(1989) 08 MP CK 0025

Madhya Pradesh High Court (Indore Bench)

Case No: Criminal A. No''s. 60 and 82 of 1985

Nawabkhan and Others		APPELLANT
	Vs	
The State		RESPONDENT

Date of Decision: Aug. 23, 1989

Acts Referred:

- Evidence Act, 1872 - Section 114A
- Penal Code, 1860 (IPC) - Section 109, 34, 366, 370, 376

Citation: (1990) CriLJ 1179

Hon'ble Judges: V.D. Gyani, J

Bench: Single Bench

Advocate: M.A. Khan, for the Appellant; A.H. Khan, Government Advocate, for the Respondent

Final Decision: Dismissed

Judgement

V.D. Gyani, J.

This appeal (Cr.A. 60/ 85) is connected with Cr.A. 82/85 preferred by co-accused Mushtali, who was also jointly tried along with other accused appellants Nawab, Abbas and Shabbir. Both these appeals, therefore, were heard together and are being decided by a common judgment. Appellants Mushtaque and Nawab have been found to be guilty of offence punishable u/s 376 IPC, while appellants Abbas and Shabbir have convicted u/s 370/34 IPC and all of them have been sentenced to undergo rigorous imprisonment for ten years. Mushtaque in addition to the above sentence, has also been found to be guilty of a charge u/s 366, I.P.C. and sentenced to undergo RI for three years.

2. Aggrieved by the judgment dated 18-1-85 passed by the Addl. Sessions Judge, Shajapur (Camp Shujalpur) in S.T. No. 80/84, the accused have preferred these appeals.

3. Prosecution case was that Parwati was married to Ramesh of village Dhiglepur. On the date of incident i.e. on 12th of May, 1984, she had a wordy duel with her Jethani (wife of husband''s elder brother), her father was also not keeping well. Her husband had also asked her to visit her father at Ujjain if she desired; it was in this stage of mind she came to ''Mav-Padana'' railway station from village Dinglepurto go to Ujjain and purchased a ticket for Ujjain. While she was standing quite unmindful and depressed at the platform the accused Mushtaque approached her and before she had narrated her woes to an old man sitting on the platform, it was through him that she had purchased a ticket for Ujjain. The train was yet to arrive when accused Mushtaque approached her addressing her as is ''Dharam Bahan'' introducing himself as an acquaintance of her husband and his elder brothers. He entreated of her not to go to Ujjain and promised to take her back to Danglepur. It was around 1.00 p.m. They started for Dinglepur, walking on the railway track, they reached a bifurcation. The accused instead of proceeding towards Dinglepur, took a turn towards the route, going to the forest. The prosecutrix declined, but she was made to go, at the point of knife. As they reached a ''Nalla'' the accused gave her lathi blows. She screamed but there was none to hear her screams. The accused fell her down and committed rape on her at the point of knife.
4. The accused forcibly took her ahead. The sun was set by the time they reached a Jamun tree. She was again fell by the accused who forced himself upon her, turning a deaf ear to screams and cries. She was kept under the Jamun tree that night.

5. Next day morning accused Nawab appeared on the scene with Abbas and Shabbir. Around 12, Nawab also committed rape on her and chastised her for her crying and repeated the felony again in the evening. She was beaten up by Nawab.

6. In the night accused Mushtaque and Nawab made her lie beside them under the Jamun tree while the other two Abbass and Shabbir kept a watch. It was around 9.00 p.m. that some villagers including Kailash P.W. 1 (the elder brother of Parwati''s husband Ramesh Dhansingh P.W. 2 came there, searching for Parwati, while others managed to escape. Nawab was caught on the spot. They went to Police Station Sarangpur where Parwati lodged F.I.R. Ex. P.9.

7. A case u/s 366 to 376 and 392-34, I.P.C. was. registered. Parwati was sent for medical examination. She was examined by lady Asstt. Surgeon Dr. Smt. Rekha P.W. 8 who gave her report Ex. P. 15. The accused were arrested. They were also medically examined by Dr. Ashok Jain P.W. 5 and Dr. Sisodiya P.W. 9 as per their reports Exs. P.5 and P.6 and P.I 1, accused Mushaque, Shabbir and Nawab were found to be capable of having-sexual intercourse.

8. As per medical examination report Ex. P.O, Parwati being a married woman was accustomed to sexual intercourse as such no definite opinion could be given by Dr. Rekha P.W. 8 about rape being committed. On completion of investigation the accused were charged and tried for the above offences. The trial Court found them

guilty and convicted and sentenced them as stated above. Hence this appeal.

9. The arguments of both the learned counsel Shri M. A. Khan as also Shri Pathan, are virtually indentical except for the fact that Shri Pathan has argued for appellant Mustaque, on the point of abduction. Barring this, their arguments have remained the same. The following points have been raised by the learned counsel:

(i) Lack of corroboration of the testimony of the prosecutrix from medical evidence;

(ii) The inter se contradictions and omissions obtaining in the testimony of the prosecutrix and other witnesses which render from evidence unreliable;

(iii) The belated nature of the F.I.R. which was lodged two days after the first incident.

Apart from these common points, Shri Khan raised the question of identity of the case and Shri Pathan urged that the trial Court wrongly rejected the defence version, and

(iv) Lastly it was urged by both the learned counsel that the sentence is too severe.

10. To take up the first point -- namely corroboration, the law as it stands, does not necessarily require corroboration in case of rape of the testimony of the prosecutrix. The myth of corroboration now stands exploded, (see Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, . What was argued that there is no corroboration from medical evidence. Dr. Smt. Rekha P.W. 8, had examined, the prosecutrix on 14-5-84 and gave her examination report Ex. P. 10. The loss of time between the first act and the medical examination, should not be overlooked. The FIR was lodged at 24.20 hours on 14-5-84 and thereafter the prosecutrix was sent to the lady Asstt. Surgeon for medical examination. According to Parwati P.W. 6, Mushtaque committed rape on her in the ''Nulla'' in the afternoon of 12th May, 84. Thereafter she was again subjected to forcible intercourse under the Jamun tree, in the evening. Next day, in the forenoon and again in the evening it was Nawab, who committed rape on her. Parwati being a married woman, she was habituated to intercourse and it was for this reason that Dr. Smt. Rakha opined that no opinion as regards commission of rape could be given by her. As far external marks of injury the evidence of Parwati is to the effect that she was compelled to submit at the point of knife. No doubt she has also stated that both the accused Mushtaque and Nawab had beaten her, and one would ordinarily expect some external marks of injury being found. There was a gap of almost 36 hours between the first act of beating and the time of medical examination. After such a long lapse of time, the possibility of finding injury marks depends on the particular part of the body where injury is inflicted, the nature of injury and the time lapsed since infliction of injury. The mere fact that no external marks of injuries were found by itself would not throw the testimony of prosecutrix overboard.

11. There is another piece of corroboration more reliable than the medical evidence and it is the chemical examiner''s report Ex. P. 14. As per medical examination report of Parwati Ex. P. 10, two slides were prepared from secretion in vagina and pubic hair were seen along with peticoat, duly sealed. P.W. 10 Ashok Bhardwaj the I.O. has stated in evidence that he had sent these articles for chemical examination and that report Ex. P. 14 was received from the chemical examiner. There is not a single question in her cross-examination directed to this point. These articles -- peticoat, slides of vaginal smear and pubic hair were marked as A, B-1, B-2 and B-3 and presence of human spermatozoa was confirmed on all these articles. In face of external marks of injuries it would not be correct to say that there is no corroboration of the testimony of the prosecutrix.

12. The presence or absence of injury on the body of the rape victim, is relevant to decide whether the act of sexual intercourse was committed with consent or not. It may be recalled that in view of Section 114A of the Evidence Act, as inserted by the Criminal Law Amendment Act, 1983, if the prosecutrix states in her evidence that she did not consent to the sexual intercourse, the onus to prove consent lies on the accused. The fact of sexual intercourse is no doubt requires to be established by the prosecution. As pointed out by the Supreme Court in Rafiq Vs. State of U.P., absence of marks of injury on victim is not fatal in each case; nor does the absence of such physical injuries on the prosecutrix warrant the presumption of consent on her part. It may be noted that this incident had taken place on 12-5-84, after the amendment, aforesaid, came into force.

13. Learned counsel pointed certain infirmities, general speaking, in the prosecution case and more particularly in the evidence of the prosecutrix.

14. Let us first take the delay in lodging the FIR. As a matter of fact, on facts, as established, it cannot be said that there was any delay in lodging the FIR. The submission is apparently misconceived. The place where-from the victim Parwati was rescued from the clutches of the accused, is about 10 kms. from the Police Station. It was night time when she was rescued and report was lodged at 24.20 hours. It cannot, therefore, be said that there was any delay in lodging the FIR. Coming to certain omissions and contradictions as pointed out by the learned counsel, they are being enumerated and specifically dealt.

(a) The prosecutrix in the report Ex. P. 8 did not state that she was to go to Ujjain.

(b) There was an omission in the FIR about the representation made by Mushtaque claiming acquaintance of her husband and his elder brother;

(c) The fact that Mushtaque gave 3.4 lathi blows while taking her on the route towards jungle; and

(d) that Mushtaque lifted her peticoat; the fact that she was taken to the Jamun tree where Mushtaque fell her down and despite her screaming, committed rape. Now

most of these omission are also referable to her previous statement Ex. D.3 recorded by the police. It was argued by the learned counsel that in view of these omissions, the testimony of the prosecutrix can not be relied upon, the submission cannot be accepted; Firstly because these omissions even if considered, are insignificant and immaterial in themselves; and even if considered most liberally, they do not obliterate the evidence of the prosecutrix. While lodging the report or at the time of recording her statement it was not expected of her to state such minor facts as rising of peticoat by the accused or the claim of acquaintance advanced by him. As a matter of fact reading her statement Ex D.3. and the FIR Ex. P. 8, it is apparently clear that the prosecutrix did state the fact that the accused came to her and claimed that, he was acquainted with her ''Jeth'' (elder brother of her husband). The only omission, if it is an omission at. all, is with regard to her husband Ramesh. The fact, she was given 3-4 lathi blows while turning towards jungle route is certainly not to be found in the FIR Ex. P.8 and her previous statement Ex. D.3. But these omissions by itself is not sufficient to discard her testimony. It cannot be and ought not to be overlooked that she was making a report, soon after being rescued from the clutches of the accused. Every detail of the incident is neither necessary nor can it be expected in such a state of mind of any prosecutrix to narrate the same. Similarly, same is the case with an omission as regards appellant Mushtaque approaching her as his ''Dharam Bahan'' and touching his feet. She has been cross-examined on this point at length and it must be stated that she has withstood test of cross-examination. None of these omissions, considered either separately or conjointly in such as to render her testimony unreliable.

15. It has come in her cross-examination that her village Dinglepur was about 4.5 miles i.e. 8-10 kms. from the ''Nulla''. It was suggested to her that she was a woman of easy virtues. No doubt she had repelled the suggestion. Even assuming it to be so, for the sake of argument, how does it help the accused ? It has also come in her cross-examination that while she was going on railway track along with Mushtaque, they met none. She had offered resistance by kicking the accused but she was rendered helpless as the accused whipped out a knife (see para 28 of. her statement). Even when appellant Nawab committed rape on her, she was absolutely helpless and resigned to fate. He had also raped her at the point of knife. He had kept it at her breast while other two accused were also present there. The suggestion that the accused had come in search of their cattle, has been emphatically rejected by the prosecutrix. It is in this state of helplessness that she was subjected to rape not once but four times. It can hardly be construed as an act of consent, by no stretch.

16. Learned counsel argued that appellants Abbas and Shabbir cannot be legally convicted u/s 376 with the aid of Section 34, I.P.C., as has been done by the trial Court. The submission appears to be sound but there is overwhelming evidence on record to show that their presence was not innocuous although legally they may not be convicted u/s 376 with the aid of Section 34, I.P.C. as rightly contended by the

learned counsels, reading the charge as framed, and in view of evidence which has been adduced, they can safely be found guilty with the aid of Section 109 of the Penal Code. Their conviction u/s 376/34, I.P.C. as recorded by the trial Court, is altered to one u/s 376/109, I.P. C. The evidence establishes that--

It is not a case where the accused-appellants had not merely endeavoured to prevent the crime, or apprehend the criminal, but on the other hand they, by their conduct, in proceeding and being present aided and abetted the commission of rape inasmuch they kept a watch, lest some one comes and prevents the offence, that they have their share participation and contribution in commission of the offence of ''rape'' in concert with the rest who actually perpetrated rape. A person voluntarily present at the scene of commission of a crime like rape, offering no opposition, to it though he might reasonably be expected to prevent it; and had the power to do so, there is cogent evidence, to justifiably, base a finding that they aided and abetted the crime (see (1882) 8 QBD 534, R v. Coney).

17. Appellant Musthaque has been convicted u/s 366, I.P.C. as well. Use of force is not an essential ingredient of Section 366, I.P.C. ''Abduction'' ''kidnapping'' can be achieved even by deceitful means and there is overwhelming evidence on record to sustain such a charge u/s 366, I.P.C. and conviction thereunder.

18. Lastly, it was urged by the learned counsels that the sentence is rather harsh. Considering the sexual indulgence and attending horror thereof where every possible motive is imputed to the prosecutrix to submit to such forcible intercourse, to my mind the sentence as imposed by the trial Court is quite just and does not call for any interference, so far as appellants Nawabkhan and Mushtaque are concerned. It is accordingly maintained. It is a case where the baseness of man has been displayed in all its nakedness. A victim of circumstances, has been ravished and robbed of her most precious possession.

19. As far appellant Abbas and Shabbir, the only extenuating circumstance in their favour, is that they have not actually committed the offence but abetted it. The trial Court has imposed the same term of imprisonment of 10 years in respect of these appellants as well. To my mind, considering the role played by them, the ends of justice would be substantially met with, if their sentence is altered to five years instead of ten years as imposed by the trial Court. Accordingly they are sentenced to undergo five year R.I.

20. Appellant Musthaque''s conviction u/s 366, I.P.C. as imposed and directed by the trial Court, is maintained.

21. For the foregoing reasons this appeal fails and is accordingly dismissed. The conviction and sentence as imposed by the trial Court, subject of course to the alteration indicated above, are maintained. The appellants to surrender to their bail bonds to undergo remaining part of their sentence.