
(2009) 02 GUJ CK 0100
In the Gujarat High Court
Case No : Criminal Appeal No. 1420 of 2003

Rajubhai Jivabhai Patel

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 27-02-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 323, 376

Citation : (2009) 1 GLR 893

Hon'ble Judges : Rajesh H. Shukla, J; Jayant Patel, J

Bench : Division Bench

Advocate : Chirag M. Pawar, for the Appellant; K.P. Raval, Addl. P.P., for the Respondent

Final Decision : Allowed

Judgement

Rajesh H. Shukla, J.—Present appeal is directed against the judgment and order dated 3-2-2003 passed by the learned Additional Sessions and Fast Track Judge, Modasa in Sessions Case No. 19 of 2002 recording conviction of the accused for offence under Sections 376 and 323 of Indian Penal Code ("I.P.C.") and imposing sentence of life imprisonment for the offence u/s 376 and fine of Rs. 5000/- and also recording conviction for offence u/s 376 and imposing R.I. for 3 months and fine of Rs. 500/-. The sentences were also ordered to run concurrently.

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

2.1. It is the case of the prosecution that on 16-11-2001, when the victim girl aged about 7 years had taken the cattle for grazing at the outskirts of village Bayad, the accused had come there, caught hold and dragged her in the field, and thereafter, overpowered her and committed the alleged offence u/s 376 of I.P.C. It is alleged that, as a result thereof, the victim girl aged about 7 years had become unconscious after she initially shouted for help and was also bleeding. As she shouted, the aunt of the victim girl is said to have rushed there and found the accused running away. Thereafter, the aunt inquired of the victim girl as to

what had transpired and the victim girl is said to have narrated about the incident, on the basis of which the complainant - Uncle, lodged the complaint with the Bayad Police Station being I C.R. No....for the alleged offence u/s 376 of I.P.C. as well as u/s 323 of I.P.C.

2.2. On the basis of the complaint given by the complainant, the offence came to be registered vide C.R. No. I 118 of 2001. After the investigation was over, the charge-sheet was filed, and as the offence under Sections 376 read with Section 323 of I.P.C. were exclusively triable by the Court of Sessions, the learned Magistrate committed the case of the Court of Sessions. Thereafter, the learned Additional Sessions and Fast Track Judge, Modasa, framed the charges levelled against the accused for the alleged offence u/s 376 read with Section 323 of I.P.C. and proceeded with the trial.

2.3. In order to bring home the charges levelled against the accused, the prosecution has examined the following witnesses:

-----	P.W.	No.	Name
and Status Exhibit -----			
1. Jitendrasinh Ramsinh, Complainant	7	2. Sarojben Devusinh, Victim Girl	9
3. Induben Chandusinh, Aunt	10	4. Devusinh Ramsinh, Uncle	11
5. Rangusinh Ramsinh	12	6. Dr. Ishwarbhai Revandas Patel	13
7. Lalabhai Udabhai	16	8. Kantibhai Mudabhai	18
9. Jaswantsinh Motisinh Jhala	20	10. Dr. Jitendrakumar Manilal Upadhyay	23
11. K.S. Patel I.O.	26	12. Kanjibhai Shivajibhai Chavda I.O.	28

2.4. The prosecution has also produced the documentary evidence which shall be referred to in the judgment as and when required.

2.5. After recording the evidence of the prosecution witnesses was over, the learned Additional Sessions and Fast Track Judge, Modasa recorded the further statement of the accused u/s 313 of the Criminal Procedure Code. In his further statement, the accused has denied the charges levelled against him.

2.6. After hearing the learned A.P.P. as well as learned Advocate for the accused, the learned Additional Sessions and Fast Track Judge, Modasa convicted the accused for the alleged offence under Sections 376 and 323 of I.P.C. and sentenced him as stated hereinabove.

It is this judgment and order which has been assailed on the ground inter alia that the conviction of the accused for the alleged offence has been recorded erroneously and the learned Judge has failed to appreciate the material and evidence on record and has failed to consider that the prosecution has failed to establish the charges levelled against the accused for the alleged offence as there was no offence committed by the accused u/s 376 of I.P.C.

3. Learned Advocate Mr. Chirag M. Pawar for the accused referred to the deposition of P.W. 1-Jitendrasinh Ramsinh-complainant at Exh. 7 and the complaint at Exh. 8 and also referred to the deposition of P.W. 3-Induben

Chandusinh (aunt) at Exh. 10, and submitted that, as per the prosecution case, P.W. 3-Induben (aunt) is the eye-witness and, therefore, such an offence could not have been committed at all. Learned Advocate Mr. Pawar has also referred to the deposition of P.W. 1-Jitendrasinh Ramsinh at Exh. 7 and the complaint at Exh. 8 and also the deposition of P.W. 3-Induben Chandusinh (aunt) at Exh. 10 and tried to emphasize that there is discrepancy in the version narrated in the complaint as well as in the deposition of P.W. 3-Induben Chandusinh at Exh. 10.

4. Learned Advocate Mr. Pawar for the accused also referred to the deposition of P.W. 2 - victim girl - Sarujben Devusinh at Exh. 9, who is a minor, and referring to her deposition, it was submitted that though she has stated in her deposition about the incident and the alleged offence while giving the history before the doctor regarding the injury, she has stated that as she fell down while running and she has received the said injury. Therefore, learned Advocate Mr. Pawar for the accused had submitted that the history given by the victim herself to the doctor narrating about the injury would be natural and it is inconsistent with her deposition. Her deposition may not be accepted, particularly when she is a minor child who could be tutored. Further, learned Advocate for the accused has also submitted that the evidence of P.W. 3-Induben Chandusinh (aunt) at Exh. 10, who is said to have been eye-witness, could not be believed or accepted as she has been conveyed as to what had transpired to the victim, and therefore, she has not seen the incident, therefore, the evidence of the prosecution witnesses like P.W. 3-Induben Chandusinh (aunt) at Exh. 10, P.W. 1-Jitendrasinh Ramsinh at Exh. 7 and P.W. 4-Devusinh Ramsinh (father) at Exh. 11, is not reliable.

5. Learned Advocate Mr. Pawar for the accused has also submitted that normally in such cases there would be injuries or the marks of injuries, whereas, no such marks of injuries are found on the body of the accused. For that purpose, he referred to the deposition of P.W. 6-Dr. Ishwarbhai Revandas Patel at Exh. 13 and the medical certificate given by him at Exh. 15. Learned Advocate Mr. Pawar for the accused has tried to submit that, as it is stated by the doctor, no marks of injuries are found on the body of the accused. Further, learned Advocate Mr. Pawar for the accused also stated that he cannot confirm and say that the accused had a intercourse within 24 hours. He has also submitted referring to the deposition of P.W. 10-Dr. Jitendrakumar Manilal Upadhyay at Exh. 23 and the medical certificate at Exh. 25 and submitted that the doctor has admitted that the injuries which are found on the face of the victim girl, could have been caused if such a child falls down. He has also admitted that the victim girl has stated before the doctor while giving the history, that she had received the injury while she fell down and the doctor has also stated that the relatives of the victim had stated about the alleged offence. Therefore, learned Advocate Mr. Pawar for the accused has strenuously submitted that, in view of this evidence of the doctor, who has examined the victim girl stating that the history has been recorded, wherein the victim girl has stated that she has received the injury while she fell down coupled with the fact that such a injury could be caused when a child fell down and the injuries on private parts could also be caused with the

blunt substance. The conclusion cannot be arrived at about the alleged offence u/s 376, as there was no intercourse. Learned Advocate Mr. Pawar strenuously submitted that though the victim girl is said to have been referred to the Gynaecologist, Civil Hospital, Himmatnagar, no certificate is obtained by the I.O. during the investigation nor any statement has been recorded as has been admitted by both the I.Os., i.e. P.W. 11-K. S. Patel at Exh. 26 and P.W. 12-Kanjibhai Shivajibhai Chavda at Exh. 28.

6. Therefore, learned Advocate Mr. Pawar for the accused has strenuously submitted that as there is no conclusive medical evidence with regard to the alleged offence and the fact that the doctor who had examined the victim girl has stated that while giving history she herself has stated that she has received the injury while she fell down. The possibility cannot be ruled out and the accused should be given the benefit. Further, learned Advocate Mr. Pawar for the accused emphasized and submitted that the prosecution has examined the witnesses who are only near relatives of the victim, though prosecution could have examined the independent witnesses, but as no independent witness is examined and only the close relatives of the victims are examined in the facts of the present case coupled with the fact that the doctor who had examined the victim girl has also stated that, while recording the history she has stated about having received the injuries while she fell down. The benefit should go to the accused. Further, learned Advocate Mr. Pawar for the accused has submitted that as it reflected from the medical evidence, no marks of injuries are found on the body of the accused, which is also required to be considered as a relevant circumstance.

7. Learned Advocate Mr. Pawar for the accused has also tried to submit that the prosecution has relied upon the deposition of P.W. 3-Induben Chandusinh (aunt) at Exh. 10, who is said to be an eye-witness, which is also doubtful, as she could not be an eye-witness, otherwise the incident could not have occurred and this itself would suggest that she is a got-up witness and the accused has been falsely implicated due to the local politics, which was canvassed before the trial Court. He, therefore emphasized that, as no other independent witness except the relatives of the victim girl is examined, and in view of the medical evidence, which do not support the prosecution case, the benefit of doubt should go to the accused. Learned Advocate Mr. Pawar for the accused has referred to and relied upon the judgment of the Hon'ble Apex Court reported in State of Andhra Pradesh Vs. Polamala Raju @ Rajarao,

8. Learned A.P.P. Mr. K. P. Raval for the state, referred to the deposition of the witnesses, including the deposition of P.W. 1-Jitendrasinh Ramsinh at Exh. 7 and also the complaint at Exh. 8. He also referred to the deposition of P.W. 2-Sarojben Devusinh - victim prosecutrix at Exh. 9 and submitted that the trial Court has also, after having satisfied about her ability to understand, recorded the evidence, which is more natural truth and is reliable. Learned A.P.P. Mr. Raval referring to the deposition of P.W. 2-Sarojben Devusinh - victim girl at Exh. 9 emphasized that she has specifically narrated about the incident and she has also

stated that she was bleeding from her genital part and she has also stated that when she raised shouts, P.W. 3-Induben Chandusinh (aunt) came there and the accused ran away. Thereafter, the victim girl narrated to P.W. 3-Induben (her aunt) as to what has transpired, which is natural. Learned A.P.P. also submitted that though in the cross-examination, it was suggested to the victim girl that she has received injury when she fell down while she was running, which has been denied by her. Learned A.P.P. also referred to the deposition of P.W. 3-Induben Chandusinh (aunt) at Exh. 10 and submitted that this witness has stated that on hearing shouts, when she rushed to the place of the incident, she found the accused having dropped his clothes and when she run after him, he has escaped with pants in his hands. She has also stated that the victim girl had narrated about what had transpired. Learned A.P.P. Mr. Raval submitted that even in the cross-examination, she had not been dislodged from her version, on the contrary, she has clearly stated that she ran after the accused.

9. Learned A.P.P. referred to the medical evidence and submitted that the medical evidence on the contrary supports the prosecution case. For that purpose, he referred to the deposition of P.W. 6-Dr. Ishwarbhai Revandas Patel at Exh. 13, who had examined the accused. He pointedly referred to the fact that smegma was not found during medical examination. Moreover, he has also clarified that if somebody takes bath properly, smegma may not be found. Learned A.P.P. submitted that the marks of injuries are not found, which has been much emphasized. However, as the victim girl was a minor, there may not be any such injury offered during resistance and, therefore, it would not be relevant. Similarly, learned A.P.P. referred to the deposition of P.W. 10-Dr. Jitendrakumar Manilal Upadhyay at Exh. 23, who had examined the victim girl and pointedly referred to the injuries. In his deposition he has specifically stated that the victim girl had received injuries on her private part and it was bleeding. He also emphasized that the doctor has clearly stated that according to the opinion she was sought to be molested and there was the rupture of the libia majora and has stated about the vaginal rupture and hymen was also ruptured, which is stated in the medical certificate at Exh. 25. Learned A.P.P. Mr. Raval submitted that the contention raised about the history given by the victim girl about having received the injuries while she fell down, is not supported by this medical evidence and the certificate. He also referred to the cross-examination of P.W. 10-Dr. Jitendrakumar Manilal Upadhyay at Exh. 23 and submitted that, though a suggestion was put to the doctor as to whether such injuries could be received with blunt substance, to which he has specifically denied that the injuries which were found on the private part of the victim could be caused with blunt substance. Learned A.P.P. Mr. Raval, therefore, submitted that the medical evidence has also supported the same. He further referred to the F.S.L. report at Exh. 31 and referring to the analysis, learned A.P.P. submitted that the clothes of the accused and the clothes of the victim were found with blood-stains. Therefore, merely because semen is not found, would not be sufficient to draw an inference that the offence is not committed. Moreover, F.S.L. report at Exh. 31

established that blood-stains of the victim girl are found on the clothes of the accused. The submission that there was absence of semen, is not the only aspect, particularly when the F.S.L. report supports the prosecution case and the blood stains of the blood group of the victim are found on the clothes of the accused.

10. In view of the rival submissions made by both the sides and on reevaluation and scrutiny of the material and evidence on record, it is required to be considered whether the impugned judgment and order passed by the trial Court calls for any interference by this Court.

11. For this purpose, the first aspect which is required to be considered is the age of the victim. It is not in dispute that the victim was aged about 7 years which has been established by the certificate at Exh. 27. The incident is said to have occurred when the victim girl had taken cattle for grazing in lonely place. The accused is said to have come there, overpowered her and committed the offence. The submissions made with much emphasis that there was no marks of injuries found on the accused, is therefore, without any merit, as it is not necessary that there has to be mark of any injury in every such case. It is well accepted and settled law that when the victim is either young or fragile, may not be in a position to give the proper resistance and the marks of injuries may not be there. The another facet of the argument with regard to the contradiction or the discrepancy in the prosecution evidence in the form of deposition of P.W. 1 - complainant at Exh. 7, complaint at Exh. 8 and the deposition of P.W. 3-Induben Chandusinh (aunt) at Exh. 10 is required to be appreciated. The submissions have been made that though P.W. 3-Induben (aunt), who is examined at Exh. 10 and who is said to be an eye-witness, is not an eye-witness and is a got-up witness, therefore evidence is not reliable and she has been giving the testimony to implicate due to local political issues. It is required to be appreciated that in such crimes, if the eye-witness is there, the incident of crime would not occur. However, a close scrutiny of the deposition of P.W. 3-Induben at Exh. 10 would clearly suggest that though she may not be a witness to the incident as to what had transpired, but what has been stated is that, on hearing shouts of the victim girl she rushed to the place of incident and found the victim girl and the accused there, the accused having taken off his clothes (chaddi) and when she tried to caught him and ran after him, the accused is said to have escaped with pants on his hands. Therefore, the conduct is also natural and her presence is also natural, as the minor girl, who has gone with the cattle for grazing, P.W. 3-Induben (aunt) who would also around somewhere, on hearing shouts, has rushed there and seen the accused running away. This aspect in fact corroborates the testimony of the victim girl, who is examined at Exh. 9 though she is a minor. It is required to be appreciated that the trial Court after verifying her competence and ability to understand, has recorded her testimony at Exh. 9 and she is said to have narrated about what had transpired. She has specifically stated about having received the injuries on her genital part as well as bleeding from there and also bleeding from her mouth. The trial Court has specifically recorded that

the minor victim being of a tender age, has been able to describe the incident in her own way. In cross-examination, a specific suggestion - that she had received the injury when she fell down while running, is denied. Therefore, with this evidence, where the testimony of the minor victim prosecutrix at Exh. 9 is sufficiently corroborated by P.W. 3-Induben (aunt) at Exh. 10 and also the medical evidence, the submissions made by the learned Advocate for the accused cannot be accepted. The submissions made by the learned Advocate for the accused that the alleged offence is not at all committed or there is no medical evidence to support the alleged offence or the intercourse having been committed is also belied from the medical evidence in the form of testimony of P.W. 10-Dr. Jitendrakumar at Exh. 23, who has examined the victim and has narrated specifically about the injuries on her genital parts and having specifically stated about the rupture of the hymen and vaginal injuries. This evidence itself is sufficient to reject the submissions made by learned Advocate Mr. Chirag Pawar for the accused. Further, the submissions made by the learned Advocate for the accused about the injuries not having been found on the accused and much emphasis given to the deposition of P.W. 6-Dr. Ishwarbhai Revandas Patel, at Exh. 13, and the medical certificate at Exh. 15 also do not assist in any manner to the defence. P.W. 6-Dr. Ishwarbhai Revandas Patel in his testimony at Exh. 13 has stated that smegma was absent and he could not confirm whether the accused has done intercourse within 24 hours. A close scrutiny of his testimony would make it clear that if a person had a bath then smegma could not be found. There is hardly any possibility that the victim could have offered any resistance considering her age of 7 years and the accused was 27 years, and therefore, as rightly observed in catena of decisions that the injury on the accused is not a sine qua non and there may not be any injury where the victim is overpowered. Therefore, that by itself is not a ground, which should weigh with the Court.

12. A useful reference is also required to be made to the observations of the Hon'ble Apex Court in case of State of Punjab Vs. Gurmit Singh and Others, wherein it has been observed as under:

Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the

statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration require in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

13. Moreover, it is required to be appreciated that when the testimony of the victim girl aged about 7 years is found to be natural as recorded by the Court below, that she has explained as to the injury, which has been sufficiently corroborated by the medical evidence, as discussed above, particularly the testimony of P.W. 10-Dr. Jitendrakumar Manilal Upadhyay at Exh. 23 and the certificate given by him (on examining the victim) at Exh. 25. It is also required to be appreciated that the victim was only aged about 7 years and it is not only a heinous crime committed on the body of the victim, but it would affect her physique or the personality after she is grown up. It is also required to be appreciated that it will have a psychological bearing when she grows up and can have an effect on her development and personality, which she will have to suffer.

14. Therefore, in view of the unimpeachable evidence with regard to the incident, which has been clearly described by the victim in her testimony corroborated by the testimony of P.W. 3-Induben (aunt) at Exh. 10 and also the medical evidence, the impugned judgment and order recording conviction of the accused by the Court below does not call for any interference.

15. However, the alternative submission made by learned Advocate Mr. Chirag Pawar for the accused that if the conviction is maintained with regard to the sentence, the Court may consider that the accused was a young boy.

16. It is required to be appreciated that the offence has been committed on the minor victim girl who was aged about 7 years and the accused has not committed the offence in his adolescent misadventure inasmuch as the accused is not of a age around 16 to 18 years or even 20 years where he could have not realised the consequences of the act. The accused is aged about 27 years. Therefore, it is required to be appreciated in light of the observations made by the Hon''ble Apex Court in Gurmit Singh's case (supra) and considering the doctrine of proportionality and also considering the gravity of the offence that the offence has been committed on the minor victim girl who was aged about 7 years, who suffered not only the physical assault, but has also suffered psychologically and which she may continue to suffer when she grows up. The submissions with regard to the sentence or awarding a minimum sentence or less than minimum considering the age of the accused also cannot be entertained, as the same is without any merit.

17. The Hon"ble Apex Court, in a judgment reported in *Siriya @ Shri Lal Vs. State of Madhya Pradesh*, has, while considering doctrine of proportionality in such cases has considered this very aspect as to whether leniency in the sentence is called for or not and it has been observed:

7. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law must find answer to the new challenges and the Courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner - stone of the edifice of "order" should meet the challenges confronting the society. Friedman in his "Law in Changing Society" stated that, "State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

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 serious 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. Vs. State of Tamil Nadu*,

9. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes, it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes, the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

Therefore, the Hon"ble Apex Court, considering all these aspects has laid down

that there may not be any formula or criteria which would be applicable in every case and it is the obligation of the Courts to decide the punishment according to the crime with reference to the gravity of the offence.

18. Thus, the accused's behaviour and lust has left the indelible scar, not only physically but also emotionally on the victim girl, and therefore, no leniency is called for. It may not be out of place to mention that the message has to go in the society conveying that serious crimes are punished severely without any leniency and only then it will have the deterrent effect, which in turn will allow the common man to feel secured, and society as a general also secured and civilized. Any leniency or misplaced sympathy would rather have the effect of causing more harm to the criminal justice delivery system.

19. Therefore, the impugned judgment and order dated 3-2-2003 in Sessions Case No. 19 of 2002 passed by the learned Additional Sessions and Fast Track Judge, Modasa, recording the conviction of the accused for the offence under Sections 376 and 323 of I.P.C. and imposing the sentence of life imprisonment for the offence u/s 376 and fine of Rs. 5000/- and also recording the conviction for offence u/s 376 and imposing R.I. for 3 months and fine of Rs. 500/-, is hereby confirmed. The present appeal therefore stands dismissed accordingly.