

(2015) 10 GUJ CK 0075
In the Gujarat High Court

Case No : Criminal Appeal (Against Conviction) No. 1230 of 2009 and Criminal Appeal No. 1772 of 2009

Remubhai Bhimabhai Vasava

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 20-10-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 114, 343, 346, 363, 366

Citation : (2015) 10 GUJ CK 0075

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

Bench : Single Bench

Advocate : H.L. Patel, Advocate, for the Appellant; H.L. Jani, Addl. Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh H. Shukla, J.—The present appeals are directed against the impugned judgment and order rendered in Sessions Case No. 45 of 2008 dated 15.5.2009 by the learned Addl. Sessions Judge, Narmada at Rajpipla, recording conviction of accused Nos. 1 and 2 for the offences under Sections 363 , 366 , 376 , 343 , 346 r/w. sec. 114 , 114 of the Indian Penal Code and sentencing then for Rigorous Imprisonment for 10 years for the offence under sec. 376 r/w. sec. 114 of IPC and fine of Rs. 10,000/- each and also sentencing them for offences under sec. 363 , 366 r/w. 114 to R.I. for 5 years and fine of Rs. 2,000 each and also convicted and sentenced for the offences under sec. 343 , 346 r/w. sec. 114 as stated in the judgment.

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

2.1 The complainant-victim was residing with the family at village Simamli. On 21.8.2008 at about 9"o clock in the night when she came out of the house to answer the call of nature, accused No. 1 is said to have caught her and gagged her mouth with cloth and took her away where one rickshaw wala and other

three persons (other accused) were present. Thereafter they had taken her in the forest near village Gundvan and A-1 committed the offence as stated in the complaint. Thereafter also he used to commit the offence. It is stated that when she tried to escape she was beaten and the other accused A-2 or A-3 also committed the rape. Thereafter on the next day morning she was forced to accompany the accused persons in the forest and had remained there for the whole day where the accused persons committed the offence. Again, they stayed there in the jungle and thereafter tied her to the tree with her cloth. However, when she started shouting they ran away and her aunt came there and she was brought to her parental house. Thereafter, she was taken to the hospital and the complaint was lodged being C.R. No. I-30/2008 for the alleged offences under sec. 363 , 366 , 376 read with sec. 114 of IPC at the Sagbara Police Station.

2.2 After the investigation was over, the chargesheet was filed and as the offence under sec. 376 is triable by the Court of Sessions, it was committed to the Court of Sessions. Thereafter the learned Addl. Sessions Judge framed the charge for the offences as stated above and proceed with the trial.

2.3 In order to bring home the charges levelled against the appellants-accused, the prosecution examined the witnesses including the victim, her father and other witnesses and also produced documentary evidence including the medical evidence which shall be referred to in the judgment hereinafter. After recording of the evidence of the prosecution witnesses was over, the learned Addl. Sessions Judge, Narmada at Rajpipla, recorded Further Statement of the accused persons under sec. 313 of Cr.P.C.

2.4 After hearing the learned AP as well as the learned advocate for the defence, the learned Addl. Sessions Judge, Narmada at Rajpipla recorded conviction of the accused persons and sentenced them as stated hereinabove.

2.5 It is this judgment and order which has been assailed on the grounds as stated in detail in the memo of appeal, inter alia, that the learned Addl Sessions Judge committed an error in appreciation of the evidence. They have also contended that the victim had voluntarily accompanied and the story which has been stated is not believable. It is also contended that narration of the incident about the repeated offences by the accused persons is not believable and no offence has been committed. In any case, it was with her consent qua A-1 and therefore the appeal may be allowed.

3. Learned counsel Shri Vijay Patel referred to the charge. He also referred to the testimony of the victim at exh. 17. It was submitted that narration of the incident is not believable and the rape is not committed. He emphasised that the medical evidence suggests that there is no injury and therefore it is not possible that the offence has been committed as narrated. Learned counsel Shri Patel referred to the medical certificate of the victim at exh. 21 and submitted that in the certificate it is clearly mentioned while recording the history that she had voluntarily accompanied A-1 and the complaint was registered due to force by

the parents. Learned counsel Shri Patel also emphasised that there are no marks of injury and therefore in view of her own history recorded in the medical certificate, exh. 21, the conviction could not have been recorded. He submitted that the court below has failed to appreciate this relevant evidence and has accepted whatever version stated in her testimony as the Gospel truth ignoring this vital evidence which also referred to the history recorded in the medical certificate. Similarly, he referred to the medical certificate of A-1 produced at exh. 33. He submitted that there are no marks of any injury and it clearly records, "no sign of recent forceful intercourse". He also referred to the similar certificate qua other accused and submitted that the court below has totally overlooked such evidence. He referred to the testimony of the victim at exh. 17 and again referred to the medical certificate of the victim at exh. 21 and submitted that the narration of the manner in which the offence is committed repeatedly is not at all corroborated by the medical evidence which does not mention about any injury. He therefore submitted that the court below has failed to consider such evidence. Learned counsel Shri Patel has also referred to the FSL report at exh. 60, serological report at exh. 61 and also other evidences. Learned counsel Shri Patel also referred to the testimony of the Principal of the school, exh. 54, and the testimony of the father of the victim at exh. 40 as well as the testimony of the doctor, PW-16. Learned counsel Shri Patel therefore strenuously submitted that the testimony of the victim and the father are not consistent. He emphasised that the victim in her testimony at exh. 17 has not stated that she had become unconscious. Similarly, he submitted and emphasised the discrepancy as regards the injury and submitted that she was taken to the hospital and thereafter she was taken to the police station. He emphasised about the aspect of consent referring to the history recorded in the medical certificate, exh. 21. Learned counsel Shri Patel therefore submitted that as there are no injuries and as it has been stated that she had voluntarily accompanied, it would imply that it was a case of consent.

4. Learned counsel Shri Patel also submitted that though it has been claimed that she was a minor, in fact, she was 16 years or more and therefore the testimony of the victim and the evidence regarding the age of the victim requires a closer scrutiny. For that, he referred to the testimony of the principal of the school, PW-13 at exh. 54, who issued the certificate. He also referred to exh. 68. Learned counsel Shri Patel referred to the provisions of sec. 375 of IPC and submitted that at the relevant time prior to the amendment of 2013 which provides the age of 16 years, and if the evidence is scrutinized, the victim was aged about 16 years and therefore it was a case of consent and the offence as alleged cannot be said to have been established. He also referred to exh. 55 which is the school leaving certificate. He also referred to the testimony of the I.O., PW-15, exh. 64 and PW-17, exh. 70.

5. Learned APP Shri Jani referred to the material and evidence on record and submitted that it requires a closer scrutiny of the evidence. He submitted that the background of facts and the manner in which the offence is said to have been

committed with reference to the age of the victim is also required to be appreciated. Learned APP Shri Jani referred to the testimony of the victim, PW-2, exh. 17 and submitted that she was abducted from her house against her will and the offence of rape has been committed. He submitted that as stated by the victim in her testimony, it would be a gang rape and though charge has not been framed, she has clearly narrated about the manner in which the offence of rape was committed not only by one person but by other accused also. He emphasised that as per the testimony of the victim, the rape is committed by more than one person. Learned APP Shri Jani referred to the physical condition of the victim. He therefore submitted that the evidence of the victim is required to be appreciated with care and the condition of the victim was also stated by the I.O. which itself reflects that she had passed through unbelievable situation for the two days. He emphasised that while appreciating her testimony the background has to be considered and therefore he also referred to the panchnama of the T.I. Parade at exh. 53. He submitted that if the testimony of the victim is convincing, then, the conviction could be based solely on her testimony.

6. In support of his submission, he has referred to and relied upon the judgment of the Hon''ble Apex Court L.I.C. of India and Another Vs. Ram Pal Singh Bisen, . He also referred to the medical evidence and submitted that merely because in the certificate the doctor has recorded the history suggesting that there was her consent may not be accepted as it requires a closer scrutiny. Similarly, learned APP Shri Jani submitted that the injury is not a sine qua non. He submitted that in catena of judicial pronouncements it has been observed that the injury may not be there. He however submitted that even the medical certificate of A-1 is required to be considered which has recorded the history and it could be treated as an extra-judicial confession before the doctor. He pointedly referred to exh. 33 which is the medical certificate of A-1 and submitted that even A-1 himself has stated about having intercourse with the victim against her will. He referred to and relied upon the judgment of the Hon''ble Apex Court reported in B.A. Umesh Vs. Regr. Gen. High Court of Karnataka, . He therefore submitted that the testimony of the victim is required to be examined and if it is found to be reliable, the conviction could be based on such evidence. He has also referred to and relied upon the judgment of the Hon''ble Apex Court reported in State of Himachal Pradesh Vs. Asha Ram, . Learned APP Shri Jani submitted that the medical evidence is only a corroborative piece of evidence or medical opinion and the direct evidence of the victim has to be preferred over a medical evidence which is an expert opinion.

7. In rejoinder, learned counsel Shri Patel referred to the papers including the medical certificate regarding the injury and submitted that it is a corroborative piece of evidence for appreciation of the version of the victim. He referred to and relied upon the judgment of Hon''ble Apex Court reported in Rai Sandeep @ Deepu Vs. State of NCT of Delhi, . He also referred to and relied upon the judgment of the Hon''ble Apex Court reported in Radhu Vs. State of Madhya

Pradesh, . Learned counsel Shri Patel also referred to the testimony of the I.O. and the victim and also submitted that there is improvisation.

8. Learned counsel Shri P.K. Shukla for the appellant in Criminal Appeal No. 1772 of 2009 submitted that he would adopt the submissions made by learned counsel Shri Patel. He also referred to the papers and submitted that in her testimony at exh. 17 specific questions with regard to her clothes were asked and she has stated that only her "odhni" was torn. Similarly, he referred to the report and submitted that what she has stated cannot be believed and it is doubtful. Similarly, he referred to the other evidence and submitted that her statement is not consistent. He referred to the testimony of Doctor, PW-3, exh. 19 and the cross-examination. He emphasised that in the history it has been recorded that she had voluntarily accompanied suggesting her consent. He emphasised that she was pressurized for which the complaint has been filed which is clearly stated. Learned counsel Shri Shukla submitted that it is a customary marriage where the victim had married or there was such custom which was prevailing in the society and thereafter such complaint has been filed. He submitted that it may not be believed. He therefore submitted that the appeal may be allowed.

9. In view of these rival submissions, it is required to be considered whether the present appeal can be entertained.

10. As discussed and referred hereinabove, the background of facts is required to be kept in mind while appreciating the evidences as well as the rival submissions. The submissions which have been made by learned counsel Shri Patel referring to the testimony of the victim at exh. 17 that it is not reliable and may not be believed as a gospel truth requires a closer scrutiny. Learned counsel Shri Patel has emphasised that there is no involvement of the respondents accused and in support of the submission he has referred to the medical evidence. He referred to the medical certificate of A-1, exh. 33, and emphasised that as clearly stated "there are no signs of recent forceful intercourse." He also referred to the serological report, exh. 61 and the FSL report, exh. 60. Therefore, much emphasis given on the aspect of reliability of the testimony of the victim at exh. 17 requires to be considered.

11. A close scrutiny of the testimony and the manner in which she has been abducted and thereafter forcibly taken to the forest has been explained. She has specifically stated that as her mouth was gagged she could not raise any cry or shout for help. Similarly, she has also stated that when a few accused would go about somewhere for food, she would be under the watch by other co-accused. In fact, she has also explained about her condition that due to the offence of rape committed on her and the physical condition she could not make an effort to escape as her body would not permit. It appears that this explanation has been sufficient to make her testimony convincing and reliable.

12. Regarding the submissions which have been made with much emphasis referring to the aspect of injury on the body, it is well-accepted that it is not a

sine qua non. Further, the medical certificate of accused No. 1 at exh. 33 stating that there are no signs of recent intercourse would be a medical opinion which cannot be relied upon to discard the testimony of the victim. It is required to be mentioned that the factum of taking away the victim and she was kept for about two days cannot be overlooked. A useful reference can be made to the judgment of the Hon''ble Apex Court in a judgment reported in State of Punjab Vs. Gurmit Singh and Others, . It lays down broad guidelines with regard to appreciation of evidence in such cases with sensitivity. The same aspect has also been emphasised in a subsequent judgment reported in Wahid Khan Vs. State of Madhya Pradesh, . The Hon''ble Apex Court in a judgment reported in Md. Iqbal and Another Vs. State of Jharkhand, has observed and quoted,

"There is no prohibition in law to convict the accused of rape on the basis of sole testimony of the prosecutrix and the law does not require that her statement be corroborated by the statements of other witnesses."

13. Thus, even if there is some variance with the testimony of the victim in the medical evidence, direct evidence of the victim has to be preferred as the medical evidence would be an opinion. In other words, when there is a direct evidence of the victim, the conviction can be based on such testimony of the victim if it is found to be reliable and trustworthy. It is well accepted that the conviction can be based solely on the testimony of the victim if it is found to be reliable and trustworthy.

14. As discussed hereinabove, the testimony of the victim, exh. 17, cannot be doubted as it sounds more natural when she has a probable explanation with regard to the doubts which are sought to be suggested. Further, as observed in the judgment of the Hon''ble Apex Court in the case of Wahid Khan (supra) referring to the aspect of medical jurisprudence which has been quoted from the Medical Jurisprudence and Toxicology, 22nd Edn., at page 495, it has been observed,

"Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

15. Therefore, the medical evidence could be considered. However, at the same time, it has to be considered with care and human touch and not in a mechanical way that as there are absence of any mark of injury, the offence could not have been committed. It is difficult to jump to such conclusion based on such medical opinion.

16. It is in this background, if the testimony of the victim is found reliable and trustworthy which sounds more natural, there is no reason to brush aside the same.

17. One more aspect which has been emphasised by learned counsel Shri Patel is with regard to the age of the victim as well as the aspect of consent. Though such submissions have been made, the background of facts, the testimony of the victim and the serological report and the FSL report which otherwise confirm sexual activity would not justify acceptance of such a submission. The emphasis which has been given to the provisions of sec. 375 is that at the relevant time the victim would be of the age of 16 years. He has also referred to the medical certificate of the victim at exh. 21 to emphasise about the aspect of consent that she had voluntarily accompanied A-1 is required to be considered. The age as stated by the complainant father is 17 years and therefore whether she had consented or voluntarily accompanied A-1 requires a closer scrutiny. It is not in dispute that A-1 and the other co-accused had taken her and she was kept for a few days. In fact the medical certificate of the accused particularly A-1 refers to the history given by A-1 himself about the sexual intercourse with the said girl. This itself suggests that even A-1 had also admitted about the sexual activity while giving the history to the doctor voluntarily. Therefore, the medical certificate which is relied upon by learned counsel Shri Patel itself refers to the history given by A-1 himself stating about such sexual activity and therefore the emphasis which was given by learned counsel Shri Patel on the latter part that there is no recent intercourse cannot be readily accepted. Therefore, assuming that in the past there was some kind of relationship itself would not justify the abduction of the girl by the accused persons and keeping her forcibly with them for a few days and committing the offence. In fact, in a given case, the girl or the victim may have accompanied which would not necessarily imply that she had consented for such sexual activity.

18. Therefore, considering the testimony of the victim which is otherwise reliable, and particularly the medical certificate of A-1 which confirms about such sexual activity as stated by the accused himself while giving the history, it hardly leaves any doubt. Therefore, had there been consent, there would not have been any such complaint and in any case the victim would not have testified with such details. Therefore, the submission about the consent that she had voluntarily accompanied cannot be accepted. The submission made by learned counsel Shri Patel that prior to the amendment in sec.375 of IPC in the year 2013, the age of 16 years was provided at the relevant time and therefore considering the school leaving certificate at exh. 55, it cannot be said that she was a minor.

19. However, as regards the aspect of consent, even if it is assumed that she was not a minor, it would not be of any help in light of the testimony of the victim and the background of facts. It will have to be considered on appreciation of the background of facts and the evidence and the testimony of the victim. Therefore, the submission made by learned counsel Shri Patel relying on the history in the medical certificate with much emphasis about the consent cannot be accepted in light of her own testimony as discussed hereinabove.

20. It is in these circumstances the impugned judgment and order recording

conviction by the court below cannot be said to be erroneous which would call for interference in the present appeal. The Hon"ble Apex Court in a judgment reported in State of M.P. Vs. Madanlal has made the observation that the appellate court has a duty to make complete and comprehensive appreciation of all vital features of the case and scrutinize the evidence on record with care and caution.

21. Therefore, Criminal Appeal No. 1230 of 2009 filed by A-2 and Criminal Appeal No. 1772 of 2009 filed by A-1 deserve to be dismissed and accordingly stand dismissed. The impugned judgment and order recording conviction and sentence of the appellants accused by the court below is hereby confirmed.