

(2008) 04 GUJ CK 0060

In the Gujarat High Court

Case No : Criminal Appeal No's. 1749 and 2074 of 2004

Shibubarman Dharajibarman Pandit

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 02-04-2008

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 363, 366, 376

Citation : (2008) 04 GUJ CK 0060

Hon'ble Judges : Akil Abdul Hamid Kureshi, J

Bench : Single Bench

Advocate : P.K. Shukla, for the Appellant; Punani, APP for Opponent 1, for the Respondent

Judgement

Akil Kureshi, J.—The appellants herein were original accused in Sessions Case No. 71 of 2004. They have by two separate appeals challenged the judgment and order dated 30th September, 2004 rendered by learned Sessions Judge, Kheda at Nadiad. The appellant of Criminal Appeal No. 2074 of 2004 Rameshdas Tatva was the original accused No. 1. Appellant of Criminal Appeal No. 1749 of 2004 Shibubarman Pandit was the original accused No. 2. Both the accused were charged with offences punishable u/s 363 366 376 read with Section 114 of IPC. Accused No. 1 Rameshdas Tatva was convicted for offences under Sections 363 366 and 376. He was sentenced to 5 years of R.I. for offence u/s 363, for 7 years of R.I. for offence u/s 366 and, for 7 years of R.I. for offence u/s 376 of IPC. All sentences were to run concurrently. Accused No. 2 Shibubarman was convicted for offences u/s 363 and 366 but acquitted for offence punishable u/s 376. He was sentenced of R.I. for 5 years u/s 363 and 7 years u/s 366 of IPC.

2. As per the prosecution case, on 22.11.2003 the two accused kidnapped minor girls "R" & "A" when they were cutting grass in a canal near their house. Father of "R" Bhagubhai lodged the complaint with Police about his daughter "R" and his nephew's daughter "A" missing since the morning of 22nd November, 2003 and also the fact of two accused found missing, since then. Eventually, the

accused and the two girls were traced at New Delhi and brought back. As per the prosecution, "R" was aged about 12 1/2 years and "A" was aged about 14 years, when the incident took place.

3. Complainant PW-1, Bhagubhai, was examined at Exh.8. He stated that his daughter "R" has passed 2nd Standard. She was aged about 12 1/2 years at the time of incident. His niece, Mohitbhai's daughter "A" aged about 14 years and "R" had together gone for collecting fodder behind the plywood factory. Since both of them did not return till 1.30 in the afternoon, they started searching for them but they were not found from the place. He also found that the two accused who were employed in the plywood factory were also missing. He, therefore, suspected that the accused must have kidnapped the girls. He, therefore, contacted Sarpanch of the Village and thereafter, filed Police Complaint. He produced the School Certificate of "R" before the Police to show her age. Before the Court, he identified the two accused.

3.1 In the cross-examination, he agreed that the complaint was drafted by his advocate and he had not read the same.

4. PW-2 Mahendrakumar alias Munna was examined at Exh.10. He was a labour contractor at the plywood factory. He stated that he knew the accused since he had engaged them in the factory. On date of the incident, both of them had taken their pay and thereafter, not returned to work. The witness had left to Kanpur thereafter, where he received the phone call from the Sarpanch of the Village telling him about the missing workmen as well as two girls. He knew that Shibubharman was from Delhi. He, therefore, went to Delhi and joined the Supervisor of his factory at Bus-stand, Anand Vihar, Delhi. They traced out the accused who were staying in a rented room with the two girls. At that time, Shibubharman accused No. 2 and the two girls were in the room. Rameshdas Tatva-accused No. 1 had gone to work in a factory nearby. He was also called there. The witness brought the two accused and the girls back.

5. The victim girl "R", PW-3 was examined at Exh.13. In her deposition, she stated that on the date of the incident she had gone to collect fodder with "A" at about 10 O'Clock in the morning. When they were cutting grass, both the accused came from behind and Ramesh Tatva pressed white cloth on her face. Shibubharman covered face of "A" with similar cloth. Therefore, both of them lost consciousness. When they regained consciousness, they were told that they had reached Delhi. They were taken to a room and were locked up there. That night accused No. 1 Rameshdas Tatva had intercourse with her against her wish.

5.1 In the cross-examination, she denied that in the Police Statement she has not stated about accused covering her face with the cloth and rendering her unconsciousness (In deposition of I.O., however, this contradiction had been established by the defence, reference to which would be made at a later stage). She agreed that around the room where they were staying in Delhi, there were many other people staying.

6. Another victim girl "A" , PW-4 was examined at Exh.14. She also in her deposition narrated the incident of 22nd November, 2003 in some what similar fashion. She also stated that accused No. 1-Rameshdas Tatva forcibly had intercourse with "R". She, however, did not complain against accused having intercourse with her.

6.1 In the cross-examination, she also denied not having stated before the Police about accused rendering her unconsciousness and taking to Delhi in such a state. She, however, admitted that when they reached Delhi Railway Station, she was fully conscious. At the Station, though there were many people including Police persons, she did not complain to any of these persons about being kidnapped. She admitted that at the room, she and "R" were staying alone sometimes when accused used to go out to work, despite which, they did not complain to the neighbors about the kidnapping.

7. Dr. Nikul Patel, PW-6 was examined at Exh.20. He had carried out the physical test of both the victim girls as well as two accused. In his deposition, he stated that both the girls had given a history of having eloped with the accused and having gone from Sarsa to Narol and, thereafter, to Delhi in a Luxury Bus. "R" had also given history of having intercourse with accused No. 1-Rameshdas Tatva once.

8. Pravinchandra Parmar PW-7, Exh.26 was the Talati-cum-Mantri of Kanera Village. He had produced the Birth Certificate of "A". The Certificate shows that "A" was born on 26.12.1989.

9. Gunvantgiri Goswami, PW-8, Exh.31 was the Investigating Officer who had carried out the investigation. He narrated the manner in which the investigation was conducted.

9.1 Importantly, in the cross-examination, he agreed that in her statement before the Police "R" did not state that accused came from behind and covered the face with white cloth rendering her and "A" unconscious, after which, they were taken somewhere and when she regained consciousness, she was told that she was in Delhi and that she was locked up in a room in Delhi. He stated that in fact in her Police Statement "R" had stated that she and "A" had left the house in the pretext of collecting fodder. They had met the accused near the canal, taken a Rickshaw and reached to Narol from where they reached Ahmedabad Bus-stand and boarded a Luxury bus going towards Jaipur. At Jaipur they changed the bus and reached Delhi.

10. Equally, importantly, the I.O. also stated that "A" also had denied the version before the Court in this respect similarly, as compared to her statement before the Police. "A" had also stated before the Police that she had gone with the accused to Narol then to Ahmedabad Bus-stand and then to Delhi by Luxury Bus.

11. Dr. Nitin Dave, PW-10, Exh.41 had carried out the medical examination of the two victim girls to assess their ages on the basis of examination of different parts

of the body. He opined that "R" was aged between 12 to 14 years and "A" was aged to 14 to 16 years.

12. This is a gist of evidence of which the prosecution case rests.

13. Having heard the learned advocates appearing for the parties and having perused the evidence on record, it is amply clear that the victim girls were not forcibly or against their wish taken away by the accused as is sought to be suggested. In the theory of the victim girls being forcibly taken away by the accused, there are large number of contradictions. Most significantly as already noted, though both "R" and "A" denied any change in their deposition compared to their Police statements, the I.O. admitted that there were many changes.

14. Notably, both the witnesses had stated before the Court to the effect that on the date of the incident when they were cutting grass near plywood factory, the two accused came there and covered their faces with white cloth rendering them unconscious. They regained consciousness only when they had reached Delhi. At Delhi, they were kept in a room and accused No. 1 Rameshdas Tatva forcibly had intercourse with "R".

15. However, both the girls had stated clearly before the Police that they had left their houses and met the accused near the plywood factory from where in a Auto-rickshaw they reached Narol, from Narol they went to Ahmedabad Bus-station and boarded bus for Jaipur and at Jaipur, they changed the bus and they reached the Delhi next day.

16. It is thus clear that these witnesses had made material changes in their version before the Court as compared to the statements before the Police. The contradictions were most significant.

17. Additionally, I also find that Dr. Nikul Patel, who had examined the victim girls had recorded a history being given by them about having met the accused and having accompanied the accused to Delhi. "R" also stated that she had intercourse with accused No. 1-Rameshdas Tatva once during her stay.

18. Additionally, as noted, "A" also stated that when they reached Delhi, she was fully conscious. There were many people including Policemen at the Railway Station. She, however, did not complain to anyone. She and "R" often used to be alone in the room at Delhi when both the accused used to go out for work. Despite this, they never complained to the neighbors.

19. Considering all these aspects of the matter, I have no doubt in my mind that both the victim girls had voluntarily joined the accused and left their home on their own. That the version of them being drugged and render unconscious is completely unbelievable.

20. Equally, for the same reason, the allegation of accused No. 1 having forcible intercourse with "R" cannot be believed.

21. The crucial question, however, is of the age of the two girls. Here I find that

through reliable cogent evidence, the prosecution established that both girls were of tender age.

22. Father of "R", in his deposition, stated that she was aged about 12 1/2 years of age. So far as birth Certificate is concerned, it showed the date of birth as 31.05.1991. PW-1 stated that he had got married about 22 years back. After one year of marriage, his daughter Manji was born. Some three years thereafter, his second daughter was born and about 2 years after that "R" was born. This also matches with the medical evidence of Dr. Nitin Patel of PW-10 in which on the basis of medical examination of R, he assessed her age between 12 to 14 years.

22.1 With respect to "A" also the prosecution produced her Birth Certificate which shows her date of birth as 26.12.1989. This also matches with opinion of Dr. Nitin Patel that "A" was aged about 14 to 16 years on the date of the incident.

23. It can thus be seen that both the girls were below 16 years on the date of the incident. In fact, "R" was aged below 13 years or so. Any intercourse with her even with her consent would constitute offence punishable u/s 376 of IPC. The fact that accused No. 1 had intercourse with her remains established beyond doubt. This was stated so by "R" in her deposition. This was the history given by her to Dr. Nitin Patel. This was also stated by "A" who also claimed to be an eye-witness. The prosecution also collected the clothes of the victim as well as accused No. 1 and other materials. Dr. Nikul Patel PW-6 also found that hymen of "R" was ruptured.

24. Considering the above aspects of the matter, I find that accused No. 1 Rameshdas Tatva was rightly held guilty of offences punishable under Sections 363 366 and 376 of IPC. Even if "R" had voluntarily left her parents' house and joined accused No. 1, such consent would be of no consequence, since "R" was of rather tender age and apparently, was not able to comprehend her consequences of her actions. In comparison accused No. 1-Rameshdas Tatva was aged about 23 years of age. He had thus reached age of maturity. His conviction and sentence was therefore just and proper and call for no interference.

25. In so far as accused No. 2 Shibubarmen is concerned, as noted, he is not found guilty of offence u/s 376 of IPC. In fact, there are no allegations of him having intercourse with any of the girls. He is, however, convicted for offences punishable under Sections 363 and 366 of IPC. Apparently, "A" had joined the accused on her own volition. "A" was of course below 18 years of age on the date of the incident. Looking to her young age, offence u/s 363 of IPC was thus proved.

26. Section 366 of IPC, however, reads as under:

366. Kidnapping, abducting or inducing woman to compel her marriage, etc. - Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or

knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, (and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid).

27. When I find that "A" had voluntarily joined accused No. 2 and when I find that there was no element of either forcible intercourse or forced marriage, I find that offence u/s 366 of IPC was not made out.

28. His conviction u/s 366 is, therefore, required to be set aside.

29. Accused No. 2, Shibubarmann who was sentenced to 5 years of RI for offence u/s 363 of IPC, has already served out the actual sentence of more than 4 years and 6 months with remission. He has thus virtually served out the entire sentence awarded for offence u/s 363 of IPC. It would, therefore, be appropriate to reduce the sentence to one already under gone.

30. In the result the appeals are disposed with following directions:

(1) Criminal Appeal No. 2074 of 2004 is dismissed. Conviction and sentence of the appellant- Original Accused No. 1 are upheld.

(2) Criminal Appeal No. 1749 of 2004 is allowed in part. Conviction and sentence of appellant-Original Accused No. 2 u/s 366 of IPC is set aside. Conviction and Sentence u/s 363 is upheld. His substantive sentence, however, is reduced to one already undergone. Fine is reduced to Rs. 500/-. In case of default of fine, he will serve S.I. of 3 months.

With above directions appeals are disposed of.