
(2012) 08 GUJ CK 0005
In the Gujarat High Court
Case No : Criminal Appeal No. 713 of 1994

State of Gujarat

APPELLANT

Vs

Fakir Gafarsa Mahmadasa

RESPONDENT

Date of Decision : 30-08-2012

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 378
Penal Code, 1860 (IPC) — Section 354, 376, 506(2)

Citation : (2012) 08 GUJ CK 0005

Hon'ble Judges : A.L. Dave, J;A.J. Desai, J

Bench : Division Bench

Advocate : Neeraj Soni, app, for the Appellant; Notice Served, for the Respondent

Final Decision : Dismissed

Judgement

Honourable Mr. Justice A.J. Desai

1. State of Gujarat, by way of present Appeal u/s 378 of the Code of Criminal Procedure, 1973, has challenged the judgment and order passed by learned Additional Sessions Judge, Bhavnagar in Sessions Case No. 45 of 1993 by which the respondent-accused has been acquitted from the charges u/s 376 of Indian Penal Code and u/s 135 of Bombay Police Act. The brief facts arising from the case are as under:-

1.1. That on 16.10.1992 at about 00:30 hours the Prosecutrix lodged a complaint with Police Sub-Inspector, Mahuva Police Station alleging that, on 15.10.1992 at about 9:30 hours, when she was going towards the market in Village Mahuva, the respondent-accused called her at a place where she was doing her labour work. Since she was working as a labourer in the said premises, she went there and at that time against her will the respondent-accused committed rape on her. When the accused was trying to run away from the place of incident, she made shouts, pursuant to which her grandmother Samjuben and

her sister Godiben reached at a place of incident, and on inquiry she informed about the incident. Since her parents had gone to some other village, the complaint was not lodged immediately, but only after arrival of her parents, she visited the police station along with the parents and lodged the FIR. Pursuant to the FIR Exh. 11, the police personnel started investigation, and after having found sufficient material against the accused, filed chargesheet in the Court of learned JMFC at Mahuva, who in turn committed the case in the Court of Sessions Judge at Bhavnagar.

1.2. The learned Sessions Judge framed the charge at Exh. 4 for the offences under Sections 376, 506(2) of Indian Penal Code as well as u/s 135 of Bombay Police Act.

1.3. The learned Sessions Judge, after perusing the depositions of 8 witnesses examined by the prosecution as well as after appreciating the documentary evidence proved by the prosecution, came to the conclusion that the accused had not committed the offence u/s 376 of Indian Penal Code as well as u/s 135 of Bombay Police Act, but convicted the respondent-accused for 18 months u/s 354 of IPC as well as convicted the accused for 18 months u/s 506(2) of IPC and further directed that both the sentences should run concurrently.

1.4. At this juncture, we would like to note that there is no appeal by the respondent-accused challenging the conviction as well as sentence u/s 354 and 506(2) of IPC.

2. Though the appeal was admitted way back in 1994 and notice of admission is served to the respondent-accused, he has chosen not to appear himself or through any advocate. However, with the help of learned APP Mr. Neeraj Soni, we have decided the matter finally.

3. Learned APP Mr. Neeraj Soni appearing for the State has assailed the judgment of the trial court while acquitting the accused u/s 376 of IPC that the learned trial court ought to have convicted the accused on relying upon the deposition of Prosecutrix. She has categorically stated in her deposition that, against her will the accused has committed rape and has properly explained the delay in filing the FIR with the police and, therefore, the respondent-accused ought not to have been acquitted for the charges u/s 376 of IPC. She has categorically stated that the accused had a knife in his hand, and showing the knife and threatening her, she was subjected to the said offence. It was further argued that she has specifically stated that the accused had made intercourse with her against her will, and after completion of the offence, a threat was given not to inform anybody about the incident.

In view of this aspect, the evidence of Prosecutrix is reliable and, therefore, the acquittal recorded by the trial court as far as Section 376 of IPC is concerned, is required to be quashed and set aside and the respondent-accused shall be convicted for the offence u/s 376 of IPC and be sentenced accordingly.

4. We have examined the Record & Proceedings of the case. We have also gone through the depositions of witnesses who were examined by prosecution. It is a well settled principle of law that if the deposition of Prosecutrix is found to be a truthful one, a conviction can be based on her sole deposition. Now considering the deposition of Prosecutrix, who has been examined as Prosecution Witness No.1 at Exh. 10, it appears that, when she lodged a complaint, she has stated before the police that she was aged about 16 years. She has in her chief examination stated about the incident as per her say in the complaint Exh. 11 which was recorded with Mahuva Police Station. She has stated that, after the commission of offence, the accused tried to run away from the place of incident, and at that time she made shouts pursuant to which her grandmother Samjuben and her sister Godiben reached at the place of incident. Now, considering her cross examination, it appears that the time of incident is at about 9:30 a.m. and it also appears that the place of incident is situated on the main road wherein about 150 to 200 persons are working. Opposite to the place of incident, a chawl has been situated wherein 500 persons resides. She has admitted that a mill which is adjacent to the chawl is having about 200 women workers. She has further admitted that at the place where she is doing her labour work, about 40 to 50 women are working and full season with regard to collecting dry onions and filling up in the gunny bag was going on where she was working at the time of incident.

5. Now considering the incident of rape, it appears from her cross-examination that, when the accused called her, she immediately reached at the place of incident. She had gone there under the pretext that he might have called for the labour work. She has stated that, after reaching at the place of incident, she slept there. She has further stated that she herself removed her undergarments. However, she has stated that against her will, the accused committed rape. She has admitted that when the incident took place she had not tried to resist. She did not receive any injury nor she suffered any pain. She has admitted that no blood came out from her private part.

She has also admitted that she is the eldest child in her family and her next younger sister is aged about 18 years. Now, perusing the deposition of Samjuben, P.W. 2 Exh. 12, who is related to Prosecutrix was declared hostile by the prosecution. However, she has tried to support the case of the prosecution when she was cross-examined by the Public Prosecutor. She is not clear in her deposition about the presence of the accused. Except these two witnesses about the place of incident, the prosecution has not examined any witness. Now, considering the deposition of these two witnesses, we are of the opinion that the Prosecutrix has not come out with the correct facts about the incident.

In the present case, unfortunately the prosecution did not prove the age of the Prosecutrix, whether the Prosecutrix or accused person had received injury or any intercourse had been taken place in the present incident by examining any medical officer or producing any medical evidence thereof. In absence of any

medical evidence it is very difficult to decide the age of the girl. There is no other evidence which would show that the girl was below 18 years or below 16 years of age. The corroborative evidence is lacking in the present case. The clothes of Prosecutrix as well as the accused persons do not involve the present respondent-accused, since the FSL report Exh. 20 does not indicate that the semen or blood of accused was found on the clothes of Prosecutrix. Considering overall aspects of the case, we are of the opinion that the trial court has not committed any error in acquitting the respondent-accused from the charges u/s 376 of IPC.

6. It is well settled principle of law that the appellate court shall be reluctant to interfere with such judgment of acquittal unless the court found it contrary to evidence or palpably erroneous or the view which has been taken by the trial court, could not have been taken by the court of competent jurisdiction while dealing with the appeal against acquittal, the court keeps in view the position that the presumption of innocence in favour of the accused, has been fortified for its acquittal. The golden rule is that the court is obliged and may not abjure its duty to prevent miscarriage of justice where interference is imperative and the ends of justice was required and it is essential to appease the judicial conscience. Considering the entire case, we are of the opinion that the learned Judge has not committed any error in acquitting the accused person from the charges levelled against him. Hence, the appeal fails and is dismissed accordingly.