

(1991) 02 J&K CK 0004
In the Jammu And Kashmir High Court
Case No : CM. 1st Appeal No. 12 of 1990

Bashir APPELLANT
Vs
State RESPONDENT

Date of Decision : 20-02-1991

Acts Referred:

Ranbir Penal Code, 1989 — Section 376, 511

Citation : (1991) 1 Crimes 675 : (1991) JKLR 211 : (1991) KashLJ 258 : (1991) SriLJ 196

Hon'ble Judges : R.P.Sethi, J

Bench : Single Bench

Advocate : K.S.Johal, J.L.Sehgal, H.Rehman, Advocates appearing for the Parties

Judgement

On the charge of having attempted to commit rape upon Shakeela Bano, a minor child of 7/8 years, the appellant herein was tried by the learned

Sessions Judge, Udhampur and sentenced to suffer four years rigorous imprisonment and to pay a fine of Rs. 1,000/. In default of payment of fine

the appellant was directed to further undergo six months simple imprisonment.

It was alleged by the prosecution that on 17/6/1986, the prosecutrix had gone to fetch firewood in the forest and while on her way home, she was

caught hold of by the appellant at about 6 p. m. who forcibly opened the girdle of her salwar, felled the prosecutrix on the ground, sat on her and

attempted to commit rape on her by introducing his male organ in her private part. When noise was raised it attract the attention of Moh'd Subhan

and Abdul Aziz who rescued the minor child. The appellant is alleged to have managed to flee from the place of occurrence,

The case was registered at Polite Station, Mahore. After investigation the final report under Sec. 376/511 R. P. C. was produced in the court of

Sessions Judge, Udhampur.

In order to prove the case against the accused the prosecution examined Mst. Shakeela Bano, Moh'd Subhan, Abdul Aziz, Abdul Rahim and

Gokal Chand, Investigating Officer, as witnesses. Abdul Samad and Fazal Din were examined as defence witnesses in the case. Upon trial the

learned Sessions Judge convicted the appellant under Sec. 376/511 R. P C. and sentenced him to imprisonment referred to hereinabove vide the

judgment impugned in this appeal.

I have heard learned counsel for the parties and minutely perused the record.

Learned counsel appearing for the appellant have argued that the prosecution had failed to prove the case against the accused and the trial court

completely ignored the material contradictions in the ocular testimony of the witnesses. It is submitted that as the statement of the prosecutrix has

not been corroborated by any other testimony the learned Session Judge was not justified in passing the order convicting and sentencing the

accused. Alternatively it is submitted that, in fact, the statement of the prosecutrix has been contradicted by the other witnesses in all material

particulars. The learned Govt. Advocate had, however, argued that the sole statement of the prosecutrix who is a minor child is sufficient to

warrant a conviction as she had no reason to make false allegations against the appellant whom she treated as her uncle. It is true that if the

statement of the prosecutrix inspires confidence of the Court, the same may not be insisted to be corroborated. Necessity of corroboration is a

matter of prudence. It is also admitted position of law that a girl who is a victim of outrageous act is, generally speaking, not an accomplice. In rape

cases the human psychology and behavioural probability is required to be kept in mind while assessing the testimonial potency of the victim's

version. The inherent bashfulness the innocent naivete and the faint tendency to counsel the outrage of masculine sexual aggression or factors

which are relevant to improbabilise the false implication. This does not, however, mean that in all cases of rape the possibility of false implication is to

be ruled out completely. Rape is an accusation easily to be made and hard to be proved and harder to be defended by the party concerned. The

rule of prudence requires that the testimony of the prosecutrix should at least get some corroboration from the medical testimony either of the

prosecutrix of or the accused.

Conviction cannot ordinarily be based upon the sole testimony of a child witness which is not corroborated by any other supporting evidence.

However, where there are unimpeachable and most eloquent matters on the record which lend an unfailing assurance that such a witness was not a

witness of imagination, the conviction can be held up. Accurate consistency in the deposition of the child witness cannot be accepted but from the

tenure of such deposition it has to be ascertained whether he or she was not a free agent and has been tutored at any stage of the trial. In this, case,

the admitted position is that the prosecutrix child was never got medically examined and the corroborative evidence has failed to support the

averments made by the prosecutrix. On the other hand, the statement of the prosecutrix who is a child witness, and her tutoring cannot be

completely ignored, has been found to have been contradicted by the other witnesses in all material particulars. From the record it appears that the

FIR was lodged in the form of a written application scribed by a petition writer who has tampered with the date and the number of endorsement

Without giving any explanation. It appears to the naked eye that the endorsement number of the petition writer's registered as inscribed on the FIR

was earlier 63 dated 18/7/1986 which was changed to 61 dated 17/7/1986.

In the FIR the father of the prosecutrix had stated that the appellant got hold of his daughter, threw her on the ground and tried to commit rape

with her. His daughter raised hue and cry which attracted the attention of Moh'd Subhan, Abdul Rashid and Nazir, who went on spot and saved

her from the clutches of the accused. He has categorically stated that the appellant had only attempted to commit rape on the person of his

daughter. The police registered the case under Sec. 376/511 R. P. C. and presented the final report for the commission of offence of attempting to

commit rape. Shakeela Bano, prosecutrix, in her deposition stated that the accused was the real brother of her father, Abdul Rahim, her father,

however, denied of having any relation with the accused. She has further stated that the accused had committed sexual intercourse with her in

consequence of which she bled and got pain. She has further stated that the accused has inserted his male organ to the extent of half a finger in her

vagina where from blood oozed and fell on the ground and stones. She has

stated that Subhan and Aziz came to spot and had seen the occurrence. She further states that she was medically examined and that at the time of the medical examination she was having pain in her private parts. She further states that the blood was seen by the police who has seized the blood stained stones from the spot. She has, however, admitted that a dispute is going on between the accused and her father with respect to water mill from the last 5 years. She has also admitted that the accused and his father have been threatening her father to relinquish the possession of the land in their possession. She has gone on record to say that there has been a quarrel between her father on the one hand and the accused and his father on the other at least 5 times. Moh'd Subhan and Abdul Aziz PWs have, however, stated that there was no penetration of the male organ in the private parts of the prosecutrix. They had not seen any blood on the land or on the stones. They have, however, denied the existence of any dispute between the father of accused and the prosecutrix. They have categorically stated that the prosecutrix was never medically examined.

Abdul Rahim, father of the prosecutrix has also unambiguously stated that his daughter did not get any injury nor was bleeding. He has further submitted that the prosecutrix was not subjected to medical examination either by the police or by him privately. He has denied the strained relation with the accused for disputes over the watermill.

Gokal Chand, ASI, has stated that he did not seize any blood stained stones or a footwear. Without assigning any reason he has categorically stated that the prosecutrix was not subjected to medical examination. From the statement of the prosecutrix it transpires that there was a dispute between the two families regarding the water mill and the land. She was subjected to sexual intercourse by penetration of the male organ of the accused to the extent of half a finger in her vagina and she bled. Blood fell on the ground and the stones. She was medically examined and was feeling pain at that time. In all these material particulars the prosecutrix has been contradicted by the other prosecution witnesses. Failure on the part of the investigating officer to get the prosecutrix, medically examined has proved to be fatal. It shows that such a serious offence was recklessly conducted by an inexperienced A. S. I. The possibility of the child being utilised

by her father to take vengeance against the accused, in relation to the dispute with respect to the water mill and the land cannot be completely ruled out in the instant case. In order to seek conviction the prosecution was under an obligation to stand on its own legs and prove the offence against the accused beyond any reasonable doubt. Such a proof could be established even on the sole testimony of the prosecutrix. However, the testimony of the prosecutrix in this case is shaking and contradicted by other witnesses in justifying the conclusions arrived at for convicting and sentencing the appellant has already remained in custody for over a period of one year. Accordingly this appeal is allowed by setting aside the conviction and sentence recorded by the trial court vide the order impugned. The appellant shall be set at liberty forthwith, if not required in any other case.