**Jamil Vs. the State**

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**Court** : Delhi

**Decided On :** Mar-05-1982

**Reported in** : 22(1982)DLT40

**Judge** : Charanjit Talwar, J.

**Acts** : Indian Penal Code (IPC), 1860 - Sections 376; Code of Criminal Procedure (CrPC) , 1973 - Sections 161

**Appeal No.** : Criminal Appeal No. 220 of 1981

**Appellant** : Jamil

**Respondent** : The State

**Advocate for Pet/Ap.** : B.G. Singh and; D.R. Sethi, Advs

**Judgement** :

**Charanjit Talwar, J.**

(1) The parents of Kumari Geeta, the proiecutrix, are sweepers. According to the prosecution they used to work in a part of the locality of Gali Takia Razan, Sheesh Mahal, Teliwara, situated on Shivaji Road, Delhi. The prosecutrix used to help them. One of thhouses falling in that locality bearing No. 1993-94/29 is owned by the appellant's father. Jamil, the appellant herein, used to reside with his parents in the first floor of that house.

(2) It is the prosecution case that on 23rd January, 1979, at about 5.30 p.m. Geeta aged 13 years, was cleaning the latrines in the ground floor of that house. When she had completed her work there, Jamil asked her to clean a room on the first floor. At his bidding she went upstairs to the room where Jamil followed her. He bolted the door from inside, took off his pants, laid her on the ground, untied her Salwar and had sexual intercourse with her against her will. Thereafter, he went downstairs and ran away. In that unlawful act she suffered injuries on her private parts and bled profu sely. She walked back to her house and waited for her mother. On her return at about 8 p.m. she reported the incident to her. Her mother took her to a nearby private clinic of a lady doctor who told them to go to a Hospital as it was a serious case.

(3) Next day Geeta was taken to Hindu Rao Hospital by her mother where she was admitted. On medical examination the doctor found half an inch long 'perineum tear' It was stitched. There was no other external injury apart from the said tear.

(4) On a report being lodged the accused was arrested on 25th January, 1979.

(5) After trial, Shri 0. P. Diwedi, an Additional Sessions Judge, Delhi, has found Jamil guilty for an offence under Section 376, Indian Penal Code, and sentenced him to rigorous imprisonment for seven years.

(6) The prosecution in all has produced 15 witnesses. Constable Gian Singh (Public Witness 7) was the duty constable in Hindu Rao Hospital on 24th January, 1979, the day the prosecutrix was admitted in that Hospital at about 12.15 p.m. Sansar Chand Sub-Inspector (Public Witness 8) was the duty officer in Police Station Bara Hindu Rao who recorded the first information report bearing No. 45, copy Exhibit Public Witness 8/A, on receipt of the informat ion from the duty constable. It is not necessary to analyze in detail the evidence of these two formal witnesses.

(7) I propose to firstly deal with the medical evidence brought on the record before appreciating the oral evidence.

(8) Dr. (Mrs.) Satya Chopra has a clinic at Bahadurgarh Road at 763, Sheesh Mahal, Delhi. She has been practicing there for quite some time. The clinic is situated in the same locality where the alleged incident took place. She has deposed as Public Witness I that about a year prior to her statement recorded in Court on 11th December, 1979, one old lady had brought a girl of about 13 years to her clinic. The girl was bleeding from her private parts. The lady accompanying her told her that it was a case of rape. On that information considering it to be a serious case, she advised them to go to a big Hospital. She did not give any treatment to the girl and as such made no entry regarding the patient in her record. It is not clear from her testimony whether she examined the girl. In cross-examination, she admitted that her statement was recorded by the police who approached her after two or three days of the visit of the girl. She admitted to be familiar with that locality. She was categorical that Mohalla Takia Bazar was different from Mohalla Sheesh Mahal; Takia Bazar was situated on Shivaji Road while Sheesh Mahal was situated on Bahadurgarh Road. She further stated that the prosecutrix and her mother never worked in her clinic or at her residence both situated at Sheesh Mahal. No question was put to her by the prosecution whether the prosecutrix, Geeta, was the girl who had been brought to her Clinic.

(9) Now, the testimony of those doctors who had examined the prosecutrix in the Hospital may be noticed ; they are, Dr. (Mrs.) B. K. Chauhan (PW 15) Gynaecologist; Dr.A. K.Gupta (Public Witness 9), who had prepared the modicolegal certificate and the Radiologist Dr. J. R. Dass (Public Witness 13).

(10) Dr. Chauhan states that on 24th January, 1979, the patient was referred to her. On local examination she found 'perineal tear' and a blood clot lying at 'Citus'. She admitted that first page of Out Patient Department Card Exhibit Public Witness 15/A is in the handwriting of a Casualty Officer but entries on its reverse are in her handwriting. It is however, difficult to discern from Exhibit Public Witness 15/A as to where the blood clot was found. The doctor has written the word which can be read as 'vitus' or 'citus' in Exhibit Public Witness 15/A and in her testimony in Court also the word has appeared as 'citus'. However, according to the medicolegal certificate summary and Exhibit Public Witness 15/B, an old blood clot was found on the ruptured hymen. The doctor who had prepared the said

summary has not been produced although it is signed by Dr. Chauhan. This document having come from proper custody, having been prepared in the course of official duties by a House Surgeon and having been signed by Dr. (Mrs.) Ghauhan after the facts stated therein were verified by her from the case history, in my view, the same is admissible in evidence. In any case Mr. Bawa, learned counsel for the appellant, during the course of arguments did not challenge the authenticity or admissibility of the said document.

(11) The medicolegal certificate Exhibit Public Witness 9/A and the Out Patient Department card clearly make out that apart from the 'perineal tear' there was no other external injury found on the person of the prosecutrix. Learned counsel for the parties agree that 'perineal' means 'perineum'. The dictionary meaning of the word 'perinum' is 'the region situated between the opening of the bowel behind and of the genital organs in front. In the female it is apt to be lacerated in the act of child birth'. Webster's Third New International Dictionary defines the word 'perineum' at page 1680 as 'an area of tissue marking externally the approximate boundary of the outlet of the pelvis and as use demarked giving passage to the urinogenital duets and the rectum; sometimes: the area between the axus and the posterior part of the external genitalia esp. in the female'.

(12) The medical dictionaries referred to at the time of arguments define the word 'perineum' in the same manner.

(13) From the medical evidence; which although is not very clear, it seems 'tear' referred to by the doctor was on the fourebette that is in the 'small fold of membrane connecting the labia minora in the posterior part of the vulva'.

(14) What is to be assessed is whether the perineum was torn at the time of the alleged rape on 23rd January, 1979. As is evident from the summary, Exhibit Public Witness 15/A, no injury was found to be present inside the vagina which admitted two fingers. The hymen was not intact. The medical evidence does not show at all if there was any fresh tear of the hymen of the prosecutrix. If that was so, it must have been detected by the doctor. The contention of the prosecution, however, is that nevertheless the perineum tear occurred during the course of rape as alleged. It is surprising that the prosecution did not put a single question to

the doctor as to how old this tear was.

(15) The medical dictionaries show that a tear of this type is possible at the time of child-birth- (See Blacks' Medical Dictionary). In fact, at the time of birth to facilitate delivery of the child, this type of tear is caused by the doctors as well. It is no doubt true that this type of tear can also occur when a girl of very tender age is raped by a matured, strong and healthy young man. But, is this type of a tear possible to a girl of about 13 years whose vagina admitted two fingers. As to the probability of such a tear occurring in the present case and as to how old was it were the questions which should have been put by the prosecution to the doctor (Public Witness 15) whe she appeared in the witness box. Nevertheless, I do not rule out the possibility that such a tear can be caused, when a girl of tender age is raped: a savage sexual assault by a healthy youngman could lead to such a tear of the perineum.

(16) TAYLOR'S Principles and Practice of Medical Jurisprudence (Vol. II) Twelfth Edition has cited two instances where such a tear was found on very young victims. In one case the girl was under four years and the accused, her father, was aged 24. In the other case where perineum was found to be 'nearly torn through', the victim was aged 8 years. However, apart from the perineum tear in those cases of rape there were other inju- ries. In both the cases the orifice, as well as the whole of the vagina were lacerated. There were internal injuries in the vagina as well.

(17) In the present case, however, as noticed earlier, there were no other injuries at all. As per summary. Exhibit Public Witness 15/B 'no mark of external injury' was found. Hymen was not intact and the old blood clot was found on the ruptured hymen. That very document shows that 'entroitus admitted two fingers. It is also apparent that at the time of examination on 24th January, 1979, there was no swelling of the female organ of the prosecutrix. The vaginal smear which was taken admittedly did not show any sperms. In the event the doctors had found a fresh tear' 'of the hymen or of the perineum and they would have stated so. The prosecution did not even care to examine Dr. (Mrs.) Chauhen under Section 161 of the Code of Criminal Procedure. No opinion was sought from her by the

prosecution about the age of the perineum tear and whether in the absence of any other external injuries could this tear be caused on account of the alleged rape committed by the accused on the prosecutrix on 23rd January, 1979. Even in Court no question was put by the prosecution to the doctor soliciting her opinion about the age of the tear. The medical evidence in the instant case is extremely sketchy. If rape had been committed on the prosecutrix as alleged by the prosecutian on 23rd January, 1979, there was bound to be detected swelling or redness on the female organ, if not other external or internal injuries, on the next day.

(18) At this stage the evidence regarding the age of the prosecutrix may be noticed.

(19) Dr. J. R. Das (Public Witness 13) under whose supervision the X-ray was taken has opined the age of the prosecutrix to be above 12 years but below 14 years. He reiterated this position in his cross-examination by staling that the patient in no case was over 14 years.

(20) Mr. Bawa in view of the testimony of the Radiologist and of A. K. Goel (Public Witness 6) who had proved the entry, Exhibit Public Witness 6/A, relating to Gita from the birth register, did not seriously challenge the fact that the prosecutrix was less than 16 years of age, on 23rd January, 1979, although according to him it was curious as to how the name of the prosecutrix had been entered as Geeta in the municipal records. In my view, however, copy of the birth certificate showing the date of birth of Geeta as 22nd August, 1966, cannot be challenged on this ground. In families like that of the prosecutrix 'Namkaran' ceremony is generally not performed; they name the child as soon as it is born.

(21) In this case thereforee, from the medical evidence it cannot be conclusively held that rape was committed on the prosecutrix, who was no doubt less than 16 years, on 23rd January, 1979. Another aspect is also necessarily to be kept in view while assessing the medical evidence. The accused was medically examined by Dr. A. K. Bhardwaj in the police hospital on 26th January 1979. The doctor did not notice any injury whatsover on the male organ of the accused. He also did not find any stains of blood or semen over the pubic hair or on the under-clothings of

the accused. It is well-settled principle 'that if a girl of 10 or 12 years who is a virgin and whose hymen is intact is subjected to rape by a fully developed man, there are likely to be injuries on the male organ of the man'. (See Rahim Beg v. State of U. P., : 1972 CriLJ1260 ). Presuming that the prosecutrix was virgin and assuming further that she was raped as alleged on 23rd January, 1979, the appellant was likely to suffer injuries on his male organ.

(22) As in view of the medical evidence which I have already noted is sketchy it cannot be found that prosecutrix was raped on 23rd January, 1979, it is not safe to rely solely on the testimony of Geeta about the occurrence. It has, thereforee, become imperative to look for corroboration of the prosecution case on material particulars.

(23) The first allegation which needs corroboration is whether the prosecutrix and her mother were working in the locality or the house where the accused lived. According to the defense it was Ghaman (DW 1) and his family who were working as sweepers in that locality of Takia Razan where the house is situated. Mohd. Rafiq (DW 5) runs toy-manufacturing business in a neighbouring house, namely, 1993-94/37, Takia Razan, Shivaji Road, for the last 10 years prior to the alleged date of occurrence. He had brought the license issued in his name by the Directorate of Industries for running the said business. A photostat copy of the license has been produced as Exhibit Dw 5/A. It shows that the witness was carrying on the said business at the said address. He categorically stated that one Des Raj son of Chaman and his wife used to work as sweepers in his factory; the sweeper used to come in the morning at 9.30 a.m. and that Takia Razan and Sheesh Mahal are different areas of the locality. He admitted in cross-examination that the same sweeper worked in the house of the accused.

(24) Dw I is Chaman who has stated that he had been working as a sweeper in the area of Takia Razan and Hathi Khana as those were his areas According to him his son and daughter-in-law were working in the area of Takia Razan. He deposed that he was working as a sweeper in the house of the accused. He admitted that one of his daughters was named Geeta. He was categorical that no one by the name of Sham Lal or Mundo were working as sweepers in that area. Nothing

could be elicited from him by the prosecution in his cross-examination excepting for the fact that his son Des Raj was working as a sweeper in that area and for the last 2 or 4 years the witness had not gone to the house of the accused for that work.

(25) It is well known that in the walled city of Delhi sweepers have allotted amongst themselves specific Mohallas for working. Occupier of a house may change but the sweeper continues to be the same or of the same family. From the testimony of Dr. Chopra (Public Witness 1) it appears that the prosecutrix and her parents were not working as sweepers even in the neighbouring locality of Sheesh Mahal which is a different area from Takia Razan. Her mother's assertion in cross-examination 'that this Ilaqa belonged to one Ghaman but they have been working there' is not borne out. In the facts and circumstances of the case the defense version that the prosecutrix Geeta was not working as sweeper in the house of the accused seems to be more probable. The result is that the prosecution's submission that as Geeta was working in that house, the appellant got the opportunity to entice her or that by playing a ruse was able to get her to come to his room on 23rd January, 1979, is to be rejected. Further, while assessing the the testimony of Geeta it has to be kept in mind that according to her version the incident took place at about 5.30 p.m. on 23rd January, 1979, in the house where the accused was not the only one living. Abdul Zalil, father of the accused, appeared as Dw 2. He has stated that he owns the house bearing No. 1993-94/29. He is in possession of one room, one Kothri and one kitchen. He lives there with his wife and 11 children. He stated that on 17th January, 1979, a child was born to his wife in the Hospital. She had come back to the house on 21st January, 1979. On the date of incident, he stated, his wife and other children were in the house. He further deposed that daughter-in-law of one Chaman wa working as sweeper in their house and not Sham Lal, his wife or his children. He was not cross-examined by the prosecution on these material facts such as that his wife and his 11 children all live with him in that house and that a child was born to his wife on 17th January, 1979, and that his wife had come back to the house on 21st January, 1979.

(26) No question was put to this witness regarding the accommodation which was in possession of the family of the accused.

(27) D.W. 3 Smt. Shah Jahan mother of the accused supported her husband. She stated that on 21st January 1979 she had come back from the Hospital. She remained in the house as she was unable to move about. She denied that there was any incident of rape. She stated that the daughter of Chaman used to work as a sweeper. In cross-examination she was asked that the child born on 17th January, 1979, was her sixth and not 11th issue. She however, denied the suggestion. She was also not asked about the accommodation which is in the possession of the family and about her presence in the house on the day of incident.

(28) Another material fact which must be borne in mind is that if the incident had occurred as alleged it could have been only either in the room or the Kothri. There is no other accommodation which is available to the family to which the accused could have taken the prosecutrix. At least, there is no material on the record to that effect. The prosecutrix says that she was asked to come up by the accused to a room. The prosecutrix further says that she did not raise any alarm as the accused had threatened her and after the act of rape had run away. Assuming for a moment that this act was committed in the Kothri, after having come out of the Kothri she could have raised an alarm or atleast could have informed the mother of the accused who was present in the house at that time. She did not do so. She did not tell anybody in the Mohalla also. According to her she was bleeding and her clothes got smeared with blood but those clothes have not been produced nor any witness who may have seen her wearing those blood-stained clothes. in that crowded locality, has been produced by the prosecution. In fact, the record does not show if any effort was made by the prosecution to recover those clothes. The version of the prosecutrix about the clothes having been thrown away by her brother in 'disgust' is unbelievable. Her mother's case in fact was that after the incident she did not inform either her son or her husband about it. She states, 'I did not state about the incident to my husband that night. My eldest son, aged 22 years, resides with me at the aforesaid address. I also did not go to the police station with my son that night since my son returned that day at about 10-11 p.m. It would take only about 10-15 minutes from my house to reach the police station on foot. I did not state about the incident to my son on his return that night, nor the incident was narrated by the prosecutrix to him to my knowledge'. Her son having

not been told about the incident by her, could not have thrown away the clothes of the prosecutrix in disgust as stated by Geeta. When and where did he throw away the clothes is not forthcoming on the record. It appears that she did not apprise the police about this fact. In any case it was incumbent upon the police to have recovered the clothes alleged to be blood-stained.

(29) All these facts throw grave doubt on the prosecution story about the incident having taken place on 23rd January, 1979, at the house of the accused.

(30) The contention of Mr. D. R. Sethi, learned counsel for the State, that there is enough corroboration of the case of prosecution cannot be accepted. According to Mr. Sethi there is ample corroboration of the version of the prosecutrix from the fact that after the occurrence she related the incident to her mother and that on her admission in the Hospital it was found that she had received injuries on her private parts. In support of this contention he relied on Krishan Lal v. State, of Haryana, : 1980 CriLJ926 . In that case the prosecutrix who was less than 16 years of age was sleeping with her mother and other children in the open. The allegation against the appellant was that he along with another carried her away under intimidation to a neighbouring godown and committed rape on her. After subjecting her to sexual assault the prosecutrix who had become nearly unconcious was put back in her cot from where she had been removed. In the morning the mother of the victim found blood on the daughter's Salwar and thereupon the prosecutrix narrated the incident to her.' In the facts of that case it was held that injuries on the person of the victim especially her private parts had corroborative value. Her complaint to her parents and the presence of blood on her clothes were also considered to be material corroborating her version.

(31) The said case is distinguishable on its own facts. In the present case, as I have noted above, the medical evidence does not corroborate the version of the prosecutrix being raped on 23rd January, 1979. Her clothes allegedly blood-stained were not produced before the Investigating Officer nor was any effort made by the prosecution to recover them.

(32) Mr. Sethi next relied on Rafiq v. State of Uttar Pradeah, Air 1981 Sup Court 559, for his alternative submission that in any case no corroboration of the

testimony of the prosecutrix is required. It has, inter alia, been held in that case that 'Gorroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances'. In the said case the trial Court as well as the High Court had believed the testimony of the prosecutrix. The Supreme Court because of the concurrent finding of fact did not interfere observing 'By these substantial canone the present petition for leave has not even a dog's chance'. Before me is a first appeal. It is incumbent upon the first appellate Court to examine the facts all over again. In the facts and circumstances of this case, as enumerated above, I have considered it prudent to look for corroboration and I have found none.

(33) Mr. Sethi then cited Harpal Singh and another v. State of Himachal Pradesh, 1981 Crl. L.J. 1. In that case the argument on behalf of the appellant was that there was no injury detected on the private parts of the girl and that she was found to have been used to sexual intercourse by consent. But as the prosecutrix was proved to be below 16 years of ago, hence it was held that the element of consent was wholly irrelevant. This authority has no bearing on the facts of the present case.

(34) For the reasons stated above I allow this appeal. The conviction and sentence of the appellant under Section 376, Indian Penal Code, are set aside and he is acquitted.