

2008 (0) AIJEL-HC 220836

GUJARAT HIGH COURT

Hon'ble Judges:A.L.Dave and J.C.Upadhyaya JJ.

Prakashbhai @ Bhagat Govindbhai Vaghari Versus State Of Gujarat

Criminal Appeal No. 2628 of 2005 ; *J.Date :- DECEMBER 24, 2008

- INDIAN PENAL CODE, 1860 Section - 363 , 366 , 376

Indian Penal Code, 1860 - S. 363, 366, 376 - kidnapping and rape - rape on minor girl - Sessions Court found that prosecutrix was minor below 16 years of age and the evidence proved guilt of the accused and, therefore, recorded the conviction - appeal against - held, it is a case of love affair between the prosecutrix and the appellant and a misconceived or misguided action on the part of the appellant, and the element of criminality is not reflected in the conduct of the appellant - offence stands constituted because of the technicality - a harsh view is not required to be taken in such a situation - substantive sentence awarded by Trial Court is on a higher side - sentence reduced to already undergone - appeal partly allowed.

Imp.Para: [7] [8]

Equivalent Citation(s):

2008 JX(Guj) 697 : 2008 AIJEL_HC 220836

JUDGMENT :-

A.L.Dave, J.

1 The appellant came to be convicted by the Sessions Court, Sabarkantha at Modasa, for the offences punishable under Ss. 363, 366 & 376 of the Indian Penal Code and was sentenced to undergo S.I for three years and fine of Rs. 500.00, in default, S.I for 15 days; S.I for three years and fine of Rs. 500.00, in default, S.I for 15 days, and S.I for eight years and fine of Rs. 1,000.00, in default, S.I for one month respectively, by judgment and order dated 19.11.2005, rendered in Sessions Case No. 30/2005. All the sentences were ordered to run concurrently.

2 The prosecution case, in brief, was that the appellant kidnapped minor daughter of first informant Amrutbhai Lallubhai Vaghari around 14 hours on 7.6.2004 from Maninagar, Bayad, from the lawful guardianship of the first informant and took her to various places

and subjected her to rape. The first informant lodged the information on 27.6.2004, on the basis of which, offence was registered and was investigated. The charge-sheet was filed in the Court of learned J.M.F.C., Modasa, who, in turn, committed the case to the Court of Sessions, Sabarkantha at Modasa.

3 The charge was framed by the trial Court against the accused at Exh.4 for the offences punishable under Ss. 363, 366 & 376 of the Indian Penal Code, to which he pleaded not guilty and claimed to be tried. The Sessions Court, after considering the evidence, found that the date of birth of the prosecutrix was 19.11.1988 and, therefore, she was minor below 16 years of age and the evidence proved guilt of the accused and, therefore, recorded the conviction and sentenced the appellant for the imprisonment, as stated in the earlier part of this judgment. Aggrieved thereby, the convict has preferred the present appeal.

4 We have heard learned advocate Mr. Ansari for the appellant, and learned A.P.P. Mr. Bhatt for the respondent-State.

5 Learned advocate Mr. Ansari took us through the record and proceedings and in all fairness conceded that the question of legality and propriety of conviction is not possible to be agitated, as the age of the prosecutrix is proved by Exh.44 and the factum of intercourse is proved by the evidence of the prosecutrix as well as Dr. Bhamini Pandya (Exh.35). He, however, submitted that though an offence can be said to have been constituted technically, there is no criminality behind it. He submitted that the appellant was a young boy of 20 years of age and there was a love affair between the prosecutrix and the appellant. The prosecutrix went with him voluntarily and stayed with him for about 5 to 6 months at different places in the capacity of husband and wife. She has not raised any alarm for help, nor has she tried to escape during this time, which reflects her willingness or consent. Mr. Ansari submitted that though willingness or consent would be insignificant considering the age of the prosecutrix, it may be a relevant consideration for sentencing the appellant. He, therefore, submitted that the appeal may be partly allowed by reducing the sentence. He submitted that the appellant is in prison for the period of more than four years and the case may be considered sympathetically.

6 Learned A.P.P. Mr. Bhatt has opposed this appeal. According to him, once the offence is constituted and conviction is not challenged, this Court may not interfere with the sentence imposed by the trial Court and the appeal may, therefore, be dismissed.

7 We have considered the rival side submissions. We find force in the submissions made by Mr. Ansari that it is a case of love affair between the prosecutrix and the appellant and a misconceived or misguided action on the part of the appellant, and the element of criminality is not reflected in the conduct of the appellant. The offence stands constituted because of the technicality. The age of the prosecutrix at the time of the incident was 15 years and 7 months. The appellant was aged 20 years and his marital status was that he was unmarried. In our opinion, a harsh view is not required to be taken in such a situation in the present days' social scenario. The case can be considered as one falling under the proviso to Sub-sec. (1) of Sec. 376 of I.P.C. The appellant comes from a lower strata of the society, where education and finance are at lower level.

Keeping all these aspects in mind, we are of the view that the substantive sentence awarded by the trial Court is on a higher side and deserves to be interfered with by reducing the same to the sentence already undergone by the appellant, in exercise of appellate jurisdiction by this Court.

8 For the foregoing reasons, the appeal is partly allowed. The conviction of the appellant for the offences punishable under Ss. 363, 366 & 376 of the Indian Penal Code recorded by the learned Additional Sessions Judge, Fast Track Court No. 11, Sabarkantha at Modasa, by judgment and order dated 19.11.2005, in Sessions Case No. 30/2005, is hereby confirmed. However, the sentence of imprisonment awarded by the trial Court for the offence punishable u/s. 376 IPC is altered to one already undergone by the appellant, without any change in the fine. The sentences awarded for the offences punishable under Ss. 363 & 366 IPC remain unaltered. All the sentences are ordered to run concurrently. The appellant shall be released from prison forthwith, if not required in any other Case.

The above order shall come into operation only if and when the appellant pays the amount of fine.