

(1995) 03 GUJ CK 0007
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Jaysukh @ Harsukh Hakubhai

RESPONDENT

Date of Decision : 20-03-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 28(3)
Penal Code, 1860 (IPC) — Section 363, 366, 366, 376, 376

Citation : (1996) 2 GLR 33

Hon'ble Judges : M.R. Calla, J;B.C. Patel, J

Bench : Division Bench

Judgement

B.C. Patel, J.—Criminal Appeal No. 1358 of 1986 is preferred by the State for enhancement of sentence recorded by Assistant Sessions Judge, Gondal on 30th August 1986 whereby the accused was convicted for offences punishable under Sections 376, 363 and 366 of the Indian Penal Code and was sentenced to rigorous imprisonment for 5 years and to pay a fine of Rs. 300/-, in default of payment of fine, rigorous imprisonment of 6 months. While passing the sentence, the Court did not pass any separate sentence for offences punishable under Sections 363 and 366 of the Penal Code.

2. Accused preferred Criminal Appeal No. 4 of 1987 before the Sessions Judge against the aforesaid order of conviction and sentence and by order passed on 22-9-1989 by the Division Bench of this Court (Coram: R.J. Shah & K.J. Vaidya, JJ.) the same was ordered to be transferred to this Court and the said Criminal Appeal No. 4 of 1987 is renumbered as Criminal Appeal No. 17 of 1990.

Both the appeals are arising from the common judgment and they are, therefore, heard together and disposed of by this common judgment.

3. Section 376(1) of the Indian Penal Code reads as under:

(1) Whoever, except in the case provided for by Sub-section (2) commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may

extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

It is, thus, clear that the section provides for life imprisonment. The First Schedule to the Code of Criminal Procedure clearly indicates that an offence u/s 376 is a non-bailable, cognizable offence and it is triable only by a Court of Session. Offence punishable u/s 366 also provides for imprisonment for 10 years and fine and it is a non-bailable, cognizable offence and is triable only by a Court of Session. Section 9 of the Code of Criminal Procedure reads as under:

Court of Session.

9.(1) The State Government shall establish a Court of Session for every Sessions division.

(2) Every Court of Session shall be presided over by a Judge, to be appointed by the High Court.

(3) The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.

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Thus, reading this section, it is clear that the High Court may appoint Assistant Session Judge to exercise jurisdiction in a Court of Sessions. In the instant case, it appears that by a notification issued by the High Court, being No. A. 1202/86, which has been published in the Gujarat Government Gazette, Part IV-C, amongst some other Judges, Mr. V.C. Vyas, Assistant Sessions Judge, Gondal, Rajkot was appointed as Additional Sessions Judge of Rajkot. That notification is dated 18th September 1986. The instant judgment is dated 30th August 1986. In view of the aforesaid notification, learned Judge Mr. V.C. Vyas could have exercised jurisdiction of a Sessions Judge from 18th September 1986 but certainly not prior thereto. In view of this, learned Judge in the instant case was not empowered to exercise power of Court of Session. No doubt, an Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years, as provided u/s 28(3) of the Criminal Procedure Code, but in the instant case, the trial commenced and concluded before the High Court passed the order as aforesaid. This case is not tried by a Court of Session and in this view of the matter, it is clear that the trial is without jurisdiction. However, Mr. Upadhyaya, learned Advocate, realising that if the matter is remanded for retrial, the accused may be required to undergo greater sentence, does not press this appeal. We have also not discussed this issue as the same is not challenged by the learned

Advocate.

4. Mr. Upadhyaya, learned Advocate further submitted that the accused has already undergone sentence as well as the imprisonment in default of payment of fine. Hence, it would be only academic question for him to argue this matter and, therefore also, he does not press the appeal.

5. On behalf of the State it was submitted that the trial Court came to the conclusion that the accused is guilty of the offences aforesaid and, therefore, the trial Court ought to have passed appropriate order of sentence. The trial Court has sentenced the accused to rigorous imprisonment for 5 years and a fine of Rs. 300/-, in default of payment of fine, rigorous imprisonment for six months, for an offence punishable u/s 376 of the Penal Code. Mr. Patel, learned Additional Public Prosecutor submitted that in a case like this, when the accused has been convicted under Sees. 363 and 366, the trial Court ought to have passed appropriate sentence. He further submitted that Section 376 provides for imprisonment for life or imprisonment for 10 years and fine and Section 363 provides for imprisonment for 7 years and fine. He submitted that in the instant case, by not sentencing the accused for the aforesaid two offences, the trial Court has committed serious error.

6. True, Section 376 provides that the trial Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years. In the instant case, though the sentence is for 5 years, adequate and special reasons are not mentioned in the judgment for awarding lesser sentence. In the absence of adequate and special reasons, there is no question of invoking proviso and, therefore, it is clear that the learned Judge has committed an error in awarding sentence and ought to have awarded sentence as per law.

7. The question is: Whether this Court should interfere now? There is an interval of about 9 years. The accused has already undergone the sentence. If this matter was heard soon after the conviction and sentence, this Court could have interfered but ordinarily in criminal matters, after long delay, it would not be proper to exercise this power. State, looking to the facts and circumstances of the case, should have moved the Court for early hearing of this matter. Having not done so, after a period of 9 years, we feel that it would be unjust to interfere in the matter. Therefore, we would not like to interfere on the question of sentence.

In the result, both the appeals are dismissed.