
(2005) 10 GUJ CK 0002
In the Gujarat High Court
Case No : Criminal Appeal No. 401 of 2001

Thaker Rajeshkumar @ Khanna Vasudev	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 13-10-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374(2)
Penal Code, 1860 (IPC) — Section 354, 376, 511

Citation : (2006) CriLJ 1973

Hon'ble Judges : Bankim N. Mehta, J

Bench : Single Bench

Advocate : N.N. Prajapati and Chetnaben Joshi, for the Appellant; I.M. Pandya, Assistant Public Prosecutor, for the Respondent

Judgement

Bankim N. Mehta, J.—This is an appeal filed u/s 374(2) of Code of Criminal Procedure, 1973 challenging the judgment and order passed by the learned Sessions Judge, Mehsana on 21-4-2001 in Sessions Case No. 243 of 2000 convicting the appellant-accused for the offence punishable u/s 376 of the Indian Penal Code and directing him to undergo rigorous imprisonment of seven years and pay fine of Rs. 1,000/- in default thereof to undergo rigorous imprisonment of one month.

2. The name of the victim of rape is not indicated in this judgment in view of decision of Hon"ble Supreme Court in Bhupinder Sharma Vs. State of Himachal Pradesh,

3. In brief, the prosecution case was that on 30th July, 2000, Ms. Vasantiben wife of Gaurishanker Ishwarlal residing at Village Sunshi lodged a complaint stating inter alia that her daughter i.e. the victim aged about 12 years was studying in Std. 7th and the appellant came to her house on bicycle at about 2-30 p.m. and asked her daughter to come with him to learn bicycle riding that the appellant took the victim on his bicycle to the fields - in the "sim" of Village Sunshi on Visnagar Road, that as the victim did not return till late, she started to search

her; that when she was on the road to Visnagar, she saw that Thakor Bhupatji Sardarji and his wife were coming towards the village with the victim who was crying and was scared; that she told that the appellant-accused took her to a lonely place near Sunshi lake on the pretext of teaching bicycle and committed rape; and that when she tried to shout, the appellant tried to shut her mouth with cloth.

4. On the basis of complaint, the investigation was started and appellant was arrested. At the end of investigation, charge-sheet was filed for the offence punishable u/s 376 of I.P. Code before the learned Judicial Magistrate, First Class at Visnagar and the case was committed to the Court of learned Sessions Judge, who framed charge for offence punishable u/s 376 of I.P. Code. The appellant pleaded not guilty to charge which was explained to him and demanded trial. Therefore, the prosecution adduced evidence and examined eight witnesses including the victim as well as documentary evidence. On conclusion of the prosecution case, incriminating circumstances were explained to the appellant and the further statement u/s 313 of Code of Criminal Procedure was recorded. After hearing the oral submissions, the learned Sessions Judge came to the conclusion that the prosecution has proved beyond reasonable doubt the offence u/s 376 against the appellant accused and imposed the sentence as aforesaid which is under challenge.

5. Learned Advocate Mr. Prajapati for the appellant-accused has submitted that the prosecution has not proved the charge beyond reasonable doubt, and at the most, the appellant convict can be convicted for the offence punishable u/s 354 of Indian Penal Code. It is argued that there is no evidence to establish that the appellant committed rape on the victim more particularly when there is no medical evidence in that regard, and therefore, the conviction is bad in law.

6. Learned Additional Public Prosecutor Mr. Pandya has supported the judgment and has contended that the evidence clearly indicates that the appellant used force and committed rape, and therefore, no interference is required with the impugned judgment and order of conviction.

7. I have re-appreciated the whole evidence on record in the light of broad and reasonable probabilities of the case.

8. It is clear from the evidence recorded before the trial Court that the victim examined as P.W. 2 at Exh. 11 has been partly declared hostile. It appears from her evidence that before recording her evidence, the learned Judge by putting certain questions to her, ascertained that she was capable of understanding the sanctity of oath. It appears from her evidence that she has supported the prosecution case so far the appellant took her at a lonely place. However, she has not supported the prosecution case with regard to rape on her. She has been declared hostile in that regard and was cross-examined by the learned Additional Public Prosecutor. In the cross-examination by learned Additional Public Prosecutor, she has admitted that the appellant-accused took her "pyjama" off

and he tried to penetrate his private organ into her organ. In the cross-examination, the defence has not challenged this part of the evidence at all. Therefore, the testimony of the victim established that the appellant had made an attempt to commit rape on her. In light of this evidence, the medical evidence is required to be re-appreciated.

9. The prosecution has examined P.W. 6-Dr. Bhavesh Exh. 24 who had treated the victim after the alleged incident. It appears from his evidence that after examining the victim, he had referred her to Dr. Paruben Patel who examined her and sent the report to him on the basis of which the certificate Exh. 26 was prepared. The witness has given details of the injuries found on the person of the victim. The witness has deposed that there was no visible injury on vagina and examination of vaginal swab did not indicate presence of semen. According to the Doctor, small and reddish abrasion were found at the mouth of vagina and hymen was ruptured and insertion of one finger was possible. The witness has further deposed that looking to the condition of the patient and papers, he was not in a position to give a definite opinion that rape was committed. The witness, has in the cross-examination, denied that the injuries found in Exh. 26 certificate could be caused by fall from bicycle. The witness has deposed that spermatozoa was not found in the urethral swab or vaginal swab.

10. The prosecution has examined P.W. 7-Dr. Paruben at Exh. 27. She has deposed that blood-stained marks or seminal marks were not found on the genital of the victim, but there was incised wound at the mouth of genital. She has opined that considering the external organs of the victim, it could not be said that force was used in order to have intercourse. She has also admitted that when she examined the victim, there was no bleeding except from the nose.

11. The prosecution has produced the medical certificate of the victim at Exh. 26 wherein the history of the injuries given by her is recorded. It is apparent from the history that the appellant took the victim to a lonely place near lake and inflicted two slaps. The certificate also indicates that there was no external injury mark on pubic region and there was no bleeding from genital.

12. The prosecution has also produced the panchnama of clothes of the victim at Exh. 14 and the panchnama of clothes of the appellant at Exh. 21. The clothes were sent to F.S.L. for examination. The F.S.L. Report Exh. 34 indicates that no blood-stained marks or presence of semen were found on the clothes. In view of this, it is clear that the offence of rape was not committed.

13. The injury certificate of the victim at Exh. 26 indicates that several injuries were found on her person. However, in view of the medical evidence of Dr. Bhavesh, I am of the view that the prosecution has failed to establish beyond reasonable doubt that the appellant-accused had committed offence u/s 376 of Indian Penal Code.

14. It appears from the complaint Exh. 31 that the victim went with the appellant who took her on bicycle and she was taken at a lonely place in the field. The

evidence of P.W. 2 i.e. the victim Exh. 11 also indicates that the appellant took her to a lonely place on a bicycle and tried to use force and as she shouted, the appellant gave slaps, and thereafter, threw her in the bushes. The injury certificate shows the injuries on the person of the victim. However, in view of the fact that there is no cogent and reliable evidence to indicate that the appellant had intercourse with the victim, in my view, the appellant cannot be convicted for the offence punishable u/s 376 of Indian Penal Code. However, considering the totality of the evidence, there is no doubt that the appellant used criminal force with an intention to outrage the modesty of the victim and committed rape on her. Therefore, the conviction u/s 376 is required to be converted into offence punishable u/s 376 read with Section 511 of Indian Penal Code.

15. For the reasons recorded in the judgment, this appeal is partly allowed. The judgment and order of conviction dated 21-4-2001 passed by the learned Sessions Judge, Mehsana in Sessions Case No. 243 of 2000 is modified and the appellant-Thaker Rajeshkumar @ Khanna Vasudev is convicted for the offence punishable u/s 376 read with Section 511 of Indian Penal Code and is directed to undergo rigorous imprisonment of five years and to pay a fine of Rs. 1,000/- (Rupees One Thousand Only) and in default thereof to undergo rigorous imprisonment of three months. As the appellant is in Jail from the date of the order of conviction passed by the learned trial Judge, the appellant would be entitled to set off for the period of imprisonment undergone by him. The appellant-accused has already undergone the sentence of imprisonment modified by this Court as the appeal is heard after considerable long time, and therefore, he shall be set free if not required in any other offence. Direct Service is permitted.