IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 22-12-1995.

CRIMINAL APPEAL NO. 911 OF 1990

For Approval and Signature:

THE HON'BLE MR. JUSTICE A.N. DIVECHA

And

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?

2. To be referred to the Reporter or not ?

3. Whether Their Lordships wish to see the fair copy of Judgment ?

4.

question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judge?

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Shri S.R. Divetia, Addl. Public Prosecutor for the appellant.
Shri M.J. Budhbhatti, Advocate for the respondent.

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Coram: A.N. Divecha,J. & H.R. Shelat,J.
(22-12-1995)

ORAL JUDGMENT: (Per: H.R. Shelat, J.)

The then learned Assistant Sessions Judge at Baroda acquitted the respondent charged with the offences under Section 363, 366, 376, 506 Part 2 and Section 201, Indian Penal Code, delivering the judgment on 21st July 1990 in Sessions Case No. 206 of 1989 on his file. The appellant-State, being aggrieved by

the same, has preferred this appeal before us.

2. The case of the prosecution, briefly stated, is that Bhikhiben alias Bhagwatiben, the daughter of Ramanbhai Panchal residing at village Bhoj had gone to Utiya along with Shantaben and Surajben as Arvindbhai, the son of Shanabbai Kalabhai was to marry. She joined the marriage party. After the Samaiya was over, the respondent showing the knife frightened her and succeeded in taking her aside. He then took her to some isolated place where he showing the knife intimidated her. Being put to fear of instant death or hurt she succumbed to the ill-will of the prurient respondent. She was made to put off her clothes and lie down. The respondent then against her will and desire raped her, as a result she was defiled. She was asked not to tell any one about her defloration. She was also in this regard threatened with dire consequences. Meanwhile owing to rustle the respondent could guess some one was coming. The respondent pouring water on her clothes fled away. She was then taken to the place of marriage by those who had rushed to the place of offence. She informed her friends Shantaben and Surajben and came back to village Bhoj along with the marriage party. Because of minacity she pretended about her drenched clothes but after going back home she narrated her miseries and woes to her mother. She was taken to the Doctor and thereafter a complaint was lodged in the police station at Padra. The police officer of that police station initiated the investigation. At the conclusion thereof, he filed the chargesheet against the respondent before the Court of the Judicial Magistrate (First Class) at Padra. As the learned Magistrate was not competent to hear and decide the case of rape, he committed the case to the Court of Sessions at Baroda. The case then came to be registered as Sessions Case No. 206 of 1989. The learned Sessions Judge at Baroda assigned the matter to the then learned Assistant Judge for hearing and disposal in accordance with law. The learned Judge below then heard both the parties and framed the charge at Exh. 3. The respondent pleaded not guilty and claimed to be tried submitting that he was wrongly involved because of the rivalries of two factions in the village. The learned Judge at the conclusion of the hearing, appreciating the evidence,accepted the case of the prosecution on all other counts but found that the identification parade was not held as per the requirements of law. With the result according to him the prosecution had failed to establish the charge beyond reasonable doubt. He therefore acquitted the respondent of the offences with which he was charged. Being aggrieved by such judgment and order, the appellant-State has preferred this appeal.

3. Mr. Divetia, the learned Additional Public Prosecutor representing the appellant submitted that the learned Judge believed the case of the prosecution on all other issues, except that of the identification parade, which was the error. The

identification parade held was in consonance with law. The learned Judge below ought to have convicted the respondent. The reasonings of the lower Court were illogical and unconvincing. Mr. Budhbhatti, the learned Advocate representing the respondent submitted that the judgment and order of the lower Court were not on the verges of perversity and there was no need to set the evaluation right. In fact, the learned Judge had committed no error which would warrant the interference of this Court.

4. In law even if with free consent a person subjects the girl,below 16 years of age to sexual intercourse, the offence of rape is committed and so consent of such girl will never help the wrongdoer. In this case, Bhikhiben, the victim at the relevant time was aged about 10 to 11 years. On searching scrutiny ignoring certain infirmities even if we agree that some one obsessed with concupiscence has molested Bhikhiben with or without her volition and will and satisfied his carnal desire, the crucial question who did the wrong has not been unravelled.

5. On perusal of the evidence on record, without any hesitation we agree with the learned Judge below with regard to the identification parade. Before we deal with the same, we may mention about other points giving a fatal blow to the prosecution's case. The conduct of the victim as well as her parents cannot be overlooked. The victim when she was taken to the Doctor at Vadu did not disclose how her private part was injured; she on the contrary told the Doctor that as a log of wood estubs struck her, she was injured. Seeing her doleful when her friends, Shanta and Suraj questioned she replied that she stumbled as her foot came up against some object on the road and fell down into the plash and sustained the injuries and her clothes came to be drenched. She also did not say about abrasions or bruises on her back and suppressed the wrong done by the respondent. Her mother also accordingly stated before the Doctor and did not disclose about the alleged rape. When the complaint was lodged, Bhikhiben has also remained silent about the injury on her back; and the fact about a knife having been shown and the threat given by the respondent. When at the initial stage,the incident has been suppressed for no good cause, without any independent corroboration, her evidence and that of her mother cannot be accepted. Ramanbhai Ambalal Panchal, father of Bhikhiben, also before the Doctor did not disclose the fact about rape and injury on the back. He also waited for two days and then filed the complaint. No doubt, he has explained stating that he wanted to consult Kasambhai, but later on when Kasambhai was not available, he took his daughter Bhikhiben to the police station at Padra and got the complaint lodged. The explanation offered is certainly insipid. Why he was to be consulted, was there any hindrance removable only by Kasambhai, was there any qualm, are the factors conveniently kept behind the veil. It may be noted that later on after two days without waiting for

Kasambhai he goes to the police station and lodges the complaint. Future prospects of Bhikhiben was not therefore the vexatious problem to him. It is pertinent to note that Surajben one of the friends of Bhikhiben is examined but she has not supported the case and these witnesses. We are, therefore, not inclined to place sole reliance on the evidence of these witnesses.

6. We do not find any other supporting evidence on record. Dr. Ramesh N. Tandon who examined the respondent on 31st May 1989 did not find any injury on the private part of the respondent. He also found that there was no semen. It may be stated at this stage that the age of Bhikhiben at the time of the incident, was about 11 years and as submitted by the learned Addl. Public Prosecutor she was a virgin. The age of the respondent at the relevant time being of 25 years was adult. If the adult rapes a minor girl, what marks or signs the doctor would note has been made clear by the Supreme Court in the case of Rahim Beg & Anr. vs. State of U.P.- 1972 Criminal Law Journal, 1260, A.I.R. 1973 S.C. 343. It is observed that if the rape is committed by a fully developed man on a girl of 10 to 12 years who is virgin and whose hymen is in tact, absence of injuries on the male organ of the accused would point to his innocence. In view of this decision, in this case when no injury is found on the organ of the respondent, it is the strongest circumstance discrediting the truth of the prosecution's case and pointing to the innocence of the respondent. Of course, our attention was drawn by Mr. Divetia, the learned Addl. Public Prosecutor to the fact that the Doctor found indurated swelling on the private part, but that will not help the prosecution. In such cases, as pointed out by the Apex Court in the above said decision, some injury would be seen, and not swelling which may be due to many other reasons. Hence mere swelling seen by the Doctor cannot prompt us to jump to the conclusion against the respondent.

7. Non-examination of Shantaben may not be fatal to the prosecution because as per its case Bhikhiben - the victim did not tell the truth, but the prosecution cannot escape from the consequences of non-examination of others who were in a position to throw light on the proposition. According to Bhikhiben hearing her shouts, four persons rushed to the place of the incident and took her to the marriage marguee where the marriage ceremony was going on. Out of those four persons no one is examined and no reason is assigned for not examining them. When independent evidence is available and the same is suppressed for no good cause, the Court is entitled to infer every thing against the prosecution.

8. Much has been emphasized upon the identification parade. Mahesh P. Pandya, the Deputy Mamlatdar and Executive Magistrate, held the identification parade. His evidence is recorded at Exh.

17. Before we discuss about his evidence, we may refer to the decision of this Court rendered in the case of Motilal Gajarbhai Chasisiya vs. State of Gujarat-1988 (1) G.L.H. 264, wherein it is laid down that, while holding the identification parade, care should be taken to procure the dummies of nearly the same age and physique of the accused, so that the accused may not be wrongly identified, and involved with the crime. In this case, we find the identification parade held was perfunctory and an empty formality also. Nothing has been mentioned in the I.P. panchnama (Exh.15) of what height the dummies were. The Deputy Mamlatdar selected the dummies of the age of 20, 32, 43, 36 and 27 years. He did not take care to select the dummies falling within the same age group. The persons having similar physique were also not selected. It seems the Executive Magistrate did not ascertain the description of the respondent so as to select almost similar dummies. Description of the persons selected as the dummies is also not mentioned in the panchnama, but with a view to fill-up the gaps that remained in the panchnama, the Deputy Mamlatdar has made rectifying statement at the time of his evidence.The panchas selected were the managers of the mid-day meal scheme. The panch witness (Exh.14) has made it clear that they had to obtain the permit from the Mamlatdar's office for the mid-day meal scheme. Both the panchas were therefore not above the dominating effect of the Executive Magistrate. The panchas will therefore like to be attuned to the requirements of the prosecution and will never be impartial and bold. The dummies from the village of the respondent were not selected. In view of such circumstances it was easy for Bhikhiben to single out the respondent. The identification parade held therefore cannot be termed veracious and credible, and consistent with the law made clear in the above referred decision. The learned Judge has elaborately dealt with the point of the identification parade assigning adequate reasons. We do not find any reason to disagree with him. We, therefore, cannot agree with the submission made on behalf of the appellant in this regard.

9. In view of the above discussion and the evidence on record, there is no good reason to interfere with the judgment and order passed by the lower Court; the learned Judge below was right in acquitting the respondent. The appeal, in view of the matter, is required to be dismissed.

10. While parting, let us mention that we do agree with the learned Addl. Public Prosecutor that in such cases where safety of women and girls is endangered, the wrong-doer cannot go unpunished and the Courts must come down heavily upon them; but we, as the Court of law, cannot, being obsessed with public sentiments, convict the accused. We have to scan the evidence on record and determine whether the prosecution has in accordance with law established the charge beyond reasonable doubt. In this case, for the reasons stated hereinabove, the prosecution has

failed to establish the charge and therefore, we have to reluctantly pass the order confirming the lower court's decision.

11. In the result, the appeal is hereby dismissed and the judgment and order of the lower Court, recording the acquittal of the respondent, are maintained. The respondent is in jail. He be set at liberty if no longer required in any other matter.

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(Per: A.N. Divecha, J.)

I had the privilege of hearing the judgment dictated by my learned brother in this case. I fully concur with not only the conclusion reached by him but also with the reasoning given in support thereof. I have however thought it fit to add a few words of my own.

1. It is not necessary to set out in detail the facts giving rise to this appeal. The factual position has succinctly been set out by my learned brother in his judgment. It would be sufficient to note that the respondent herein was charged with the offences punishable under sections 363, 366, 376, 506 Part 2 and sec. 201 of the Indian Penal Code, 1860 (the IPC for brief). The learned trial Judge acquitted the respondent herein of the charge levelled against him by his judgment and order passed on 21st July 1990 in Sessions Case No. 206 of 1989. The present appeal is directed against the said jugment and order of acquittal passed by the learned trial Judge.

2. The acquittal of the respondent herein is based mainly on the ground that his identify as the offender has not been established. So far as the commission of the crime is concerned, the learned trial Judge has accepted the prosecution version about it. The evidence on record is a clear pointer to the fact that the victim of the crime was a minor girl and she was subjected to rape at the relevant time.

3. The medical evidence on record is a clear pointer to the fact of subjecting the prosecutrix to sexual intercourse. She was found to be aged around 10 or 11 years at the relevant time. Of course, it is nobody's case that she was a consenting party. Even if it be so, such an act would constitute a statutory offence punishable under Section 376 of the Indian Penal Code.

4. The basic question is who subjected her to such sexual intercourse. The learned trial Judge has not found the respondent herein guilty of it. He has given cogent and convincing reasons therefor. We are in full agreement therewith. We should however like to make our own appreciation of the evidence on record.

5. In her oral testimony at Exh.8 the prosecutrix has clearly stated that she saw the respondent for the first time on that day. When the respondent attempted to take her away aside under some false pretext, according to her, her two friends, named Surajben and Shantaben, accompanied her in the beginning. They are said to have run away at the show of a knife by the respondent. One of them named Surajben has been examined at Exh.15 on the record of the case. She has not at all supported the prosecution. Besides, the prosecutrix in her evidence at Exh.8 has clearly stated that at the relevant time some four persons came to her rescue after hearing her shouts. She is stated to have deposed to the effect that they saw the respondent running away. It was seen by them. None of those four persons has been examined on behalf of the prosecution at trial.

6. In order to establish the identity of the respondent connecting him with the offences with which he stood charge at trial, the prosecution undertook the holding of the identification parade. It was done by the Executive Magistrate at the relevant time. His testimony has been recorded at Exh.17 on the record of the case. The outcome of the identification parade has been reduced to writing and it is at Exh.15 on the record of the case. The learned trial Judge has minutely scrutinised the evidence in that regard and highlighted quite a few infirmities found therein. The infirmities galore in the identification parade would leave no room for doubt that what was done was a mere empty formality. The Executive Magistrate had done his job very casually and in a cavalier and perfunctory manner.

6. It has clearly been found from the deposition of the Executive Magistrate at Exh.17 that he had not ascertained the description of the accused before holding the identification parade. Such ascertainment of description before hand should enable a holder of the identification parade to select appropriate dummies falling within the same age group and almost having the similar physique. Besides, independent panch witnesses have also not been sent for. The panch witnesses were managers of the mid-day meal plan. The panch witness at Exh.14 has clearly stated that they have to obtain permit from the Mamlatdar's office for the purpose of the mid-day meal plan. The Executive Magistrate at Exh.17 was the Deputy Mamlatdar in the Mamlatdar's office. Both the panch witnesses would therefore certainly be under his influence. In that view of the matter, expected impartiality and objectivity on the part of the panch witnesses is found wanting in the present case. Moreover, it transpires from the report of the identification parade at Exh.15 that no attempt was made to select dummies for the purpose from the same age group. No description of theirs is found recorded therein. The dummies were selected from different villages. They were not in the same age group. Their ages varied from 20

years to 43 years. The respondent was the resident of that very small village. His identification at the identification parade in the midst of dummies from different villages and of different age group may not really result in his true identification. He could easily be singled out from the group of such persons. Again, the description of the dummies is also not recorded in the identification parade report at Exh.15. It therefore becomes difficult to know whether or not persons similarly built as that of the respondent herein were selected as dummies. All these infirmities are duly highlighted by the learned trial Judge for the purpose of discarding the credibility of the identification parade. On careful scrutiny of the evidence on record, we are in agreement with the learned trial Judge on that score.

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