

(2012) 02 GUJ CK 0065
In the Gujarat High Court
Case No : Criminal Appeal No. 1372 of 2007

Melo @ Melaji Jeramjibhai Khavadiya

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 23-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 363, 366, 376

Citation : (2012) 02 GUJ CK 0065

Hon'ble Judges : Paresh Upadhyay, J; Jayant M. Patel, J

Bench : Division Bench

Advocate : Subhadra G. Patels 1 and Mr. Mehul H. Rathods 1, for the Appellant;
Shah Id., APP for Opponent(s) 1, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice Jayant Patel

1. The present appeal is directed against the judgment and order dated 27.7.2007 passed by the learned Presiding Officer, 3rd Fast Track Court, Gondal, camp at Upleta, in Sessions Case No. 70/2007, whereby, the appellant-accused has been convicted for the offences u/s 363, 366 and 376 of IPC and the sentence has been imposed upon him of 4 years R/I with fine of Rs. 3000/- and six months" S/I for default in payment of fine, 5 years R/I with fine of Rs. 4000/- and six months S/I for default in payment of fine and 10 years R/I with fine of Rs. 4000/- and six months S/I for default in payment of fine for the respective offences.

2. As per the prosecution case, the father of the victim Motibhai Rukabhai PW-2, filed the complaint with Upleta Police Station stating that his daughter - victim whose birth date is 18.8.1991 was alone at his house when he left for labour work and when he came back, his wife informed him that victim had not come back and upon further inquiry, he learnt through Shobhanaben that the victim and accused had gone to Upleta in luxury bus, and thereafter, victim had not

returned, and therefore, the complaint was filed.

3. The investigation of the complaint was made and ultimately, the charge-sheet was filed and the case was committed to the Court of Sessions being Sessions Case No. 70/2007.

4. The prosecution, in order to prove the guilt of the accused, examined 9 witnesses and produced documentary evidence of 21 documents, the details of which are mentioned by the learned Sessions Judge at para-3 of the judgment. The learned Sessions Judge, thereafter, recorded the statement of the accused u/s 313 of Code of Criminal Procedure, wherein, he denied the evidence against him and in his further statement stated that he is innocent and he has been wrongly implicated in the case. The learned Sessions Judge, thereafter, heard the prosecution and the defence and he has found that the prosecution has been able to prove the case against the accused, and therefore, held the accused guilty for the offences under sec.363, 366 and 376 of IPC. The learned Sessions Judge has also heard the prosecution and the defence on the aspects of sentence, and thereafter, imposed the sentences, as referred to herein above. Under the circumstances, the present appeal before this Court.

5. Learned Counsel appearing for the appellant has raised the only contention that even if it is considered that the case was proved for the charged offences, the punishment imposed upon the accused by the learned Sessions Judge for the alleged offences, are improper and unjust. It was submitted by the Learned Counsel for the appellant that the facts have come on record by way of medical history given to the doctor that there was consent for the physical relations by the victim with the accused. It was further submitted that there were no injury marks found on the body of the victim as per the medical evidence and keeping in view the said aspect, even if it is believed that the victim was aged less than 16 years, the punishment imposed of 10 years R/I for the offence u/s 376 of IPC, may be interfered with by this Court. It was also submitted that by now the appellant-accused has already been undergone the sentence of about 5 years or more, and therefore, he is restricting the case only on the aspect of sentence.

6. Learned APP while supporting the judgment and order of the learned Sessions Judge on the aspect of sentence under sec. 376 of IPC, submitted that the discretion has been properly exercised, and therefore, the sentence imposed by the learned Sessions Judge for the alleged offence u/s 376 of IPC is just and proper and no interference is called for by this Court.

7. We may state that on the aspect of proportionality of punishment, this Court had an occasion to consider the case u/s 376 of IPC wherein the material had come on record to show that the prosecutrix had intercourse with the boy with consent and there was no satisfactory evidence of compulsion for such purpose. In the said case, this Court observed at paras 4 to 9 as under:

4. Learned Counsel at the out set submitted that the appellant is not assailing the judgment and order passed by the learned Sessions Judge for finding the

appellant guilty for the offence under sections 376, 363 and 366 of IPC and he also submitted that the appellant is restricting the case for the present appeal on the aspect of quantum of punishment. It was submitted by the Learned Counsel for the appellant that there is evidence available on record, and more particularly of the medical history showing that the prosecutrix had every point of time consented for the sexual intercourse and there was no compulsion made. He fairly conceded that the age of the prosecutrix was 13 years and 2 months, and the offence was found as proved by the learned Sessions Judge, but he submitted that keeping in view the said aspect, the punishment of 10 years imposed upon the appellant is improper, and therefore, this Court may reduce the sentence to the minimum of 7 years. He also relied upon the decision of this Court in the case of *Thakore Tejaji Devaji & Ors. vs. State of Gujarat*, reported in 2006 (4) GLR page 2807 and in the case of *Shanabhai Chandubhai Vasava Vs. State of Gujarat and Another*, .

5. Whereas, the learned APP supported the quantum of punishment imposed by the learned Sessions Judge contending, inter alia that, once the offence is proved, the Court has appropriately imposed the punishment. Therefore, it was submitted that no interference be made by this Court on the quantum of punishment.

6. We may state that on the aspect of proportionality of punishment, the law is by now well settled. It is not that the punishment has to be imposed to the fullest extent or to the maximum in every case once the accused or offender is convicted for a particular offence, but at the time of imposition of punishment, the nature of the offence, its gravity, the effect on the society and the personal circumstances are some of the aspects which would be required to be taken into consideration. But at the same time, it cannot be said that they are exhaustive, there may be additional circumstances warranting the Court to modulate appropriate punishment unless it is barred by express provision of the statute. However, it would be required for the Court to record specific reason at the time when the punishment is to be imposed including that for a minimum provided by the statute or higher up to the maximum punishment.

7. Examining the facts of the case, it does appear that the offence can be said as committed on account of the age of the prosecutrix u/s 376 of IPC. So far as the punishment imposed by the learned Sessions judge for the offences u/s 363 and 366 of IPC are concerned, they are in any case not exceeding 7 years, and as all the sentences are to be undergone concurrently. The punishment which may be required to be considered by us in the present appeal now would be u/s 376 of IPC and the reason being that the appellant, as declared by the Learned Counsel for the appellant, has already completed about seven years imprisonment on 10.11.2011.

8. It does appear from the evidence on record of Dr. Nitinbhai Janakbhai Dave, PW-9 Exh.35, that the prosecutrix in medical history had declared that she had gone with consent and they had stayed together for one night and the

prosecutrix had intercourse with the boy Sanjay. She has not declared about any force or compulsion for such purpose. The very doctor has also deposed that when he examined the prosecutrix, there was no injury on any part of the body of the prosecutrix. In the deposition of Dr.Kaushik Narendrabhai Vyas, PW-10 Exh.38, in the medical history, there is reference to the sexual intercourse with consent two years back and thereafter it was stated that the accused had sexual intercourse without consent. In the said evidence also, nothing has come out from the medical papers that there was any injury on the body or private part of the prosecutrix. Therefore, the circumstances of applying force or creating compelling circumstances by the accused though may not be relevant aspect for finding him guilty for the commission of the offence u/s 376 of IPC since the age of the prosecutrix was 13 years and 2 months only, but such may be one of the relevant aspect while considering the question of quantum of punishment. In the case of Thakore Tejaji Devaji (supra), this Court, more particularly in para-16, did observe that when a technical rape is established by the prosecution, there was no reason for the Court to impose the punishment which is more than minimum punishment prescribed. The Court further observed that while imposing punishment, the Court should look to such an accused with reformatory eyes and may not be so harsh. In the case of Shanabhai Chandubhai Vasava (supra), this Court, more particularly in para-12, did observe taking into consideration the socio-economic background of the parties and circumstances in which the offence has been committed deserve to be considered on the point of quantum of sentence.

9. It is in view of the aforesaid facts and circumstances referred to herein above by us, we find that the appropriate punishment could be imposed by the learned Sessions Judge for the offence u/s 376 of IPC of 7 years rigorous imprisonment being the minimum sentence provided.

8. If the facts of the present case are considered in light of the above referred legal position, Dr. Sonalben Shah, whose testimony is at Exh. 38, had examined the victim and in the medical history given by the victim to the doctor, the victim had stated that she had a love affair with the appellant-accused and they had stayed together for last 10 months and number of time they had physical relations with consent and the last physical relation was on 6.3.2007. It is true that in the history it was also stated by the victim that the appellant-accused had seduced her, and thereafter, taken to the village Khoraj. However, we find that on the aspect of the offence u/s 376 of IPC, the same is not much relevant, but the relevant aspect is the consent for the physical relation or sexual intercourse by the victim which was stated by the victim before the doctor in the medical history. It further appears from the testimony of Dr. Sonalben Shah PW-9 Exh. 38 that when she had examined victim, there were no injury marks found on her body or on her private part. The victim was examined as PW-1 whose testimony is at Exh. 6 and in her cross-examination, she has admitted that she and appellant-accused had stayed together for about 10 months and during the said period, they had stayed at different places, and at those places there were so

many persons on road and nearby area, but no complaint was made by victim.

9. In our view, even if it is considered that the age of the victim was less than 16 years, which may attract the offence u/s 376 of IPC. The aforesaid aspects have relevance while imposing the sentence. Keeping in view the facts and circumstances of the case, as referred to herein above, we find that the appropriate sentence required to be imposed was 7 years R/i for the offence u/s 376 of IPC and not 10 years R/I as imposed by the learned Sessions Judge. Therefore, it appears to us that the impugned judgment and order passed by the learned Sessions Judge deserve to be interfered with to that extent.

10. Under the circumstances, while maintaining the conviction of the appellant-accused, on the aspect of sentence, it would be just and proper to reduce the punishment for the offence u/s 376 of IPC by 7 years R/I in place of 10 years R/I as imposed by the learned Sessions Judge. The other part of the sentences or imposition of fine of Rs. 4000/- and six months S/I for default in payment of fine, does not deserve to be interfered with.

11. In view of the aforesaid observations and discussions, the appeal is partly allowed. The impugned judgment and order of conviction dated 27.7.2007 passed by the learned Presiding Officer, 3rd Fast Track Court, Gondal, camp at Upleta, in Sessions Case No. 70/2007, for the offences u/s 363, 366 and 376 of IPC, is hereby confirmed. But, on the aspect of sentences, the impugned judgment and order of the learned Sessions Judge is modified to the effect that the sentence for the offence u/s 376 of IPC shall be 7 years R/I in place of 10 years R/I. The other part of the sentences and fine imposed are not interfered with.