

(2009) 10 GUJ CK 0017
In the Gujarat High Court
Case No : Criminal Appeal No. 233 of 1995

State of Gujarat

APPELLANT

Vs

Raval Prahaldbhai Shakarabhai

RESPONDENT

Date of Decision : 06-10-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 377
Penal Code, 1860 (IPC) — Section 363, 375, 376, 376(1), 450

Citation : (2009) 10 GUJ CK 0017

Hon'ble Judges : Z.K. Saiyed, J;K.S. Jhaveri, J

Bench : Division Bench

Advocate : R.C. Kodekar, app, for the Appellant; Ekant G. Ahuja, for the Respondent

Judgement

K.S. Jhaveri, J.—This appeal, u/s 377 of the Code of Criminal Procedure, 1973, is directed against the judgment and order of conviction dated 18.01.1995 passed by the learned 2nd Assistant Sessions Judge, Mehsana, in Sessions Case No. 128 of 1994, whereby, the accused has been convicted for the offence under Sections 363 and 376 IPC.

For conviction u/s 363 IPC, the accused was sentenced to undergo sentence of RI for three years with fine of Rs. 100/- and in default of payment of fine RI for a period of one months and for conviction u/s 376 IPC, he was sentenced to undergo RI for a period of five years with fine of Rs. 100/- and in default of payment of fine RI for a further period of one month.

Both the sentences were ordered to run concurrently. The accused was also granted the benefit of set-off.

2. The brief facts of the prosecution case are as under:

2.1. On 08.04.1994, at about 1100 hours, the accused after abducting the minor daughter of the complainant, committed rape on her.

2.2. Therefore, a complaint with respect to the aforesaid incident was filed before Mansa Police Station vide I-C.R. No. 52 of 1994 for offences punishable u/s 363 and 376 IPC. On the said complaint necessary investigation was carried out by the Police officials. Panchnama of the scene of offence was done and muddamal articles were collected. Further investigation was carried out and statement of several witnesses were recorded. As cogent material was found against the accused, he was arrested. On completion of the investigation, charge-sheet was filed before the Court of learned JMFC, Mansa. However, as the case was exclusively triable by the Court of Sessions, the same was committed to the Sessions Court, Mehsana and it was numbered as Sessions Case No. 128 of 1994.

2.3. To prove the guilt of the accused, the prosecution had examined eight witnesses, viz. PW-1 Dr. Manubhai Solanki at Exhibit-6, PW-2 Dr. Dharmendrasinh Pratapsinh at Exhibit-9, PW-3 Gajaraben Punjiram at Exhibit-15, PW-4 Ashaben Punjiram at Exhibit-17, PW-5 Punjabhai Chanabhai at Exhibit-18, PW-6 Jethabhai Virabhai at Exhibit-19, PW-7 Dhulaji Keshaji at Exhibit-22 and PW-8 Bavanji Rabari at Exhibit-24.

2.4. The prosecution had also placed upon several documentary evidence, more particularly, the medical certificate of the victim at Exhibit-7, the certificate regarding the age of the victim girl at Exhibit-14, the complaint at Exhibit-16, the panchnama of the scene of offence at Exhibit-20, FSL report at Exhibit-28 and the Serological report at Exhibit-29.

2.5. On submission of the closing purshis, the further statement of the accused u/s 313 Cr.P.C. was recorded. At the end of trial, the Court below passed the impugned judgment and order convicting the accused u/s 376 and 506(1) IPC and imposed punishment as narrated in the earlier part of this judgment. Being aggrieved by same, the State had preferred this appeal for enhancement of the sentence.

3. The learned APP for the State has submitted that looking to the gravity of the offence, the punishment imposed by the Court below is on the lower side. He has submitted that since the offence in question is a heinous one and that to against a minor, the Court below ought to have imposed a much stringent punishment. Hence, a much higher sentence of imprisonment deserves to be imposed on the original accused.

4. To prove the guilt of the accused, the prosecution had examined the prosecutrix as PW-4 at Exhibit-17. In her examination-in-chief, she has deposed each and everything in detail, during which the accused had indulged into physical relationship with her. She has been cross-examined at length by the other side. From her cross-examination, it is established that the accused had indulged into physical relationship with her without her consent and against her will. We have carefully examined the evidence of the prosecutrix and find no reason to disbelieve the same.

5. Heard learned Counsel for the parties and perused the documents on record.

At the time when the alleged incident took place the prosecutrix was around ten years of age. It is true that the prosecution has not produced any documentary evidence on record in support of the age of the prosecutrix. However, the prosecution has relied upon the report of the Serologist at Exhibit-14, which states that at the relevant time, the prosecutrix was around nine to ten years age. The said fact is supported by the oral evidence of the mother of the prosecutrix who have been examined as PW-3 at Exhibit-15.

5.1. The prosecutrix has been examined as PW-4 at Exhibit-17. In her deposition she has narrated the entire incident in detail. She has also stated her age to be below ten years. The prosecutrix has been cross-examined at length by the other side. However, nothing incriminating has come out. At this stage it would be relevant to refer to the decision of the Apex Court rendered in the case of *Moti Lal Vs. State of M.P.*, wherein, on the sole testimony of the prosecutrix, the conviction u/s 450 & 376(1) IPC, imposed on the accused was confirmed.

5.2. The prosecution also gets support from the evidence of the medical officer, who had been examined the prosecutrix which she was brought to the hospital for medical examination. The prosecutrix had narrated the history of the incident before this witness. He has categorically deposed to the injuries sustained by the prosecutrix over different parts on her body. He has issued the medical certificates which have been produced on record vide Exhibits-7 & 8.

5.3. The FSL report at Exhibit-28 also fully supports the prosecution case. Thus, looking to the entire oral as well as documentary evidence on record, it is established beyond doubt that the appellant has committed offence of rape on the prosecutrix. We are in complete agreement with the reasonings given by and findings arrived at by the Court below while convicting the appellant for the offences punishable u/s 363 and 376 IPC.

5.4. After appreciating the evidence on record, the Court below found the accused guilty of the offence punishable u/s 376 IPC since the prosecutrix was, evidently below sixteen years of age at the relevant point of time and the medical evidence showed that forceful sexual intercourse had been done. In view of the definition of "rape" as defined in Section 375 IPC, the aspect of consent also becomes immaterial. Thus, when the victim is found to be below the age of sixteen, then as per the statutory provisions, the minimum punishment for offence u/s 376 IPC is seven years and therefore, the Court below ought to have imposed the statutory minimum punishment of seven years. Therefore, the Court below has committed serious error in law in imposing imprisonment of five years only. Hence, the same is required to be enhanced.

6. In the result, the appeal is partly allowed. The impugned judgment and order passed by the Court below is modified to the extent that the conviction u/s 363 & 376 IPC confirmed. However, so far as the sentence imposed for conviction u/s 376 IPC is concerned, the same is modified to the extent that the accused will undergo sentenced to undergo sentence of seven years instead of five years. The

rest of the judgment and order remains unaltered. The accused is on bail and therefore, his bail bonds stand cancelled. At this stage Mr. Ahuja, request that some reasonable time may be granted to the accused to surrender to the custody. Looking to the facts and circumstances of the case, he is directed to surrender to the custody within a period of eight weeks from today, failing which the investigating agency will take necessary action against him in accordance with law. The Registry to sent back R & P, if lying with this Court, to the Court below forthwith.