IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL NO. 1081 of 1992

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE ANANT S. DAVE

and

HONOURABLE MR.JUSTICE S.H.VORA

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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 the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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STATE OF GUJARAT....Appellant(s)

Versus

AYUBBHAI ISMAILBHAI & 6....Opponent(s)/Respondent(s)

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Appearance:

Mr.HARDIK SONI, ADDL PUBLIC PROSECUTOR for the Appellant(s) No. 1

MR SAAD AIJAZ KHAN, ADVOCATE for the Opponent(s)/Respondent(s) No. 1 - 7

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CORAM: **HONOURABLE MR.JUSTICE ANANT S. DAVE**
and
HONOURABLE MR.JUSTICE S.H.VORA

Date : 31/07/2015

ORAL JUDGMENT (PER : HONOURABLE MR.JUSTICE ANANT S. DAVE)

This appeal is preferred by the State of Gujarat- appellant- original complainant against the judgment and order of acquittal by the learned Additional Sessions Judge, Ahmedabad (Rural), Mirzapur, Ahmedabad by which order of sentence passed by the lower court against accused nos.1 to 7 dated 23.01.1991 in Sessions Case No.37 of 1990 came to be set aside.

Brief facts of the case of the prosecution are as under:

2. The complaint was lodged by victim Savitaben with Sarkhej Police Station on 14.11.1989 at about 2.15 pm. It is her case in the complaint that on 04.11.1989 at about 9.00 pm appellant- accused no.2 Nadir came near the house of the complainant in the company of appellant- accused no.1 and 3 by Rickshaw bearing no.2731 and her two sisters Lalita & Usha were seated in the rickshaw. At that time, she was standing near her house and her mother was sleeping inside the house. It is her further case that all the three of them, viz. appellant nos.1 to 3 caught her and forcibly took her in the rickshaw saying that if she was not taken she would reveal the incident.

All the three of them were taken onto the terrace of a house under construction in Tavakkal Society (Sarkhej) where all the three of them slept during night. On the next day morning, on Sunday, i.e. 5.11.1989 all the three of them were taken to the house of appellant no.4 Govind at about 7.00 a.m. by rickshaw No.2731 of accused No.2 Nadir. All the three sisters stayed at the house of appellant no.4 Govind for two days. Lilaben- wife of appellant no.4 Govind was also present in the house. On Tuesday (7.11.1989) all the three sisters were taken to the house of appellant No.5-Jamal at Village Ratanpura where neither any lady nor any child was present. However, household articles were there. All the three sisters used to prepare the food and dine there. On Thursday (9.11.89) appellants no.1, 2 & 3 came there at about 1.30 pm by rickshaw No.2731 and they went away in the company of Lalita & Usha by rickshaw. It is her further case that appellant no.5 Jamal committed rape on her against her will and by using force and he also committed unnatural offence with her at about 2.00 pm on the same day noon. It is her further case that present appellant no.6 Jayanti brought Lalita & Usha to the house of appellant no.5 Jamal on a scooter, after midnight at about 1.30 am. It is also her case that appellant accused no.6 Jayanti and her sister Usha had slept in the last room at

night and thereafter appellant no.6 Jayanti went away on scooter, on the next day morning at about 6.00 pm. That appellant no.2 Nadir came there on Friday (10.11.1989) at about 8.00 pm. He came alone on foot, he and complainant's sister Lalita slept together in the room and thereafter appellant no.2 Nadir went away at about 12.00 midnight. That appellant no.2 Nadir had extended invitation to her both the sisters Lalita & Usha to come to see a movie and hence all the three sisters went to Sangam Talkies, Sarkhej by bus at 5.00 or 5.30 pm on Saturday, 11.11.1989. The present appellant Nos.1, 2 and 3 met them at Sangam Talkies and all the three of them went to purchase cinema tickets in the company of her two sisters. Thereupon, complainant escaped and went to her mother and informed her about what had happened. One Hemtaji who is treated as brother of complainant's mother Jiviben was also informed and all the three of them went to the places mentioned above in search of Lalita & Usha, but they did not find either Lalita or Usha or any of the appellants. Thereafter, complainant Savita lodged complaint with Sarkhej Police Station on 14.11.1989 at 2.15 pm. During the course of the investigation, prosecution made out a further case that appellant no.1 and appellant no.7 had committed rape upon Lalita and appellant nos.2 and 3 committed rape upon Usha on

the night of 4.11.1989 in the terrace of a building of Tavakkal Society. The prosecution also made out a case during investigation that during the stay of these three victims at the house of appellant no.5-Jamal, accused no.1 and accused no.7 had committed rape on Lalita, while accused no.2 Nadir and accused No.5 & 6 Jamal and Jayanti had committed rape on Usha. The prosecution made out a case that appellant No.4 Govind had kept all the three girls at his house knowing that all the three girls were kidnapped. Similarly, prosecution also made out a case that appellant no.5 had kept all the three girls at his house knowing fully well that these three girls were kidnapped.

3. The original accused of Sessions Case No.37 of 1990 of this Court were charge sheeted by Sarkhej Police Station for the offences punishable under section 363, 366, 376, 377, 343 and 114 of Indian Penal Code in respect of the offences registered at C.R. No.I-177 of 1989 of Sarkhej Police Station. The accused were committed to the Court of Sessions and the Sessions Case No.37 of 1990 was transferred to the Court of the learned Assistant Sessions Judge, who framed charge at exh.5 against all accused persons for different offences. The learned Assistant Sessions Judge conducted the trial and

recorded evidence of all the prosecution witnesses and also recorded further statements of the accused under section 313 of Criminal Procedure Code. Thereafter arguments were heard and by judgment dated 03.01.1991, the learned Assistant Sessions Judge convicted the accused under section 235(2) of the Code of Criminal Procedure. Accused Nos.1, 2 and 3 were convicted for the offences punishable under sections 363, 366 and 114 of Indian Penal Code, and they are sentenced to suffer each rigorous imprisonment for a period of two years and to pay a fine of Rs.250/- each in default to suffer further rigorous imprisonment for a period of 15 days for each of the aforesaid offences. Accused no.4 was convicted only for the offence punishable under section 368 of Indian Penal Code and was sentenced to suffer rigorous imprisonment for a period of two years and to pay a fine of Rs.250/-, in default to suffer further rigorous imprisonment for a period of 15 days. Accused nos.1, 2 and 3 were further convicted and along with them accused nos.6 and 7 were also convicted for the offences punishable under section 376 read with 34 of Indian Penal Code and sentenced each to suffer rigorous imprisonment for a period of seven years and to pay a fine of Rs.1000/- each in default to suffer further rigorous imprisonment for a period of two months for the aforesaid offence. Accused no.5 was further

convicted for the offence punishable under section 368 of Indian Penal Code, and was sentenced to suffer rigorous imprisonment For a period of two years and to pay fine of Rs.250/- in default to suffer further rigorous imprisonment. For a period of 15 days for the said offence and he is also further convicted of the offences punishable under section 376 read with 511 and also for the offence punishable under section 377 of Indian Penal Code, and was sentenced to suffer rigorous imprisonment for a period of 5 years and to pay a fine of Rs.750/- in default to suffer further rigorous imprisonment for a period of 1 month for each of the aforesaid two offences. The learned Judge ordered that the substantive sentences inflicted upon appellant nos. 1, 2, 3 & 5 should run concurrently. Being aggrieved by this judgment and order of conviction and sentence, the appellants – original accused preferred the appeal before the learned Additional Sessions Judge, Ahmedabad (Rural), Mirzapur.

4. The learned Additional Sessions Judge, Ahmedabad (Rural) allowed the said appeal by setting aside order of conviction and sentence of the learned Assistant Sessions Judge and acquitted all the accused. The said order reads as under:

"This appeal is allowed.

The order of sentence passed by the lower court against accused nos.1 to 7 on 23.01.1991 in Sessions Case No.37 of 1990 is hereby set aside. All the accused persons are given the benefit of doubt. Muddamal be destroyed. The accused lodged in the Jail be released immediately if not required in other case. The fine imposed on accused persons be refunded.

Pronounced in the open Court today on 29th July 1992."

5. Mr.Hardik Soni, learned APP has taken us through oral as well as documentary evidence appreciated by the courts below and submitted that initially judgment of conviction and sentence passed by the learned Assistant Sessions Judge is wrongly reversed by the learned Additional Sessions Judge by applying different criteria inasmuch as cogent reasons were given for arriving at finding and conclusion about proved guilt of the accused. In the backdrop of accusations referred to in earlier paras the prosecution has succeeded in establishing its case beyond reasonable doubt and version of all three prosecutrix was free from doubt, inspired confidence and truthful and therefore, reliable. It is submitted that under the

circumstances, all three victims were kidnapped and forcibly taken against their will to various places where accused had committed rape upon them for which description is given, not about the place but also about time and manner in which heinous crime was committed. It is submitted that medical examination of three victims was taken after period of ten days and therefore, absence of injuries on the body of their person or any mark of struggle or protest may not have appeared, the fact remains that victims themselves were more than clear in their depositions which were rightly considered and relied on by the learned Assistant Sessions Judge while convicting them to suffer various sentences with fine, ought not to have been disturbed by the learned Additional Sessions Judge. The learned APP has taken us to testimonies of PW 1- Ghanshyambhai Abhesinhbhai , PW 2 – Laghabhai Mangabhai, three medical witnesses, viz. Exhibits 17, 18 and 19, testimonies of PW 3- Dr.Jitendrabhai Jethalal Mehta and in turn certificates issued at Exhibits 23, 24, 26 and 27, along with testimonies of PW 4- Savitaben Manubhai at exh.31 and her complaint at exh.33, testimonies of Lalitaben Mangubhai, PW 11, exh.54, Jiviben, PW 16, Exh.86, mother of victim, Ushaben Manubhai, PW 17, Exh.92 and relevant certificate of date of birth, exh.98, register of date of birth, exh.100 and 101, two

certificates of date of birth of two victims and report of Forensic Science Laboratory (FSL), exh.104, 105, 106 and 107 and other relevant documents, which were exhibited before trial court.

On the basis of the above and supporting judgment of conviction and sentence ordered by the learned Assistant Sessions Judge in Sessions Case No.37 of 1990, it is urged that appeal be allowed and judgment and order of acquitting the accused by reversing the order of the learned Assistant Sessions Judge be quashed and set aside.

6. Learned advocate for the defence/ respondents would argue that judgment of conviction and sentence whereby the learned Assistant Sessions Judge, based on probabilities sans principles of appreciating evidence, oral as well as documentary and the learned Assistant Sessions Judge was carried away by manner in which the incident was narrated, but no evidence surfaced on record. According to learned counsel for defence as per both the courts below medical evidence about crime under sections 363, 366 and 376 of IPC revealed no such incidents attracting or bringing any of the ingredients of sections and therefore, appreciating and

interpreting evidence in a different manner by an appellate court whether just and proper and within the legal parameters, are to be looked into by this Court. It is submitted that while setting aside judgment of conviction and sentence by the learned Assistant Sessions Judge, the first appellate court, namely, the learned Additional Sessions Judge has threadbare again considered testimonies of the prosecutrix and medical officers before whom statements were given by victim in juxtaposition to complaint and their first statement before the Investigating Officer, it was found that version of three prosecutrix suffer from inherent inconsistencies, contradictions and improvements and therefore, by assigning just and proper reasons order of sentence came to be quashed and set aside by the appellate court and it deserves no interference in exercise of powers of this Court as prayed for by the appellant-complainant.

7. The learned Additional Sessions Judge had undertaken critical analysis of all the issues in paras 14 to19 of judgment as under based on proper appreciation of evidence on record by assigning cogent and convincing reasons.

“14) Now, the second issue to be considered is

regarding the medical evidence. The medical certificate of Lalitaben has been produced vide Exh. 16. It has been stated that the last physical intercourse had been committed on Friday night, and it is very clear that the medical examination has been conducted on the third or the fourth day thereafter. The doctor has clearly stated and it has been stated in the certificate also that no marks of rape were found. No injury had been sustained. No stains of blood or semen were there on the body or on the clothes. The private organ and other body-parts were completely developed. Swab-test had been taken, and on the basis of all the facts, it can be said that the certificate issued in this regard shows that no marks related to rape have been found if it might have been committed, as per the medical certificate. The certificate relating to the age of Lalitaben has been produced vide Exh. 26 and her age has been shown to be around 18 years therein. As per the medical opinion regarding Ushaben, it has been shown that her age is about 18 to 19 years. The deposition of Dr. Kantilal Sutariya has been recorded vide Exh. 82. Her case-papers and the medical certificate of Ushaben have been produced vide Exh. 83 and 84 respectively. There was no injury on the body. No injury was found on the private part. He has not stated the fact as to whether the hymen of the patient was broken or not, but it is the say of this witness that if physical intercourse is committed for 7 days continuously, the hymen may break. The deposition of Dr. Daisy Patel has been recorded which is limited to Savitaben only, and hence, it is not required to be discussed further. On making the physical examination of all the accused

persons, no marks have been found. It can be said on the whole that the Prosecution has not been able to produce any kind of medical evidence, and no injury is found from the medical evidence, and no injury has been found on the uterus also, and no injury has been found with the accused persons also. These witnesses state in their depositions that it had been severely opposed. No marks of any nail have been found anywhere. No injury or bruises are there on the body of the accused persons. If the incident of the rape committed in Tavakkal Society has occurred as described, that surface was so uneven, that it would certainly cause the marks of laceration, but no marks of any injury have been found on the body of any of the two sisters. The bruises may not be found after some time, but the marks of dried blood or the marks of bruises inevitably remain on the body, no such external injury has been sustained.

15) On the whole, it can be said that the medical evidence is not against the accused persons. Further, looking to the arguments advanced in this respect for both the parties, the learned advocate Shri Keshvani argues that when there is no injury or any kind, the medical evidence is not required to be taken into consideration, and independent corroboration becomes inevitably necessary. Hence, under the circumstances wherein no evidence apart from these two sisters or three sisters has been produced for corroboration, all the accused persons should get the benefit of doubt.

16) The next issue relates to consent. In such type

of case, consent cannot be in written or oral form, and on the basis of the circumstances and the facts, the Court is supposed to decide as to whether consent was there or not. In order to decide the issue as to whether there was consent or not, the normal behaviour and conduct of the person plays the most important role. It is expected that the woman or the man having sensibility behaves in a certain manner under a certain circumstances, and if she or he does not behave in that manner, or if the behaviour is unnatural, that witness has to give a clarification in this regard, or in this case, it has to be given by the Prosecution which can be considered to be an established principle. Consent is an important fact for the offence u/s 375 of the Indian Penal Code. As per the facts discussed above, there is full reason to believe that the age of Usha and Lalita might be more than 16 years. Hence, if consent is proved, the offence of rape is not constituted. Physical intercourse is not an offence, except the fact that it may have been committed with a woman below 16 years in age. If the legal situation is considered, as per the amendment made lastly, presumption is made u/s 114 (a) of the Indian Evidence Act. If the victim declares before the Court that her consent was not there, the Court can definitely presume that her consent was not there, and hence, the onus to prove the fact that consent was there remains on the Defence. The presumption made is not imperative, but it is the matter left to the discretion of the Court. This presumption is rebuttable, and hence, it remains to be considered as to whether it was a rape, or a physical intercourse having consent, and thereafter, the issue as to gang-rape would

remain to be considered. Nothing has been stated in the complaint in respect of the rape committed on the terrace of Tavakkal Society. It can be certainly believed that the complainant may be sleeping at that time and she might not be aware of it and hence, it is pardonable that such a fact might not have been dictated in the complaint. The deposition of Lalitaben Manubhai has been recorded vide Exh. 54. She states that the three sisters had been taken on the terrace of Tavakkal Society, nobody was living around the bungalow there, and later, the accused no. 7 had come on the terrace, Aiyub and Habib had committed evil act with them. Petticoat was lifted and Aiyub had put the urinary part in her urinary part, Habib had also done so. This witness states that both of them committed evil act with her in this way. This witness states that Usha was present there at that time, and it is the say of this witness that the accused nos. 2 and 3 had committed evil act with Ushaben. Both of these had committed evil act for 2-3 minutes. They had been kept on this terrace of the bungalow of Tavakkal Society up to morning, and they had been taken to the place of Govindbhai in the morning. Some questions have been asked in this respect in the cross-examination. The witness states that the incident had occurred on the bungalow situated adjacent to the road. The witness has stated the fact that the two accused persons had held her, and said that we will kill you if you use excessive force. Aiyub and Habib, that is, the accused nos. 1 and 7 had committed rape on her and she states that she had caused injuries by nails. She states that she was kicking also. She also states that

there was stony place. However, no injury has been sustained by the accused or her. The fact that clothes have not been found to be torn should be certainly taken into consideration. It becomes clear that no physical intercourse has been committed at the house of Govind. Thereafter, they had been taken to the house of Jamal in the farm of eucalyptus. They had been kept at the house of Jamal and had been threatened. She states that Aiyub and Habib had committed evil act in the farm of eucalyptus. She states that both had committed evil act for 2-3 minutes. She states that the accused nos. 2 and 3 were committing evil act with Usha. Usha and Jayanti, i. e. the accused no. 6 were in the room and she also states that Jayanti had committed evil act with Usha. She states that after threatening on Friday in the afternoon, he had taken all the three sisters to watch movie. She states that on the previous night also, they had gone for watching movie in Sangam Talkies. She was not alone at the time of watching movie, and they could have definitely escaped at that time. It is not out of place to presume that the person who says that rape has been committed on her may make an attempt to get rid of it, and she may take any risk for it. The same fact is stated by Ushaben also in her deposition As per the averment of Ushaben, the accused nos. 2 and 3 had committed evil act with her and evil act had been committed on the terrace of Tavakkal Society also. The deposition of the Police Inspector Shri Prithvisinh has been recorded vide Exh. 103. The statement of the witness Lalita has been recorded. She does not state that the accused no. 2 had threatened to kill. It has also not been stated by her in

the statement that Nadir had caught hold of Savita. It has also not been stated clearly that she had been made to sit in the rickshaw by getting hold of her. It is also not written in the statement that Aiyub and Firoz were sitting around her. She has also not stated that Aiyub and Habib lifted my petticoat and Aiyub put his urinary part in that of mine and thereafter, Habib had also done the same. I was pushing them back and they were saying that 'I will hit you if you use coercion'. The fact stated by her in the deposition as regards her conversation with Govind has also not been dictated in the statement given before the police. The description of the incident of rape which occurred in the farm of eucalyptus has not been dictated in the statement and only such a fact has been stated that both of them had committed evil act with her. It has been dictated by her that Jayanti had come only once. If this fact is taken into consideration on the whole, it can be said that no elements of rape are attracted, and as compared to the statement made before the police, these witnesses have stated many more facts in their depositions on oath. The deposition of the witness Ushaben has been recorded vide Exh. 92. She states that the accused nos. 2 and 3 had committed evil act on her. She has given the description in this regard. As per her say, there is no such medical evidence that there was bleeding from her uterus. She also states that she and Lalita had opposed at the time of rape. She states that she has also seen the fact that she has seen that rape was committed on Usha. She also states that thereafter, they had been taken to watch movie on Tuesday by giving intimidation. She also states that they had brought

them back on scooter. She also states that Jayanti had committed rape at night. She is unable to state some facts clearly during the cross-examination and certain contradictions arise which raise doubt. The deposition of the witness Prithvisinh who has carried out investigation in this case has been recorded vide Exh. 103. He has recorded the statement of Ushaben. She has stated of evil act having been committed in the veranda, but she does not state that evil act had been committed at the place of Jamal at night. If the cross-examination is viewed in the deposition of Exh. 103, it can be said that the significant facts which she has stated in the deposition have not been all stated in the statement given before the police. In this respect, it is not necessary that all the facts are recorded literatim, after stating that evil act was committed, many additions have been made therein. These facts should get corroboration in order to attract the element of rape which is extremely significant.

17) As discussed earlier, when there is a question of consent, there cannot be any written rule regarding it, but such fact can be certainly decided from the conduct of witnesses and circumstances as to whether there was consent or not. In this case, as discussed earlier, rickshaw stopped for half an hour. No uproar has been made. Thereafter, rickshaw was driven for twenty five minutes and when they were taken on the terrace in Tavakkal society, they did not oppose. The fact that threat was given, has been stated in the deposition. The same has not been stated in the statement before the police or complaint. This is an incident occurred on the

terrace in Tavakkal society, and panchnama in respect of the incident has been drawn in the bungalow no. 36 of Govardhan society, and Lalita has shown the said place. This panchnama is produced vide exhibit no. 39. The incident had taken place in the veranda in the field of eucalyptus. The panchnama thereof is produced vide exhibit no. 36. Lalita has shown the said place. In fact, according to complaint and deposition, incident has taken place in the room. Savita states adding something in her deposition. Lalita and Usha have not remained loyal to their police statement at all. When they stayed at Govind's house for three days, no effort has been made for running away or no outcry has been made or no effort has been made to get help. They were forced in the night of Tuesday. They got into bus and went to Sangam Talkies on the next day, and no other accused was with them at that time. They had no reason to come back to the field of Jamal after Savita ran away, and they could have run away immediately from there on finding opportunity. They have worn the clothes of Jamal's wife. They have returned on the scooter after watching out movie with Jayanti. They have not got help of anyone during the period of three hours movie, they have not raised alarm. It cannot be believed that one person can watch picture in this situation. If there is no consent, the first attempt of running away or finding out defence would be made. There is no such medical certificate as may corroborate their facts.

18) As per section 133 of the Indian Evidence Act, a victim should not be considered co-accused. But, there

are many judgments available that when a victim does not give reliable evidence, it is not safe to rely upon it. These three sisters do not stick to the same fact and it cannot be stated being emotional only that these three sisters were in the pathetic condition. They know accused no. 1, 2 and 3 of this case before the incident due to business of kerosene. Savita states that some amount of kerosene was due. It can be said from this that there was some transaction among them before the incident also. The case different from police statements and complaint has been filed in the court, and if they corroborate one another therein, it cannot be said to be corroboration. If a witness states two facts and when there is no truthfulness in the statement of witness, his evidence should be evaluated minutely, and the same has become an established rule. The Defence has relied upon A.I.R., 1979, the Apex Court, 185 and the court has discussed as to what kind of elements should be there regarding consent. When such fact is not proved that there was any kind of fear, it cannot be stated that she had given consent due to fear, and the Apex court has stated that the accused is liable to acquittal under such circumstances. Reliance has been placed upon the case of Bharvad Bhoginbhai Hirjibhai Vs. State of Gujarat, published on the page no. 753 of A.I.R., 1983, Supreme Court in the support of his argument and detailed discussion has been made therein as to what kind of support is required. When evidence of victim is believable, there is no need of any corroboration, but when any doubt arises, corroboration should be certainly received. In this regard, reliance has been placed upon

1979, 4, Supreme Court cases, 638. It has been stated therein that first information report and evidence should be entirely evaluated. The learned advocate Mr. Keshvani has relied upon A.I.R., 1977, Supreme Court, 1307 and other judgments in support of his argument. The essence of all is that they did not make any effort of opposing or running away or shouting. There is no need to discuss all the judgments because discussion has been made regarding evaluation of evidence therein and under what circumstances, the same should be corroborated in such cases and the same has been discussed and deliberated in the earlier discussion.

19) It is necessary to note that name of Habib is not in the complaint. The rape committed on the terrace of Tavakkal society has not been mentioned. No intercourse has been committed at Govind's house. No incident of having committed rape by the accused no. 1, 3 and 7 has been mentioned against them therein. It can be further stated that physical intercourse has been committed with Usha and Lalita, but there is no element of rape. The intentional detention is not proved. No elements of rape are attracted at the place of Jamal also, and such fact is clearly proved that they have willingly watched one movie with the accused persons in Sangam Talkies. The fact that threat was given to victim women, has not been got recorded in the complaint or statement before the police, and all the said facts have been stated at the stage of deposition only. The Prosecution has put different incident in the complaint and depositions, and therefore, all the facts of it become suspicious. In this

case, as discussed earlier, there is no evidence in respect of rape having been committed with Savita. Sodomy is not proved. No incident of abduction is proved. The fact that there is Tavakkal society or Govardhan society, is doubtful. The fact that they opposed, has not been stated before the police. The medical evidence is not corroborative evidence. The fact that witnesses corroborate one another in the deposition, is different from the statement recorded before the police. As rape is not proved, there is no question of Savita's age. Lalita's age is undoubtedly above sixteen years, and it is doubtful as to whether Usha's age is less than sixteen years or not. The consent is proved. Considering these facts, facts of rape having been committed are not undoubtedly proved, and therefore, there is no question of thinking about gang rape having been committed. If rape is proved, such fact is to be thought as to which accused has played what role in the gang rape. But, when facts of rape are not undoubtedly proved, there is no question of gang rape, and therefore, it is out of place to think as to who played what role in the gang rape. It can be said from all these facts that it is necessary to interfere in the order passed by the lower court. Mr. Saiyed, learned A.P.P., has laid more emphasis on such arguments as provokes such emotion that these three women have become victims and are liable to pity than true facts or legal provisions. It cannot be said that these three sisters are not reliable as they do the business of kerosene. The fact that they are not reliable, is proved from their conduct, and considering the way they acted, it can be certainly stated that there was their consent.

The lower court has believed all the allegations and charge having been proved undoubtedly. The lower court has discussed and deliberated in great depth, but evaluation of evidences has not been carried out properly. When there are two facts on the record, it was necessary to keep in mind the principle that benefit thereof should be certainly given to accused. The Defence has to prove as to whether there was consent of victim women or not. But, such fact can be proved from only conduct, and therefore, it is a refutable presumption that there was no consent. In this case, as it is proved from the conduct that there was consent, presumption u/s 114(A) of the Indian Evidence Act is refuted. The medical evidence is not helpful, and there is no need to discuss about statements of any other witnesses because they produce evidence giving only corroboration. When main facts are not proved, evidences in respect of panchnama or blood stains are not required to be thought in this kind of case. When rape is proved, other evidence can be taken into account as corroborative evidence. But, corroborative evidence cannot take the place of main evidence which is an established rule of evidence. It is clear that a doubt arises from the entire discussion and the same is not solved through the evidences of the Prosecution or arguments of learned A.P.P. If benefit of doubt is given to all the accused persons, it may be considered quite appropriate, and therefore, it is necessary to interfere in the judgment delivered by the lower court, and I give the decision of this judgment in affirmation."

8. Upon careful perusal of the record contained in oral as well as documentary evidence we are benefited by reasonings and findings of courts below, namely, the learned Assistant Sessions Judge and the learned Additional Sessions Judge and even perused evidence in its entirety, namely, testimonies of Savitaben, PW-4, Ushaben, PW-17, Lalitaben, PW-11, along with Dr.Ghanshyambhai Abhesinhbhai, PW-1, who examined Lalitaben, PW-11 and Ushaben, 17 on 15.11.1989 with regard to incident dated 04.11.1989, noticed absence of injuries on the body of persons. Likewise, Dr.Jitendra Jethalal Mehta, PW-3, who examined Savitaben, PW-4, complainant on 17.11.1989 though noticed above Savitaben, PW-4 was around 14 – 15 years, but no evidence was available about any kind of injury on body of the person and exh.23- medical certificate, if carefully perused in juxtaposition to testimonies to PW-4-Savitaben what was believed by the learned Assistant Sessions Judge for crime under section 376 of IPC was an attempt to commit rape or an offence under section 377 of IPC. Likewise, Dr.Kantial Punamchand Sutharia, PW-15, had taken note of history given by Ushaben, PW-17, noticed again absence of injuries and in her testimonies, Ushaben- PW-17 improved and added to the guilt of the accused viz-a-viz. her Police statement, whereby it was stated that she had gone along with

accused and stayed with them for seven days and out of fear that her mother would scold her she had not immediately rushed to her residence. About the alleged incident Ushaben, PW-17, Lalitaben, PW-11 and Savitaben, PW-4, all three prosecutrix have different versions not only about the accused, who committed the crime but even place and time of incident and what was noticed by the learned first Appellate Court about ample opportunities available to all three victims either to complain before the Police authorities or to any one when they had passed through public places and twice they had gone to watch movie at Sangam Theatre, Sarkhej. The manner in which kidnapping had taken place reveal that complainant was forcibly lifted in a rickshaw when two sisters were sitting inside along with accused from a locality inhabited by number of persons including close relatives of the victims do not inspire any confidence about veracity of their version. The learned Additional Sessions Judge while discussing the evidence about the age of the prosecutrix noticed that date of birth of Ushaben, PW-17 and Lalitaben, PW-11 could not be proved beyond reasonable doubt and statement given by mother of the victim clearly reveal that birth of Lalitaben, PW-11 had taken place before heavy flood in Sabarmati river in the year 1970 and thereafter they had shifted to the area of

Juhapura, Ahmedabad. Thus, on the date of incident, viz. 04.11.1989, she was major and other circumstances reveal that she had gone on her own with accused and stayed with them. So was the case of another victim, viz. PW 17 for which except date of birth which remained unsupported in deposition of competent authority was not believed by the learned Judge. In case of third victim, Savitaben, PW-4, no doubt she was below 16 years, even as per medical report, but considering the medical certificate exh.23 and testimonies of doctor, who had examined her including initial examination of Resident Doctor, Agan it was found that she was not subjected to rape or sodomy - an unnatural offence under section 377 of IPC.

9. On conjoint and collective reading of evidence along with findings and reasoning by the learned Assistant Sessions Judge in convicting and ordering sentence imposed upon each of the accused which came to be reversed by the first Appellate Court, namely, the learned Additional Sessions Judge, we find force in the submissions of the learned advocate for defence – respondents herein that reasoning and findings of the learned Additional Sessions Judge, namely, first Appellate Court are based on legal appreciation of evidence rather than approach of learend Assistant Sessions Judge based on probabilities in

believing case of prosecution, ignoring vital omissions, major contradictions and material discrepancies in testimonies of prosecution witnesses. In exercise of powers under section 378 of the Code of Criminal Procedure, 1973 we are convinced of and in agreement with the findings and conclusions arrived at by the learned Additional Sessions Judge in acquitting the respondents-accused by quashing and setting aside the judgment and order of conviction and sentence passed by the learned Assistant Sessions Judge.

10. No case is made out. Accordingly this Criminal Appeal filed by the State of Gujarat, the appellant, under section 378 of the Code of Criminal Procedure, is hereby dismissed and the judgment and order of acquittal by the learned Additional Sessions Judge, Ahmedabad (Rural), Mirzapur at Ahmedabad dated 29th July 1992 in Criminal Appeal No.5 of 1991 stands confirmed. Bail bonds stand cancelled. Record & Proceedings be sent back to the Trial Court concerned.

(ANANT S.DAVE, J.)

(S.H.VORA, J.)

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