

(1987) 05 DEL CK 0017

In the Delhi High Court

Case No : Criminal Appeal No. 191, 194 and 196 of 1986

Aman Kumar, Om Parkash and Satbir Singh

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 08-05-1987

Acts Referred:

Citation : (1987) 2 Crimes 755 : (1987) 32 DLT 319

Hon'ble Judges : M.K. Chawla, J

Bench : Single Bench

Advocate : D.C. Mathur, Y.S. Rana, Naval Kishore, M.S. Mann and P.S. Sharma, for the Appellant;

Judgement

M.K. Chawla, J.

(1) In the month of April, 1985, Constable Aman Kumar and his two colleagues, Satbir Singh and Om Parkash were posted at police post Hari Nagar under the jurisdiction of Police Station Tilak Nagar, Delhi. Aman Kumar is alleged to have committed rape on the person of Kumari Jhunu Majumdar, without her consent and against her will while she was in police custody during the intervening night of 2nd and 3/04/1985. Satbir Singh and Om Parkash are accused of abetting the commission of rape. Aman Kumar was charged to stand trial for the offence punishable u/s 376(Proviso-A) Indian Penal Code while against the remaining two charge u/s 109 IPC was framed.

(2) The accused denied their involvement. The defense is that at the instance of Dr. Aparna Sarin, the so-called social worker of the area they have been falsely implicated. In fact she had a personal grudge against the officers posted at police post, Hari Nagar, as they refused to oblige her in doing wrong acts on several occasions. They even denied their presence at the relevant time and place of the occurrence.

(3) The prosecution in support of their case examined as many as 21 witnesses while the accused recalled and produced Dr. J. Chatterji to depose about the

bony age of the prosecutor. Besides that, the statement of Sunita Gupta, M.M. was recorded on the basis of the judicial file of the case FIR456/85 under Sections 363/366/376 Ipc, in which she had recorded the statement of the prosecutrix u/s 164. Cr. P.C.

(4) On consideration of the oral as well as documentary evidence placed and proved on record the learned Additional Sessions Judge found the accused guilty of the offences charged with, and sentenced all of them to undergo R.I. for a period of 10 years together with a fine of Rs. 5000.00 each, in default of payment of fine, to undergo R.I. for 2 years Rs. 10,000.00 was ordered to be paid to the prosecutrix. This very order is the subject matter of three separate appeals of the accused persons and are being disposed of by this judgment.

(5) Before taking up the case of the accused persons, one must know the circumstances under which the offence was committed. Kumari Juman Majumdar is the prosecutrix, and the most material witness. Her version is that she and her sister-in-law Smt. Anjali Majumdar were working as maidservant in the house of one Chattar Singh. As ill luck would have it, on 1st of April, 1985, Mrs. Chattar Singh misplaced one of her ear-rings. She made enquiries from the prosecutrix who showed her ignorance and denied having stolen the ear-ring. Chattar Singh then summoned the local police and lodged the report. Even after the enquiries, the ear-ring could not be found. The local police then brought the prosecutrix to the police station for further investigation. She was detained, first at the police station Tilak Nagar and then transferred to the police post and kept there. It is the case of the prosecutrix that on the intervening night of 2nd and 3rd of April, 1985 she was given beating during the night. One of the constables (pointing towards accused Aman Kumar) committed rape on her. Before the act the accused had taken off his clothes and forcibly removed her clothes. Even though she offered resistance but the accused completed the act and during his process, bit her on the lips. All along this period, accused Om Parkash and Satbir Singh remained present in the room.

(6) In the morning of the next day, according to her, Smt. Anjali Majumdar came to the police post and met her. The prosecutrix narrated the entire incident to her. With the help of Dr. Aparna Sarin, she was got released in the evening and was medically examined the same day.

(7) It is her case that the police officers again took her away and arranged a forced marriage with one Vijay Bara, an invalid person. She was also offered some amount in consideration of the closure of the case. but she refused to oblige them. On the basis of her statement and after collecting the relevant material, the case was registered.

(8) The submissions of the learned counsel for Aman Kumar in brief are that :-

(A) The trial court gravely erred in placing reliance on the evidence of Dr. J. Chatterji, Radiologist, in fixing the age of the prosecutrix as 14 years, in as much as, in the subsequent case against the prosecutrix her age was determined

between 15 years and less than 17 years.

(B) There is no document to show as to when and at whose instance and by whom the prosecutrix was taken into police custody. Further more there is no evidence to suggest that during the night between 2nd/ 3/04/1985, she was present at the police post .

(C) The allegation of rape by accused Aman Kumar does not find corroboration from the medical record and/or the reports from the C.F.S.L.

(D) No reliance should have been placed on the test identification parade ,inasmuch as, the accused had already been shown to the prosecutrix at the police post.

(9) The contention of the other two accused is that their names do not find mention in the first information report and the possibility of their false implication in the case cannot be ruled out. The identification parade held by Shri V.K. Malhotra, M.M. was a farce as each of the accused was not mixed up with persons having identical features. According to them, there is no worthwhile evidence to show that any of the two accused were in conspiracy or in any manner assisted the commission of the rape by the main accused.

(10) Learned counsel for the State mainly relied upon the unrebutted evidence of the prosecutrix, supported by medical evidence. He also defended the action of the learned Metropolitan Magistrate in holding the identification parade so as to fix the identity of the accused persons

(11) Learned counsel for the accused persons have tried to create doubt about the presence of the prosecutrix at the police post on the day and time of the occurrence. Their contention is that no case u/s 380 Indian Penal Code was got registered by S. Chattar Singh from whose house an car-ring is alleged to have been stolen by the prosecutrix. Besides that, S. Chattar Singh was also not produced to support the plea of his having produced the prosecutrix or she in turn was arrested and detained in the said case.

(12) I do not find any substance in any of the contentions raised in this behalf .It is no doubt true S. Chattar Singh has not come into the witness box to support the lodging of the report or the arrest of the prosecutrix, but there is an overwhelming oral as well as documentary evidence to prove the fact that during intervening night between 2nd/3rd April, 19.S5, the prosecutrix was in custody of the police at police post Hari Nagar. The evidence of the prosecutor coupled with the statement of Smt. Anjali Majumdar, her sister-in-law, is, by itself ,enough to conclude that the prosecutor was taken into custody and detained at the police post Hari Nagar at the instance of S. Chattar Singh. Smt. Anjali is specific on the point that S. Chattar Singh brought her and the prosecutrix along with her younger brother to the police post Hari Nagar. The police detained the prosecutrix but allowed her and her younger brother to leave. Besides that the prosecution has examined Public Witness 4 Rajesh Kurnar, Public

Witness 3Dr.Aparna Sarin and the brother of the prosecutrix Jagu Majumdar. All of them in one voice depose that on the morning of 3/04/1985 they saw the prosecutrix sitting at the police post and inspire of their repeated attempts the SHO, Tilak Nagar did not allow them to meet her. Jagu Majumdar went to the extent of securing a search warrant from the competent court which was duly delivered at the police post. It was only thereafter that the prosecutrix was released from the custody. There is no worthwhile cross examination on any of these witnesses. There is no indication or even suggestion that she was not arrested on 1.4.1985 and detained at the police post during the intervening night between 2nd/ 3/04/1985.

(13) The prosecution has also produced Public Witness 10 A.S.1. Bhopal Singh who admitted having recorded the Fir No. 117 dated 3.4.1985 u/s 380 Indian Penal Code on the report of S. Chattar Singh against the prosecutrix. This fact also goes to show that a case u/s 380 Indian Penal Code was registered against the prosecutor and during the course of investigation, she was kept at the police post. The non-production of S. Chattar Singh is not a circumstance which can demolish the correctness of the prosecution case. This part of the argument, thus has no merit.

(14) The second aspect concerns the presence of the accused persons in the police station at the relevant time. In their statements u/s 313 Cr.P.C. all the accused denied their presence or their being a party to the commission of the rape of the prosecutrix. According to them, even though in the month of April, 1985, they were posted at police post Hari Nagar, but none of them happened to be in the police post on the intervening night of 2nd/ 3/04/1985.

(15) In the face of this categorical denial, the prosecution was required to establish the identity of the accused persons. During this course of the investigation ,the prosecutrix had told the police that if the accused are produced before her, she will be in a position to identify them. She also gave the description of the person who committed rape "tall and thin". It appears that on the basis of the statement of the prosecutrix, the 1.0. was not able to pin-point the accused persons inasmuch as there were eight police constables who were posted at the police post on the relevant date. In order to be on the safer side, the 1.0. preferred to move an application before the C.M.M. Delhi for fixing the identity of the accused persons. This application was moved on 6.4.1985 and on the same day, it was marked to Shri V.K. Malhotra, M.M. Delhi. The endorsement of the learned Metropolitan Magistrate shows that after tracing history of the case, he directed the 1.0. to produce all the eight constables in his Court room for identification. This direction was duly complied with and at about 2.30 P.M. all the constables were produced. The identification proceedings further indicate that before holding the parade, as per the case of the prosecutrix, the police officers were directed to remove their caps and take out their shirts from their pants so that they should be in the same state as the accused were at the time of commission of the offence. The identification proceedings were conducted in

the court room and all of them were made to stand in a row along the side wall. Later on the prosecutrix was summoned and she immediately pointed towards Constable Aman Kumar as the police officer who raped her. She also named and pointed towards Constable Om Parkash and Constable Satbir Singh as the two other police officials present in the room.

(16) Learned counsel for the accused submitted that the identification of the accused persons in the so-called identification proceedings conducted by the Metropolitan Magistrate is not identification in the eye of law, in as much as, none of the accused was made to join other persons having similar features. Learned counsel also submits that as per the admission of the prosecutrix, they had already been shown to her at the police post, a day prior to the holding of the identification proceedings. These arguments prima facie have no substance. The proceedings in this case were conducted with the sole purpose of identifying the culprits. Before that neither of them had been named as accused persons nor they were in police custody. Therefore, there was no question of joining any outsider. It was only after the fixing of the identity, that they were arrested and released on bail.

(17) On the second aspect, it is not made clear from the cross examination of the prosecutrix that any of the accused persons was shown to her prior to the holding of the identification proceedings. Of course, she had seen them at the police post but the question is at what time was it prior or after the parade. Was it at the police station or in the Court room. All these questions have not been clarified while she was under cross examination. One fact, however, remains proved and that is that in the court room, she had identified all the three accused persons without any difficulty. Such an identification has also been held and considered to be a valid one in the eyes of law. There was no occasion for the prosecutrix to falsely implicate any of the accused. She had no animus against them. She had not seen or known to the accused from before. At this stage one cannot lose sight of the fact that in her statement Ex.PW2/DB recorded under S. 161 Cr. P.O., the prosecutrix had given the description of the accused persons. According to her the person who committed rape on her was tall, lean and thin. On seeing the accused Aman Kumar, the lower Court observed that he in fact is tall, lean and thin. Thus the description given by the prosecutrix fully tallied with his constitution. The identity of the accused thus stands fully established, as the person responsible for the commission of offence.

(18) Now we come to the important aspect of the matter and that is, as to whether the evidence of the prosecutrix should be believed or not. According to the contention of the learned counsel for the accused persons, there is only one solitary statement of the prosecutrix with regard to the factum of rape by Aman Kumar and the presence of the two other accused in the room. Her statement, according to learned counsel, does not find corroboration from any quarter. On the other hand there are numerous circumstances indicating the falsehood of her version.

(19) It is no doubt true that Kumari Jhunu Mazumdar is the victim of rape and the only witness. To what extent, the court should place reliance on the solitary statement was the subject matter of discussion in various cases before the Hon"ble Supreme Court of India as well as the High Courts. Now it has become a well settled rule of precedence that the prosecutrix is not an accomplice and her testimony cannot be equated with that of an accomplice in an offence. As a rule of prudence, however Court, normally looks for some corroboration of her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated (Gurcharan Singh Vs. State of Haryana,). The conviction of an accused person cannot be said to be illegal merely because her statement is based on uncorroborated evidence, provided it is truthful and believable .But if her testimony finds the slightest corroboration, which may come from the circumstantial evidence, the medical report or from an unknown source ,then there is no going back. One has, however, to keep in mind the circumstances under which she was placed at that point of time and the opportunity for the accused to do wrongful act.

(20) With this background, one has carefully to peruse the statement of Km. Jhunu Mazumdar. She has stated in unequivocal terms that she was subjected to sexual intercourse against her will and without her consent by the accused Aman Kumar in the presence of the other two accused. She also narrated the sequence of events leading to the rape and the subsequent conduct of the accused persons. She was cross examined at length but unfortunately learned counsel has not been able to point out any material to render her testimony unworthy of credence. The cross-examination mostly revolves round the non-registration of a case u/s 380 Indian Penal Code or the events subsequent to her release from the police custody. There is no worthwhile cross examination on the actual act of rape, and by whom. This evidence to my mind, is reliable and believable and by itself is enough to bring home the charge against the accused persons.

(21) Moreover, I am further of the opinion that her testimony find full support from the medical evidence. Immediately after her release from The police custody, she was taken to Jpn hospital for medical examination. The time was 8.30 P.M. She was examined by Dr. Sandhya Bajpai. The M.L.C. is Ex. Public Witness 13/A. On examination, the doctor found two small tears in the hymen .She also found abrasions on the velva. On local examination, she observed abrasions on the back of the prosecutrix. It appears that subsequently on 8.4.85, the Investigating Officer moved an application before the doctor seeking clarification asking for her opinion on the following points :-

1.Duration of the offence2. Whether the two small tears in hymen were fresh or old;3. The age of the prosecutrix and4. Whether the abrasions at velva were possible during the commission of rape or by beating.

(22) The report of the doctor is Ex. Public Witness 13.B. In her opinion the duration of the offence is within 12 hours of the commission of rape as these men had not dried on the Velva;that the two tears in the hymen were fresh; that

the age of the prosecutrix was 14 years and the abrasions on the velva were possible during the rape. Both the M.L.C. and the opinion of Dr. Sandhya taken together are in complete agreement with the case set up by the prosecution .It is the case of the prosecutrix that she was subjected to rape during the intervening night of 2nd/ 3/04/1985. It led to bleeding. Before the rape, she was given beating. At the time of the rape she was made to lie on the ground. This part of her statement stands substantially corroborated by the opinion of the doctor who found two fresh tears in the hymen and the abrasions on the velva on account of rape. Injuries/abrasions on the back are possible ,in the manner she was subjected to rape.

(23) As regards the duration of offence, even though the doctor has mentioned it to have happened within 12 hours of examination but she cleverly avoided to stick to this time and diluted it by saying that this could be "most likely possibility as the semen had not dried on the velva as yet." Learned counsel for the accused tried to take benefit of this opinion by taking the stand that there was no occasion for accused Aman Kumar to commit the rape within 12 hours of the medical examination of the prosecutrix. The possibility of somebody else having ravished the prosecutrix cannot be ruled out. This is a far-fetched circumstance and the accused cannot be allowed to take advantage of the same. The prosecutrix remained in the police post till about 3.30 or 4.00 P.M. After the release she was taken to the hospital by Dr. Aparna Sareen, Anjali Mazumdar and the brother of the prosecutrix. Shri Chhattar Pal was also with the party. It is just not possible to imagine that while going from police post to the hospital, she was subjected to forcible rape by some other persons. The case of the accused is that Chhattarpal Singh might be responsible for this. This part of the defense stand belied from the statement of PW 11 Smt. Anjali Mazumdar, the sister-in-law of the prosecutrix. According to her, the prosecutrix narrated her woeful tale immediately after her release from the police custody, i.e. even before she was taken to the hospital. This part of the statement of Anjali Mazumdar is very much relevant and material. To this, there is no challenge in the cross examination. This, thus rules out the possibility of a second assault on the prosecutrix, by a third person.

(24) On 4.4.85, the prosecutrix was produced before Cmm for her statement under S. 164 Criminal Procedure Code In that statement she narrated verbatim the sequence of events leading to her arrest, detention and the commission of rape while under police custody in the police post. During her statement she also stated that in the course of rape accused Aman Kumar bit her on the lips. Shri Subhash Wason, Chief Metropolitan Magistrate during the course of recording of the statement made an observation that there is a mark of tooth bite on the lower lip on left side, of the prosecutrix. This is yet another circumstance in support of her stand of forcible rape.

(25) Learned counsel for the accused then referred to the report of Dr. R.K. Bhatnagar of the C.F.S.L. to support the plea of innocence of accused Aman

Kumar. On Chemical examination of the blood sample of the accused Aman Kumar, the doctor opined that it is "O" Group. The semen stains on the salwar and shirt, according to the doctor gave reaction for Ab group. In the opinion of the doctor Ex. Public Witness 21/6 the blood and the semen group of an individual should be the same. In the background of this opinion, the contention is that accused Aman Kumar could not be said to have committed rape on the prosecutrix. There must be a third person and there is none else, but Chattar Pal, who admittedly took the prosecutrix to the hospital.

(26) This argument, in its first impression, appeared to be of some substance, but when examined in depth, it turned out to be damp squib. This very aspect has been very well handled at some length by the learned Additional Sessions Judge, and found the opinion to be contrary to medical jurisprudence. The learned lower court has referred to the numerous medical books of eminent authors. The commentary on the Medical Jurisprudence and Toxicology by Dr. J.P. Modi on this aspect lays down. "Blood group can be detected in the semen, if the person is a secretor i.e. one who secretes blood group antigens in his serum. If not, reaction of group O with semen may only mean absence of group substance in the semen. In the absence of knowledge of secretor or non-secretor the reaction of group O in semen will mean either group O or non-secretor." Alfred Swain Taylor has got this to say on this point as under:-

"It must be remembered that only 80 per cent of the individuals are secretors. In secretors the group can usually be readily established, as the group specific substances occur in relatively high concentration, but in non-secretors they are absent". gradwohl's Legal Medicine observed under : "The blood group substances found in body fluids are confined to those of the Abo system. Moreover not all individuals secrete their corresponding blood group substances in their fluids. About 75 per cent of the population are secretors and the rest non-secretors. Secretors usually produce A, and H blood group substances in high concentration in seminal fluids, saliva, vaginal secretion and gastric juices. In other body fluids such as sweat, tears and urine the concentration is fairly low."

(27) From the medical jurisprudence and the authorities referred to in the judgment, it can safely be said that only the secretors secrete their corresponding blood group in their fluids. This is not so with the non-secretors. Applying this ratio, in this case, it has not been found or determined if Aman Kumar is a secretor or a non-secretor. In its absence, the accused cannot take advantage of the opinion report of the Chemical examination. In nutshell, the statement of the prosecutrix stands fully corroborated from the medical evidence placed and proved on record.

(28) As a last resort, counsel for the appellants, submitted that at the time of the alleged offence the prosecutrix was major and a consenting party. In this behalf he relies upon the evidence of Dw 1 Dr. J. Chatterjee. In her opinion as on 5.10.85 the prosecutrix's medical epiphyseal union of humerus has not united - radial head epiphysis is in the process of union, suggesting the bony age to be

less than 17 years. Furthermore the fact that she did not report the matter immediately to go show her willingness and consent to the act,

(29) Even though there is no need to determine the age of the prosecutor at the time of the commission of the rape, so far as the charge goes but even here the accused have no case. The prosecution examined Dr. J. Chatterjee a radiologist of Ram Manohar Lohia Hospital. On examination she opined that at the relevant time, the prosecutrix was 14 years old. Her report is Ex. Public Witness 1/A. In order to demolish her evidence, the accused again summoned and examined this very doctor to prove the report in a subsequent case against the prosecutrix. There also she gave the specific opinion that the radial line is clearly seen suggesting that the bone-age to be 15 years. This is no other evidence. The conclusion thus is that the prosecutrix was either 14 or 15 years of age at the relevant time and the question of her willingness or consent does not arise.

(30) In the result, there is no other alternative for this court but to hold that the circumstances do point an accusing finger towards Aman Kumar as the person responsible for the commission of rape on K. Mazumdar while she was in police custody. He has rightly been found guilty of an offence u/s 376(a)(3) of the Indian Penal Code which I hereby confirm.

(31) As regards the part of the other two accused in this drama, the case of the prosecutrix is that they throughout remained present in the room when Aman Kumar gave her beating and raped her. At one stage, the prosecutor did utter the sentence that the remaining two accused also gave her beating. Can this fact, by itself, bring their case within the four corners of section 107 IPC which defines abetment? This big question mark needs specific and definite answer. According to learned counsel, it is no part of the prosecution case that with a common object all the three accused entered the room where the prosecutrix was sitting. It is also not their case nor there is any evidence to suggest that they entered into a conspiracy instigated or intentionally aided Aman Kumar for commission of rape. In the absence of such an evidence, their conviction cannot stand.

(32) That may be so but once it is found as a fact that accused Om Parkash and Satbir Singh were present in the room and at the time when Aman Kumar subjected the prosecutrix to sexual intercourse against her wishes and they did not try to intervene or came to her rescue, their case prima facie will be covered under the definition of "abetment". The third clause of Section 107 Indian Penal Code lays down that if a person intentionally aids by any act or illegal omission the doing of that thingthen, he is equally liable for the offence as that of the main accused. Even though there is no clear cut evidence of any conspiracy among the accused persons but one cannot lose sight of the fact that Aman Kumar could not have all alone ravished the prosecutrix except with the tacit consent of Om Parkash and Satbir Singh. If they had not given any such consent, then it was all the more their duty to have prevented Aman Kumar from doing the illegal act. The giving of beating to the prosecutrix is another circumstance which also lends support to the prosecution version that in one way or the other,

they were also party to the commission of rape by their colleague. Being police officers, it was required of them to save the honour of a poor helpless minor girl from the clutches of the main accused while in police custody. The only inference which can be drawn under these circumstances is that the accused Om Parkash and Satbir Singh abetted the commission of offence by their colleague AmanKumar and they were rightly found guilty of an offence u/s 109 I.P.C.

(33) On the question of sentence, accused Aman Kumar does not deserve any sympathy. He was a police constable and a person in authority at the police post. The minor girl was brought and kept at the police post under the garb of the investigation of a case of theft. There is no regular lock up for the accused persons at the police post, what to talk of a separate lock-up for women. Time and again, it has been emphasised that women charged of any offence should not be kept in a police station at night unless the circumstances are beyond the control of the police authorities. In that situation also the instructions are that the delinquent should be shifted to a police station where there is a regular lock up for women and is also manned by the women police force. In this case, the prosecutrix was first brought to the police station Tilak Nagar which I presume had a regular lock-up for women. She under the garb of investigation, shifted to police post Hari Nagar and kept there during the night. This police post does not have any lock up. The police post is situated in the Lig Flats of Dda having 4 rooms on the ground floor and same accommodation on the first floor. As and when one approaches to the post, there are two rooms opposite each other which are used as a reporting room and the office room of the in charge, Police Post. There are two small rooms on the back side of the quarters and in between, there is an open space. The room where the prosecutrix was detained is in the far end of the quarter and is used as a rest room. The rooms on the first floor are meant for the residence of the police officers. There was an ample opportunity for the accused persons to take undue advantage of the presence of a poor and helpless girl of 14 years sleeping in the said room. At the dead of night, the accused mustered courage to wake her up and was made to suffer the pains of forcible intercourse against her wishes. Being in police custody, and involved in a false case, she was already scared of the environment of the police station. At that late hour of the night, she even could not raise hue and cry which normally a minor girl should be in a position to do, if attacked under different circumstances. The threats of the accused persons that she would be sent to jail were more than sufficient to dissuade her from reporting the matter to the superiors. The accused persons are the police officers who are the custodians of law. Their primary role should have been to protect the innocent from any and every kind of on slaught. If those who are entrusted with the job of maintaining law and order play the role of law breaker of a serious crime such persons prima facie do not deserve any sympathy. This was the precise reason why the legislature thought it fit to amend section 376 and to incorporate the offences like the present one to be dealt with severely. The accused have taken the undue advantage of their position and have committed monetary pleasure.

(34) In the result, the appeals fail. The conviction and sentence of all the arrested to serve out the remaining part of their sentence.