

(2016) 01 GUJ CK 0152
In the Gujarat High Court

Case No : Criminal Appeal Nos. 1385 and 1219 of 2007

State of Gujarat

APPELLANT

Vs

Amrutbhai Jugabhai Raval

RESPONDENT

Date of Decision : 21-01-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 307, Section 363, Section 366, Section 368, Section 376, Section 376(2), Section 376(2)(f)

Citation : (2016) 01 GUJ CK 0152

Hon'ble Judges : M.R. Shah and Z.K. Saiyed, JJ.

Bench : Division Bench

Advocate : Moxa Thakkar, A.P.P., for the Appellant; Sonal Vyas, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Shah, J.—1. As both these Appeals arise out of the impugned judgment and order passed by the learned Principal Sessions Judge, Mehsana in Sessions Case No. 32 of 2007, one by the State for enhancement of the sentence imposed by the learned trial Court, imposed while convicting the original accused for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code and another by the original accused challenging the impugned judgment and order of conviction passed by the learned trial Court convicting the original accused for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code, both these appeals are heard, decided and disposed of by this common judgment and order.

1.1 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned trial Court in Sessions Case No. 32 of 2007 convicting the original accused for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code the original accused has preferred Criminal Appeal No. 1219 of 2007.

1.2 Feeling aggrieved and dissatisfied with the aforesaid impugned judgment and order passed by the learned trial Court the State has preferred Criminal Appeal No. 1385 of 2007 for enhancement of the sentence imposed by the learned trial Court, imposed while convicting the original accused for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code.

2. At the outset, it is required to be noted that while convicting the original accused for the offence under Sections 363, 366 and 376 of the Indian Penal Code, the learned trial Court has imposed the sentence of 06 years R.I. with fine of Rs. 2,000/-, in default to undergo further 06 months S.I. for the offence under Section 376 of the Indian Penal Code and has sentenced to undergo 01 year R.I. with fine of Rs. 1,000/- and in default to undergo 03 months S.I. for the offence under Section 366 of the Indian Penal Code and also sentenced to undergo 01 year R.I. with fine of Rs. 1,000/-, and in default to undergo further 03 months S.I. for the offence under Section 363 of the Indian Penal Code.

3. The case of the prosecution in nutshell is as under:--

3.1 According to the prosecution case, on 11.12.2006 complainant viz. Savitaben had gone for selling fruits and her daughter viz. Sumitra was at home and her sons had gone to school. When the complainant reached home in the evening, Sumitra was not at home and hence she thought that she might have gone to village. However, since she did not return back, the complainant inquired from the surrounding people and informed her brother-in-law (diyar) viz. Prahladbhai Somabhai. Pursuant to that Prahladbhai alongwith other family members had gone to search Sumitra in the nearby village and also to the house of their relatives. However, they could not search her. In the meantime, Raval Amrutbhai and Raval Kamleshbhai met the complainant and they informed her that they saw her daughter and the accused going towards Gozariya at about 3 O'clock. Therefore, the complainant went to the house of the accused and found that the accused after locking the house had run away. On inquiry being made by the complainant in her house, she came to know that her daughter had taken gold and silver ornaments and cash of Rs. 9,000/- with her. Thus, the accused took the victim with intention to defile by luring and enticing her promising to marry. Therefore, the complaint was registered as CR No. I-162 of 2006 before Langdhaj Police Station on against the accused.

4. On the basis of above allegations, investigation was carried out and statements of several witnesses were recorded. During the course of investigation, accused person was arrested and, ultimately, charge-sheet came to be filed against him. As the case was sessions triable the same was committed to the Court of Sessions.

5. Thereafter, charge came to be framed and explained to the accused person, to which the accused person pleaded not guilty and claimed to be tried.

6. To prove the case against the accused the prosecution has examined nine following prosecutions witnesses:--

Through the aforesaid witnesses the prosecution also produced following documentary evidences:--

7. Thereafter closing purshis was submitted by the prosecution and further statement of the accused came to be recorded under Section 313 of the Criminal Procedure Code. In his further statement, he denied the case of the prosecution in entirety. According to him, he has been roped in a false case of rape. However, he has neither led any evidence nor did he examine any witness in support of his defence.

8. At the end of the trial, on appreciation of the entire evidence on record, both documentary as well as by oral, impugned judgment and order the learned trial Court has held the original accused guilty for the offences under Sections 363, 366 and 376 of the Indian Penal Code and has imposed the aforesaid punishment/sentence.

9. Feeling aggrieved by the impugned judgment and order, both original accused as well as State have preferred the present appeals, one by the original accused challenging the impugned judgment and order of conviction and another by the State for enhancement of the sentence imposed by the learned trial Court, imposed while convicting the original accused for the offence under Sections 363, 366 and 376 of the Indian Penal Code.

10. Ms. Sonal D. Vyas, learned advocate has appeared for the original accused and Ms. Moxa Thakkar, learned APP has appeared on behalf of the State.

10.1 Ms. Sonal D. Vyas, learned advocate appearing on behalf of the original accused has vehemently submitted that in the facts and circumstances of the case and considering the evidence on record the learned trial Court has committed a grave error in holding the original accused guilty for the offence under Sections 363, 366 and 376 of the Indian Penal Code.

10.2 It is submitted that while recording the conviction and holding the original accused guilty for the offence under Sections 363, 366 and 376 of the Indian Penal Code, the learned trial Court has not properly appreciated the conduct on the part of the victim/prosecutrix, after she ran away with the accused.

10.3 It is vehemently submitted by Ms. Vyas, learned advocate appearing on behalf of the original accused that victim has specifically admitted that when she left her house and ran away with the accused and when she went to Vadodara by bus, she never shouted for the help and/or raised any alarm. It is submitted that even when she stayed at Vadodara for 03 days no efforts were made by her to run away and/or get out of the custody of the accused.

10.4 It is submitted that therefore and even from the deposition of the victim/prosecutrix it can be said to be case of consent and/or the victim/prosecutrix can be said to be consenting party. It is further submitted by Ms. Vyas, learned advocate appearing on behalf of the original accused that even otherwise it has come on record that both the accused and the victim were knowing each other

and/or were in love since last 02 years. It is further submitted by Ms. Vyas, learned advocate appearing on behalf of the original accused that the findings recorded by the learned trial Court and age of the victim at the time of occurrence of the incident was 17 years of age i.e. above 16. It is submitted that therefore when the victim herself can be said to be a consenting party and even she also stated before the doctor that she had sexual intercourse with the accused with her consent, the learned trial Court has materially erred in convicting the original accused for the offence under Sections 363, 366 and 376 of the Indian Penal Code.

10.5 Making above submissions Ms. Vyas, learned advocate appearing on behalf of the original accused has requested to allow the appeal preferred by the accused and to quash and set aside the impugned judgment and order of conviction passed by the learned trial Court.

11. The appeal preferred by the original accused challenging the impugned judgment and order of conviction passed by the learned trial Court is vehemently opposed by Ms. Moxa Thakkar, learned APP appearing on behalf of the State.

11.1 It is submitted by Ms. Thakkar, learned APP appearing on behalf of the State that in the facts and circumstances of the case, more particularly when the victim was niece of the accused and looking to her family circumstances i.e. her father left them and taking the disadvantage of such a situation and the accused was in dominating position being a uncle, the case would fall under Section 376(2)(f) of the Indian Penal Code. It is submitted that therefore assuming without admitting that there might be a consent of the victim, the learned trial Court has rightly convicted the original accused. It is submitted that as such the victim has specifically deposed in her evidence that the accused had sexual intercourse with her against her will and wish. It is submitted that therefore as such no error has been committed by the learned trial Court convicting the original accused for the offence under Sections 363, 366 and 376 of the Indian Penal Code.

11.2 Making above submissions it is requested to dismiss the appeal preferred by the original accused.

11.3 Now so far as the appeal preferred by the State being Criminal Appeal No. 1385 of 2007 for enhancement of the sentence imposed by the learned trial Court is concerned, Ms. Thakkar, learned APP has vehemently submitted that while convicting the original accused for the offence under Sections 363, 366 and 376 of the Indian Penal Code, the learned trial Court has imposed the sentence less than the minimum provided under Sections 376 of the Indian Penal Code.

11.4 It is submitted that as such no cogent reasons have been assigned by the learned trial Court while imposing the sentence less than the minimum provided under Section 376 of the Indian Penal Code. It is submitted that therefore while imposing the punishment/sentence the learned trial Court has not exercised the discretion judiciously and as such not imposing the adequate punishment

commensurate with the gravity of the offence which has resulted into miscarriage of justice.

11.5 It is further submitted by Ms. Thakkar, learned APP appearing on behalf of the State that while considering and imposing the punishment, the learned trial Court has not properly appreciated and considered the relationship between the accused and the victim and that the accused was in a dominating position being uncle and that he had taken disadvantage of family situation of the victim and her family members. It is submitted that as such being uncle and more particularly when the father of the victim had left her and her mother the accused ought to have behaved like a loco-parentis and/or guardian. It is submitted that instead the accused who was widower had taken disadvantage of the situation and had lured the victim. It is submitted that therefore the learned trial Court ought to have imposed the maximum punishment under Section 376(2) of the Indian Penal Code.

11.6 It is submitted that in any case the learned trial Court is not justified in imposing the punishment/sentence less than minimum provided under Section 376(2) of the Indian Penal Code.

11.7 Making above submission relying upon the following decisions it is requested to allow the appeal preferred by the State and to enhance the sentence imposed by the learned trial Court and to impose the maximum sentence provided under Section 376(2) of the Indian Penal Code upon the accused.

11.8 In the case of Sumer Singh vs. Surajbhan Singh and others, , (2014) 7 SCC 323, the Hon''ble Supreme Court had an occasion to consider the principle of sentencing proportionality and adequacy of sentence. In the aforesaid decision while emphasizing the need for appropriate punishment in paragraph-36 the Hon''ble Supreme Court has observed and held as under:--

"36 Having discussed about the discretion, presently we shall advert to the duty of the court in the exercise of power while imposing sentence for an offence. It is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the Court's accountability to remind itself about its role and the reverence for rule of law. It must evince the rationalized judicial discretion and not an individual perception or a moral propensity. But, if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined. Law cannot tolerate it; society does not withstand it; and sanctity of conscience abhors it. The old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of

mercy, for no fathomable reason, should be allowed to rule. True it is, it has its own room, but, in all circumstances, it cannot be allowed to occupy the whole accommodation. The victim, in this case, still cries for justice. We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society. Therefore, striking the balance we are disposed to think that the cause of justice would be best sub-served if the respondent is sentenced to undergo rigorous imprisonment of two years apart from the fine that has been imposed by the learned trial Judge."

11.9 Again in the case of Narinder Singh and others vs. State of Punjab and another, , (2014) 6 SCC 466, the Hon"ble Supreme Court had an occasion to consider the sentencing policy, the purpose/jurisprudential justification of awarding sentence (deterrence, retribution or rehabilitation) vis-a-vis nature of crime. In para 14, 16 and 17 the Hon"ble Supreme Court has observed as under:--

"14. The Law prohibits certain acts and/or conduct and treats them as offences. Any person committing those acts is subject to penal consequences which may be of various kind. Mostly, punishment provided for committing offences is either imprisonment or monetary fine or both. Imprisonment can be rigorous or simple in nature. Why those persons who commit offences are subjected to such penal consequences? There are many philosophies behind such sentencing justifying these penal consequences. The philosophical/jurisprudential justification can be retribution, incapacitation, specific deterrence, general deterrence, rehabilitation, or restoration. Any of the above or a combination thereof can be the goal of sentencing.

16. What follows from the discussion behind the purpose of sentencing is that if a particular crime is to be treated as crime against the society and/or heinous crime, then the deterrence theory as a rationale for punishing the offender becomes more relevant, to be applied in such cases. Therefore, in respect of such offences which are treated against the society, it becomes the duty of the State to punish the offender. Thus, even when there is a settlement between the offender and the victim, their will would not prevail as in such cases the matter is in public domain. Society demands that the individual offender should be punished in order to deter other effectively as it amounts to greatest good of the greatest number of persons in a society. It is in this context that we have to understand the scheme/philosophy behind Section 307 of the Code.

19. We would like to expand this principle in some more detail. We find, in practice and in reality, after recording the conviction and while awarding the sentence/punishment the Court is generally governed by any or all or combination of the aforesaid factors. Sometimes, it is the deterrence theory

which prevails in the minds of the Court, particularly in those cases where the crimes committed are heinous in nature or depicts depravity, or lack morality. At times it is to satisfy the element of "emotion" in law and retribution/vengeance becomes the guiding factor. In any case, it cannot be denied that the purpose of punishment by law is deterrence, constrained by considerations of justice. What, then, is the role of mercy, forgiveness and compassion in law? These are by no means comfortable questions and even the answers may not be comforting. There may be certain cases which are too obvious namely cases involving heinous crime with element of criminality against the society and not parties inter se. In such cases, the deterrence as purpose of punishment becomes paramount and even if the victim or his relatives have shown the virtue and gentility, agreeing to forgive the culprit, compassion of that private party would not move the court in accepting the same as larger and more important public policy of showing the iron hand of law to the wrongdoers, to reduce the commission of such offences, is more important. Cases of murder, rape or other sexual offences etc. would clearly fall in this category. After all, justice requires long term vision. On the other hand, there may be, offences falling in the category where "correctional" objective of criminal law would have to be given more weightage in contrast with "deterrence" philosophy. Punishment, whatever else may be, must be fair and conducive to good rather than further evil. If in a particular case the Court is of the opinion that the settlement between the parties would lead to more good; better relations between them; would prevent further occurrence of such encounters between the parties, it may hold settlement to be on a better pedestal. It is a delicate balance between the two conflicting interests which is to be achieved by the Court after examining all these parameters and then deciding as to which course of action it should take in a particular case."

11.10 While considering the discretion vested in the court while awarding the sentence less than the minimum provided under Section 376 of the IPC and the direction on the judges to levy the appropriate sentence the Hon'ble Supreme Court in the case of Shimbhu and another vs. State of Haryana, , (2014) 13 SCC 318, has observed in para 11, 19 and 22 as under:--

"11. The crucial stage in every criminal proceeding is the stage of sentencing. It is the most complex and difficult stage in the judicial process. The Indian legal system confers ample discretion on the Judges to levy the appropriate sentence. However, this discretion is not unfettered in nature rather various factors like the nature, gravity, the manner and the circumstances of the commission of the offence, the personality of the accused, character, aggravating as well as mitigating circumstances, antecedents etc., cumulatively constitute as the yardsticks for the Judges to decide on the sentence to be imposed. Indisputably, the sentencing Courts shall consider all relevant facts and circumstances bearing on the question of sentence and impose a sentence commensurate with the crime committed.

19. Thus, the law on the issue can be summarized to the effect that punishment should always be proportionate/commensurate to the gravity of offence. Religion, race, caste, economic or social status of the accused or victim or the long pendency of the criminal trial or offer of the rapist to marry the victim or the victim is married and settled in life cannot be construed as special factors for reducing the sentence prescribed by the statute. The power under the proviso should not be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation.

This is yet another opportunity to inform the subordinate Courts and the High Courts that despite stringent provisions for rape under Section 376, IPC, many Courts in the past have taken a softer view while awarding sentence for such a heinous crime. This Court has in the past noticed that few subordinate and High Courts have reduced the sentence of the accused to the period already undergone to suffice as the punishment, by taking aid of the proviso to Section 376(2), IPC. The above trend exhibits stark insensitivity to the need for proportionate punishments to be imposed in such cases."

12. The appeal preferred by the State for enhancement of the sentence imposed by the learned trial Court is opposed by Ms. Vyas, learned advocate appearing on behalf of the original accused.

12.1 Without prejudice to her rights and contentions in the appeal preferred by the State challenging the order of conviction, it is vehemently submitted by Ms. Vyas, learned advocate appearing on behalf of the original accused that in the facts and circumstances of the case, more particularly when it was a case of consent of the victim, when the learned trial Court has imposed the sentence, the same is not required to be interfered with in exercise of appellate jurisdiction. Therefore, it is submitted that as such the discretion exercised by the learned trial Court while imposing the sentence/punishment cannot be said to be disproportionate to the gravity of the offence and as such the learned trial Court has exercised the discretion judiciously by giving cogent reasons, the same is not required to be interfered with by this Court in exercise of the appellate jurisdiction.

12.2 Making above submissions, it is requested to dismiss the appeal preferred by the State.

13. Heard the learned advocates for the respective parties at length. We have considered and gone through the findings recorded by the learned trial Court and we have also re-appreciated the entire evidence on record, both oral as well as documentary evidence.

13.1 From the deposition of prosecutrix/victim it emerges that the prosecutrix and the accused after they left the village went from one place to another place. That both of them went to the place of sister of the accused in jeep at Village Gojariya. Both of them stayed at night at the house of sister of the accused. That thereafter both of them went to Vadodara in the public transport vehicle and went to the house of mother-in-law of the accused. Both of them stayed at

Vadodara for 04 days. It is admitted by the prosecutrix that at no point of time either she tried to run away and/or informed any other person that she has been given threat and/or that she has been forcefully taken away by the accused. As the complaint was filed, the prosecutrix herself appeared before the Langdhaj Police Station and all the family members of the prosecutrix reached Langdhaj Police Station. At this stage, it is required to be noted that even the history given by the prosecutrix before the doctor, who examined the prosecutrix she specifically stated that she had a sexual intercourse with her consent and wish since last 03 months and she had a last sexual intercourse before 03 days. The aforesaid is recorded by Dr. Bharatkumar Babubhai Solanki in his certificate produced at Ex. 12. Dr. Bharatkumar Babubhai Solanki has been examined by the prosecution as P.W. No. 2 at Ex. 11. No injuries are found on the private part of the body of the prosecutrix. The doctor has also opined that he cannot give any specific opinion that there was a rap committed on the prosecutrix in absence of any injuries found on the body and/or private part of body of the prosecutrix. Dr. Bharatkumar Babubhai Solanki has also opined that the prosecutrix was habitual for sexual intercourse. However, despite the above, subsequently the prosecutrix has stated that she was forced to go with the accused as the accused threatened her that if she does not come then he will commit suicide. The subsequent version of the prosecutrix cannot be believed in view of the conduct of the prosecutrix after she ran away with the accused, which are narrated hereinabove. Under the circumstances, it appears that the prosecutrix is not telling the truth and she is not reliable and/or trustworthy and, therefore, it is not safe to convict the accused on sole testimony of the prosecutrix. The prosecutrix has deposed that she was taken from one place to other and remained at various houses with only explanation given by her is that she was threatened by the accused and she was ravished a number of times. As observed hereinabove, the doctor has categorically deposed that no injuries were found on her private part and body. She was habitual for sexual intercourse. She gave the history before the doctor that she had a sexual intercourse on number of occasions since last 03 months and lastly she had a sexual intercourse before 03 days. Under the circumstances, it appears that it was a case of consent and/or that the prosecutrix was the consenting party. It is an admitted position that at the time of incident she was 17 years of age. As observed hereinabove, looking to the conduct of the prosecutrix and as it is found that she is not telling the truth and, therefore, she is not reliable and trustworthy. It will not be safe to convict the accused solely on the testimony of the prosecutrix. The recent decision of the Hon''ble Supreme Court in the case of Mohd. Ali @ Guddu vs. State of Uttar Pradesh, reported in , (2015) 7 SCC 272 is required to be referred to and considered here. In the similar set of facts and circumstances the Hon''ble Supreme Court has reversed the conviction of the accused for the offence under Sections 376, 366 and 368 of the Indian Penal Code which was based on sole testimony of the prosecutrix and the Apex Court has acquitted the original accused by observing in paragraph 29 and 30 as under:--

"29. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished a number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon.

30. True it is, the grammar of law permits that the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not un-reproachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely does not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the appellant-accused for the alleged offences and the High Court has fallen into error, without re-appreciating the material on record, by giving the stamp of approval to the same."

14. Applying the law laid down by the Hon"ble Supreme Court to the aforesaid decision to the facts of the case on hands, we are of the firm opinion that the learned trial Court has erroneously convicted the appellant -- accused for the alleged offences.

15. In the facts and circumstances of the case the learned trial Court has committed a grave error in holding the accused guilty for the offences under Sections 363, 366 and 376 of the Indian Penal Code which in the facts and circumstances of the case narrated hereinabove cannot be sustained and the same deserves to be quashed and set aside. Apart from the evidence of the prosecutrix there is no other corroborative evidence direct or circumstantial

evidence, which would, lend assurance to the testimony of the prosecutrix.

16. Under the circumstances, the impugned judgment and order of conviction of learned trial Court deserves to be quashed and set aside. Consequently the Criminal Appeal No. 1385 of 2007 preferred by the State for enhancement of the sentence deserves to be dismissed.

17. In view of the above and for the reasons stated above Criminal Appeal No. 1219 of 2007 preferred by the accused challenging his conviction is hereby allowed and the impugned judgment and order dated 28.9.2007 passed in Sessions Case No. 32 of 2007 convicting the original accused for the offences under Sections 363, 366 and 376 of the Indian Penal Code is hereby quashed and set aside.

18. It is reported that the accused is on bail and, therefore, his bail bond stands cancelled. Consequently on allowing the Appeal preferred by the accused, the Criminal Appeal No. 1385 of 2007 preferred by the State for enhancement of the sentence does not survive and the same deserves to be dismissed and is accordingly dismissed.

19. R & P to be sent back to the trial court forthwith.