

Gaus Mohd. and Another Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Jun-26-2000

Reported in : 2001(1)MPHT305

Judge : Mr. A.K. Mishra, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 366, 376, 376(2) and 506-B

Appeal No. : Criminal Appeal Nos. 742 and 751 of 1989

Appellant : Gaus Mohd. and Another

Respondent : State of M.P.

Advocate for Def. : Advocate General

Advocate for Pet/Ap. : Shri A. Usmani and ;Shri A. Awasthi, Advs.

Disposition : Criminal Appeals dismissed

Judgement :

A.K. Mishra, J.

1. The appellant Gaus Mohammad has been convicted under Sections 366, 376, 506B, IPC, and sentenced respectively to undergo R.I. for 2 years, 4 years and 1 year. Appellant Roshanlal has been convicted for an offence under Sections 366, 376(2)(g) and 506-B, IPC, and sentenced respectively to under R.I. for 2 years, 5

years and one year.

2. Prosecution alleged that in the mid-night of September 7th and 8th, 1987 the prosecutrix was kidnaped and threatened to life, and thereafter gang rape was committed on her. In all six accused persons were put to trial. Four of them were convicted while two of them were given benefit of doubt. Prosecutrix was taken by accused Gaus Mohammad on cycle. She was taken to the bushes by Gaus Mohammad and performed sexual intercourse forcibly. In the night of September 7th, 1987, accused Milan, Kaudu and Roshan joined for satisfying the lust and committed sexual intercourse with Jahura Bai, prosecutrix. Again on September 8th, 1987 in the morning accused Milan, Kaudu and Roshan committed sexual intercourse with prosecutrix Jahura Bai and on disclosure by her to anybody threatened her with life.

3. Accused Milan's underwear was recovered, so also that of accused Kaudu, respectively Articles 'A' and 'B'. The accused were referred for medical examination.

4. Prosecution alleges that three women of the village Aamgaon had asked the prosecutrix Jahura Bai to purchase a LUGDA from one Khwaja Mohd., father of accused Gaus Mohd. In that connection the prosecutrix had come to village Chhuria to buy a LUGDA. Khwaja Mohd. did not give LUGDA, as it was not ready. Thereafter she went back to village. Next day she was again sent to Khwaja Mohd. to bring LUGDA, again she could not succeed in purchasing it. This happened on September 7th, 1987, while she was coming back, on the way and went to Banihni, to collect ATTA from flour mill. When she was collecting ATTA at flour mill, accused Gaus Mohd. s/o Khwaja Mohd. who came along with two other boys, assured her for giving LUGDA and thereafter she was forcibly taken on a cycle and taken in the bushes and asked to keep quite. Thereafter, accused Gaus Mohd. committed rape on her. Thereafter he took the prosecutrix to village Chhuria and left her. Thereafter accused Milan, Kaudu and Roshan came and took her on cycle to a deserted house and her mouth was gagged and they committed forcible sexual intercourse with her one after other. Thereafter she went to the house of one of her acquaintance Neerabai (P.W. 1) and narrated the incident to

her and stayed there in the night. In the morning when the prosecutrix went to answer the call of nature towards a river, in the presence of Neerabai, accused Milan, Kaudu and Roshan caught hold of prosecutrix, and took her to village Boirdeeh's Dongri and was forced to consume liquor and 3 accused committed rape again. Thereafter the prosecutrix went to village Chhuria by bus. At the bus-stand Chhuria accused Milan and Kaudu threatened her not to disclose the incident to anybody, otherwise she would be killed. Thereafter she went to village Aamgaon by bus and narrated the incident to her parents and went along with her parents and Sarpanch Narendra Bahadur Singh (P.W. 12) and lodged the report Ex. P-20 on September 8th, 1987 in the night at 11:20 p.m. at Police Station, Chhuria. On the report being lodged offence was registered and investigation was set in.

5. The prosecutrix was sent for medical examination. In the medical examination she was found accustomed to sexual intercourse. However, one injury on her person was found. Accused; Roshan, Kaudu and Milan were also referred for medical examination and they were found capable of performing sexual intercourse. On September 10, 1987 broken bangle pieces Article 'H' were recovered as per seizure memo Ex. P-19. Cycle receipt and Article 'D' register were also seized by the police. Identification parade was also conducted by P. Tirki (P.W. 11). Seized material was sent for chemical analysis to the Forensic Science Laboratory.

6. Accused persons abjured the guilt and contended that they were falsely implicated. The prosecutrix was of bad character. Defence evidence has also been led in the shape of Yadram and Khwaja Mohd.

7. Learned counsel for the appellants in separate appeals have contended that it is a case where offence of commission of rape is not made out. It is a case of false implication and they submitted that at the most it is a case of sexual intercourse with consent.

8. Learned counsel for the State has supported the judgment and reasoning of the Trial Court.

9. It is settled law that the version of the prosecutrix stands at par as that of injured witness. If it is reliable, it does not require any corroboration. Asking for corroboration may amount to adding insult to injury. Reliance is placed on the decision of the Supreme Court in case of *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* (AIR 1983 SC 753). In case of *State of Punjab v. Gurmit Singh* (AIR 1996 SC 1393), it has been observed by the Supreme Court as under:--

'The inference drawn by the Trial Court that the more probability is that the prosecutrix was a girl of loose character when based on no evidence and not even on a denied suggestion lacks sobriety expected of a Judge. Such like stigmas have the potential of not only discouraging an even otherwise reluctant victim of sexual assault to bring forth complaint for trial of criminals, thereby making the society to suffer by letting the criminal escape even trial. The Courts are expected to use self-restraint while recording such findings which have larger repercussion so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole where the victim of crime is discouraged the criminal encouraged and in turn crime gets rewarded. Even in cases, where there is some acceptable material on the record to show that the victim was habituated to sexual intercourse no such inference like the victim being a girl of 'loose moral character' is permissible to be drawn from that circumstances alone. Even the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to any one and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. No stigma, should be cast against such a witness by the Courts, for after all it is the accused and not the victim of sex crime who is on trial in the Court.'

10. In para 7 of the aforesaid decision the Supreme Court observed as under:--

'Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but here is no requirement of law to

insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of law but a guidance or prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.'

11. Prosecutrix Jahura Bai (P.W. 10) has stated that she had gone to collect LUGDA. She came to collect the same at village Chhuria and did not find vehicle to go back to Aamgaon. She was waiting at bus-stand. She boarded the bus at about 7 p.m. and went to Bamhani to collect ATTA from flour mill. When she was going to flour mills, Gaus Mohd. and two other persons whose name she did not know, caught hold of her. Gaus Mohd. forcibly took her on cycle and took her towards the bushes. She was made to sit on the front rod of the cycle. Near Mahuwa tree accused performed sexual intercourse with her. Gaus Mohd. had removed her clothes. Thereafter took her back to village Chhuria on cycle and left her at bus-stand. She proceeded to the house of her sister. Before she could reach there she met another set of accused persons, namely; Milan, Kaudu and Roshan. She was again stopped and taken on cycle outside village Chhuria in an isolated house and all of them performed sexual intercourse with her. Thereafter they left her and in the night she reached the house of Kewateen who is one of her

relations and narrated the incident to her. Next day in the morning she went to answer the call of nature, where Milan, Kaudu and Roshan caught hold of her, they were in a drunken state and took her towards village Dongari and again performed sexual intercourse, thereafter they left her. Then she came to village Boirtola and boarded a bus and came to village Aamgaon and narrated the incident to her parents. Along with parents she went to Sarpanch Narendra Bahadur Singh. Dhursingh and Kolwarin were also present at the relevant time. She deposed that an injury on her right elbow was caused during sexual intercourse. She had identified accused Raju @ Hareshkumar in the identification parade. In the cross-examination the prosecutrix has stated that her marriage was performed with Yadram. She had one child of 3 years from the wedlock. She resided with Yadram for two years. Thereafter she performed marriage at village Chirchari and she was living at the relevant time with the man of village Chirchari for the last one year and had not conceived any child from the second husband. She used to work as labourer. Other suggestion put of having conceived and she got abortion, was not of much relevance. Indira had given her Rs. 20/- to buy LUGDA. Fare to and fro was Rs. 3/- from village Chhuria to village of the prosecutrix. She had gone alone to village Chhuria and had not purchased any article from market as she was having no money of her own. When she came back from Bamhani to Chhuria in a bus and was going to flour mill, at flour mill there was one servant, when she was on the middle of the way to flour mill she met Gaus Mohd. A day earlier, she had left grain at the flour mill. She was not aware whether on the cycle carrier was there. She had raised hue and cry, at that time the person at the flour mill had abused accused persons where they were taking the girl, but, they did not listen to him. She has stated that Gaus Mohd. was carrying a knife with him, but, this fact that he was carrying a knife was written or not in the report, she does not know. She has stated that near bus-stand there were 2-3- hotels, 2-3 pan shops and 3-4 residential houses. Flour mill belongs to one Shyam Bihari. Another near by flour mill is that of Baldeo Thakur. She had gone at Baldeo's flour mill and person who was at the flour mill of Baldeo had cried when she was taken away by the accused persons on the cycle. At the time when she was taken on cycle the crowd was not there at the pan shops. She was taken on cycle by accused Gaus Mohd. He took her from Bamhani towards Chhuria.

About 5 kms. she found no village in between and she states that when she was brought back after commission of sexual intercourse, near bus-stand she had raised hue and cry and had narrated the incident to person at hotel and betel shop. She was again caught hold by other accused; Milan, Kaudu and Roshan. Nobody came to rescue her and Milan, Kaudu and Roshan caught hold of her, she was again taken by Milan, Kaudu and Roshan about 1 and 1/2 km. towards opposite side. She has admitted that for going Kokpur road, it is necessary to cross the locality of Chhuria. She had raised hue and cry, but, nobody had come to save her. Accused Milan had taken her on cycle, Kaudu and Roshan were on different cycle. She has stated that Kewatin and Neerabai is a same person, Police Station was at quite distance from her house. She has further narrated that in front of Neerabai accused had caught hold of her next day, Neerabai had not listened to her and did not pay any heed.

12. In view of the deposition of the prosecutrix what emerges is that several persons had witnessed her being taken away on cycle by the accused persons. Firstly, at the point of time when Gaus Mohd. had taken her, servant at the flour mill had raised cry. She was taken on the cycle from the locality. The fact that Gaus Mohd. was carrying knife was not mentioned by her in the first information report. At the second time other set of accused persons took her. Several persons had witnessed and she was taken through the locality where the houses are situated at Chhuria, she had raised hue and cry, but, nobody came to her rescue. She has further deposed that she stayed in the night with Neerabai and Neerabai also remained silent when again she was picked by three accused persons in the morning. Neerabai was present and did not lodge any report and try to save her from the clutches of the accused.

13. Thus, it is apparent that several witnesses had seen hue and cry during the course of her taking away as alleged by prosecutrix and Neerabai also had actually witnessed the morning incident when she was again taken away by the accused persons.

14. Neerabai (P.W. 1) had deposed that in the night prosecutrix Jahura Bai came to her house and went back in the morning. She had not disclosed anything to her

regarding the commission of such an offence. She was obviously declared hostile. She had denied to have given the police statement Ex. P-1.

15. Rehman (P.W. 2) is the resident of village Bamhani working as servant at the concerned flour mill. He has stated that Jahura Bai had come in the night at about 8 p.m. and had taken away ATTA. He was not aware if anything had happened with Jahura Bai. Witness was also declared hostile. He has resiled from his police statement Ex. P-6.

16. Brajlal (P.W. 3) resident of village Aamgaon stated that Jahura Bai resides in his village. When he was sitting at the house of Narendra Bahadur along with Baisakhu, Dhursingh, Kotwarin and Narendra Bahadur etc. at about 9-10 p.m. Jahura Bai came along with her parents and narrated the details of the incident to all of them. Witness has given the details of narration made by prosecutrix to them which is on the similar line as that of the prosecution case. Witness was not knowing Gaus Mohd., Milan and Kaudu. He stated that police did not record his statement.

17. Lakhanlal Mandhe (P.W. 4) had proved the spot map at village Chhuria. Sonsingh (P.W. 5) village Kotwar has been examined in order to prove the seizure of under garments of the accused persons, clothes of the prosecutrix. He has also supported the seizure of cycle receipt as per the memo P-13. Ramankumar Yogi (P.W. 6) has stated that accused Milan had taken the cycle on rent, of which entry was made in register (Article 'D'). The entry relates to the date of incident. Mehtru (P.W. 7) is the witness with respect to recovery of undergarments of the accused. Gopal Prasad Shrivastava (P.W. 8) has stated that he was at the flour mill on the day in question. He was not aware of any happening prior to being informed by Station House Officer, an incident had taken place in the boundary of his house.

18. Dr. (Smt.) I. Chelani (P.W. 9) has deposed that the abrasion found on the hand was superficial. It was pinpointed. Its width could not be measured. Same could be caused by some hard pointed or rough object. The abrasion was found pin point on the exterior aspect of the hand in the mid point. Pus formation was present. Prosecutrix was examined on September 9, 1987 at 6 p.m. by the Doctor.

19. P. Tirki (P.W. 11), Addl. Tehsildar has deposed that on the direction of S.D.M. Rajnandgaon he had conducted test identification parade with respect to the acquitted accused Raju @ Haresh. His evidence is of no relevance for the purpose of present appeals of the two appellants.

20. Narendra Bahadur Singh (P.W. 12) Sarpanch of village Aamgaon has supported the version of the prosecutrix that she came about 9-10 p.m. and narrated the incident to him and others. He has also described the details which were narrated by the prosecutrix. Narration is on line of the prosecution case. Mohan Prasad Dubey (P.W. 13) supported the investigation done by him.

21. Ex. P-23 is the report of chemical examiner which had confirmed the presence of human spermatozoa and semen on the Articles A1, A2, B, B2, D and F which; Article A1 is Lahanga of prosecutrix, A2 is sari, B1 and B2 are vaginal smears slides of the prosecutrix, Article D is underwear of accused Milan, Article F is underwear of accused Kaudu.

22. From the aforesaid evidence it is clear that the prosecutrix was subjected to sexual intercourse. Question which arises for consideration is whether it was a case of consent or forcible sexual intercourse.

23. Learned counsel for the appellants has relied on the decisions of the Supreme Court in case of Kuldeep K. Mahato v. State of Bihar (AIR 1998 SC 2694), State of Maharashtra v. Abdul Hafiz Faroki and others (AIR 1998 SC 2382) and also an unreported decision of this Court in case of Muinuddin and others v. State of M.P., in Cr. Appeal No. 602/96 and also a decision of this Court in case of Banti @ Balvinder Singh v. State of M.P. (1992 MPLJ35) so as to contend that the version of the prosecutrix is not reliable and that she was a consenting party.

24. In case of Kuldeep K. Mahato (supra), 18 years old girl was kidnapped. She was taken in a tempo. She was taken out of lawful guardianship. It was observed that the prosecutrix had sufficient opportunity not only to run away from the house of Ramgrah but she could have also taken the help of neighbours from the said village. Medical evidence of the doctor also indicates that there were no injuries on the person of the prosecutrix including her private part. Her entire conduct clearly

shows that she was a consenting party to the sexual intercourse and if this be so, the conviction of the appellant under Section 376, IPC cannot be sustained. The Supreme Court also noted that it was not the case of the prosecutrix that she was put in physical restraint in the house at Ramgrah, with the result her movements were restricted.

25. In case of *State of Maharashtra v. Abdul Hafiz Faroki and others* (supra) prosecutrix had boarded the train. She was taken into the latrine of the compartment. 8 persons alleged to have committed rape on her. There was further allegation that accused had pushed prosecutrix out of running train after giving kick. However, except a small incised wound on her right hand and some minor superficial abrasions no other injury was found on her person. It was held that the version was highly improbable and it was held by the High Court that in all probability prosecutrix had willingly gone along with the accused. The High Court, therefore, acquitted all the 7 accused. Appeal against acquittal was filed before the Supreme Court. Supreme Court disbelieved on the basis of probability factor of commission of rape inside the latrine of the compartment and on the floor in between two berths. The girl was not carrying on well with her parents and she had left with her aunt and did not have money to purchase tickets. If she was pushed out of the running train after giving kicks then some injuries would have been found on her person. But, except for a small incised wound on her right hand and some minor superficial abrasions no other injury was found on her person. She did not raise any shout, hence, it was held that she had gone willingly and the accused persons were falsely implicated in the case of offence of rape.

26. In case of *Banti @ Balvinder Singh* (supra) it has been observed that 'a presumption has been enacted in Section 114A of the Evidence Act which says that in a case inter alia of gang rape, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent. Hence the legal position is that if the fact of sexual intercourse by the accused is proved, the evidence of the woman in a case of gang rape that she did not consent to sexual intercourse would have to be believed and it will not help the defence merely to

show that the woman was of easy virtue. The presumption about want of consent is not conclusive. Evidence may still be given to disprove it. Immoral character would still not be an absolutely irrelevant circumstances'. In case of Band @ Balvinder Singh (supra) the conviction and sentence was set aside as the conduct of the prosecutrix in not making the report for five days was held to be fatal.

27. In the case of Muinuddin (supra) testimony of the prosecutrix was not relied. In the absence of independent corroboration and also in the absence of any support from the medical report regarding the commission of offence of rape. She had gone to the house of the accused alongwith her husband.

28. In the instant case the prosecutrix was aged 20 years at the relevant time. Though in the instant case servant of flour mill; Rahman (P.W. 2) has been declared hostile, but, he has mentioned in the examination-in-chief that the prosecutrix had come to collect the ATTA. Thereafter witness has clearly avoided to state truth on the pretext that he was busy and did not see anything. But, the evidence corroborates that the prosecutrix had come to the village. It is misfortune that the girl, was taken away though she states that she had raised hue and cry, nobody came to her rescue.

29. Neerabai (P.W. 1), with whom the prosecutrix stayed in the night, has also not supported the prosecutrix version. However, had it been the case of consent the evidence as afforded by independent witness of village Aamgaon namely Brajlal (P.W. 3) who was sitting at the house of Narendra Bahadur (P.W. 12) Sarpanch along with Dhursingh and Sonsingh (P.W. 5) of the village would not have come forth. The first information report was lodged at 23:20 hours in the mid-night on 8-9-87 itself, which goes to indicate that the prosecutrix was not a consenting party. Had she been a consenting party, the first information report would not have been lodged promptly and the incident was narrated to respectable persons of the village at about 9-10 p.m. Report was lodged at 11:20 p.m. Thus, there is no element of consent of prosecutrix in the instant case. She was treated as if she was an object of sexual satisfaction degrading all the concepts to respect of dignity to womanhood. She had gone to different village by bus and was not in her own village Aamgaon. It has come in the evidence that she went by bus to village

Chhuria and also to village Bamhani. Gaus Mohd. had taken her on the pretext that she would get LUGDA. As a matter of fact she had gone to Khwaja Mohd. his father same day and was returning back from village Chhuria by bus which was at a quite distance, but, in spite of visiting twice the said village on 6th and 7th September she was not able to purchase LUGDA from Khwaja Mohd. She was given Rs. 20/- by Indira to purchase it. It is clear that she was taken on cycle on two occasions on September 7, 1987. Three persons had accompanied on both occasions, though it may sound little unnatural, why for resistance was not put, but, some time the facts are stranger. The circumstances in which the prosecutrix was taken by Gaus Mohd. she was in search of LUGDA and had gone to Gaus Mohd.'s father, probably the girl was alone, Gaus Mohd. appears to have followed her and took her on cycle. It is unfortunate that the witnesses are not coming forward to support the cases. As prosecutrix was married, obviously in her medical examination, injury on her private part is not found. However, abrasion which found is not of much significant size, its presence and immediate conduct indicates that she was not consenting party. Even if abrasion is discarded which is very small in size, it appears that she was exploited by the accused persons against her wishes. She was made to drink liquor as per her initial version in the first information report. In the night three accused persons had committed sexual intercourse with her and they had repeated this act in the morning when she had gone to river after staying with Neerabai in the night, though Neerabai has not supported, but, still has stated that she stayed in the night. No serious injury on the person of prosecutrix or sign of resistance except one abrasion, may indicate that she had resigned to her fate. She was helpless being a young girl against the muscle power of accused persons who committed rape on her.

30. Broken bangles were also seized as apparent from Ex. P-19. Not only that in the version of the prosecutrix she has raised hue and cry and appears to have succumbed to her fate as she was alone in other village. The immediate conduct of the prosecutrix after commission of offence supports her version when Gaus Mohd. had left her back at village Chhuria, thereafter she was taken away by accused Milan, Kaudu and Roshan as if they were having the right of committing offence and as if each of them was having the right to exploit the woman. Trial Court has found that village Bamhani and Chhuria are small villages and not

thickly populated.

31. The submission of learned counsel that Gaus Mohd. was having enmity with Narendra Bahadur Singh is not borne out in the evidence and such allegation of rape would be levelled on account of that enmity is not believable in the instant case. If the enmity was with Gaus Mohd. what was the reason to implicate others. Such case is not made out as other set of accused had not accompanied Gaus Mohd. and had taken the prosecutrix after Gaus Mohd. had left her, I find no force in the submission of learned counsel that the prosecutrix is a woman of easy virtue and she must have satisfied her lust with accused persons with consent. By the conduct of the prosecutrix it is clear that she was not a consenting party and whatever was possible to her she had done. She was put to fear and when she succumbed to muscle power of the accused persons, her conduct cannot be said to be such as to negate the inference of forcible sexual intercourse.

32. In the result the conviction and sentence imposed upon the appellant in both the appeals are upheld. Both the appeals are dismissed.

33. Criminal Appeals dismissed.