

(2009) 07 GUJ CK 0023

In the Gujarat High Court

Case No : Criminal Appeal No's. 1364 of 1993 and 611 of 1994

State of Gujarat

APPELLANT

Vs

Shipai Majid Manubhai @ Majalo

RESPONDENT

Date of Decision : 14-07-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 354, 363, 376, 376(2)

Citation : (2009) 07 GUJ CK 0023

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

Bench : Division Bench

Advocate : R.C. Kodekar, app, for the Appellant; K.G. Sheth, for the Respondent

Final Decision : Allowed

Judgement

K.S. Jhaveri, J.—Criminal Appeal No. 1364 of 1993 has been preferred by the appellant - State of Gujarat against the Judgment and order passed by the learned Additional Sessions Judge, Bhavnagar in Sessions Case No. 47 of 1992 on 30.9.1992, acquitting the appellant - accused of the offence u/s 376 I.P. Code. Criminal Appeal No. 611 of 1994 has been preferred by the appellant - original accused being aggrieved by and dissatisfied with the Judgment and order passed by the learned Additional Sessions Judge, Bhavnagar in same Sessions Case whereby the the learned Judge has held the appellant - accused guilty for the offence punishable under Sections 363 and 354 I.P. Code.

2. The short facts of the prosecution case are that on the date of incident i.e. On 19.10.1991 at about 2.00 P.M., victim girl Sonal, aged about Seven years was kidnapped by the accused without the consent of her guardian and she was raped by the accused and thereafter the accused gave Rs. 5/- to the victim and went away. The victim narrated the said incident to her mother and her mother thereafter told the same to the wife of elder brother of her husband. The complainant along with wife of elder brother of her husband Ambaben and victim Sonal went to the Talaja Police Station and filed complaint before P.S.I., on 19.10.1991 at 16.15 hours, which was registered as CR No. I - 92/91. The

offence punishable under Sections 363, 354 & 376 was registered against the accused. The police has carried out the investigation. The victim was sent for medical examination, drew the panchnama in presence of panchas, clothes of the victim were sent to FSL for analysis and after completion of investigation the charge-sheet was submitted before the learned J.M.F.C., Talaja. As the offences were absolutely triable by a Court of Sessions, the learned J.M.F.C., Talaja has committed the said case to the Court of Sessions.

2.1 Thereafter, the charge was framed against the accused. The accused pleaded not guilty to the charge and claimed to be tried.

2.2 The prosecution has examined following witnesses to prove the case against the accused:

- (1) Natvarbhai Khimabhai Rathod, Exh. 15;
- (2) Samjuben Laxmanbhai - complainant, Exh. 16;
- (3) Victim Sonalben Nagjibhai, Exh.18;
- (4) Ambaben Bhikhabhai, Ex. 19;
- (5) Popatbhai Panchabhai, Exh. 20;
- (6) Kantibhai Bhavanbhai, Exh. 23;
- (7) I.O. Divyakant Chimanlal Nanavati, Ex. 26;
- (8) Dr. Kurangiben Balkrishnabhai Dhruv, Ex.28

2.3 The prosecution has also produced following documents:

- (1) Complaint, Ex. 17;
- (2) Medical Certificate of victim, Exh. 29;
- (3) Panchnama of scene of offence Ex. 24;
- (4) Panchnama of clothes of the victim, Ex. 21;
- (5) Arrest panchnama of accused, Exh. 22;
- (6) Yadi written to the Medical Officer,
- (7) F.S.L. Report Exh. 30;
- (8) F.S.L. Report Exh. 31;
- (9) Serological Report Ex. 32

3. After appreciating the documentary as well as oral evidence the learned Additional Sessions Judge, Bhavnagar, has, vide Judgment and order dated 30.9.1993, held the accused guilty for the offence punishable u/s 363 I.P. Code and awarded sentence to undergo rigorous imprisonment for five years and to pay fine of Rs. 500/- i/d to undergo RI for one month. The learned Judge also

held the accused guilty for the offence punishable u/s 354 I.P. Code and awarded sentence to undergo rigorous imprisonment for two years. The learned Judge ordered both the sentences to run concurrently and the fine, if paid, may be given to the victim as compensation. However, the learned Judge has acquitted the accused from the offence punishable u/s 376 I.P. Code.

4. Against the said Judgment and order dated 30.09.1993 passed by the learned Additional Sessions Judge, Bhavnagar, in Sessions Case No. 47 of 1992, the appellant - State of Gujarat has preferred Criminal Appeal No. 1364 of 1994 challenging the acquittal of accused from the offence punishable u/s 376 I.P. Code and the original accused has preferred Criminal Appeal No. 611 of 1994 challenging conviction of the accused for the offence punishable under Sections 363 and 354 I.P. Code.

5. We have heard learned A.P.P. Mr. Kodekar on behalf of State Government and learned Advocate Mr. K.G. Sheth on behalf of the original accused at length. We have also gone through the papers and the Judgment and order passed by the trial Court. Since both appeals arise out of one Judgment and based on same evidence, both the Appeals are being heard and disposed of by this common Judgment.

6. Learned Counsel Mr. Kodekar for the State has taken us through the evidence of victim P.W.3 - Sonalben (Exh.18) and the evidence of P.W. 8 - Dr. Kurangiben Balkrushnabhai Dhru (Exh. 28) and also the medical certificate (Exh.29) as well as other evidence, like scene of incident, and submitted that the view taken by the trial Court is contrary to the evidence on record which is required to be re-appreciated and the order of acquittal of accused from the offence u/s 376 I.P. Code is required to be quashed and set aside and the accused is also required to be convicted for the offence punishable u/s 376 I.P. Code in view of the fact that the victim, on the date of incident, admittedly even as per the Medical Officer, was less than 12 years.

6.1 Learned APP has also pointed out that from the clothes of the victim semens was found which clearly established that the offence was completed and inspite of this fact the learned Judge has acquitted the accused from the offence punishable u/s 376 I.P. Code.

6.2 Learned APP, therefore, contended that looking to the evidence on record it established that the prosecution has proved that the accused has committed serious and heinous offence of a rape on the victim who was aged about seven years and, therefore, the accused is required to be held guilty also for the offence punishable u/s 376 I.P. Code.

7. Learned Counsel Mr. Sheth for the original accused has submitted that the accused has already undergone the sentence, awarded by the trial Court, of more than 5 years since he was not granted bail because of the Appeal filed by the State Government.

7.1 Mr. Sheth has contended that the victim has voluntarily gone with the accused and, therefore, no offence u/s 376 I.P. Code is made out against the accused and the order of acquittal u/s 376 I.P. Code passed by the trial Court is required to be up-held.

8. We have heard the learned Counsel for the parties. We have also gone through the evidence of victim. On a plain reading of the version of the victim it is established that the victim has clearly stated that the accused has taken her near to the water tank and committed rape on her. The say of the victim was supported by the evidence of Medical Officer. Dr. Kurangiben Balkrushnabhai Dhru, P.W. 8, Exh. 28, has clearly opined that the private part of the victim was injured and she has clearly opined that the age of the girl is less than 11 years and the injury which has been caused on the private part of the victim by a male aged more than 15 years. As per the report of F.S.L. on the clothes of victim semen was found. Looking to the medical evidence it is clearly established that the victim was below the age of 12 years on the date of incident and, therefore, we are of the opinion that the prosecution has successfully proved the case against the accused.

8.1 Thus, the Sessions Court has come to a definite conclusion that the appellant is guilty of the offence. It is in umpteen number of cases the Apex Court has clearly expressed that no lenient view is required to be taken in such cases. Rape is a heinous crime against woman. In the present case the victim was minor aged only about 12 years on the date of incident. She could not even resist the heinous crime and, therefore, also no lenient view should have been taken by the Sessions Court. As per Section 376(2) of I.P. Code, the minimum sentence of 10 years is prescribed.

9. In view of above, Criminal Appeal No. 1364 of 1993, filed by the appellant - State of Gujarat, is allowed. The accused is convicted for the offence u/s 376 I.P. Code and is sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs. 1000/- i/d to undergo RI for 2 months.

9.1 It is stated at the Bar that the accused is already in jail and, therefore, no notice or warrant for his arrest is required to be issued to surrender himself before the Court.

9.2 It is made clear that both the sentence i.e. u/s 376 I.P. Code awarded by this Court and under Sections 363 & 354 I.P. Code awarded by the Sessions Court shall run concurrently.

9.3 If the accused has already undergone the sentence awarded by the Sessions Court and released from the jail, then time to surrender himself before the competent Court within six weeks from today is granted, failing which Non Bailable Warrant shall be issued against him by the concerned Sessions Court.

10. Criminal Appeal No. 611 of 1994 filed by the appellant - accused is dismissed. Bail Bonds, if any, shall stand cancelled.

Record & proceedings be sent to the trial Court.