

(2004) 03 GUJ CK 0074
In the Gujarat High Court
Case No : Criminal Appeal No. 1070 of 2002

Mangalsinh Balusinh Parmar	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 25-03-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 376, 452

Citation : (2004) 03 GUJ CK 0074

Hon'ble Judges : C.K. Buch, J

Bench : Single Bench

Advocate : J.V. Japee, for the Appellant; I.M. Pandya, APP, for the Respondent

Final Decision : Allowed

Judgement

C.K. Buch, J.—This appeal is directed against the order of conviction and sentence passed by the learned Addl. Sessions Judge, Sabarkantha, at Himatnagar in Sessions Case No. 88 of 2002 convicting the appellant-accused for the offence punishable under sections 452 and 376 of the IPC and sentencing him to suffer R.I. for 3 years and to pay a fine of Rs. 1000/- in default to further undergo R.I. for six months for the offence punishable u/s 376 IPC. The appellant accused was also convicted and sentenced to suffer S.I. for 6 months and to pay a fine of Rs. 200/-in default to further undergo S.I. for one month. Both the above sentences were ordered to run concurrently.

2. The facts giving rise to the present appeal are as under:

2.1 On 7.5.20902 all the male members of the family of victim Bai Sharda viz. her husband, father in-law Udaisinh, brother in law Vinusinh had gone to the agricultural field as the process of erecting a bore well was going on and a rig for the concerned contractor was brought for the purpose in the field. The work was in progress during night time and therefore, all the male members of the family had been to the site where the construction of bore well was in progress. The

victim Bai Sharda was sleeping on a cot which outside her residential house being summer and her daughter Meena was sent to her mother in laws place with a view to give her company. The two sons viz. Mahendra and Sonal had also gone to the site with their father. Youngest son Naresh aged about 8 years was sleeping in the fali (open piece of land at the residence of Bai Sharda). At that time the accused Mangalsinh Balusinh Parmar had gone near the cot of Bai Sharda where she was sleeping and forcibly dragged her inside her house and committed rape. When this accused was in the house of Bai Sharda, the husband of the victim Bai Sharda returned from the field and on noticing the arrival of the husband of Bai Sharda, the accused, taking advantage of the darkness as there was no electric light in the village/area, escaped from the spot. Husband of Bai Sharda, according to the prosecution is a physically handicapped person and therefore he could not catch hold of the accused while he was running away from the place of incident.

2.2. On realising that her husband has reached home, victim Bai Sharda shouted for help and ultimately her husband, father in law and mother in law reached for her rescue. By that time the accused had already left the place in darkness towards the piece of uneven land.

2.3. In the morning, Bai Sharda was taken to the police station. Before she could reach the police station, on the bus stand of town Himatnagar, she was hit by a water tanker lorry and she sustained injuries. Therefore, she was taken to the Civil Hospital, Himatnagar where she was treated for the injuries sustained by her. She gave her detailed complaint about the incident at the police station.

3. After completion of the investigation and after obtaining the report from FSL, the police charge sheeted the accused for the above said two offences.

4. As the offences registered against the accused were triable by Court of Sessions the learned Magistrate committed the accused to the Sessions Court to stand his trial.

5. Mr. Japee has taken me through the oral as well as documentary evidence led by the prosecution and especially the deposition of victim Bai Sharda, her sister in law Keserben and the husband of the victim who had reached the spot where , as per the case of prosecution, the accused was inside the house of Bai Sharda . The panchnama of the scene of offence is also referred to by Mr. Japee and it is submitted that in the area of about 20-30 ft. more than 2-3 persons other than Bai Sharda were sleeping on their respective cot. So the husband of Bai Sharda being a physically handicapped person, she had developed some love and affection with the accused and on the date of the incident, the accused was invited by Bai Sharda.

6. It is submitted that the learned Trial Judge has failed in appreciating certain important part of the oral as well as documentary evidence whereby it clearly emerges that this not a case of rape but of consent by Bai Sharda. The accused has not disproved the case of prosecution but he has simply established the

probabilities. The statement of accused recorded u/s 313 Cr.P.C., if considered, in the light of the evidence led by the prosecution it clearly emerges that there is an element of consent emerging from the record and therefore, the accused ought not to have been convicted for the offence of rape. The element of offence u/s 452 IPC is also missing. So the order of conviction and sentence requires to be quashed and set aside 8.4.2004

7. According to Mr. Pandya learned APP, the finding recorded by the learned Trial Judge is in accordance with law and the version of the victim Bai Sharda, if it is found acceptable and trust worthy the accused can be convicted for the offence of rape. But in the present case, the version of Bai Sharda gets corroboration from the evidence of Keserben and her husband Makusinh. The FSL report which is admitted in evidence satisfactorily establishes one fact that on the date of the incident i.e. 7-5-2002, the intercourse may have been made with the victim Bai Sharda. The opinion evidence of medical officer who examined Bai Sharda does not contradict the say of Bai Sharda. Undisputedly, Bai Sharda is aged about 35 years having 3 children and if she is taken to the hospital for examination, in this regard, normally, apparent possible sign of rape may not be found. But the FSL report corroborates the testimony of Bai Sharda and therefore, the finding recorded by the learned Trial Judge cannot be said to be perverse or erroneous finding of fact.

8. In more than one decisions, this court and the Apex Court has convicted the accused persons on the sole testimony of victim of rape. The apparent conduct and behavior of the accused also should be seen and there was no reason for the accused to visit the house of Bai Sharda at night when she was sleeping in a cot in the open piece of land/area which is adjacent to her residential house, more particularly when her husband was not in the house. So the finding recorded by the learned Trial Judge does not require any interference and the order of conviction and sentence should be upheld. According to Mr. Pandya the accused has committed a heinous crime and the act of the accused is of a head strong man and therefore, there was no reason for the learned Trial Judge to impose any lessor punishment than the minimum prescribed u/s 376 IPC. However, as this court is not dealing with the appeal filed by the State for enhancement of sentence, the order of sentence passed by the learned Trial Judge should be confirmed and there is no scope even to show any leniency. Mr. Pandya submitted that the village where the incident has taken place, is a very small village and therefore the accused must be aware of the fact that all male members of the family of the victim lady have gone to their field where the operation of digging bore well was going on even after sun set and an instrument popularly known as rig was also hired for the purpose. So the accused person has taken advantage of the loneliness of the victim as there was no male members in her family as well as the situation that the victim lady was sleeping in a cot in the adjacent open land to her house. The physical disablement of the husband of the victim or minor contradictions or omissions found in the evidence of victim are facts which should be treated as insignificant and therefore Mr.

Pandya submitted that the order passed by the learned Sessions Judge holding the appellant guilty may be confirmed.

9. The arguments advanced by Mr. Japee learned counsel for the appellant accused are based on one aspect that the accused was invited and the intercourse by the accused with the victim lady was not rape as defined in section 375 IPC because according to Mr.; Japee the intercourse with the victim by the accused was neither against her will or without her consent. So the fact of intercourse is not even disputed by Japee. It is submitted that the affairs between the victim and the accused were such that only the victim can inform the accused that no male member in the entire family will be available on that particular night including her father in law and brother in law except only one minor son aged about 7 years.

10. The distance between the cot of other female members of the family is not there on record. But it emerges from record that when the victim lady shouted, the accused put his hand on her mouth and thereafter she was taken in side her house. But a plain reading of the evidence of the important prosecution witnesses it is clear that their evidence is not consistent to this fact. It may be that a young boy was sleeping near his mother, may not have heard the shouts of his mother; but the other major female members sleeping nearby the area had also not noticed the shouts if it was made. Even in the deposition, the victim Sharda, she has not stated that she had shouted initially when her body was touched and caught hold of by the accused. In the same way it is the case of the prosecution that the accused after taking her into her house had forcibly pulled down her to the floor and thereafter he committed rape and that allegedly a wrongful act was being done. At that time she noticed that somebody is approaching the house and on recognizing the noise of the bicycle of her husband , as stated by her in her deposition, she shouted. A plain reading of the examination in chief creates an impression that till that movement she had not attempted to raise her voice. It is the say of the prosecution that the husband of the victim Sharda is physically handicapped person and therefore, he could not chase the accused who had run away from the spot of the incident in darkness and on his shouts, the father and brother i.e. father in law and brother in law of the victim Sharda had reached the spot and they could not also catch hold of the accused. victim.

11. The description of the entire event given by the victim Sharda requires to be appreciated in light of the medical evidence and her conduct. It is submitted by Mr. Japee that the victim lady has undergone tubeoctomy before five years of the date of incident and one young daughter-Meena was also asked to go to her mother in law's house and other children Mahendra and Sonal were also sent to the field where bore well digging operation was going on during night hours. The relations between accused Mangalsinh and the husband of the victim were strained. The reasons for having strained relations between the two, has not been brought on record specifically either by the prosecution or by the defence

site. It is argued by Mr. Japee that the strained relation between the accused and the victim Sharda was a subject of gossip amongst the villagers. The relations were strained because of some reasons; otherwise, normally there was no scope for straining such relations.

12. Undisputedly the complaint is filed late. The prosecution attempted to explain the delay though the injury on the body of victim Sharda were noticed by the doctor who had examined her i.e. Bhamani Babulal p.w.-1 exh.11. But it is not the case of prosecution that these injuries were caused when she was victimised by the accused. On the contrary the prosecution has pleaded specifically that these injuries were caused to the victim Sharda when she was given a hit by the mother vehicle viz. a water tanker when she was going to police station with other family members from the bus stand of Himatnagar. However, the fact remains that the complaint reached Himatnagar in an auto rickshaw and not in a regular S.T. Corporation bus as per the case of the prosecution. There is no explanation or evidence on record that why the auto rickshaw was not directly taken to the hospital. Prior to her examination by Dr. Bhamini Babulal, she was taken to Dr. Raju Naik and Dr. Yadav in respect of the injuries sustained by her because of the alleged vehicular accident. But no documents proving the fact of accident is produced on record. Neither the FIR nor any entry registered with the Himatnagar Police Station is available on record. None of the two doctors who were named by Dr. Bhamini Babulal in her deposition had treated the victim initially for the injuries sustained by her in a vehicular accident, has been examined. So the nature of injuries found on the body of the victim by these two doctors are not available on record. The certificate of injuries found on the body of the victim is not available on record. So the court finds some force in the arguments of Mr. Japee that the prosecution has attempted to keep a curtain as to why the delay is accused in lodging the FIR and how and when the injuries on the body of the victim Sharda were caused i.e. whether they were caused by severe beating by her husband or other family members. This aspect, according to Mr. Japee emerging indirectly from the evidence led by the prosecution has not been considered while appreciating the defence version when the accused is supposed to put probabilities to his defence version.

13. The age of the victim and the accused is mostly similar. They are of the same age group. When she was taken to the hospital for examination and examined by Doctors viz. Dr. Bhamini Babulal and Dr. Dhaneshkumar Barolia she had given history as to the incident wherein she has stated that she was raped at about 11.00 p.m. It can be therefore, legitimately inferred that at about 11.00 p.m. or any time between 11.00 a.m. and 12 midnight, she was taken from her cot inside the house; but in deposition she has stated that she was raped at about 12 mid night. According to her till about mid night she was on her cot outside her house and at that time the accused Mangalsinh had come and gagged her mouth by cloth and thereafter she was taken inside her house and given kicks, fist blows etc. and she was pulled down and was raped. In para 6 of the examination in chief of Dr. Dhaneshkumar exh.12, he has stated that at about

11.00 p.m. the accused had raped her and she was relieved and left by the accused at about 12 midnight. When an independent prosecution witness has stated this fact initially to the doctor, then the same shall have to be appreciated in the light of the say of the accused.

14. Mr. Japee has rightly argued that as the victim Sharda, personally was of the view that the accused may not be convicted. Therefore, though she has settled in her life having four children has made a show that she is sticking to the story placed by the prosecution, has stated in her cross examination that she has not lodged the complaint. This statement creates an impression that the complaint was lodged on behalf of her either by her husband or her brother in law who had accompanied her in an auto rickshaw to Himatnagar and the police station. On one hand she states that she was pulled down forcibly by the accused and she was raped and on the other hand, it emerges from record that she was taken to a place where the quilt was spread on the floor and on that quilt she was raped. The cover of this quilt was also seized by the investigating agency and was sent for analysis and report to the FSL. Victim Sharda has identified the cover when the same was shown to her by the learned Public Prosecutor. This circumstances, if appreciated in the light of the basic story of prosecution and the oral evidence led by the victim Sharda, as to the point when she shouted for the first time, becomes relevant. It seems that she had never shouted till her husband reached the open fali described by her as "angna".

15. The question posed by Mr. Japee is that her minor children viz. the daughter and one son were sent conveniently at two places viz. the house of her mother in law and the field respectively where the rigging operation of the bore well was going on and the accused has taken advantage of their natural absence. No independent witness is neither examined by the prosecution nor is it the say of the prosecution that no such witness was available from the neighborhood though the incident had started from an open piece of land abutting the house.

16. In the deposition of p.w. 5 Keserben exh.21 the sister in law of victim and wife of younger brother of the husband of the victim Sharda has stated that she heard the shouts at about 12 mid night and at that time she had seen the accused Mangalsinh running away from the house of the victim Sharda and at that time Sharda had told her that Mangalsinh had been to rape her but she had not stated as to what had actually happened. On the contrary, it emerges from her examination in chief that after some hue and cry at midnight, none of them had made any attempt to trace out the accused Mangalsinh or to lodge a complaint about the incident with the police. None of the prosecution witnesses examined as panch has supported the case of the prosecution nor the documentary evidence carry the case of the prosecution any further.

17. In view of the above discussion of the evidence led by the prosecution and in the back ground of the reasons recorded by the learned Trial Judge holding the accused guilty of the offence punishable u/s 376 IPC, the court is of the view that there is force in the say of of Mr. Japee that alternative defence taken by the

accused i.e. the consent of the victim, has not been appreciated by the learned Trial Judge. The material contradictions and improvements are wrongly treated as minor contradictions. The delay in lodging the FIR is also found not satisfactorily explained. The conduct of victim Sharda also supports the version that the accused may be an invitee and to facilitate him only victim Sharda was the person who was present in her house except the minor son aged about 8 years and no individual is likelihood return before mid night. The FSL report only corroborates only one fact that some clothes put on by victim Sharda viz. saree petticoat etc. were found stained with semen and blood etc; but it is in evidence, as narrated by victim Sharda to Dr. Bhamani Babulal that it was the 3rd day of the menstrual period of victim Sharda. Even then, these circumstances by themselves are not sufficient to link the accused with the crime when the accused has satisfactorily brought the probability of consent of victim Sharda and there is no satisfactory evidence to show that intercourse was made either with force or against the will of victim Sharda.

18. Having considered the totality of facts and circumstances emerging from record, especially the evidence led through main four prosecution witnesses viz. Dr. Bhamini Babulal, victim Sharda, her husband and Keserben the sister in law of the victim, the court is of the view that material error has been committed by the learned Trial Judge in appreciating the evidence. The finding recorded by the learned Trial Judge is merely based on conjectures and surmises. It is true that in examination in chief victim Sharda has stated that she was forcibly raped but this statement does not stand to the test of cross examination and other evidence led by the prosecution. When an accused is placing a bold defence as an alternative defence it shall have to be appreciated in the light of totality of the facts and circumstances directly or indirectly emerging from the record and the evidence led. The error in this regard committed has resulted into conviction of the appellant-accused. Such conviction cannot sustain. The act of accused whether was of a head strong person, or of a person victimising the wife of a poor handicapped or of a person having consent of an accomplice, remained unclarified and under shadow of doubt on evaluation of prosecution evidence. In view of the nature of evidence available on record, the learned Trial Judge ought to have given benefit of doubt to the accused .

19. In view of the above discussion the appellant accused is acquitted by giving benefit of doubt. The appellant-accused is set at liberty forth with if he is not required in any other case. The judgment and order of conviction dated 29.11.2002 recorded by the learned Additional Sessions Judge, Sabarkantha at Himatnagar against the accused in Sessions Case No. 88 of 2002 is hereby quashed and set aside. Fine if paid be refunded to him. The appeal is allowed.