

State Vs. Musha and ors.

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Court : Delhi

Decided On : Aug-10-1970

Reported in : 7(1971)DLT31

Judge : Hardayal Hardy and; T.V.R. Tatachari, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 363; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 417

Appeal No. : Criminal Appeal No. 10 of 1966

Appellant : State

Respondent : Musha and ors.

Advocate for Pet/Ap. : S. Malhotra and; Inder Singh, Advs

Judgement :

Hardayal Hardy, J.

(1) This appeal under section 417 of the Code of Criminal Procedure has been filed by the State against the judgment of acquittal passed by the learned Assistant Sessions Judge, Mandi, on 30-4-1966.

(2) Respondents, Musa and Ummar Din, were accused in a case sent up by the police in the Court of the Magistrate at Karsog, District Mandi. The learned

Magistrate framed charge against Musa for an offence under sections 363, 366 and 376, Indian Penal Code, and against Ummar Din for an offence under sections 363 and 366, Indian Penal Code, and committed them for trial by the Court of Session at Mandi. They were both tried by the learned Assistant Sessions Judge and were acquitted as stated above.

(3) The facts as alleged by the prosecution are that on 17-10-1964 Smt. Satyan (Public Witness . 3), wife of Ali Hussain (Public Witness . 1) and Nurbanu (Public Witness . 2), daughter of Ali Hussain from another wife named Smt. Bibi, were returning home from forest with grass loads on their heads. Smt. Satyan reached home alone and informed her husband that Nurbanu had been forcibly kidnapped by four persons from Suin Nala in the forest. On this information Ali Hussain went in search of Nurbanu. He was informed by Supkar Din, a lambardar of Gujjars, that Nurbanu had been kidnapped by Musa and Ummar Din to village Badhras.

(4) On 24-10-1964 Ali Hussain lodged a report which was registered on 25-1 (J-1964 at the police station, Karsog. As a result of police investigation Nurbanu was recovered from a house in village Mumbai which, according to memo. Ex-PC belonged to accused Musa. After the girl was recovered she made allegations of having been ravished by Musa. Both she and Musa were thereafter medically examined. The police also recovered a used Chaddar (sheet) which, according to the prosecution, Nurbanu was wearing and had been given to her by accused Musa. On 29-10-1964 the police also took into possession a black Salwar which the girl was wearing. They also took into possession the trousers worn by Musa accused. After examination of witnesses the two accused Musa and Ummar Din, as already stated, were sent up for trial on the charges mentioned above.

(5) As regards the charge of rape under section 376, Indian Penal Code, the learned Assistant Sessions Judge has held that the charge is based on the solitary statement of Nurbanu (Public Witness . 2) who stated that Musa accused had forcible intercourse with her twice and that she had felt pain and that blood had oozed out from her vagina. She further said that she had raised a hue and cry but Musa had threatened to put her to death.

(6) Dr. Om Parkash (Public Witness . 10), who had examined Nurbanu at the District Hospital Mandi on 3-11-1964 did not find any spermatozoa. dead or living in the vaginal smear taken by him. He also did not find any scratches or any other evidence of violence. The hymen was found torn with residual tag present but he did not detect any bruise, laceration, blood or discharge. The learned trial Judge was, therefore, of the opinion that in the absence of any other evidence it was not safe to convict the accused of the offence of rape on the solitary statement of the prosecutrix especially when there were no indications of any struggle on the part of the girl.

(7) As the question of responsibility of accused Musa for the offence of rape also involves, besides the question 'of consent, the question of the age of the girl, we shall deal with this aspect of the case after we have dealt with the question of culpability of the accused on the charge of kidnapping under sections 363 and 366 of the Indian Penal Code.

(8) The evidence that Nurbanu was forcibly taken away by the accused consists of the oral testimony of her step-mother Smt. Satyan and Nurbanu herself. Nurbanu stated that on 17-10-1964 she along with her father Ah Hussain and step-mother Smt. Satyan had gone to the forest to cut grass. After sun-set her father returned to the dera but she and her step-mother remained in the forest. It was quite dark when she and her step-mother left the forest with loads of grass on their heads. When they reached Sum Nullah, Umar Din accused threw the load of grass off her head and forcibly lifted her up. He also pushed her mother away and carried Nurbanu towards Dhar side. He gagged her mouth with the folds of her Chaddar which she was wearing at the time. After a little distance he placed her on a stone and threatened her that he would put her to death if she raised hue and cry. Thenceforward. both he and Musa carried her by turns. After walking throughout the night they reached Luhri in the morning and took her to the house of Dittu Gujjar where they all had their meals. The wives of Dittu and Bagru were also present in the house along with Bagru and Dittu. After taking their meals the kidnappers proceeded further and reached the house of Umar Din where they spent the night. On the following morning Musa took her to his own dera where he left her with his mother and himself went out to look after his buffaloes. He

returned to his dera on the following day and at night had forcible intercourse with her on two occasions. At that time she was wearing Salwar (Ex. P. 1) and Musa was wearing Pyjama (Ex. P. 2). She said next morning she washed her Salwar while Musa went away to look after his buffaloes. After some days the police arrived at Musa's dera but he took her to the house of lambardar where she was kept for whole day and night. On the next day he took her from the house of lambardar to the house of Sohnu from where she was recovered by the police in the presence of Musa accused,

(9) At Nirath the police took into possession her Salwar (Ex. P. 1). They had also taken into custody the Pyjama of Musa (Ex. P. 2). From Nirath tile police took her to the police-station Karsog and then sent her for medical examination to Mandi.

(10) Smt. Satyan supported the version of Nurbanu so far as it related to the accused having taken her away from Suin Nullah in the evening of 17-10-1964. She also stated that on return to her dem she informed her husband about the two accused having kidnapped the girl.

(11) Dittu (Public Witness . 9) also supported the prosecution case and stated that on 18-10-1964 (3rd of Kartik) the two accused had come to his dera at Giddar and had their meals with him. Nurbanu was with the accused at that time. There is also the evidence of Bagru (Public Witness . 8) who deposed that on 3rd of Kartik the two accused along with Nurbanu had met him on this side of Nirath on the bank of Sutlej. On inquiry the accused told him that they had brought the girl from Mandi.

(12) There is also the evidence of Head-Constable Hari Saran (Public Witness . 13) which is supported by the statement of Faqir Ali (Public Witness . 6) about the recovery of Nurbanu from a Kotha which, according to the witness, was in the joint occupation of Musa and Sohnu.

(13) This evidence leaves no doubt about the girl having been taken away by the two accused. It is true that in the first information report (Ex. PA) which was lodged with the police by Ali Hussain on 24-10-1964 it was mentioned that four unknown persons had forcibly taken away his daughter without his consent with the intention of compelling her to marry or seducing her to illicit intercourse and this

circumstance and the delay in lodging the report with the police have largely weighed with the learned trial Judge in rejecting the prosecution case in so far as it relates to the charge of kidnapping and abduction against the accused; but both these circumstances are not such as to justify the conclusion that the girl had not been taken away by the accused. The girl was undoubtedly carried away by some persons when her father was not with her. The only person who saw the girl being removed from the Suin Nullah was her stepmother. It was pitch dark at the time. Smt. Satyan who was the sole informant of the occurrence so far as Ali Hussain was concerned, could easily have made a mistake about the number of persons who were involved in the offence at that time or she might have deliberately exaggerated the incident. There is, however, no reason to disbelieve the version of Nurbanu to the extent it is corroborated by the evidence of Dittu (Public Witness . 9) and Bagru (Public Witness . 8) and by the evidence of her subsequent recovery from the Kotha of Musa.

(14) We therefore, hold it proved that it was accused Musa and Umar Din who had carried away Nurbanu on the night of the occurrence.

(15) In order to establish an offence punishable under section 363.. Indian Penal Code. the prosecution has not only to prove that the minor was taken or enticed away by the person accused of the offence but also to establish that the minor if a male, was under 16 years of age or if a female, was under 18 years of age. The prosecution has further to establish that the taking away on enticement of the minor was out of the keeping of the lawful guardian of such minor without the consent of such guardian. In the present case we hold it proved from evidence on record that Nurbanu was taken away by the two accused out of the keeping of her lawful guardian Shri Ali Hussain and that they did so without his consent. The only question, therefore, to be decided is whether she was under 18 years of age when she was taken away by the accused.

(16) As regards the offence under section 366, Indian Penal Code, (the age of the person kidnapped or abducted is not material. The only requirement of the section is that the person kidnapped or abducted must be a woman and that the accused should do so with intent that she may be compelled or knowing it to be likely that

she will be compelled to marry any person against her will or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse. The section also makes it punishable if any person who by means of criminal intimidation as defined in the Code (section 503) or abuse of authority or any other method of compulsion induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person.

(17) Section 362. Indian Penal Code, defines abduction and lays down that whoever by force compels, or by any deceitful means induces any person to go from any place, is said to abduct that person.

(18) Learned trial Judge has held that the prosecution had failed to establish that Nurbanu was below 18 years of age at the time of the occurrence. He has also held that there is no evidence to establish that the girl was either compelled to go with the accused by use of force nor is there any evidence of her having been induced to do so by any deceitful means employed by the accused.

(19) The contention of the learned counsel for the State is that the conclusion i cached by the learned trial Judge with respect to the age of Nurbanu is not correct and that at the time of the occurrence she was below 18 years of age. Learned counsel also contends that even if it is found that she was 18 years of age or above, there is ample evidence- on record to establish that she had been abducted by the accused with intent that she may be forced or seduced to illicit intercourse with accused Musa.

(20) We shall, therefore, examine both the contentions urged by the learned counsel for the appellant. It is not disputed that the prosecution has not produced any entry from the birth registration records maintained by public authorities. Her mother Smt. Bibi who is admittedly alive and was living with her husband Aii Hussain has also not been examined as a witness. Ali Hussain alone appeared as a witness and deposed that on 1-3-1966 Nurbanu would be completing 16th year in the coming month of Jeth which means, according to him, she was between 14 and 15 years of age in the month of October 1964. As against that the accused examined one Gulam Rasul (DW. 2) who claimed to be a lambardar of Gujjars of

Rampur Tehsil and also a member of Gujjar Welfare Committee from Rampur. He stated that Nurbanu was 19 or 20 years of age and that his reason for saying so was that during the communal disturbances of 1947 Aii Hussain had come to stay with him for about a month and that at that time Nurbanu was about 8 months old. He also stated that the births of the children of Gujjars were now entered with the Panchayat but previously the birth entries used to be made by the Patwari. Learned trial Judge has held and in our opinion rightly that in view of this conflicting evidence and the fact that Nurbanu's mother Smt. Bibi had not been examined as a witness not much reliance could be placed on the oral testimony of her father Ali Hussain.

(21) The only other evidence with regard to the age of the girl, therefore, consists of the two medical witnesses examined by the prosecution. Of these Dr. Om Parkash Sharma (Public Witness . 10) deposed that according to his observation Nurbanu was 16 years of age when he examined her on 3-11-1964. His observations are contained in his report (Ex. Public Witness . 10/B). According to that report the breasts of the girl were fully developed, pubic hair were thickly grown and axillary hair were also fairly grown. He, however, admitted that in India the girls invariably develop their breasts at the age of 13 or 14 years. He also admitted that there can be variation in the age on account of climatic, dietetic or hereditary factors. The real significance of his evidence, however, lies in his observations on the X-ray report prepared by Dr. S. N. Batra (Public Witness . 12). According to that report the X-ray radiograph revealed the following results:-

'MEDICALLYepicendyl United. Lateral epicendyl United. Head of radius United. Lower end of radius Not united. Lower end of vlna Not united. Head of humerus Not united Age About 15-16 years.'

(22) In the opinion of Dr. Om Parkash Sharma there could be a possibility of variation in age to the extent of one year in the lower and upper limits of 15 and 16 years given by Dr. S. N. Batra. But the witness was not prepared to concede that climate had any significant effect on ossification. He, however, did say that it had some effect but it was not much.

(23) According to Dr. S. N. Batra (Public Witness . 12) who, as a radiologist, took the X-ray radiographs, however, the appearance of centres of ossification varied to some extent due to climatic, dietetic and hereditary factors. He also stated that the union of epiphyses with the head of radius and the shaft had taken place in the case of Nurbanu but the union of epiphyses of the lower end of radius and ulna had not taken place. In his opinion this union takes place at the age of 16 to 17 years and there can be variation in the age this way or that way. The conclusion that emerges from the evidence of the two medical experts produced by the prosecution, therefore, is that according to Dr. Om Parkash Sharma the girl was 16 years of age when he examined her but her age could be either 15 or 17 years whereas according to Dr. S. N. Batra the age could be 15 to 16 years which again means it could be 14 and it could also be 17 years.

(24) Learned counsel for the State has, however, invited our attention to certain passages in Modi's text-book of Medical Jurisprudence and Toxicology (1961 Edition) where it has been said that the sign of ossification of bones is helpful for determining age until ossification is completed, for skiagraphy has now made it possible to determine even in living persons the extent of ossification, and the union of epiphyses in bones. In this connection we have been referred to a table appearing at pages 33 to 36 of that book and it is contended that keeping in view the said table the age of Nurbanu could in no case be more than 16 years. The table appears to be a summary of the observations made by different authors showing the age in years when the fusion of some of the epiphyses among people in various parts of India and abroad takes place. An examination of the table makes it clear that there is a certain amount of disparity even among people from Punjab, Bengal and Uttar Pradesh.

(25) Learned counsel has also referred us to a Bench decision Calcutta High Court in *Biswanath Ghosh v. The State* : AIR1957 Cal589 where Chakravarti C.J. observed that in the present state of the development of the medical science and the present state of our knowledge, we must proceed on evidence of age as furnished by the ossification test.

(26) There can be no doubt that the evidence of age as furnished by ossification test is of considerable importance, but there is equally no doubt that too much reliance cannot be placed on such evidence alone. In fact, the learned author is himself careful enough to say at pages 31 and 32 of his book that for ascertaining the age of young persons radiograms of any of the main joints of the upper or the lower extremity of both sides of the body should be taken, and an opinion should be given according to the following table to which we have already referred, 'but it must be remembered that too much reliance should not be placed on this table as it merely indicates an average and is likely to vary in individual cases even of the same province owing to the eccentricities of development.' Learned author has further observed that 'owing to the variations in climatic, dietetic, hereditary and other factors affecting the people of the different provinces of India it can not be reasonably expected to formulate a uniform standard for the determination of the age of the union of epiphyses for the whole of India.'

(27) It may also be mentioned that the observations of Chagravarti C.J. in the case relied upon by the learned counsel for the State were made not in a case where the accused had been convicted, on the basis of evidence of age as furnished by the ossification test. What had happened in that case was that in the case under section 363, Indian Penal Code, trying Magistrate had refused to commit the accused for trial before the Court of Session on the ground that there was not sufficient evidence with regard to the age of the girl. Upon an application under sections 435 and 437 of the Code of Criminal Procedure, the learned Additional Sessions Judge had directed a further inquiry which was challenged on behalf of the accused before the High Court. At the hearing of the revision it was contended on behalf of the accused that the doctor's evidence with regard to the age of the girl was merely based upon his observation of the ossification of the bones of the girl and that opinion, based on such material, could not be accepted as final or decisive since the medical science in that regard had not yet become an exact science. It was in this context that it was observed by the learned Chief Justice that if there was proper evidence about the age of the girl and that evidence was that she was between 16 or 17 years of age, there was obviously sufficient evidence of her minority upon which the petitioner could be committed to take his trial before the Court of Session.

(28) It was nowhere said that the 'evidence of age furnished by the ossification test was by itself sufficient of from the basis or conviction for an offence under section 363, Indian Penal Code. No help can, therefore, be derived by the learned counsel for the State from the above decision of the Calcutta High Court.

(29) Learned counsel for the respondents has, on the other hand, invited our attention to the judgment of Passey J. in *Kishori Lul Raghbir Dass vs. the State* where it was held that an X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert, but it can by no means be so infallible and accurate a test as to indicate the correct number of years and days he has lived Hence the opinion of a medical expert based on such tests cannot be regarded as conclusive, particularly when the difference of approximate age state by him and the one fixed by section 363, Indian Penal Code, is wide.

(30) We are in respectful agreement with that view. It may be mentioned here that in the present case the kidnapped female does not belong to any of the provinces mentioned in the table prepared by Modi. There is also the additional circumstance that the margin between the age as disclosed by the ossification test and that prescribed under section 363 i.e., 18 years, is not sufficiently wide. According to that test the girl could be 17 years or a little more. Is it too much to say that she could as well be 18 or a little more? It has also to be borne in mind that the father of the girl did not make any attempt to produce the birth entry although there is evidence on the record to show that in the case of Gujjars birth entries were previously made by Patwaris while now-a-days those entries are made by the Panchayat. The girl's mother who is admittedly living with her husband and was perhaps the best person to give evidence about the age of the girl was also not produced. No evidence was also given about the births of any other children of All Hussain from his wife Smt. Bibi. In this state of evidence it is difficult to hold that the learned Assistant Sessions Judge was in error in holding that there was no satisfactory evidence to establish that Nurbanu was below 18 years of age.

(31) It is true that the High Court in an appeal against acquittal has the same right of examining the evidence for itself as it has in an appeal against conviction under

section 423, Criminal Procedure Code. but while doing so it has to bear in mind that the accused has been acquitted by the trial Court and the presumption of innocence in his favor has certainly not weakened by his acquittal. The High Court has also to show due regard to the trial Court's appreciation of oral evidence and its assessment of that evidence is not to be lightly interfered with. In the present case the trial Court has held that the evidence of All Hussain with regard to the age of his daughter cannot be relied upon. It has also held that the evidence of Gulam Rasul (DW. 2) who said that the age of the girl was 19 or 20 years could not be rejected out of hand.

(32) In this view of the matter we see no reason to differ from the conclusion reached by the learned Assistant Sessions Judge in holding that the present case the trial Court has held that the evidence of Ali Hussain The acquittal of the respondents on a charge under section 363, Indian Penal Code, has, therefore, to be maintained.

(33) This brings us to the question as to whether there is any evidence to establish the charge under section 366, Indian Penal Code, against them. The girl was admittedly removed by the accused from place to place. She had several opportunities of meeting people. The journey from Suin Nullah to the dera of Dittu was of course performed in the darkness of the night, but thereafter the entire journey was performed during day time. If the girl was not a willing party and was a victim of force or deceit she had ample opportunity of attracting the attention of passers-by. In fact, according to her own statement, after the accused brought her to the dera of Musa. she was left alone with Musa's mother and he himself went away to look after his buffaloes and yet the girl made no attempt either to escape or to raise an alarm.

(34) The conduct of her step-mother Smt. Satyan in not raising any alarm or offering any resistance, when the girl was first lifted by Umar Din, also ill accords with the suggestion that any force was used by the accused. Smt. Satyan admitted in her statement that accused Musa was already known to her because she had seen him on some occasions near her dera at Saran in Rampur ilaqa and yet when she returned home she did not disclose to her husband that Musa was one

of the persons who had taken away Nurbanu. Learned counsel for the respondents suggested that the conduct of Smt. Satyan was quite consistent with her being a consenting party to the taking away of the girl, just as much as the girl herself was. The suggestion does not seem wholly unreasonable.

(35) The conduct of Ali Hussain also leaves much to be desired. The girl had been taken away on 17-10-1964 and yet he did not lodge any report with the police till 24-10-1964. Even if it is assumed that he was not aware as to who the culprits were; but he was at least aware of the fact that the girl had been forcibly kidnapped. Ordinarily, therefore, he was expected to seek the aid of the police. He, however, remained quiet for almost a week. These circumstances, in our opinion, cast a serious doubt about the girl having been forcibly removed. The case of abduction must also, therefore, fail.

(36) The prosecution having failed to establish that Nurbanu was under 16 years of age, even if it held that she was subjected to sexual intercourse by Musa, that would not make him liable for an offence punishable under section 376 Indian Penal Code, unless it is established that he did so without her consent. On the facts of the present case it cannot be said to have been established beyond reasonable doubt that Nurbanu was subjected to sexual intercourse without her consent. The circumstances, on the other hand, clearly point to the girl being a consenting party. We also find it difficult to believe that her consent was obtained by putting her in fear of death or hurt. The allegation is based on the uncorroborated testimony of the girl herself and is also inconsistent with her conduct before and after the alleged criminal assault.

(37) There is thus no satisfactory evidence to hold accused Musa guilty of the offence of rape of which he has been acquitted by the trial Court.

(38) The result is that the judgment of the trial Court acquitting both the respondents is upheld, the appeal filed by the State is dismissed and the bail bonds furnished by the respondents are ordered to be cancelled.