
(2013) 11 GUJ CK 0072
In the Gujarat High Court
Case No : Criminal Appeal No. 1125 of 2008

Rampratap Gangaramji Samaliya

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 19-11-2013

Acts Referred:

Citation : (2013) 11 GUJ CK 0072

Hon'ble Judges : Z.K. Saiyed, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Kartik V. Pandya and Mr. Pratik B. Barot, for the Appellant; H.L. Jani, APP, for the Respondent

Final Decision : Dismissed

Judgement

Akil Abdul Hamid Kureshi, J.—Appellant-original accused was convicted by the impugned judgment dated 02.11.2007 rendered by the learned Sessions Judge, Ahmedabad in Sessions Case No. 48 of 2007 for offences punishable under Sections 376(2)(f) and 323 of the Indian Penal Code. For the offence u/s 376 of the Indian Penal Code, he was sentenced to imprisonment for life. For offence u/s 323, he was sentenced to imprisonment for one year. Such sentences were made concurrent. Accused has, thereupon, filed present appeal challenging the judgment of the Trial Court. Briefly stated the prosecution version was that:

The accused was father of the victim S, aged about 11 years. The wife of the accused was living separately with her brother. The accused lived with his daughter S and other children separately. Since about four months prior to 13.09.2006, the accused started to physically abuse and beat up the victim girl. He repeatedly committed rape on her on several occasions. He was, therefore, charged with offences punishable under Sections 376(2)(f) and 323 of IPC.

2. The complainant Hanuman Ramdevji Bagadi, P.W. 2, Exh. 17, the father-in-law of the accused, turned hostile. Even the victim girl, Ms. S, P.W. 7, Exh. 26 turned hostile. However, the learned Judge referred to other evidence on record to

convict the accused. Such evidence is as under.

3. The victim girl had, first confided into her teacher Bhaviniben Kantibhai Patel, P.W. 4, Exh. 22. In her deposition, she stated that she taught Gujarati language in Hindi Medium School. The victim girl studied in 6th standard. On 08.09.2006, in the afternoon during recess time, the victim met her when she was alone. She wanted to meet the Principal. When inquired about the purpose of the meeting, she told her that her father beats up her mother and also beats her. She feels scared in the evening since the father takes indecent liberty with her and forces himself upon her and rapes her. The witness took the victim girl to the Principal, alongwith another teacher Savitriben the next day. The victim girl met the Principal in presence of these two teachers, the next day. As per this witness, the victim reiterated her version before the Principal also.

4. The version of this witness, Bhaviniben, P.W. 4 was supported by the other teacher Savitriben Kantibhai, P.W. 5, Exh. 23. She also was a teacher in the same school. She deposed that the victim had also confided in her. She had cried and complained that she wanted to meet the Principal because her father beats up her mother, behaves indecently with her and forces himself on her. She was taken to the Principal the next day.

5. The Principal of the school, Devendrasinh Rajaramsinh Rajput, P.W. 6 was examined at Exh. 24. He deposed that on 09.09.2006, at about 11 O'clock, teachers of his school Bhaviniben and Savitriben met him since the victim wanted to meet the Principal. When inquired about why she wanted to meet, they narrated the incident. He, thereupon, met the victim on 11.09.2006 in presence of the said lady teachers. The victim told him that her father had driven away her mother. He beat up her brother and her also and was committing rape on her. She was crying.

6. Dr. Tushar Manharbhai Shah, P.W. 3, Exh. 19 had examined the victim. He, alongwith two senior doctors of Gynecology Department, had carried out the procedure. He produce the certificate at Exh. 21. As per this witness, the victim was co-operative as far as external examination was concerned. However, when it came to the examination of the private parts, the victim tensed up, due to which, they had to carry out the examination after a small doze of anesthesia. They did not find any injury marks on the private parts but, found that the hymen was ruptured. The vaginal passage permitted entry of two fingers easily. She had not yet began the menstrual cycle. Her secondary sexual characters such as hair in the underarm, on the private parts and her breasts were not yet developed There was a bruise of 2x2 cm on her left shoulder. In his opinion, the fact, that the victim was subjected to rape, cannot be ruled out. He also opined that the victim could have been subjected to multiple sexual intercourse. He clarified that reference to old rupture of the hymen in the certificate Exh. 21 only meant that tear was not very recent. It was not possible to state how old the tear was. Significantly, there was no cross-examination of the doctors.

7. Various articles collected during the course of the investigation were sent for forensic analysis. The FSL report Exh. 9 along with serological report Exh. 10 confirmed presence of semen from the underpants of the victim. It also established that the group of semen was A, that belonging to the accused. Correspondingly, the pants of the accused established presence of human blood of Group B, that belonging to the victim. A certificate issued by the Principal of the school when the victim was studying of her date of birth was produced at Exh. 27. In such certificate, her birth date was shown to be 04.09.1995. This, in the nutshell, is the evidence on record.

8. Learned advocate, Mr. Pratik Barot for the appellant submitted that the involvement of the accused is not established. The victim girl herself did not support the prosecution. In the history given to the doctors also she had exonerated the accused from sexual assault.

Referring to the deposition of the complainant, P.W. 2 Hanuman Ramdevji Bagadi, counsel contended that the victim girl was not shown to be below 12 years of age. There was no evidence to suggest that she was less than 12 years when the incident took place. Section 376(2)(f) of the IPC, therefore, was wrongly applied.

9. Lastly, the counsel submitted that in any event sentence of life imprisonment was extremely harsh. He prayed for reduction of the sentence.

10. On the other hand, learned APP, Mr. Jani opposed the appeal contending that there was sufficient evidence on record to convict the accused. The sentence awarded also needs no interference.

11. From the evidence on record, it clearly emerges that the victim girl was barely aged about 12 years. It may be that the precise age was not established on record through documentary evidence. The certificate of the Principal of the school Exh. 27 did show her date of birth as 04.09.1995. However, on what basis such certificate was issued is not clear, nor do we know on what basis such date was entered in the school record it at all. It may also be that as per the complainant, Hanuman Ramdevji Bagadi, P.W. 2, she was about 12 to 13 years of age. It can certainly not be, however, disputed that she was a young girl aged about 12 years. The medical evidence suggested that she had not yet started menstrual cycle. The secondary sexual characters were not developed. She was studying in sixth standard of the school.

12. It is also established that the accused and his wife were living separately. The victim and other children of the couple lived with the father. This portion of the prosecution version is not even disputed by the defense. This factor shall have to be borne in mind while appreciating other evidence on record.

13. Undoubtedly, the victim turned hostile. We must, however, remember that the accusation were made against her own father and of an offence none other than that of rape. In that view of the matter, we cannot discard the testimony of

the two teachers of the school where the victim studied as also the Principal of the same school. To recall, Bhaviniben, P.W. 4, Exh. 22, the Gujarati teacher of the school, to whom the victim first met and confided about her plight. She wanted to meet the Principal. To Bhaviniben, she narrated the incident and stated that her father not only beats her, misbehaves with her and in fact rapes her. This was also disclosed by the victim to another teacher Savitriben, P.W. 5. Both the teachers, thereupon, took the victim to the Principal of the school Devendrasinh, P.W. 6. He also confirmed before the Court that the victim, in presence of the two lady teachers, had complained about being raped by the father.

14. We are conscious that the version given by these witnesses can, at best, be termed as hear say evidence. Insofar as the allegations are concerned had this been the only evidence, would have certainly acquitted the accused. The testimony of these witnesses however needs to be seen in light of other evidence on record.

15. Such evidence is the medical and forensic evidence. To recapitulate, Dr. Tushar Shah, P.W. 3, Exh. 19 was one of the three doctors, who had examined the victim. In his medical certificate Exh. 21 as well as his deposition, he expressed an opinion that the victim could have been raped. She could have been subjected to multiple acts of sexual intercourse. Additionally, we can also not lose sight of the finding of the doctor that the victim had not yet started menstrual cycle. Secondary sexual characters had not yet been developed. Despite this, her hymen had an old tear. The vagina permitted two fingers with ease. When put in juxtaposition such findings, the conclusion, that the victim was subjected to repeated acts of sexual intercourse, is firmly established.

16. Such evidence, when seen in light of the forensic and serological reports, confirms the involvement of the accused in such acts of sexual violence. The serological report confirms presence of semen of the accused on the underpants of the victim. His underpants confirmed the presence of blood of the victim.

17. The evidence on record thus unerringly points to the involvement of the accused in commission of rape on his own daughter. Undisputedly, the accused lived with his minor children without his wife. The victim was in his custody of the accused and barring going to school would be mostly confined at home. She was subjected to repeated acts of sexual intercourse. The forensic analysis connected the accused with such offence.

18. The sole question, therefore, survives is of the quantum of punishment. Section 376 of IPC prescribes punishment for the offence of rape. Sub section (1) thereof provides in essence that except for cases covered in sub section (2), the punishment for offence of rape may extend to 10 years or for life. Except for adequate and special reasons to be recorded, such sentence shall not be below 07 years. Sub section (2) of Section 376, which prescribes punishment for aggravated cases of offence of rape, provides that in the cases specified in

Clauses (a) to (g) the punishment shall not be less than 10 years but which may extend to life. Here again for adequate and special reasons to be mentioned in the judgment, sentence below 10 years can be imposed. Clause (f) of sub section(2) of Section 376 pertains to one who commits rape of a woman who is under 12 years of age. It was, in this context that the counsel for the appellant was contending that the age of the girl not being established below 12 years, the said provision would not apply. We are, prepared to accept such contention. The fact still remains that the accused committed offence of rape punishable u/s 376 of IPC. Even in sub section (1) thereof sentence for such offence can be for life. The question is, in the present case, should such sentence be awarded? In order to come to the conclusion in this respect, we must bear in mind the few salient features of the matter. The girl was not proved to be below 12 years, nevertheless, was admittedly about 12 to 13 years of age. She was studying in 6th standard of a school. The medical evidence also suggested that she was of tender age and had yet not reached puberty. She was in care and custody of her father, the mother living separately due to discord between husband and wife. The accused committed rape on his own daughter. He used to beat her and assault her. The act of rape was not one off incident but was committed repeatedly over a span of nearly four months. In our view, the case qualifies for maximum punishment prescribed under the law. The accused has committed an offence which is heinous and abhorrent.

19 In case of Shyam Narain Vs. The State of NCT of Delhi, the Supreme Court discussed the aspect of sentence in rape cases. It was the case wherein the accused had raped a woman after intoxicating her with drink. He had threatened her that if she would inform anybody he would inflict knife blow upon her and her parents. The victim was bleeding from the private parts due to rape. She was a young girl barely 08 years old. Considering the brutality of the offence, the Supreme Court justified the maximum punishment making following observations:

11. Primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

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After referring several decisions on sentencing, the Court further observed:

22. Keeping in view the aforesaid enunciation of law, the obtaining factual matrix, the brutality reflected in the commission of crime, the response expected from the courts by the society and the rampant uninhibited exposure of the bestial nature of pervert minds, we are required to address whether the rigorous punishment for life imposed on the appellant is excessive or deserves to be modified. The learned counsel for the appellant would submit that the appellant has four children and if the sentence is maintained, not only his life but also the life of his children would be ruined. The other ground that is urged is the background of impecuniosity. In essence, leniency is sought on the base of aforesaid mitigating factors. It is seemly to note that the legislature, while prescribing a minimum sentence for a term which shall not be less than ten years, has also provided that the sentence may be extended upto life. The legislature, in its wisdom, has left it to the discretion of the Court. Almost for the last three decades, this Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight year old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilized society. The age old wise saying "child is a gift of the providence" enters into the realm of absurdity. The young girl, with efflux of time, would grow with traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullyng the physical frame of a woman is the demolition of the accepted civilized norm, i.e., "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically

compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court. The mitigating factors put forth by the learned counsel for the appellant are meant to invite mercy but we are disposed to think that the factual matrix cannot allow the rainbow of mercy to magistrate. Our judicial discretion impels us to maintain the sentence of rigorous imprisonment for life and, hence, we sustain the judgment of conviction and the order of sentence passed by the High Court.

20. In the present case also, considering the rather young and tender age of the victim, the relationship between her and the accused, the experience would certainly leave a trauma and deep mental scars on her which cannot be erased for life. At the time when she was still to attain puberty had yet to experience the joys of life and had entire youth ahead of her to do so, at one stroke. Her innocence was destroyed for ever by a person none other than her own father. As noted earlier, this was not a case of one off incident of rape but of repeated series of acts of violent sexual intercourse by father on his own child barely about 12 years of age. Even without the aid of Section 376(2)(f) of IPC, we are convinced that this is a case where the maximum punishment prescribed u/s 376(1) of the Code needs to be awarded. In the result, the appeal is dismissed. R & P to be transmitted to the trial Court.