

(2008) 10 GUJ CK 0002
Gujarat High Court
Case No: Criminal Appeal No. 480 of 2004

Stevan Chhotabhai
Rajwadi

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision: Oct. 20, 2008

Acts Referred:

- Penal Code, 1860 (IPC) - Section 375, 376, 493

Citation: (2010) 1 DMC 477 : (2009) 1 GLR 279

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

Bench: Division Bench

Advocate: N.D. Nanavaty and Nirjar Buck, for Nanavaty, for the Appellant; U.R. Bhatt,
Addl.P.P., for the Respondent

Final Decision: Allowed

Judgement

A.L. Dave, J.

This appeal arises out of the judgment and order rendered by the Sessions Court, Bharuch at Rajpipla, on 15th March, 2004, in Sessions Case No. 71 of 2003." The appellant came to be convicted for the offences punishable under Sections 493 and 376 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 15,000/-, in default, to undergo simple imprisonment for two years for the offence punishable u/s 493, and to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 2,500/-, in default, to undergo simple imprisonment for one year for the offence punishable u/s 376 I.P.C. The Court also ordered that out of the amount deposited by way of fine, Rs. 10,000/- would be paid to the complainant as compensation.

2. Complainant Kapilaben, daughter of Rupjibhai Keliya Vasava, lodged an F.I.R. on 28-9-2002 (12-8-2002) against the appellant before the District Superintendent of Police, Narmada making charges for the offences punishable under Sections 493

and 376 of I.P.C., alleging that she is born on 1-6-1974, that, the appellant was her teacher in Indrajit Vidyalaya, Umarva and was teaching drawing etc. Around January, 1994, when she was about to complete her study in Std. 10, the appellant offered her help for admission and gave guidance about her education and came closure to her. According to the complaint, the appellant posed before the complainant as a bachelor and proposed her for marriage and promised that he may secure admission for her in Physical Training Course ("P.T.C." for short) and would marry her. After passing Std. 10th Examination, she again took admission in Std. 11 in Kanya Vinay Mandir, Rajpipla and was staying in Girls' Hostel, where she was informed by the appellant-accused that arrangement for her admission to P.T.C. was made and then took her to Borsad. For going to Borsad, next morning, he took her to a hotel and established physical relationship against her will and in spite of her denials, and thereby, committed rape. Thereafter, the appellant represented before her that establishment of physical relationship is performance of marriage. According to the complainant, the appellant took her to village Umalla-Vaghpura and kept her over there and established physical relationship every day, which she permitted under a belief that he is her lawfully wedded husband. She, however, came to know, later on, that the appellant was a married person, having children, the eldest one being almost of her age.

2.1. On the basis of the F.I.R., offence was registered and investigated. The police ultimately filed charge-sheet in the Court of learned J.M.F.C. Rajpipla, who, in turn, committed the case to the Court of Sessions and Sessions Case No. 71 of 2003 came to be registered. The charge was framed against the appellant-accused at Exh. 4 for the offences punishable under Sections 493 and 376 of I.P.C., to which he pleaded not guilty, and hence, he came to be tried.

3. On the basis of the evidence led by the prosecution as well as after considering the evidence led by the defence, the trial Court came to the conclusion that the prosecution was successful in establishing the charges for both the offences and recorded conviction and ordered punishment, as stated hereinabove. It is against the said judgment and order that the present appeal is preferred.

4. We have heard learned Senior Advocate Mr. N. D. Nanavaty appearing with learned Advocate Mr. Nirjar Buch for Nanavaty Advocates for the appellant, and learned A.P.P. Mr. U.R. Bhatt for the State. We have also examined the record and proceedings.

5. Learned Senior Advocate Mr. Nanavaty submitted that the basic ingredients constituting either of the offences, for which the appellant was charged and convicted, are not established. He has submitted that, admittedly, the complainant and the appellant were staying together openly as husband and wife in a house next door to the house, where the wife of the appellant was also staying. Admittedly, they have stayed together for nearly 8 years and there has neither been any complaint nor any action on the part of the complainant. Mr. Nanavaty submitted

further that the evidence would go to show that there was an affair between the appellant and the complainant-prosecutrix, which was then accepted by the society. They have lived together as husband and wife. The complainant's parents were also visiting the house, where the appellant and the complainant-prosecutrix were staying as husband and wife and they also used to attend social functions as husband and wife in the family of the complainant's father. Mr. Nanavaty submitted that it has come in evidence that the prosecutrix also used to identify herself as the wife of the appellant, to which the appellant never objected and the appellant also maintained the same relationship. Mr. Nanavaty also submitted that the evidence shows that the Bank Accounts were also opened in the joint names posing the complainant-prosecutrix as "wife" of the appellant-accused. Mr. Nanavaty submitted that if all these pieces of evidence are considered together, the element of deceit would be eliminated and if that is so, offence punishable u/s 493 I.P.C. cannot be said to have been constituted. Similarly, the offence of rape would also not be constituted because it cannot be said that the lady consented to physical relationship on her being made to believe that the appellant is her husband. Mr. Nanavaty, therefore, submitted that the appeal may be allowed.

6. The appeal is opposed by learned Additional Public Prosecutor Mr. U.R. Bhatt. According to him, the trial Court has considered these very aspects and has also taken a view that such relationship, which was established in a clandestine manner, should be dealt with sternly. The judgment is well reasoned and may not be interfered.

7. We have taken into consideration the rival side submissions. Upon going through the record and proceedings, we find that prosecutrix Kapilaben has deposed at Exh. 8, her father Rupji is examined at Exh. 55, her mother Dhanuben is examined at Exh. 57 and her brother Deepsingh is examined at Exh. 58. Her maternal uncle Hepubhai is examined at Exh. 56.

8. The prosecutrix has deposed on the lines of her complaint and has stated that she was lured by the accused-appellant by offering monetary help and guiding her in her studies. She states that she was taken to a hotel, where she was forced into an intercourse and when they were taken to police station, the accused introduced themselves as spouses, and from there, they were taken to Court, where also he said the same thing. She was driven out from the Hostel because of such relationship and then she was taken by the appellant-accused to his house. She has been cross-examined at length, where she has admitted that when she was staying in the hostel, she had never objected to the appellant meeting her at every week-end. She has also admitted that she had obtained consent from the hostel authorities for going with the appellant to Borsad for getting admission in P.T.C. She also admits that she herself had told the police that they are husband and wife and when they were taken to Court, she again said the something. She admits that she had not stated before the police that she was deceitfully taken to the hotel by the

accused-appellant. During her cross-examination, it is revealed that she had stayed with the appellant for a long span, without any complaint and with the knowledge about his being married and his wife stayed in the house next to the house where she was staying. She has also admitted a number of letters written by her to the appellant. She also admits her presence in several photographs of social functions. According to her, she was staying with the accused-appellant not from 1992, but from 1994 till 2001. She admits that she lodged the complaint about 13 months after she left the house of the appellant with her parents. She tries to explain the delay in lodging the complaint by saying that they were trying to persuade the appellant.

8.1. The father of the prosecutrix Rupjibhai Vasava is examined at Exh. 55. His evidence is more or less in the form of hearsay evidence i.e. on the basis of what has been told to him by the prosecutrix. He states that the appellant lured the prosecutrix and impressed upon her that they were lawfully wedded and are spouses. During his cross-examination, he admits that he had not given any complaint because his daughter Kapilaben was staying with the accused at village Umalla and that her future would have been bright while staying with him. He also felt that the accused-appellant used to keep her well, and therefore, he felt that she was staying with the accused-appellant of her own volition. He also admits that while she was staying with the appellant for 7 years, he used to visit her often. He also admits that he had attended the obituary of the mother of the appellant. He also admits that he used to visit Jamnaben, wife of the appellant. He also admits that even the appellant and the complainant were visiting his house and he used to maintain good respect for the appellant.

8.2. The deposition of Dhanuben, mother of the prosecutrix, is recorded at Exh. 57. From her deposition, it emerges that once they had gone to the house of the prosecutrix and the accused and there was a quarrel between the accused and the prosecutrix on return of the accused, and the accused drove them out of the house and ultimately they lodged the F.I.R.

9. If the above pieces of material evidence are considered, it is clear that the relationship between the accused and the prosecutrix developed somewhere before 1994 when she was studying. That relationship ultimately culminated into a love affair and the appellant used to extend all possible help to the prosecutrix, either for education or to cater to her financial needs. It also appears that consistently both, the appellant as well as the prosecutrix, have accepted the relationship as that of husband and wife and that relationship they have enjoyed publicly and appears to have been accepted, by and large, by the society, including the wife of the appellant and the parents of the prosecutrix. This is not a case of solitary instance of entering into coitus by deceitful means by creating a make-believe situation that the relationship of husband and wife is established between the two and was a design to, in fact, exploit the prosecutrix by the accused.

10. The F.I.R. is delayed by about 13 months and her explanation coming forward is that they were trying to persuade the accused. In our opinion, the evidence is not sufficient to indicate that the relationship between the accused and the prosecutrix developed on any deceitful means attributable to the appellant. It is not a case whereby impression upon the prosecutrix that she is now the lawfully wedded wife of the accused, the accused had taken any undue advantage of the situation. That relationship somehow got established and was publicly established by the accused as well as by the society to an extent that they attended social functions as husband and wife and even Bank Accounts were opened under their joint names.

10.1. The problem seems to have started when there was some quarrel between the two and the appellant drove out the prosecutrix along with her parents. Till that moment, there seemed to be no dispute. Even after that incident, the F.I.R. was lodged after 13 months. We are, therefore, of the view that the ingredients of the offence punishable u/s 493 I.P.C. cannot be said to have been constituted by the evidence led by the prosecution, nor can the offence of rape be said to have been proved. Though, not very emphatically, the learned Additional Public Prosecutor indicated that Fourthly of Section 375 I.P.C. would be attracted, we are afraid that it is not possible to accept this contention for the reason that we find that the element of deceit is missing in the entire episode. We have also found that the offence punishable u/s 493 also cannot be said to have been constituted. The trial Court committed an error in recording the conviction on the basis of the bare allegations made by the prosecutrix, overlooking the surrounding circumstances. The trial Court also missed the fact that a man may tell a lie, but circumstances do not tell lie.

11. In the light of what is discussed hereinabove, we are inclined to accept this appeal and set aside the conviction.

12. The appeal is allowed. The conviction and sentence imposed by the learned Additional Sessions Judge, 2nd Fast Track Court, Bharuch at Rajpipla, in Sessions Case No. 71 of 2003, on 15th March, 2004 is hereby set aside. The appellant be set at liberty forthwith, if his presence is not required in respect of any other offence. Fine, if any, paid, shall be refunded to the appellant.