

(2016) 02 GUJ CK 0048
In the Gujarat High Court
Case No : Criminal Appeal No. 953 of 2010

Thakor Pradhanji Dhiraji

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 05-02-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Penal Code, 1860 (IPC) — Section 323, Section 376, Section 506, Section 506(2)

Citation : (2016) 02 GUJ CK 0048

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

Bench : Single Bench

Advocate : Dharmesh D. Nanavaty, Advocate, for the Appellant;

Final Decision : Dismissed

Judgement

Rajesh H. Shukla, J.—1. The present Appeal is directed against the judgment impugned judgment and order rendered in Sessions Case No. 76 of 2009 by the learned Sessions Judge, Paten dated 27.4.2010 recording conviction of the Appellant/Accused for the offence under Sections 376, 323, 506(2) of the Indian Penal Code and imposing the sentence as stated in detail in the impugned judgment and order.

The facts of the case briefly summarized are as follows.

2. As it transpires from the material and evidence on record, on 25.10.2009, the complainant victim was passing through the field for going to the village for some article, at that time, the Appellant Accused was hiding near the field, dragged the complainant victim and committed the offence of rape and also threatened that if she inform to somebody, her husband would be murdered. Therefore on the next day, the complaint came to be lodged by the complainant being FIR No. 104/2009 with the Harij Police Station for the offence under Sections 376, 323, 506 of the IPC wherein she has narrated about the other fact that the accused was eying on her since about six months. The accused would

look at her and make a comment whenever she was passing and in fact made an attempt of rape when she was alone in the house in the village.

3. After the investigation was over, the charge sheet was filed. However, as the offence was triable by the Court of Sessions, it was committed to the Court of Sessions.

4. The learned Sessions Judge, Patan proceeded with the trial and recorded further statement of the Appellant Accused under Section 313 of Cr.P.C. after recording of the evidence of the prosecution was over.

5. After hearing the learned APP as well as learned Advocate for the defence, learned Sessions Judge recorded the conviction as stated in detail herein above.

6. It is this judgment and order which has been assailed in the present Appeal by the Appellant/Original Accused on the ground stated in the memo of Appeal.

7. Heard learned Advocate Shri Dharmesh D. Nanavaty for the Appellant Accused and learned APP Shri H.L. Jani for the Respondent - State of Gujarat.

8. Learned Advocate Shri Dharmesh D. Nanavaty referred to the material and evidence including the testimony of the victim PW-9 at Exh. 30 and submitted that she has stated about the act. However, she has referred to the earlier incident. In fact there is no such complaint. Learned Advocate Shri Nanavaty also tried to submit that the manner in which the incident is said to have occurred is not believable as she would have offered the resistance and there would be the marks of injuries. He therefore submitted that it is a case of consent. He further submitted that there is no explanation for delay in filing the complaint. Learned Advocate Shri Nanavaty has also referred to Exh. 81 regarding the history given by the Appellant Accused at the time of the medical examination and submitted that he has stated that he was standing there and the victim came and he has not committed any offence of rape. Learned Advocate Shri Nanavaty submitted that as stated by him candidly that he had physical relation earlier once before one and half year which is also stated by him and therefore the present Appeal may be allowed as the Court below has failed to appreciate on this aspect.

9. Learned APP Shri H.L. Jani referred to the testimony of the witnesses including the testimony of the victim PW-9 at Exh. 30 and submitted that she has narrated about the manner in which the incident has occurred and she has also narrated about the resistance offered by her. Learned APP Shri H.L. Jani pointedly referred to the medical evidence in the form of testimony of PW-3 Doctor at Exh. 16 and stated that he has stated about the injuries and the history was recorded by him. Learned APP Shri Jani referred to the case papers at Exh. 18 and the certificate at Exh. 19. He submitted that the certificate Exh. 15 regarding the examination of victim refers to the history given by her and she has stated about the injuries which is also to be found as stated by the Doctor who had examined her. He has also referred to the case papers at Exh. 18 and the certificate at Exh. 19. Learned APP Shri H.L. Jani therefore submitted that the testimony of the victim

corroborated by the medical evidence confirming the injury itself is sufficient to establish the offence of rape as rightly recorded by the court below. Learned APP Shri H.L. Jani submitted that the FSL report has also confirmed about the act and therefore the impugned judgment and order may not be disturbed. Learned APP Shri Jani submitted that the submission with regard to the aspect of consent or the injury etc. are not relevant as the testimony of the victim is natural and convincing and she has clearly stated about the fact that she was dragged in the field and the offence was committed.

10. In view of the rival submissions, it is required to be considered whether the present Appeal recording the conviction deserves consideration and calls for any interference.

11. As it transpires from the background of the facts referred to herein above, the Appellant Accused is said to have dragged the victim and committed rape while she was passing near the field in order to go to the market. The testimony of the victim PW-9 at Exh. 30 clearly refers to what has transpired and she has also stated about the act as well as the resistance offered and the injury. She has stated about the bite as well as nail marks and her clothes being torn. She has stated that when she shouted, the mother-in-law came there and therefore the Appellant Accused ran away. As it was an issue regarding her reputation there was some delay in filing the complaint which is also convincing. This has been corroborated by the testimony of Dr. Sandeep Sonpal PW-2 at Exh. 12 who has corroborated the testimony of the victim and stated that when he examined her she has stated while giving the history as to what has transpired in the same manner which corroborates her testimony. The testimony of Dr. Sandeep Sonpal PW-2 at Exh. 12 and the certificate at Exh. 15 corroborates the testimony of the victim. Similarly, the certificate of the general hospital, Patan at Exh. 19 and the injury certificate at Exh. 21 completely corroborates her testimony regarding the act and the manner in which it has been committed with reference to the injury also. This has been further confirmed by the FSL report at Exh. 44. The submission made by learned Advocate Shri Dharmesh Nanavaty referring to the testimony of PW-1 Dr. Vinodkumar Patel at Exh. 7 who examined the accused that there are no marks of injury found on his body suggesting that there was no resistance is misconceived. Learned Advocate Shri Dharmesh Nanavaty also referred to the testimony of the Dr. Sandeep Sonpal PW-2 at Exh. 12, who examined the victim and submitted that as there were no marks of injury found on the victim, it was with her consent. He submitted that if at all there was some resistance offered, it would have left some marks of injury on the body of the victim or the accused. Such submissions are misconceived in light of the testimony of the victim as well as corroborated by the medical evidence in the form of testimony of Dr. Sandeep Sonpal as well as the certificate Exh. 15 and also the case papers and the medical certificate of general hospital, Patan at Exh. 19 and the injury certificate at Exh. 21. Similarly, learned Advocate Shri Nanavaty tried to submit that it was a field and the small bruises would not suggest any resistance. This submission is also thoroughly misconceived. In fact

the testimony of Dr. Vishnuchand Patel PW-3 at Exh. 16, who is a Medical Officer, General Hospital, Patan has also stated that the history has been recorded when he examined the victim as stated by her and she had clearly stated with name of the accused in the case papers which are produced at Exh. 18 and Exh. 19. Therefore, considering this clear evidence with regard to the act, the presence of the accused corroborated by the medical evidence and confirmed in the FSL report leaves hardly any doubt about any probability. Therefore it cannot be said that the judgment and order recording the conviction is erroneous on appreciation of the evidence. The submissions which have been made with much emphasis with regard to the consent and/or the aspect of injury are thoroughly misconceived and cannot be readily accepted in light of the discussion made herein above.

12. Alternatively, the submission made by learned Advocate Shri Dharmesh Nanavaty for modification/reduction in the sentence on the ground that the accused is young and is poor and he has also to support his family is misconceived. Learned Advocate Shri Nanavaty has referred to the observations made in a judgment reported in , (2006) 9 SCC 589 in case of Raj Kumar Alias Raju Yadav Alias Raj Kumar Yadav v. State of Bihar. Though the reliance is placed on this judgment, the facts of the case were totally different and therefore in peculiar circumstances the order was passed which cannot be considered in the facts of the present case to reduce the sentence which has been a minimum sentence. It is required to be stated that the law provides in such offences the minimum sentence and the Hon''ble Apex Court has time and again expressed a word of caution for not awarding less than minimum sentence taking the lenient view in such offences.

13. Though such submissions are made the Court has to be more sensitive while appreciating the evidence. A useful reference can be made to the judgment of the Hon''ble Apex Court in a judgment reported in , (1996) 2 SCC 384 in case of State of Punjab v. Gurmit Singh which emphasize about the sensitive approach of the court in such matters deserve careful consideration and no leniency could be shown. The Hon''ble Apex Court has observed:

"A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case."

Further it has been observed:

"The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling

reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury..... Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances."

14. Therefore as the sentence is minimum sentence of 7 years, it cannot be further reduced and the poverty or the young age is not a special circumstance as observed in a judgment reported in 2011 (0) GLHEL - HC 224401 in case of Bhupatbhai @ Uko Babubhai Chu. Koli v. State of Gujarat and in a judgment reported in 2011 (0) GLHEL-HC 226315 in case of Rameshbhai Jagabhai Makwana v. State of Gujarat.

15. The doctrine of proportionality and punishment has been considered in catena of judicial pronouncements by the Hon"ble Apex Court and it has laid down the broad guidelines that it is an obligation of the court to award the adequate punishment. It has been observed that undue sympathy either in convicting or while sentencing the accused would be counter productive. The different theories like deterrent theory and retributive theory may have a different role while considering the aspect of penology and doctrine of proportionality in sentence. The doctrine of proportionality in sentence obliges the court to impose the adequate sentence with the nature of offence and the manner in which it has been committed. Any sympathy or soft pedaling will be counter productive and it would be sending a wrong signal in the society for criminal justice system. The right of the accused and the right of the victim as well as the society collectively has to be balanced if the rule of law is to survive. A useful reference can be made to the observations made by the Hon"ble Apex Court in a judgment reported in , AIR 2008 SC 2314 in case of Siriya alias Shri Lal v. State of M.P. wherein it has been observed referring to the doctrine of proportionality:

"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 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 etc. v. State of Tamil Nadu* [, 1991(3) SCC 471]"

16. Therefore, the submissions which have been made for modification of sentence also has no merit and cannot be accepted. The present Appeal therefore deserves to be dismissed and accordingly stands dismissed. Bail bond shall stand cancelled.

Further Order

At the request made by learned Advocate for the Appellant, time to surrender is granted up to six weeks.