

(2015) 10 GUJ CK 0100
In the Gujarat High Court

Case No : Criminal Appeal Nos. 31 of 2010 and 2033 of 2009

State of Gujarat

APPELLANT

Vs

Kadvabhai Becharbhai Savaliya

RESPONDENT

Date of Decision : 09-10-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 313, 376, 506(2)

Citation : (2015) 10 GUJ CK 0100

Hon'ble Judges : K.S. Jhaveri, J;G.B. Shah, J

Bench : Division Bench

Advocate : L.R. Pujari, A.P.P., for the Appellant; M.M. Tirmizi, Advocates for the Respondent

Final Decision : Allowed

Judgement

K.S. Jhaveri, J—The present appeals assail the judgment and order dated 30/09/2009 passed by the learned Additional Sessions Judge, Rajkot in Sessions Case No. 155 of 2007, whereby the learned trial Judge was pleased to convict the original accused for the offence punishable under Section 376 and 506(2) of the Indian Penal Code, 1860 (for brevity, "the IPC") and for the offence punishable under Section 376 of the IPC, he was sentenced to undergo rigorous imprisonment for three years and a fine of Rs. 50,000/- and in default of payment of fine, to undergo, further simple imprisonment for one year and for the offence punishable under Section 506(2) of the IPC, he was sentenced to undergo rigorous imprisonment for two years and a fine of Rs. 10,000/- and in default of payment of fine, to undergo, further simple imprisonment for three months. All the sentences were to run concurrently.

2. The brief facts of the prosecution case are that when the complainant - victim was along at her home, the accused, taking advantage of her loneliness, forcibly raped her, against her will and thereafter, threatened her to kill his brother and thereby, made her to conceive and for the said alleged offence, a complaint came to be lodged against the accused for the offence punishable under Sections 376

and 506(2) of the Indian Penal Code (for brevity, "the IPC").

2.1 Pursuant to the complaint, investigation was carried out. After investigation, charge-sheet was filed and as the case was triable by the Court of Sessions, it was committed to the Sessions Court, Rajkot.

2.2 The trial Court framed charge against the accused. The accused pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution produced oral as well as documentary evidence.

2.3 In order to bring home the charge against the original accused, the prosecution has examined as many as 12 witnesses and also produced several documentary evidence.

2.4 At the end of the trial and after recording the Further Statement of the accused under Section 313 of Code and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge convicted the accused as aforesaid by impugned judgment and order.

2.5 Being aggrieved and dissatisfied with the aforesaid judgment and order passed by the Sessions Court, present appeals have been filed.

3. We have heard Mr. L.R. Pujari, learned Additional Public Prosecutor for the State and Mr. Parth Tolia and Mr. M.M. Tirmizi, the learned advocates representing the accused.

3.1 The learned advocates for the accused have mainly submitted that the prosecutrix was major while the offence alleged against the present accused had occurred. Moreover, it is submitted that it is a case of love affair between the victim and the accused and without admitting anything, it is contended, if the offence in question at all had occurred, it was with consent, inasmuch as the complaint has been filed almost after eight months, when the prosecutrix conceived and accordingly, this is a case where, the accused has wrongly been implicated in the offence and this creates serious doubt in the prosecution case. Moreover, in the submission of learned advocate Mr. Tirmizi for the accused, taking into consideration the facts and circumstances of the case, when consent is there, Section 376 of the IPC may not come into play and accordingly, the learned trial Court has committed an error in convicting the accused and hence, he urged that the appeal filed by the accused against conviction may be allowed and the appeal filed by the State may be dismissed.

3.2 Whereas, Mr. Pujari, learned Additional Public Prosecutor for the State contended that the prosecution has examined PW-1 - the victim and complainant at exh. 23 and she has narrated the whole incident that the accused was a friend of his father and was frequently coming to their house. Eventually, she has stated that the accused, taking advantage of loneliness of the victim at her home, raped her against her will and thereby, made her to conceive and thereby, committed the crime in question and also threatened to kill her brother. The learned Additional Public Prosecutor further took us to the evidence of PW-2, the

father of the victim - Vallabhbbhai Gordhanbbhai, who has been examined at exh. 27, who has also completely supported the case of the prosecution. He has stated in his deposition that the accused committed breach of his trust and has committed the crime in question. He identified the accused in the Court. Moreover, taking into consideration the evidence of PW-9 - Mansukhbhai Jethabhai Chhaniyara, Talati-cum-Mantri, who has deposed at exh. 53, the age of the victim is proved to be more than 18 years. Making above submissions, the learned Additional Public Prosecutor submitted that the prosecution has successfully proved the case against the accused beyond reasonable doubt and when the offence is proved beyond reasonable doubt, the learned trial Judge had no reason to award the lesser punishment of three years" rigorous imprisonment for the offence punishable under Section 376 of the IPC, more particularly, when, the minimum sentence provided for the said offence is not less than seven years and no cogent and plausible reasons have been assigned for awarding lesser punishment by the learned trial Judge. In the circumstances, he submitted that the appeal filed by the State for enhancement deserves to be allowed in the interest of justice.

4. We have examined the matter carefully and gone through the evidence on record. We have appreciated, re-appreciated and re-evaluated the evidence on the touchstone of the latest decisions of the Hon"ble Apex Court. We find that the trial Court while considering the evidence on record, has very elaborately discussed the evidence adduced before it and the prosecution has successfully proved the case against the accused beyond reasonable doubt. Further, the learned advocates for the accused are not in a position to show any evidence to take a contrary view in the matter or that the approach of the Court below is vitiated by some manifest illegality or that the decision is perverse or that the Court below has ignored the material evidence on record. In that view of the matter, we are of the considered opinion that the Court below was completely justified in passing impugned judgment and order.

4.1 We are, therefore, of the considered opinion that the findings recorded by the trial Court in convicting the accused of the charge levelled against him are absolutely just and proper and in recording the said findings, no illegality or infirmity has been committed by it. We are in complete agreement with the reasonings given and the findings arrived at by the trial Court. However, while awarding the sentence for the offence punishable under Section 376 of the IPC, the trial Court appears too lenient and the sentence appears to be inadequate and against the provision of law, more particularly, when no cogent reasons have been assigned for imposing the lesser punishment.

4.2 Moreover, recently, it has been held by the Hon"ble Apex Court in the decision in the case of Raj Bala Vs. State of Haryana and Others etc. etc. in Criminal Appeal Nos. 1049 to 1050 of 2015, decided on 18/08/2015, in para 1 and 2 as under:

"1. In Gopal Singh v. State of Uttarakhand, while focusing on the gravity of the

crime and the concept of proportionality as regards the punishment, the Court had observed:--

"Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect-propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasise, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment."

[Emphasis added]

2. Seven years prior to that, in *Shailesh Jasvantbhai v. State of Gujarat*, it has been held that:--

"7. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his *Law in Changing Society*

stated that: "State of criminal law continues to be--as it should be--a decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

8. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law, and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc. This position was illuminatingly stated by this Court in *Sevaka Perumal v. State of T.N.* 3"

[Emphasis supplied]

And again:--

"The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and the victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society"s cry for justice against the criminal".

4.3 Accordingly, we are of the considered opinion that the interest of justice would meet if the sentence for the offence punishable under Section 376 of the IPC is enhanced to the minimum i.e. seven years" imprisonment and accordingly, the appeal filed by the State for enhancement of sentence is allowed.

5. In view of the aforesaid discussion, Criminal Appeal No. 31 of 2010 filed by the State for enhancement of sentence, succeeds and the impugned judgment and order dated 30/09/2009 passed by the learned Additional Sessions Judge, Rajkot in Sessions Case No. 155 of 2007 is modified to the aforesaid extent and it is held that for the offence punishable under section 376 of the IPC, the accused shall have to undergo rigorous imprisonment for seven years, instead of three years, as has been awarded by the trial Court. Accordingly, if the accused is on bail, he is directed to surrender before the concerned jail authority within 10 weeks from today. The accused be given set off for the sentence he has already undergone. The rest of the judgment and order shall remain unaltered. Bail bond, if any, shall stand cancelled. The Criminal Appeal No. 2033 of 2009 filed by the accused against conviction, is accordingly, dismissed. Registry to return the R & P, if any, to the trial Court forthwith.