
(2016) 05 GUJ CK 0030

In the Gujarat High Court

Case No : Criminal Appeal (Against Conviction) No. 601 of 2015

Thakor Bharatji Jivanji Sataji

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 06-05-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 363, 366, 376

Citation : (2016) 162 AIC 718

Hon'ble Judges : Rajesh H. Shukla, J.

Bench : Single Bench

Advocate : Rekha H. Kapadia, Advocate, for the Appellant; Hansa Punani, A.P.P, for the Respondent

Final Decision : Partly Allowed

Judgement

Rajesh H. Shukla, J. (Oral) - The present appeal is filed by the appellant-original accused under Section 374 of the Code of Criminal Procedure, 1973 challenging the impugned judgment and order rendered in Sessions Case No.85/2013 by the Adhoc Additional Sessions Judge, Patan dated 18.12.2014 recording conviction and sentence for the offence under Sections 363, 366 and 376 of the Indian Penal Code as stated in detail in the impugned judgment.

2. The fact of the case briefly summarised are as follows:-

2.1 On 14.12.2012, the minor daughter of the complainant is said to have been enticed away by the appellant-accused, for which, complaint came to be filed being C.R.No.I- 15/2013 with Patan City "B" Division Police Station for the offences under Sections 363, 366, 506(2) and 114 of the Indian Penal Code. However subsequently, report was made for the offence under Section 376 of the Indian Penal Code and the charge for the offence under Section 376 of the Indian Penal Code was added.

2.2 On the basis of the complaint, the investigation was made and charge-sheet came to be filed. However as the offences were triable by the Court of Sessions,

it was committed to the Court of Sessions.

2.3 Thereafter, the Court below proceeded with the trial and recorded the evidence of the prosecution witnesses.

2.4 After recording of the evidence of the prosecution witnesses was over, the Court below recorded further statement of the appellant-accused under Section 313 of the Code of Criminal Procedure, 1973.

2.5 After hearing learned APP as well as learned advocate for the defence, the Court below recorded conviction of the appellant-original accused no.1 for the offence under Sections 363, 366 and 376 of the Indian Penal imposing sentence as stated in the impugned judgment.

3. It is this judgment and order which has been assailed in the present appeal on the grounds stated in the memo of appeal inter alia that the Court below has failed to appreciate that it was consensual act and the daughter of the complainant had eloped voluntarily and had accompanied the accused and stayed with him for about 40 days. It was submitted that the Court below has also failed to appreciate the evidence with regard to the age of the victim and has recorded conviction of the appellant-accused erroneously.

4. Heard learned advocate, Ms. Rekha H. Kapadia for the appellant-accused and learned APP Ms. Hansa Punani for the respondent-State.

5. Learned advocate, Ms. Kapadia referred to the background of the facts as well as the testimony of the complainant, mother, PW-3 at Exh.12 and submitted that as stated in her testimony, the victim had gone out for the domestic work and then, she had not returned and though it is stated that the victim is aged about 15 years, in the cross-examination, it has been admitted that the victim was married to one Govindji before one year of the incident. She has stated that she does not know about the date of birth nor it has been registered anywhere. Learned advocate, Ms. Kapadia, therefore, submitted that the Court below would not have proceeded on the assumption that the victim was minor. Learned advocate, Ms. Kapadia also referred to the testimony of the victim, PW-4 at Exh.14 and submitted that it has been admitted that she had gone with the accused and had moved from place to place though she has stated that she had cried and requested to go to her mother. She submitted that it is an admitted fact that she had gone with the accused and has not raised any alarm though she had sufficient opportunity. She pointedly referred to the fact that in a rickshaw, they had gone to bus station then, they had moved and in fact for about 1? month, they stayed together. Therefore, learned advocate, Ms. Kapadia submitted that the testimony of the victim requires closer scrutiny regarding her conduct that she has not raised any alarm even though she had sufficient opportunity. Further she has not resisted nor has made any effort to escape when they stayed together for about 1 ? month. Further the accused would go out for the work then she would be alone, where she could escape. Learned advocate, Ms. Kapadia submitted that in the cross-examination, she has also

referred to omissions and admission suggesting the love affair, where in the statement, she has admitted that as she did not like her husband with whom she was married, she was not staying at the matrimonial house. She also submitted that she had eloped with the accused and had accompanied voluntarily. Learned advocate, Ms. Kapadia referred to the complaint of the complainant at Exh.13 and submitted that even the complainant, mother has stated her age to be 16 years. Further learned advocate, Ms. Kapadia also referred to the medical certificate at Exh.36, where while recording history given by the victim, it is revealed and stated that she had voluntarily gone with the accused and they had stayed in a rented premises. Even in the case papers also, while recording history, same thing has been stated. Thus it would suggest about her consent and the voluntariness. She again referred to Exh.40, medico legal certificate, which is on the same line that she had gone with the accused and she had taken room on rent and stayed together for 1? month. She submitted that there are no marks of injury suggesting that she had never resisted or offered any resistance, which is corroborating the say of the defence about the affair and her accompanying the accused voluntarily. Learned advocate, Ms. Kapadia referred to the certificate regarding the medical examination of the accused at Exh.46 which records the history given by the accused. It is recorded as stated by the accused that the victim had called him and, thereafter, they had eloped. Learned advocate, Ms. Kapadia further submitted that the date of birth of the victim, as per the birth certificate at Exh.29, is 08.12.1997 and the school leaving certificate at Exh.32 also refers to the same date of birth as 08.12.1997. Learned advocate, Ms. Kapadia, therefore, submitted that even though it is accepted that the victim was minor below the age of 16 years, she had attained the age of discretion and, therefore, in view of this evidence, the conviction could not have been recorded.

6. Alternatively, learned advocate, Ms. Kapadia submitted that while maintaining conviction as it is, the sentence may be reduced and modified as the accused is also a young boy aged about 19 years and though on the basis of the age of the victim, the conviction may have been recorded, fact remains that it was an affair where the accused was called by the victim. Further she has emphasised that the father of the accused has died and he has to support his family and if he has made to remain in jail, it would ruin his life and, therefore, the sentence may be reduced or modified.

7. Learned APP Ms. Punani has referred to the testimony of the complainant, mother, PW-3 at Exh.12 and submitted that she has stated that the minor daughter of the complainant was enticed away. She has also referred to the testimony of the victim, PW-4 at Exh.14 and submitted that the testimony of the victim may require a closer scrutiny but the fact remains that the victim was minor as it could be seen from the birth certificate at Exh.29 and school leaving certificate at Exh.32. Learned APP Ms. Punani, therefore, submitted that assuming without admitting that when the victim is minor below the age of 16 years, the conviction recorded is just and proper. She further submitted that for

the purpose of offence under Sections 363 and 366 of the Indian Penal Code, the age for the girl child is 18 years of age and, therefore, what is required to be considered is the consent of the guardian and not of the victim. She, therefore, emphasised referring to the judgment of the Hon''ble Apex Court in a judgment in case of State of Haryana v. Raja Ram, reported in (1973) 1 SCC 544 and submitted that the conviction recorded is just and proper. It was submitted that the aspect about the consent and voluntariness may not have any relevance in light of the evidence regarding the age of the victim. She, therefore, submitted that while maintaining conviction, appropriate order for the sentence may be passed.

8. In view of these rival submissions, it is required to be considered whether the present appeal deserves consideration and whether the impugned judgment and order could be sustained.

9. As it evident from the background of the facts referring to the testimony of the complainant, mother, PW-3 and victim, PW-4, Exh.14, the victim has shown omissions and it has been also suggesting the fact that she had accompanied the accused. Further the submission regarding her accompanying the accused voluntarily without raising any alarm or moving with the accused, may not have much relevance for the purpose of considering the offence in light of the evidence regarding the age of the victim.

10. It is well settled that when the victim is minor for the offence of rape, consent is not relevant. Similarly for the offence under Sections 363 and 366 of the Indian Penal Code, the age of the girl child is 18 years. Therefore, the offence under Sections 363 and 366 of the Indian Penal Code requires the consent of the guardian and not of the victim. The offence itself provides that as the minor may not have that much maturity to understand about the consequences, consent is not relevant and minor may not be competent to give any consent. The Hon''ble Apex court in a judgment in case Raja Ram (supra) has referred to this aspect of enticing away with much deliberation. Therefore the moot question is whether the victim was minor, particularly, when the contentions are sought to be raised that the victim was married to one Jayantibhai, however, it is also not in dispute in light of the birth certificate at Exh.29 and school leaving certificate at Exh.32 that the date of birth is 08.12.1997, which would mean that she was below the age of 16 years. Therefore, the conviction which has been recorded for the offence under Section under Sections 363 and 366 of the Indian Penal Code cannot be said to be erroneous in light of the undisputed and clinching evidence with regard to the age of the victim.

11. Another facet of submission which have been made by learned advocate, Ms. Kapadia that while maintaining conviction, the sentence may be modified or reduced couple with much emphasised on the aspect of the affair, is required consideration. She has specifically stated that the victim had called the accused couple with the fact that she had accompanied and moved from place to place.

Therefore on overall appreciation of material and evidence, learned advocate, Ms. Kapadia has strenuously submitted that as the accused is also young boy aged about 19 years and has to maintain and support the family and is economically also poor, it may be considered as a special and adequate reasons for reducing the sentence to less than minimum sentence provided under Section 375 of the Indian Penal Code. The provision of Section 375 of the Indian Penal Code prescribes the sentence providing for not less than seven years punishment for such heinous offence. Therefore considering the nature of offence, the Legislature has provided for minimum sentence that it should not be less than seven years. However at the same time, proviso to Section 376(1) of the Indian Penal Code provides that the Court may for adequate and special reason impose sentence for a term less than seven years. Thus in such situation or certain facts, which demand the indulgence of the Court for the reasons to be recorded to justify such reduction in the sentence, the provision has been made. Therefore this Court is of the opinion that this is a fit case to exercise such discretion on appreciation of evidence, which has been discussed herein above, and the background of the facts as stated above. Therefore without any further elaboration while maintaining conviction, the sentence is required to be modified as suggested as the appellant is also young boy and considering the background couple with the facts and circumstances as discussed herein above while appreciating and scanning the evidence, it would justify modification and reduction of the sentence.

12. Again for the purpose of adequate sentence, the Courts have evolved the doctrine of proportionality in sentence which may have a consideration of the relevant factors depending upon the nature of offence. It is well accepted that there are different approach or different theories for the punishment like deterrent, retributive and reformative or rehabilitation. A useful reference can be made to the judgment of the Hon'ble Apex Court in case of Narinder Singh v. State of Punjab, reported in (2014) 6 SCC 466. Therefore while considering the aspect of sentence, the Court is required to examine the judicial discretion. The Hon'ble Apex Court in a judgment in case of Aero Traders (P) Ltd. v. Ravinder Kumar Suri, reported in (2004) 8 SCC 307 has referred to this aspect. It has been observed:

"6.According to Black's Law Dictionary "judicial discretion" means the exercise of judgment by a Judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right. The word "discretion" connotes necessarily an act of a judicial character, and, as used with reference to discretion exercised judicially, it implies the absence of a hard-and-fast rule, and it requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair and just determination,....."

13. Thus the discretion is required to be exercised judiciously and when the

provision has been made for minimum sentence, normally the Court would be slow in reducing the sentence. However at the same time, as stated above, the Legislature itself has provided in proviso to Section 376(1) of the Indian Penal Code that sentence may be modified less than minimum sentence prescribed for the adequate reasons. Therefore, the Courts have evolved the doctrine of proportionality in sentence and broad guidelines have been laid down by the Court with regard to the approach and after considering relevant factors, the Courts have to balance the mitigating circumstances and the crime and its effect on the society. Therefore the moot question would be the consideration of the adequate and special reasons like age of the accused, nature of offence, other relevant factors regarding social bearing on such sentence and overall circumstances, which could be considered. It would, therefore, justify the reason and corrective approach in a given case while considering special and adequate circumstances as stated above.

14. Therefore, the present appeal stands allowed partly. The impugned judgment and order recording conviction for the offence under Sections 363, 366 and 376 of the Indian Penal Code is maintained. However while maintaining conviction, the sentence is ordered to be modified and reduced and substituted as follows:-

14.1 Therefore, the appellant-accused is sentenced to undergo RI for three years and fine of Rs.1,000/-, in default, to undergo SI for one month for the offence under Section 363 of the Indian Penal Code.

14.2 The appellant-accused is sentenced to undergo RI for five years and fine of Rs.1,000/-, in default, to undergo RI for one month for the offence under Section 366 of the Indian Penal Code.

14.3 The appellant-accused is sentenced to undergo RI for five years and fine of Rs.1,000/-, in default, to undergo RI for one month for the offence under Section 376 of the Indian Penal Code.

14.4 All the sentences shall run concurrently.