The conviction of the appellant for the offence punishable u/s 376 IPC is confirmed with a clarification that the said conviction is on account of the fact that the appellant was guilty of the offence as defined by Section 375 Clause Sixthly. The appellant does not seem to have paid any fine. In case the appellant has paid any fine in connection with the offences punishable u/s 363, 366 or 366A IPC, the same shall be refunded to the appellant on proper verification.

The appeal is accordingly disposed of in the aforesaid terms.