
(2008) 11 GUJ CK 0021
In the Gujarat High Court
Case No : Criminal Appeal No. 479 of 2004

Vinodbhai @ Vinna Kukabhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 21-11-2008

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 114, 324, 376, 452

Citation : (2008) 11 GUJ CK 0021

Hon'ble Judges : J.C. Upadhyaya, J;A.L. Dave, J

Bench : Division Bench

Advocate : M.J. Buddhbhatti, for the Appellant; K.C. Shah, APP for Opponent 1, for the Respondent

Final Decision : Allowed

Judgement

J.C. Upadhyaya, J.—The appellant, who was original accused No. 1 in Sessions Case No. 145 of 2003, preferred this appeal. By judgment and order rendered by the Ld. Addl. Sessions Judge, Ahmedabad [Rural] [for short "the Ld. Trial Judge"] on 12/2/2004 in Sessions Case No. 145 of 2003, present appellant - accused came to be convicted for the offences punishable u/s 376 and 452 of the Indian Penal Code [for short "IPC"] and was sentenced to undergo rigorous imprisonment [RI] for 10 years and fine of Rs. 5,000/-, in default to further undergo simple imprisonment [SI] for one month for offence punishable u/s 376 of the IPC and RI for one year and fine of Rs. 500/-, in default to further undergo SI for one month for the offence punishable u/s 452 of the IPC. However, both the sentences were directed to run concurrently. The appellant - accused was acquitted for the offences punishable u/s 324 read with Section 114 of the IPC and Section 135 of the Bombay Police Act. The remaining 2 accused persons original accused Nos. 2 and 3 came to be acquitted from all the chages levelled against them.

2. The prosecution case, in nut-shell, is as under:

2.1. On 19/3/2003 at about 15.30 hours Sitaben, daughter of Babulal Ramlal, aged about 16 years was sleeping in her house situated in Rajivnagar, Satellite, Ahmedabad. She was all alone in the house. It is alleged that at that time, the appellant - accused entered into the house with intend to causing hurt and for assaulting her and with a view to rape her and thereby committed house trespass. It is alleged that the accused raped Sitaben after undressing her. It is further alleged that when the witness Rambahadur and Rajjan tried to rebuke the accused, at that time the appellant accused along with original accused Nos. 2 and 3 assaulted both the witnesses and caused injuries to them with lethal weapons. Sitaben Babubhai lodged FIR before Satellite Police Station, Ahmedabad, which came to be registered by the police. Police commenced investigation. During the course of investigation, statements of material witnesses were recorded. In presence of panchas, panchnamas were drawn and the clothes of the victim Sitaben and the appellant accused were seized. Medical examination of the victim and the accused was performed. After collecting necessary evidence, the police filed charge-sheet in the Court of the Ld. Judicial Magistrate First Class, Ahmedabad [Rural]. As the offence punishable u/s 376 of the IPC was exclusively triable by the Court of Sessions, the Ld. Magistrate committed the case to the Court of Sessions, Ahmedabad [Rural], which was registered as Sessions Case No. 145/2003.

3. The Ld. Trial Judge framed charge against the present appellant - accused as well as the original accused Nos. 2 and 3 at exh. 5. Along with the appellant - accused, all the accused persons did not plead guilty and claimed to be tried. Thereupon, prosecution adduced its oral and documentary evidence. After the conclusion of the evidence, Ld. Trial Judge recorded further statements u/s 313 of the Code of Criminal Procedure [Cr.P.C], to which the appellant - accused generally denied all the allegations levelled against him by the prosecution and stated that he was in love with Sitaben and her mother was knowing it, but her father and brother compelled Sitaben to lodge the FIR against him. After appreciating the evidence on record and after considering the arguments advanced on behalf of both the sides, the Ld. Trial Judge delivered the impugned judgment and order and recorded the conviction of the appellant - accused for the offence punishable under Sections 376 and 452 of the IPC and awarded sentence as hereinabove referred to. By the same judgment and order, the Ld. Trial Judge was pleased to acquit the original accused Nos. 2 and 3.

4. We have heard the submissions made on behalf of appellant accused by learned advocate Mr. Budhdbhatti and the submissions made on behalf of the respondent - State by Ld. APP Mr. Shah. We have gone through the record and proceedings of the trial Court.

5. On behalf of the appellant - accused, learned advocate Mr. Budhdbhatti submitted that perusing the FIR and testimony of Sitaben, it clearly transpires that the prosecution has come forward with a case, which is highly doubtful and

containing unnatural facts. The prosecution alleged that at the time when Sitaben was all alone in her house and was sleeping during noon hours, at that time the accused entered her house and raped her. It is the prosecution case that at that time Rambahadur, who is uncle's son of Sitaben came near her house and knocked the door which was alleged to have been closed by the accused from inside. That since the door was not opened, Rambahadur broke opened the door and it is alleged that the accused escaped from the room. That till this time Sitaben did nothing. That considering the testimony of Sitaben before the trial Court, it is full of improvements than what she mentioned in her FIR. In the testimony she stated that her clothes were torn by the accused and the accused threatened her that she would be killed. That she was loudly weeping and that though Rambahadur was knocking the door, the accused did not allow her to open the door. That when Rambahadur entered in the room, she did not say anything about the incident to him. She went to the extent of saying that she was beaten by the accused. All these material facts have not been stated by her in the FIR. That there is no explanation forth coming and during the course of entire evidence adduced by the prosecution to the effect as to how Rambahadur came to the house of Sitaben and knocked the door. That according to the prosecution case, Rambahadur was informed by witness Rajjan, that he heard the noise from the house of Sitaben as if she was weeping and thereupon Rambahadur went to her house. As against this, witness Rajjan did not say that he informed Rambahadur about the weeping of Sitaben. He stated that when he went to the house of Sitaben, at that time original accused No. 2 Hasmukh and Rambahadur were quarreling. Rambahadur stated that not only he was informed by witness Rajjan, but thereafter, they both went to the house of Sitaben. This fact is not at all corroborated by witness Rajjan. Even Sita in her testimony does not say that after Rambahadur broke opened the door of her room, Rambahadur along with Rajjan came in her room.

5.1. It is submitted that the prosecution did not produce any documentary evidence showing the exact age of victim Sita. The prosecution relies upon ossification test conducted by Dr. Nayak to show that prosecutrix was aged about 15 - 16 years. Considering the deposition of Dr. Nayak exh. 36, in his cross-examination on behalf of the defence, he admitted that there is bound to be variance of 6 months in upper age and lower age. That thus even as per the medical evidence, when the age of Sitaben is stated to be above 15 years and below 16 years and considering the variance of 6 months, it becomes clear that she was not under 16 years of age. However, as a matter of fact, considering the overall evidence on record and especially the medical evidence to the effect that there was old tear of hymen and that she was habitual to sexual relationship and the improvements made by Sitaben in her deposition and the contradiction between the testimonies of the witnesses, the prosecution failed to establish its case beyond any reasonable doubt. Alternatively, it is submitted that considering the fact that the age of the prosecutrix cannot be said to be under 16 years and the defence raised by the accused that there was love affairs between the two,

the accused cannot be said to have committed the offence of rape. It is further submitted that on the basis of same set of evidence, the original accused Nos. 2 and 3 came to be acquitted; whereas the appellant - accused came to be convicted. Therefore, it is submitted that the appeal be allowed.

5.2. Ld. APP Mr. Shah opposed this appeal and submitted that there is no reason to discard the testimony of prosecutrix Sitaben. The improvements in her deposition are not material improvements which would make her testimony doubtful when the say of the prosecutrix is supported by medical evidence and the evidence of Rambahadur. It is submitted that as per ossification test, the medical opinion is to the effect that she was above 15 years of age, but below 16 years and it is true that Dr, Nayak opined that there may be variance of 6 months in lower age and upper age and accordingly even if it is observed that she was not under 16 years of age, yet nothing emerges from the evidence that Sitaben was consenting party. Therefore, it is submitted that the appeal be dismissed.

6. The prosecutrix Sitaben is examined at exh. 33. She lodged the FIR in connection with this offence before the police, which is at exh. 34. Before her testimony is considered, it would be necessary to consider the FIR exh. 34. About the incident, it is stated that she was all alone sleeping in her room and she had not locked the door of her room from inside and abruptly the accused came in her room. That she tried to call for help, but the accused gaged her mouth and, therefore, she could not shout. It is stated that the accused told her that do not shout, nobody will come here. It is stated that thereafter the accused was undressed and she removed her Pijamam and the under garments. It is stated that the accused raped her. Soon thereafter, somebody was knocking the door from outside. That she was about to open the lock of the door, but she was not allowed to do so by the accused. The accused tried to hide himself and taking that opportunity, she opened the lock of the door and door was opened and she saw that Rambahadur, her uncle's son, was there. As she opened the door, the accused ran away from the room. Rambahadur inquired to her as to what had happened and she narrated the incident before Rambahadur. It is further stated that thereupon Rambahadur rebuked the accused and his brothers and all the 3 accused persons including the appellant accused assaulted Rambahadur and inflicted blows with iron rod and sticks on the body of Rambahadur.

6.1. However, Sitaben in her deposition exh. 33 about the incident stated that after the accused came inside her room, her clothes were torn by the accused. She was undressed by the accused. The accused threatened her that she would be killed. The accused forcibly raped her. The sexual intercourse continued for 5 minutes. At that time, she was weeping loudly. Rambahadur was knocking the door, but she was not allowed by accused to open it. Rambahadur forcibly pushed the door and the accused was panicked and tried to hide somewhere in the room and in the meantime she opened the door and Rambahadur and Rajjan both came in her room. At that time the accused ran away from her room. She

deposed that Rambahadur inquired her as to what happened, but she was continuously weeping and thereupon Rambahadur left the room. Rambahadur sent his wife Gitaben and she narrated the incident to Gitaben. Gitaben told the incident to Rambahadur and Rambahadur went to the house of the accused and thereupon Rambahadur was beaten by the appellant accused and 2 co-accused persons. However, in her cross-examination, she denied the suggestion that there was any love affairs between herself and the accused. However, in her cross-examination, she stated that she was beaten by the accused.

6.2. Thus, considering the testimony of Sitaben and the FIR, it clearly transpires that there are material improvements in her deposition. In the FIR it is no-where stated that her clothes were torn by the accused and that she was undressed by the accused. There is nothing in the FIR that the accused threatened her or that she was beaten by the accused. In the FIR it is stated that as soon as Rambahadur entered her room and inquired to her as to what had happened, she narrated the incident to him; whereas in her deposition she stated that she did not narrate the incident to Rambahadur, but she narrated the incident to Gitaben, wife of Rambahadur.

7. In this line of discussion, it is necessary to consider the testimony of Rambahadur examined at exh. 31. According to his deposition, on the day and time of the incident, he was sleeping in his house and Rajjanbhai came to his house and he was awoken and Rajjanbhai told him that Sita was weeping and thereupon Rajjanbhai and he himself went to the house of Sitaben, but the door was closed from inside. They knocked the door, but it was not opened. They forcibly pushed the door and the plaster on the wall was damaged and thereupon the door was opened. As soon as the door was opened, the accused pushed him and ran out from the room. Sita was weeping in the room and thereupon he himself and Rajjanbhai came to his house. He sent his wife to the house of Sitaben and after sometime his wife returned and narrated the incident to him. He stated that thereafter he himself and Rajjanbhai went to the house of the accused, but they were assaulted with iron rod and sticks by the appellant accused and the 2 co-accused persons. Thus, considering the deposition of Rambahadur, it was Rajjanbhai who informed him that Sita was weeping inside her house and thereupon they both together went to her house and knocked the door but the door was not opened and thereafter, door was broken open.

7.1. However, considering the testimony of Rajjanbhai Shivbahadur examined at exh. 28, he stated that at the time of incident, he was watching TV in the house of his father-in-law and he went out from the house for nature's call and at that time he heard some noise of shouting from the house of Babulal [Sita's father] and, therefore, he went near the house of Babulal and saw that original accused No. 2 Hasmukh and Rambahadur were quarreling. When he went near them, he was assaulted by original accused No. 2 - Hasmukh with piece of tiles. He stated that he came to know that Sita was raped by the appellant - accused. Rajjanbhai did not say in his deposition that after hearing some noise from the house of

Sitaben, he went to the house of Rambahadur and informed him about it and thereafter they both together came to the house of Sitaben and that the door was broken open and they entered into the room where Sita was weeping. Rajjanbhai narrated totally a different story than what was stated by Rambahadur. According to the testimony of Rajjanbhai, when he went to the house of Sitaben, Rambahadur was also there and Rambahadur and accused Hasmukh were quarreling. Under such circumstances, it becomes very doubtful as to how Rambahadur went to the house of Sitaben and knocked the door which was locked from inside. It is pertinent to note that Sitaben, who was inside the house, did not say that the door of her room was broken open by Rambahadur. She stated that she opened the lock of the door. Considering the panchnama of scene of offence, it clearly transpires that the plaster of the wall near the door was broken. This corroborates the say of Rambahadur that he forcefully pushed the door and the door was opened.

8. Considering the testimony of Gitaben Rambahadur examined at exh. 30, she stated that at the time of incident, she herself and her husband Rambahadur were inside her house and witness Rajjanbhai came to their house and told them that Sita was weeping inside her house. Thereupon, her husband Rambahadur and Rajjanbhai went to the house of Sita. Again it would be necessary to consider that Rajjanbhai in his testimony does not support such version.

9. The medical evidence reveals that Sitaben was examined by Dr. Patel, whose testimony is recorded at exh. 13. Dr. Patel examined Sitaben on 20/3/2003. In the history given by the victim to Dr. Patel, it is stated that when she was all alone in her house on 19th, at about 4.00 pm the accused came in her house and closed the door from inside and raped her without her consent. There was old tear of hymen. There was no injury on her body or on her private part. Dr. Patel opined that she was habitual to sexual relationship. Dr. Patel further stated that Sitaben stated her age to be 18 years.

9.1. Sitaben was also examined by Dr. Desai, whose testimony is recorded at exh. 35. Almost identical is the history given by Sitaben to Dr. Desai. Dr. Desai also submitted that before him Sitaben stated her age to be 18 years. He also stated that there was old tear of hymen and she was habitual to sexual relationship. No marks of any injuries were found on her body or on her private parts.

9.2. Considering the medical evidence on record, so far as the age of victim Sitaben is concerned, before both the Medical Officers, Sitaben stated her age to be 18 years. The prosecution has not produced any documentary evidence like birth certificate or school leaving certificate showing the date of birth of Sitaben.

9.3. Investigation Officer P.I. Patil is examined at exh. 39 and he deposed that he insisted the complainant and her father to produce birth date certificate, but the same was not supplied to him. Ossification test of Sitaben was conducted by Dr. Nayak. Dr. Nayak is examined at exh. 36 and Dr. Nayak stated that the result of

ossification test revealed that her age was above 15 years, but below 16 years. In his cross-examination, he admitted that there may be variance of 6 months in upper age limit and lower age limit. Under such circumstances, victim herself stated before two Medical Officers her age to be 18 years and considering the testimony of Dr. Nayak, adding 6 months to the upper age fixed on the basis of ossification test, the age would be 16 years and 6 months. At any rate, it cannot be said that the prosecution conclusively proved beyond any reasonable doubt that at the time of incident Sitaben was under 16 years of age. Considering the result of her medical examination, the defence raised by the accused about having love affairs between the two requires to be considered.

10. During the course of testimony of Sitaben exh. 33, in the cross-examination on behalf of the accused, suggestions were made about accused's defence of love affairs. However, she denied such suggestions. The fact remains that Sitaben and the accused both were found during day time in a room. At the time of incident, Sitaben was all alone in her house. Evidence reveals that they are the neighbours and even prior to the incident, they were knowing each other. As revealed from the evidence on record, at the time of incident the accused was aged about 23 years of age. Considering the discrepancies between the testimonies of Rambahadur, Rajjanbhai, Gitaben and victim Sitaben, the fact is apparent that Rambahadur knocked the door of the room which was closed from inside and the door was opened, either broken open as per the say of Rambahadur or Sitaben opened the lock of the door. As soon as the door was opened, accused and Sitaben both were found in the room. Rambahadur is victim Sitaben's uncle's son. So they both were seen together in the room by Rambahadur. In this line of discussion, certain material improvements made by Sitaben in her deposition, which are discussed at length above, are required to be considered. Suffice it to say that she went to the extent of saying that her clothes were torn out by the accused. She was threatened to be killed by the accused. She was loudly weeping. She was beaten by the accused. She did not narrate the incident to Rambahadur. All the above facts have not been stated by Sitaben in her FIR.

10.1. The accused is consistent in his defence because when accused was examined by Dr. Shaikh, whose testimony is recorded at exh. 38, it is apparently clear that before Dr. Shaikh, accused gave history that he was knowing the girl since last 6 months and outside the house they both used to meet each other. On and often he was called by the girl in her house. Frequent intercourse about 20 to 25 times was committed. On 19/3/2003 when he met the girl in her house, her brother had seen them and they both were beaten by her brother and he ran away. Even considering the further statement of the appellant - accused, he stated that he was in love with Sita and Sita was in love with him. Mother of Sita was knowing this fact. Yet Sita was compelled to lodge the FIR against him by her father and her brother.

11. The cumulative effect of all the above facts emerging from the evidence

adduced by the prosecution itself together with the fact that the prosecution failed to prove the fact that at the time of the incident Sitaben was under 16 years of age and the facts regarding the medical evidence adduced by the prosecution, would lead to suggest that the prosecution failed to establish the offence of rape punishable u/s 376 of the IPC beyond any reasonable doubt. In the impugned judgment, the Ld. Trial Judge erred in not properly appreciating the evidence on record in light of the defence raised by the accused. Sitaben in her FIR alleged that appellant - accused and two co-accused persons inflicted blows with iron rod and sticks on Rambahadur and Rajjanbhai. The Ld. Trial Judge acquitted the appellant - accused from the charge of commission of offence punishable u/s 324 read with Section 114 of the IPC and the offence punishable u/s 135 of the Bombay Police Act and even on the same set of evidence, the original accused Nos. 2 and 3 were acquitted from all the charges levelled against them. In other words, on the basis of same set of evidence, in the impugned judgment, the Ld. Trial Judge recorded the order of acquittal. The acquittal order recorded by the Ld. Trial Judge has not been challenged by preferring any appeal before this Court.

12. In light of the above discussions, we are of the considered opinion that the prosecution failed to establish its case beyond any reasonable doubt against the accused. Under such circumstances, the impugned judgment and order recording the conviction of the appellant - accused for the offences punishable under Sections 376 and 452 of the IPC deserves to be set aside.

13. For the foregoing reasons, the appeal is allowed. The impugned judgment and order dated 12/2/2004 delivered by the Ld. Trial Judge in Sessions Case No. 145 of 2003 recording conviction of the appellant - accused for the offences punishable under Sections 376 and 452 of the IPC is set aside and the appellant-accused is ordered to be acquitted. The appellant be set at liberty from the jail forthwith, if he is no longer required in any other case. Fine, if paid, to be refunded to him.