Hari Har Vs. Emperor

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Court : Allahabad

Decided On : Feb-12-1935

Reported in : AIR1935All590; 157Ind.Cas.147

Appellant : Hari Har

Respondent : Emperor

Judgement :

Kendall, J.

1. The present appellant Harihar alias Paji has been convicted by the learned Sessions Judge of Mirzapur, of an offence under Section 376, Penal Code, and sentenced to two years rigorous imprisonment and ten stripes. The complaint Mt. Sumeria is a girl, who according to the Civil Surgeon's evidence, is between 12 or 14 years of age and is probably 13. The evidence as to age is not very definite. The Civil Surgeon has given no reasons for holding that she is likely to be either over or under 14, and the Judge-has said that he does not think the evidence on the record can be held to be sufficient to establish, that the girl is under 14. There is, however no suggestion whatever that the sexual intercourse, which has been proved if the direct evidence of the prosecution witnesses is accepted was with, the consent of the girl, so that the question of her exact age is not of vital importance.

2. Her story is as follows: She had been to a big resorvoir to water her cattle and having done so she washed some clothes and spread them on the ground. One cow wont down a 'bandh.' and she followed in order to bring it back. On the way back the appellant, who is a young man of about 23 years, caught her dhoti from behind and after a struggle in which the dhoti was torn threw her down, on the ground and raped her. The girl struggled and cried out, and three witnesses, namely Sambhal, Mira and Jaimangal came up over the Bandh and called out. By this time the accused had left the girl and run away. Mt. Sumeria says that her dhoti was stained with blood, and that there was blood on the ground where she was lying. She was taken to her mother's house and told tier what had happened. Her mother washed the dhoti and then took her to the police station about a mite away where a report was entered about noon on 10th June. The report mentions that the child's mother had washed away the blood from the dhoti but that it still had some stains. This story is supported by the three witnesses who have been named. The appellant was arrested the same day, and some of his clothes together with those of the girl were sent for examination to the Chemical Examiner. His report shows that of the three garments belonging to the accused the dhoti was stained with blood but the stains on the other two garments could not be indentified. A dhoti and a piece of cloth, which are said to belong to Mt. Sumeria, were also sent for examination and were found to have blood stains on them as were some pieces of leaves and part of a sirsa fruit which the sub-inspector discovered on the spot.

3. Such was the evidence for the prosecution, and the statement of the appellant was a denial of the offence and a suggestion that there was a quarrel, the details of which he did not specify. Be claimed that there were the blood stains on his clothes when they were taken by the police, and that the witnesses for the prosecution including Mt. Sumeria had given evidence against him through the influence of the police, and also because there were some disputes about a demand for money which had been advanced by his father to these witnesses. None of the oral evidence for the defence made any impression on the Court, but it may be mentioned that of the three men who claimed to be eye-witnesses of the rape, Mira has been shown possibly to have some slight cause for a quarrel with the appellant's father over a mat tier of evidence. Nothing has been shown against

the other witnesses for the prosecution.

4. The points that Mr. Baradley has made on behalf of the appellant relate rather to the circumstantial evidence. The girl was examined when she vent to the police station in the first place by a women called Mt. Gulshan, who is said to be a servant] of the sub-Inspector. She stated that she had found blood flowing from the private parts of the girl (at the time of the report it was noted that Mt. Gulshan had found some 'fluid' coming out of the private parts of the girl), but that; she did not see any mark of injury on the private parts of the girl. The Civil Surgeon examined the girl on 15th June, that is to say five days after the alleged rape. Fie found that there were marks of injuries on her elbows and one knee. There were, however no injuries external or internal to the vagina and the hymen was absent, though there were not any signs of recent injury. When he was questioned closely in regard to the possibility of a rape having been committed without an injury being caused to the vagina, his replies were not very definite. When he was asked whether a girl of 14 who cohabited for the first, time with a man would certainly have injuries which remain on her person for four or five days, he replied no; but it was probable. If a girl had been used to sexual intercourse before and was then raped, it would not be necessary that there should be some visible injuries, after four or five days. No injuries were found on the appellant by the Civil Surgeon, but the Sub-inspector testifies to examining him and to finding, some slight marks on the penis.

5. The absence of the hymen in the girl without any marks of injury is a remarkable feature of the case. The Judge has suggested that it may have disappeared either through previous-cohabitation or monthly courses and, no doubt, it, is possible that the girl never had a hymen at all, though such cases are very rare. Previous cohabitation is not likely in the case of a girl of this age, and there is no evidence of it but, even if it could be accepted as the only possible explanation of the absence of the hymen, it would help the appellant very little in face of the direct evidence against him. As it is proved by the medical evidence that the girl's hymen was not ruptured by the appellant, it is difficult to account for the presence of blood on the clothes of the girl and of the appellant, and on the ground. If there were only very slight injuries caused to the girl, which disappeared before her examination by

the Civil Surgeon, one would not expect to find blood in so many places. It has been suggested on behalf of the defence that the blood was not due to injuries but was due to the girl having a menstrual discharge, and the first, statement which was apparently made by Mt. Gulshan is somewhat in favour of this theory. There is another curious bit, of evidence on which the counsel for the appellant has relied. A piece of cloth stained with blood was said to have been discovered on the scene of the occurrence by the police, and was sent to the Chemical Examiner with the other garments. This cloth is supposed to have been torn from the girl's dhoti by the appellant when he caught hold of her. The Chemical Examiner reported that the piece of cloth was stained with blood and it was produced in the committing Magistrate's Court and identified by the girl as part of her dhoti and by the police as the cloth which had been picked up on the spot and found to be stained with blood. This was marked Ex. 2. In the Sessions Court however it was discovered that Ex. 2 was made of an entirely different material from the dhoti, and an attempt was made to explain on the part of the police that the original piece of cloth, which had been picked up on the spot and had been certified by the Chemical Examiner to have been stained with blood, had been eaten by white ants, and that another piece had been substituted for it. This part of the evidence is most unsatisfactory and is most discreditable to the police.

6. I have been asked to make a number of inferences from the fact that it is admitted by the prosecuting authority that Ex. 2 has been changed. One thing that is certain at this stage is that it is not part of Mt. Sumeria's dhoti and it might be inferred therefore that the piece of cloth, which was sent to the Chemical Examiner and which was found to have stains of blood upon it, was not part of Mt. Sumeria's dhoti and had nothing whatever to do with the case, and that, it must have been a piece of evidence manufactured by the police. If this is so, it might further be inferred that all the evidence has been manufactured by the police, that is to say, all the evidence connected with blood stains on the cloth. I do not think that it would be right to make such a large inference as this. It may be as suggested by Mr. Bradley, that the present Ex. 2 is identical with the piece of cloth produced in the Magistrate's Court, and that the story about its having been substituted was invented when discovery was made that the material differed from that of the girl's 'dhoti'. But it is equally possible that this piece of cloth was stained with blood and

was found on the spot, although it is not a part of the complainant's dhoti. It is much more likely however that it is a. bit of false evidence that has been added in the course of the inquiry in order to make the evidence more complete. The learned Judge has however believed that the original piece of cloth was produced in the committing Magistrate's Court but was subsequently changed. In any case it is not necessary for the prosecution to prove the genuineness of this bit of cloth, and the only effect of producing it in evidence is to throw suspicion on a minor part of the prosecution case.

7. The direct evidence of the rape is so strong that it is impossible to discard it unless the circumstances to which I have referred in discussing the defence are absolutely incompatible with the commission of rape. In my opinion they are not incompatible. Mt. Sumeria may never have had a hymen or it may have been destroyed, in one of the manners suggested by the Judge. There may have been slight injuries all signs of which disappeared, before the examination by the Civil Surgeon. Whether the blood which has been proved to have been found on the clothes was due to such injuries or to a menstrual discharge, it was found on the 'dhoti' of the appellant as well as on the clothes of the girl, and there is no explanation of this very significant circumstance except in the evidence for the prosecution. The absence of the hymen and the absence of injuries are not sufficient to dispose of the statements of the girl her mother and three eye-witnesses, only one of whom is shown to have had the very slightest reason for bringing a false case against the appellants. I am, convinced that the order of the Sessions Judge must be upheld, and as the sentence is in the circumstances by no means too severe, I dismiss the appeal.