

(2003) 12 RAJ CK 0009
In the Rajasthan High Court
Case No : Criminal Appeal No. 172 of 1987

Jogi Dan and Others

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 16-12-2003

Acts Referred:

Evidence Act, 1872 — Section 114A
Penal Code, 1860 (IPC) — Section 375, 376(2)

Citation : (2004) CriLJ 1726 : (2004) 3 WLC 73

Hon'ble Judges : Sunil Kumar Garg, J

Bench : Single Bench

Advocate : T.S. Champawat, for the Appellant; M.A. Bhurat, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Sunil Kumar Garg, J.—This appeal has been filed by the accused appellants against the judgment and order dated 28-5-1987 passed by the learned Sessions Judge, Jalore in Sessions Case No. 58/1986 by which he convicted the accused appellants for the offence under Sections 376(2)(g) and 342, IPC and sentenced them in the following manner:-

Name of Convicted Sentence awarded to each accused appellant (1) Jogi Dan 376(2)(q) RI for 10 years (2) Phoolchand IPC and to pay fine (3) Shankaria of Rs. 100/- in (4) Baga Ram default of payment of fine, to further undergo one month RI

2. It arises in the following circumstances:--

On 2-10-1986 at about 11.00 pm. PW-3 Panku wife of Moolchand (PW-4) (hereinafter referred to as the prosecutrix) lodged a written report Ex.P/8 with the Police Station Jalore before PW-5 Chaunaram, SHO of that Police Station stating inter alia that she was not having parents nor brothers and sisters and since childhood she was living with her Mama Hamira and she was married with

Mool Chand, PW-4 about 3 years back and for the last one and half years, she was living with her husband PW-4 Moolchand in village Gol in a rented house and she was having a kirana shop in Gol. It was further stated in the report Ex. P/8 by the prosecutrix that on the last Sunday at about 3.00 pm. she left her house for the purpose of satisfying nature's call and when she was returning back to her house, PW-1 Kamla followed her and asked her to help in lifting the Tagari and upon which, first she refused but later on, she agreed and then she followed PW-1 Kamla and thus, she reached the Bera of accused appellant Jogi Dan, where other three accused persons, namely, Phoolchand, Shankaria and Baga Ram were also there and all the four accused appellants were taking drink and seeing them, she tried to run away, but PW-1 Kamla cried and asked the accused appellants to catch-hold the prosecutrix and then all the accused appellants came there and they lifted her and gauged her mouth by lungi and thereafter, PW-1 Kamla left that place. It was further stated in the report EX. P/8 by the prosecutrix that thereafter, all the accused appellants committed rape with her one by one against her will and she pushed them by her legs and fist, but they caught hold her and forcibly committed rape with her. It was further stated in the report Ex. P/8 by the prosecutrix that she made hue and cry and 2-3 persons, who were doing the job of mason, came there and seeing them, the accused appellants after leaving her ran away. It was further stated in the report Ex.P/8 by the prosecutrix that she returned home having tears in her eyes and told the whole incident to her husband PW-4 Moolchand, but her husband PW-4 Moolchand, because of fear and pressure, did not lodge the report. Therefore, she had come to lodge the report on 2-10-1986.

On this report Ex. P/8, police registered the case for the offence u/s 376, IPC and started investigation.

During investigation, the accused appellants Jogi Dan, Phoolchand, Baga Ram and Shankaria were got arrested on 3-10-1986 through arrest memos Ex.P/3, Ex. P/4, Ex.P/t and Ex.P/6 respectively.

The prosecutrix PW-3 Panku was also got medically examined and her medical examination report is Ex. P/7, which was got admitted by the counsel for the accused appellants during the course of trial and therefore, concerned doctor was not examined.

After usual investigation, police submitted challan for the offence under Sections 376 and 342, IPC against the accused appellants in the Court of Magistrate and from where, the case was committed to the Court of Session.

On 27-10-1980, the learned Sessions Judge, Jalore framed the charges for the offence under Sections 376(2)(g) and 342, IPC against the accused appellants), The charges were read over and explained to the accused appellants, who pleaded not guilty and claimed trial.

During trial, the prosecutrix got examined as many as 5 witnesses and exhibited several documents. Thereafter, the statements of the accused appellants u/s

313, CrI.P.C. were recorded. In defence, two witnesses were produced by the accused appellants.

After conclusion of trial, the learned Sessions Judge, Jalore through judgment and order dated 28-5-1987 convicted the accused appellants for the offence u/s 376(2)(g) and 342, IPC and sentenced them in the manner as stated above holding inter alia :--

(i) that though there was delay in lodging the report as incident took place on 28-9-1986 and the report was lodged on 2-10-1986, but it was not fatal.

(ii) That the character of the prosecutrix PW-3 Panku was not found bad.

(iii) That no question of consent on the part of the prosecutrix PW-3 to have sex with the accused appellants arises.

(iv) That in view of Section 114A of the Evidence Act, the statement of the prosecutrix PW-3 Panku on point of rape was believed by the trial Judge.

Aggrieved from the said judgment and order dated 28-5-1987 passed by the learned Sessions Judge, Jalore, this appeal has been filed by the accused appellants.

3. In this appeal, the following submissions have been made by the learned counsel appearing for the accused appellants :--

(1) That the findings of conviction recorded by the learned trial Judge against the accused appellants solely on the basis of solitary statement of prosecutrix PW-3 Panku are wholly erroneous one as the statement of the prosecutrix is not supported by an other evidence and furthermore, her statement does not inspire confidence.

(ii) That since no injury on any part of the body of the prosecutrix including private part was found and when four persons would commit rape forcibly, absence of injury on the person of the prosecutrix including private part leads to the conclusion that either no offence was committed or if committed, it was committed with the tacit consent of the prosecutrix.

(iii) That since the incident took place on 28-9-1986 and the report was lodged on 2-10-1986, therefore, there is a delay in lodging the report, which is fatal and the explanation which was given in the report Ex.P/8 cannot be said to be plausible as in that report Ex.P/8, the prosecutrix has clearly stated that her husband PW 4 Moolchand did not go for lodging the report and, therefore, she had come to lodge the report.

(iv) That the statement of the prosecutrix PW 3 Panku does not inspire confidence because she was a woman of bad character. From this point of view also, corroboration to her statement was must and since her statement is not corroborated from any other evidence, therefore, her statement should have not been believed by the learned trial Judge.

4. On the other hand, the learned Public Prosecutor supported the impugned judgment and order passed by the learned Sessions Judge, Jalore.

5. I have heard the learned counsel appearing for the accused appellants and the learned Public Prosecutor and gone through the record of the case.

6. Before proceeding further, first medical evidence of this case has to be seen which is found in the medical examination report Ex. P/7, which was got admitted by the counsel for the accused appellants during the course of trial.

7. A bare perusal of medical examination report Ex.P/7 reveals that on 3-10-1986, on the request of the SHO, Kotwali, Jalore, the prosecutrix PW 3 Panku was got medically examined by the doctor of Public Hospital, Jalore and the concerned doctor did not find any injury on any part of her body including private part and the doctor gave the opinion in the following manner:--

(i) That she was habitual to sexual intercourse.

(ii) That her age appeared to be 17-18.

8. Thus, from the medical examination report Ex.P/7 of the prosecutrix PW 3 Panku, it can easily be concluded that the medical evidence in her present case on point of rape may be treated as Nil as she was not having any sort of injury on any part of her body including private part and furthermore, she was habitual to sexual intercourse.

9. Before proceeding further, salient features of the report Ex. P/8 lodged by the prosecutrix PW 3 Panku may be summarised here :--

(1) That there is no dispute on the point that the incident as alleged and put forward by the prosecutrix was held on 28-9-1986 and the report was lodged on 2-10-1986.

(ii) That the prosecutrix PW 3 Panku went in the Bera of the accused appellant Jogi Dan as per saying of PW 1 Kamla. (It may be stated here that PW 1 Kamla has been declared hostile).

(iii) That all the accused appellants committed rape one by one with her against her will and when they were committing rape with her, she resisted their acts, but in vain.

(iv) That at that time, she made hue and cry and 2-3 persons, who were doing the job of mason, came there and seeing them. The accused appellants, after leaving her, ran away. (The names of such persons have not been mentioned in that report).

(v) That thereafter, she reached the house having tears in her eyes and then, she narrated the whole story to her husband PW 4 Moolchand, but her husband PW 4 Moolchand did not lodge any report.

10. Since in such cases, the best evidence is of prosecutrix herself, therefore,

statement of the prosecutrix PW 3 Panku has to be seen.

11. Before examining the evidence of the prosecutrix PW 3 Panku, something should be said about legal aspect with respect to appreciation of evidence of prosecutrix and the same can be summarised in the following manner :--

1. That the main evidence in all such cases is that of victim herself.
 2. That corroboration of the testimony of the prosecutrix in rape case is not required as a rule of law. But, corroboration should ordinarily be required in the case of a woman having attained majority and who is habitual to sexual intercourse and is found in a compromising position, as in such cases there is likelihood of her having levelled such an accusation on account of instinct of self preservation or when the probabilities factor is found to be out of time.
 3. That corroboration may be by facts and circumstances,
 4. That the injury on the person of the victim, especially her private parts, had corroborative value.
 5. That if the evidence of the victim does not suffer from any basic infirmity and the probabilities factor does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming.
12. In State of Punjab Vs. Gurmit Singh and Others, the Hon''ble Supreme Court has held that the testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

Burden of proof

13. In a case of rape, the onus is always on the prosecutrix to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and her mother have falsely implicated the accused. The evidence of prosecutrix witnesses cannot be accepted merely because an accused person has not been able to say as to why they have come forward to depose against him. However, great the suspicion against the accused and however strong the moral belief and conviction of the Judge, unless the offence of the accused is established beyond reasonable doubt or beyond the possibility of reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring the offence home to the accused by reliable evidence. That accused is entitled to the benefit of every reasonable doubt.

14. If the victim is unwilling to yield to sexual intercourse, she is expected to

receive injuries on her person. The absence of injuries on the body of the prosecutrix, generally, gives rise to an inference that she was consenting party to coitus. Where the prosecutrix had received multiple injuries on the various parts of her body it indicated that she offered resistance when she was subjected to sexual intercourse. The absence of injuries either on the accused or oft the prosecutrix shows that the prosecutrix did not resist but absence of injuries is not by itself sufficient to hold that the prosecutrix was a consenting party.

15. In the light of the above legal position, the statement of the prosecutrix PW 3 Panku and other evidence are being examined.

16. The witness on her saying the prosecutrix went in the Bera of the accused appellant Jogi Dan is PW 1 Kamla, who has been declared hostile by the prosecution and in cross-examination, she, has further admitted that the prosecutrix PW3 Panku was woman of easy virtue and that is why, the villagers of the village Gol had turned her out from the village.

17. Another witness is PW 2 Nihalchand and he has been declared hostile.

18. Now there remains solitary statement of the prosecutrix PW 3 Panku and her husband PW 4 Moolchand.

19. The prosecutrix PW 3 Panku in her examination-in-chief has stated that on the relevant day, in the noon, she left her house for the purpose of satisfying natures call and when she was returning back to her house, PW 1 Kamla followed her and asked her to help in lifting the Tagari and upon which, first she refused, but later on, she agreed and then she followed PW 1 Kamla and thus, she reached the Bera of accused appellant Jogi Dan, where other three accused persons, namely, Phoolchand, Shankaria and Baga Ram were also there and all the four accused appellants were taking drink and seeing them, she tried to run away, but PW 1 Kamla cried and asked the accused appellants to catch hold the prosecutrix and then accused appellant Jogi Dan caught hold her and gauged her mouth by lungi and thereafter, all the accused appellants committed rape with her one by one against her will. She has further stated that she made hue and cry and 2-3 persons, who were doing the job of mason, came there and seeing them, the accused appellants after leaving her ran away. Thereafter, she reached home having tears in her eyes and told the whole incident to her husband PW 4 Moolchand, but her husband PW 4 Moolchand, because of fear and pressure, did not lodge the report.

In cross-examination, she has admitted the following facts :--

(i) That when she entered the Bera of the accused appellant Jogi Dan, she went there silently and inside that Bera, construction was going on and 6-7 labourers were working.

(ii) That she cannot say whether PW 2 Nihalchand was there or not. (PW 2 Nihalchand has been declared hostile).

(iii) That before commission of rape with her by the accused appellants, she made hue and cry for 6-7 minutes and 5-7 labourers came there.

(iv) That she narrated the whole story to labourers also, but she could not recognize them.

(iv) That on hearing her cries, some people also assembled at bus stand, but police did not do anything.

(v) That the accused appellants were not known to her before the alleged incident.

(vi) That the floor where rape was committed with her by the accused appellant was tough one and when the accused appellants committed rape with her, she received injuries, blood also came there and she received abrasions on back and elbow joint as per her saying.

(vii) That during struggle, her blouse was also torn, but police did not take it and her gagra was also stained and since the gagra was washed, therefore, it was not shown to the police.

(viii) That when she reached house, her husband PW 4 Moolchand was there.

(ix) That on the same night, her husband PW 4 Moolchand had sex with her.

20. PW 4 Moolchand, who is husband of the prosecutrix, has stated that he did not lodge the report because he was having a fear from accused appellants as they were standing on the road having lathies in their hands. In cross-examination, he admits the following facts :--

(i) That the persons, who told him not to lodge the report, were 10-12, but he cannot tell the name of any one of them.

(ii) That in the report Ex.P/8, it was also stated that because of threat, the report was not lodged earlier.

21. The question that arises for consideration is whether in the above facts and circumstances, the findings of the learned trial Judge that the prosecutrix PW 3 Panku was raped by the accused appellants against her will, are liable to be confirmed or not or whether the statement of the prosecutrix is sufficient to make the conviction of the accused appellants for the offence u/s 376(2)(g), IPC or not.

22. In my considered opinion, from perusing the statement of the prosecutrix PW 3 Panku and other evidence on record, it cannot be accepted that the accused appellants had sex with the prosecutrix PW 3 Panku against her will and on the contrary it clearly appears that it was a case of consent because of the following reasons :--

(i) That the medical evidence in the present case is Nil and thus, from medical point of view, there is no corroboration to the statement of the prosecutrix PW 3

Panku.

(ii) That the prosecutrix PW 3 Panku did not receive any injury on any part of her body including private part and this Court is aware that absence of injury on the person of prosecutrix is not by itself sufficient to hold that the prosecutrix was a consent party, but in the present case, when it is alleged that four accused appellants committed rape with her forcibly against her will, in such a situation, some sort of injuries must have been found on her person and thus, absence of injury on any part of her body negatives the allegations of rape and to show that either the accused appellants did not have any sexual intercourse with her or if the accused appellants had sexual intercourse with her, it was with her tacit consent.

Furthermore, ordinarily, where forcibly sexual intercourse is committed there would be injury on the person of the victim. Absence of any injury on the person of a woman alleged to have been raped may go long way to indicate that the alleged intercourse was a peaceful affair and the story of a stiff resistance put up by the prosecutrix is false or an afterthought.

(iii) That the statement of the prosecutrix PW 3 Panku gets contradicted from the medical evidence as in the medical evidence, no injury was found on any part of her body including private part, while she admits that she received injuries on back, elbow joint and blood also came out.

(iv) That other corroborative factor that could be was her torn blouse and stained gagra, but the same were not seized and produced and in absence of that it appears that either the alleged incident did not take place or if took place, that took place with her tacit consent.

(v) That at the time of alleged incident, when the prosecutrix PW 3 Panku cried, 5-7 labourers came there, but none of them has been produced and this fact goes to show that the incident as alleged and put forward by the prosecutrix did not happen.

(iv) That on presumption u/s 114A, it may be stated there that no doubt presumption u/s 114A is available to cases that fall u/s 376(2), IPC and not to cases that fall u/s 376(1), IPC, in other words, in cases of gang rape, presumption u/s 114A is available. It may further be stated here that the presumption about want of consent u/s 114A is not conclusive. Evidence may still be given to disprove it. But in the absence of any evidence of disproof, there is no option with the Court but to raise a presumption about non consent if circumstances for raising the presumption u/s 376(2)(g) exist. It must, however, be conceded that immoral character would still not be an absolutely irrelevant circumstance. It may render the story itself as incredible. It may take away probative force of the story, told as it is by a woman with no scruples or morals. It may be difficult to believe a woman of immoral character if she says that some persons had sexual intercourse with her unless there existed satisfactory proof in support of the story of sexual intercourse.

In the present case, since the prosecutrix PW 3 Panku has alleged that four accused appellants committed rape with her forcibly against her will and since the concerned doctor did not find any injury on any part of her body including private part and no complaint of that incident was lodged immediately and the same was lodged with delay of five days and furthermore, PW 1 Kamla, who is star witness, has been declared hostile and though labourers were there, but none has come forward to support the statement of the prosecutrix PW 3 Panku, in such a situation, no presumption u/s 376(2)(g) of the Evidence Act could be raised and therefore, the findings of the learned trial Judge drawing prosecution u/s 376(2)(g) of the Evidence Act are wholly erroneous one and cannot be sustained.

(vii) That the prosecutrix PW 3 Panku has clearly stated that she made struggle, but this aspect of her statement cannot be accepted because there should be evidence of struggle to avoid sexual contact of penetration and the same is missing in this case.

In this respect, it may be stated here that there can be exceptional circumstances such as death, hurt or any other threat which may force her to submit and so consent in case of grown up lady should be inferred the circumstances and the prosecution may prove negative consent by producing position evidence of threat or fear of death or hurt.

In the present case, the prosecution has miserably failed to give satisfactory evidence on that point as none has come forward to support the case of the prosecutrix as this Court is very much aware of the fact that if sexual intercourse is committed forcibly with a grown up lady against her will by four persons, she would certainly receive injuries and absence of injuries leads to the conclusion that either no offence was committed or if committed, it was committed with her tacit consent.

(viii) That there is no dispute on the point that the incident as alleged and put forward by the prosecutrix took place on 28-9-1986 and the report Ex.P/8 was lodged on 2-10-1986 and thus, there was delay of about 5 days in lodging the report Ex.P/8.

This Court is aware that mere delay in filing FIR is no ground to doubt that case of the prosecution, but in the present case, the delay appears to be fatal one as the incident took place on 28-9-1986 and the report Ex.P/8 was lodged on 2-10-1986 after about 5 days and as per the report Ex.P/8, PW 4, Moolchand, husband of the prosecutrix, refuse to lodged any report and therefore, in such circumstances, if report Ex.P/8 was lodged after so many days of alleged incident especially when on the date of occurrence, the husband of the prosecutrix was in the house, it creates doubt on the prosecution story. Had her husband would have been out side, the position would have been different one.

23. For the reasons stated above, it is held that the statement of the prosecutrix PW 3 Panku does not appear to be straight forward, reliable and trustworthy and

does not inspire confidence. Her statement is not corroborated by any other evidence and rather her statement is contradicted with medical evidence. Therefore, no reliance can be placed on her statement on the point that forcible rape was committed with her by the accused appellants against her will, as it is not corroborated by medical as well as other evidence on record.

Furthermore, the facts that the report Ex.P/8 was lodged with delay of about 5 days, medical evidence is nil and non examination of material witnesses go against the prosecution and they create doubt on the prosecution story.

24. Thus, in view of the above, the finding of the learned Sessions Judge convicting the accused appellants for the offence under Sections 376(2)(g) and 342, IPC cannot be sustained and liable to be set aside and this appeal deserves to be allowed and the accused appellants are entitled to acquittal.

Accordingly, this appeal filed by the accused appellants is allowed and the impugned judgment and order dated 28-5-1987 passed by the learned Sessions Judge, Jalore are set aside and the accused appellants are acquitted of the charges framed against them.

Since the accused appellants are on bail, they need not surrender and their bail bonds stand discharged. Appeal allowed.