

(2015) 12 GUJ CK 0037
In the Gujarat High Court
Case No : Criminal Appeal No. 331 of 2008

Pradipbhai Tribhovandas Patel

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 17-12-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 114, 365, 376, 90

Citation : (2015) 12 GUJ CK 0037

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

Bench : Single Bench

Advocate : Madansingh O. Barod, Advocate, for the Appellant; H.L. Jani, Addl. Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Rajesh H. Shukla, J.—The present appeal is directed against the impugned judgment and order rendered in Sessions Case No. 9 of 2007 by the Presiding Officer and Addl. Sessions Judge, Fast Track Court No. 5, Ahmedabad (Rural) dated 26.12.2007 recording the conviction of the appellant-original accused for the offences under sec. 365 , 376 r/w sec. 114 of the Indian Penal Code, imposing sentence as stated in detail in the impugned judgment and order.

2. The facts of the case, briefly summarized, are as follows:

"2.1 As it transpires from the material and evidence on record, the wife of the complainant husband (victim) was abducted by the appellant-original accused on 18.7.2006 and committed the offence of rape under sec. 376 and had taken her from place to place with the threat that if she does not succumb to his demand, her husband and children would be killed. She was abducted by the appellant from Ghatlodia in the afternoon for which a complaint came to be filed by the complainant husband which has been registered as FIR No. I-245/2006 with the Ghatlodia Police Station for the alleged offence under sec. 365 r/w sec. 114 of IPC and thereafter the offence under sec. 376 was also added.

2.2 After the investigation was over, the charge-sheet was filed and as the offences were triable by the Court of Sessions, the case was committed to the Court of Sessions. The learned Addl. Sessions Judge framed the charge for the offences as stated above and proceeded with the trial.

2.3 In order to bring home the charges levelled against the accused, the prosecution examined the witnesses including the complainant victim and the doctors and also produced documentary evidence and medical evidence which shall be referred to in the judgment hereinafter.

2.4 After recording of the evidence of the prosecution witnesses was over, the learned Addl. Sessions Judge recorded Further Statement of the accused persons under sec. 313 of the CrPC.

2.5 After hearing the learned APP as well as the learned advocate for the defence, the learned Addl. Sessions Judge recorded the conviction of the appellant accused and sentenced him as stated in detail in the impugned judgment and order.

2.6 It is this judgment and order which has been assailed in the present appeal by the appellant on the grounds stated in the memo of appeal."

3. Heard learned advocate Shri Barod for the appellant-accused and learned APP Shri HL Jani for the respondent-State.

4. Learned advocate Shri Barod referred to the charge at exh. 2 as well as the testimony of the complainant, PW-1, at exh. 14 and his complaint exh. 15. He referred to the testimony of the victim, PW-3, at exh. 17. Learned advocate Shri Barod emphasised referring to the testimony of the victim, PW-3, exh. 17, that this is a case of consent and he referred to the background to emphasise that the victim had an affair with the accused before the marriage. He further submitted that as admitted by the victim in her testimony at exh. 17, they had moved from place to place and for about 52 days she had been with the accused. Learned advocate Shri Barod submitted that when they had moved from place to place, she had sufficient time to raise voice or alarm as they were in public places and not at a deserted place throughout. He also pointedly referred to some part of the testimony as well as the cross-examination and submitted that she was already taking medicine for depression as she could not marry according to her choice. He submitted that she has stated that she had to take pills and therefore her say that the accused had given some medicine and therefore she was under the influence of drugs when the offence was committed is not believable. Learned advocate Shri Barod submitted that in any case thereafter they have moved from place to place and she never raised any objection though she had sufficient opportunity. He also submitted that the medical evidence has also corroborated that she was not subjected to any violence as otherwise she could have resisted as she was a married woman. He submitted that there are no marks of injury found and though the doctor has examined her, there is nothing brought on evidence on this aspect and the focus is only with regard to her age.

5. Therefore, learned advocate Shri Barod submitted that admittedly she is a major and a married women and she could not have succumbed to any pressure and would have raised the cry and would have offered resistance which is not to be found. In fact, she has only stated in her testimony at exh. 17 that she was threatened that her husband and children would be killed and therefore she could not make any complaint to anyone which is not believable. Learned advocate Shri Barod submitted that the husband and the children were at their house and they were not under the control of the accused and therefore it could not be believed that she was put in a situation where she had to succumb to any such pressure.

6. Learned advocate Shri Barod submitted that one more aspect which is required to be considered is the affidavit, exh. 20, and submitted that the affidavit before the Notary produced at exh. 20 would sufficiently lend support to the version of the defence about the consent. Learned advocate Shri Barod specifically emphasised this testimony and submitted that as stated by this witness, the victim had voluntarily gone to him for the affidavit and the witness has clearly stated that at that time the victim was not under any pressure or influence of anyone. Learned advocate Shri Barod submitted that it is required to be mentioned that when she had gone for the affidavit it was in the court compound which would be full of persons and there could not have been any pressure and in fact this affidavit would corroborate what the accused has stated in his further statement under sec. 313 of CrPC. He pointedly referred to the Further Statement under sec. 313 of CrPC and submitted that in fact it was contemplated that after they have eloped, the affidavit could be made and she would state before the court and she may be sent to the Nari Gruh and thereafter they could be free in their life. Learned advocate Shri Barod submitted that what has been stated in the Further Statement has been justified in view of the affidavit at exh. 20 and the testimony of the defence witness No. 1 at exh. 61.

7. Learned advocate Shri Barod has also referred to the impugned judgment and order and pointedly referred to the aspect of consent and submitted that the court below has totally misdirected on this aspect. For that purpose, he referred to the discussion from para 86-88. He emphasised,

"....it is clear that the case appears to have based on "Consent of Victim" as per say of defence."

Learned advocate Shri Barod however submitted that thereafter the court has referred to the aspect of consent relying upon the judicial dictionary including Stroud's Judicial Dictionary and Jowitt's Dictionary on English Law and has jumped to the conclusion that the consent cannot be said to be free consent. He therefore submitted that the court below has totally misdirected on this aspect and recorded conviction which is erroneous.

8. Per contra, learned APP Shri Jani referred to the impugned judgment and also

the testimony of the complainant, PW-1, exh. 14, his complaint at exh. 15 and also the testimony of the victim, PW-3, at exh. 17. He submitted that the victim, PW-3, in her testimony at exh. 17 has corroborated the prosecution case as she has clearly stated about how she was made to accompany the accused. He also submitted that the accused would take care that she is not left alone and therefore as she was under pressure or threat that her husband and children would be killed, she may not have raised the voice.

9. Learned APP Shri Jani submitted that on the aspect of consent it is required to be considered whether it was a free consent or a consent obtained under threat, coercion or compulsion. He referred to the judgment and submitted that the court below has discussed on this aspect referring to the meaning of consent in dictionaries and he emphasised that unless it is free consent suggesting willingness it cannot be said to be consent merely because the victim has followed the accused. He referred to the observations of the Hon'ble Apex Court in a judgment reported in Uday Vs. State of Karnataka, which 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."

10. Therefore, learned APP Shri Jani submitted that the consent cannot be said to be a free consent. He submitted that the medical evidence which has been referred is on the aspect of verification of age rather than for offence under sec. 376 and it cannot be said that she was a minor as it is stated also in the medical evidence. He therefore submitted that the consent may not be free consent not because of the age but because of the circumstances and therefore the impugned judgment and order recording conviction may be confirmed and the present appeal may not be allowed.

11. In view of these rival submissions, it is required to be considered whether the present appeal deserves consideration.

12. As could be seen from the material and evidence which has been referred to by both the sides at length, the victim is not a minor as she is a married woman with two children. Therefore, there is no quarrel on the aspect of the age of the victim. Admittedly, the victim has been with the accused moving from place to place for about 52 days. A close look at the testimony of the victim, PW-3, exh. 17, would clearly suggest that they have moved from place to place, that is, from Saurashtra, Deesa, Shirdi, Saputara, Nasik and also Udaipur. During all this period they have been staying at different hotels and sometimes under different names. Therefore, the moot question would be whether the victim could have raised a cry or voice when she was abducted in such a manner, whether she had sufficient opportunity to raise the cry and make herself free from the accused. Further, even for the offence under sec. 376, as a grown-up, married woman, whether she would have the courage to resist and whether the medical evidence suggests any violence or injury.

13. As far as the aspect of consent is concerned, the aforesaid aspects deserve a close scrutiny on the basis of her own testimony at exh. 17. When the victim had accompanied the accused from place to place it is evident that they would have been moving in public places and they have stayed in different hotels which in turn would give her sufficient opportunity to raise the cry for help or to make herself free from the accused. She has not made any such hue and cry or raised any alarm for help. Even when they have been staying at different hotels she could have called somebody to help. It is not done. Admittedly, they have been staying under different names at times. Further, either while moving from place to place in public road or public places or any hotel where there would be other people including the staff of the hotel, she could have raised the voice which is not done in spite of having such opportunity. Moreover, when she has stated in her testimony that under the influence of the medicine she was feeling drowsiness and the offence of rape was committed, it is also a fact that she was under treatment for depression and used to take drugs or medicines. Assuming that initially for the first time the accused had made some advances or attempt she could have offered resistance and could have raised voice. As a major, married women it cannot be readily accepted that she would succumb to such pressure particularly when she was not in a jungle or isolated place where nobody would hear her cries.

14. Further, though the doctors, PW-7 at exh. 39 and PW-9 at exh. 44 have been examined, they have not focused on the aspect of any injury on the body and as could be seen from the testimony of PW-7 at exh. 39 it has a reference to the aspect of age and examination of the victim in that light. The medical certificates, exh. 40 & 41, all the notes has a reference to the examination for the purpose of her age and it has been stated that she was above the age of 18 years. Dr. Babubhai Parmar, PW-7 in his testimony at exh. 39 has stated and admitted that the patient was not brought to him with a police yadi. He has also stated that in the certificate no history is recorded. Further, Dr. Kajalben Patel, Radiologist, PW-9, in her testimony at exh. 44 has also stated that the victim was examined and had taken x-ray of the victim and the accused and according to the radiological age given in the x-ray, the victim would be aged about 21 years.

15. Therefore, the only explanation for not raising the cry is stated to be the threat given by the accused. Again, the husband and the children are in their residence at Ahmedabad and they are not under the control of the accused as captives or as abducted persons with the accused. Therefore, it cannot be readily accepted that the threat which was administered would have such an impact that in such situation she could not even raise a cry for help. As the husband and the children were safe at the residence, mere say of the threat would not make it so imminent as it could be taken care of by appropriate complaint before the police or seek police protection. This aspect also requires a closer scrutiny as it cannot be digested so easily in background of the facts clearly brought on record suggesting an affair of the victim with the accused before marriage. Thereafter,

as the marriage could not take place with the accused and she was married off to the complainant she was under depression. Further, apart from anything, the aspect of consent as stated above requires a closer scrutiny that whether there was any such imminent threat that she had to succumb to the pressure and though she had sufficient opportunity while moving from place to place in public she could not raise any voice or she could not inform anyone or she could not ask for help.

16. The court below has, while referring to the aspect of consent, discussed at length referring to sec. 90 which provide,

"Consent known to be given under fear or misconception"

As the victim is not a minor, there is no question of any misconception and the aspect of fear as stated above could not be readily believed. Reference is also made to Stroud's Judicial Dictionary as well as Jowitt's Dictionary on English Law suggesting influence and the state of mind. Jowitt's Dictionary on English Law has defined consent in the following words:

"Consent supposes three things, a physical power, a mental power and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise or undue influence, it is to be treated as a delusion and not as a deliberate and free act of the mind."

According to this meaning, it can hardly be said that consent was by intimidation, force, circumvention or undue influence. It cannot be said that she was under any delusion.

17. Reference to the other meaning emphasised from the judgment of the Hon'ble Apex Court reported in Uday Vs. State of Karnataka, as has been quoted, requires to be quoted again,

"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, the moot question is whether her accompanying the accused could be said to be free consent and voluntarily she had accompanied or not. The Hon'ble Apex Court in the judgment in the case of Uday (supra) has observed,

"There is no strait-jacket formula for determining whether consent given by the prosecution to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution

to prove each and every ingredient of the offences, absence of consent being one of them."

Thus, it refers to the fact that each case may be considered on the basis of the evidence and the surrounding circumstances before reaching the conclusion. The same view has been reiterated in other judgments also.

18. Therefore, in analysis of the circumstances based on the material and evidence, it would be evident that the victim was not a minor and was a major married woman. She was not coming from an under-privileged class but was a woman living in an urban civilized area with the knowledge about the modern way of living, gadgets and she could have easily been able to communicate for help at any time through any person including the manager and staff of the hotel, mobile phone and having not done so only on the ground of threat is too difficult to digest. This is because the husband and children were not under control of the accused in any manner and they were safe at their residence and therefore it cannot be believed that she was under so much of pressure that she could not think of raising any cry. In other words, if she had the opportunity as stated above and she has not raised any cry, not asked for any help, it would certainly suggest her consent in peculiar facts of the case with regard to the background which has been suggested. Therefore, it cannot be said that it was not her consent or consent was vitiated by any circumstances, intimidation, coercion, threat so as not to be a legal consent.

19. One more aspect which is required to be considered is the affidavit at exh. 20 and the statement of the accused under sec. 313 of CrPC. The affidavit at exh. 20 before the Notary is self-explanatory making the position clear about their background which has been suggested in the cross-examination that the victim had an affair with the accused and as she was married off to the complainant, she had depression and thereafter may be it was an idea that they may elope and when produced before the court or or the police such an affidavit would be given willingly by the victim. It is required to be mentioned that as per the testimony of the defence witness at exh. 61 this affidavit was sworn and made by the victim herself going to the court and therefore it rules out any possibility of any threat, coercion or pressure. The Notary Shri Narendrasinh Rathod, defence witness in his testimony at exh. 61 has also clearly stated that the victim does not appear to be under any influence or pressure when she came for the affidavit at exh. 20. Again, this affidavit is made in the court compound where there will be many people and therefore the affidavit which has been executed is required to be considered for the purpose of appreciating the evidence and the version of the prosecution case in light of this affidavit. Moreover, it is required to be stated that the affidavit at exh. 20 in fact lends corroboration and justifies the Further Statement of the accused recorded under sec. 313 of CrPC. The detailed further statement of the accused recorded under sec. 313 of CrPC is self-explanatory and it has clearly stated about this affidavit. It is in these circumstances the impugned judgment and order recording conviction of the

appellant original accused for the offence under sec. 365 and 376 of IPC cannot be sustained.

20. The present appeal accordingly stands allowed. The impugned judgment and order recording conviction of the appellant-original accused for the offence under sec. 365 and 376 r/w sec. 114 of IPC is hereby quashed and set aside. The bail bonds shall stand cancelled.