

Subhash Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Aug-21-1987

Reported in : 1987WLN(UC)530

Judge : Kishore Singh Lodha, J.

Appeal No. : S.B. Criminal Appeal No. 252 of 1986

Appellant : Subhash

Respondent : State of Rajasthan

Disposition : Appeal allowed

Judgement :

Kishore Singh Lodha, J.

1. The appellant Subhash has been convicted under Section 376 IPC and sentenced to four years r.i. and a fine of Rs. 400/- by the learned Sessions Judge, Banswara by his judgment dated 13-6-1986. He has come up in appeal.

2. The facts giving rise to this appeal may be briefly stated here. Smt. Antar aged about 19 years in the second wife on one Nathu. Her husband is employed at Mahi Dam where as she used to live in her village Hariyapada. It is alleged that on 19-4-1985 she came to the village Kutumbi in order to take a bus to Mahi Dam via Banswara. She boarded a bus of which one Lala, co-accused was the cleaner

(some time called conductor also) at Kutumbi and reached Banswara. She was made to get down at Banswara in the market and was not taken to the bus stand from where she was to get another bus for Mahi Dam. She however, managed to reach the bus stand at Banswara. There she found that the bus for Mahi Dam had already left. She, therefore, came back to the place where the same bus in which she had come from Kutumbi was standing and the cleaner Lala co-accused told her that it was going back to Kutumbi. She therefore, boarded that bus. The bus left for Kutumbi but there was a break down on the way near Sehman bridge. Thereafter when the bus was repaired it went upto Nayala from where it turned back and came to Banswara. At Banswara Smt. Antar was asked to get down from the bus. She resisted saying that there was no place for her to stay in the night and, therefore she would spend the night in the bus itself. The cleaner Lala did not allow her to stay in the bus and threatened her that if she did not get down from the bus, she would be taken to the Kotwali. It is further alleged that thereupon Smt. Antar was forcibly taken down from the bus by Lala and Lala then summoned a tempo of which one Jahur was the driver. Four or five persons were already sitting in the tempo Jahur brought the tempo and Lala forced Smt. Antar to enter the tempo saying that she was being taken to the Kotwali, Lala also came inside the tempo. She was threatened to keep quiet at the point of knife. Lala had asked another co-accused Munshi who was in the tempo to get the knife. It is further alleged that her eyes were closed by some person and some other person gagged her mouth. She was carried to a tank known as Daylab There tempo was left and she was made to walk to the nearby mango tree. According to the prosecution there Lala called Subhash who is alleged to have forcibly raped her. After finishing Subhash called Munshi who also raped her. Then Munshi called Dadu and he also raped her. Later Dadu called Mehmood and he also did the same. The driver Jahur was then called by Mehmood but he refused to have intercourse with Smt. Antar and then Lala had forcible intercourse with her without her consent. After all these persons had thus committed rape on her, the persons other than Lala and Subhash left the place in the tempo. Lala and Subhash stayed back and Smt. Antar kept lying at the place wheret he had been raped. It is also alleged that Lala and Subhash wanted to place a stone on her mouth but she told them not to do so telling them that she would not recognise them at any place latter. The Lala and

Subhash left. Smt. Antar followed them. While they were thus coming back they came across three constables. On seeing them Smt. Antar told these constables to arrest Lala and Subhash as they had raped her whereupon the constables arrested both of them. They and Smt. Antar were brought to the police Station, Banswara where Smt. Antar lodged the first Information Report involving the accused Lala, Subhash, Munshi, Mehboob Khan, Ansar Ahmed, Dadu and Jahur. After the investigations the police put up a challan against the accused persons. They were committed to the court of Sessions where Jahur was discharged and the remaining five were charged with Section 376 IPC. They pleaded not guilty and were tried. At the trial the learned Sessions Judge found that the evidence of Smt. Antar regarding rape was corroborated by the medical evidence and, therefore, it was established that she had been raped but on the question as to who out of the six accused had raped her, he found that the identity of the accused other than Lala and Subhash was not satisfactorily established. He, therefore, acquitted the other accused but convicted and sentenced Lala and Subhash as aforesaid.

3. Only Subhash has filed this appeal, Lala does not appear to have challenged his conviction.

4. I have heard the learned Counsel for the appellant and the learned P.P. and have gone through the record.

5. The learned Counsel for the appellant submitted that in the first place there is no satisfactory evidence that Smt. Antar had been raped by any of the accused persons including Subhash and in the second place even if it is found that there had been any sexual intercourse by the accused Subhash with Smt. Antar it could be only with her consent. She is a grown up lady aged about 19 and when the intercourse appears to be with her consent, the accused cannot be held guilty for any offence of rape. The learned P.P. on the other hand, has supported the judgment of the learned Sessions Judge.

6. Having considered the rival contentions and having carefully perused the record I am of the opinion that a case of rape cannot be said to have been established against the appellant and it appears to be a case of merry making where the

woman when caught has come up with a theory of rape. In this connection it may at once be stated that as sperms were found on the vaginal swabs taken from Smt. Antar soon after the alleged incidence, the finding of the learned Sessions Judge that she had been subjected to intercourse cannot be said to be improper. The question is whether this intercourse was without her consent and against her will, I am not oblivious of the amended provisions of Section 114(A) of the Evidence Act to the effect that where a woman is proved to have been subjected to sexual intercourse with the accused and she states before the court that she did not consent, the court shall presume that she did not consent but this presumption is a rebuttal presumption and the circumstances of the case in the present one clearly rebut it.

7. When I agree with the learned Sessions Judge that Smt. Antar had been subjected to intercourse by the accused persons Subhas and Lala, I need not go in detail of the evidence establishing the said intercourse but I shall only point out those circumstances which go to show that this intercourse was not a forcible intercourse and was an act with the consent of Smt. Antar.

8. In this respect the most important evidence is that of Smt. Antar and a number of circumstances would appear from her own statement which would go to show her conduct leading to the inference of consent.

9. I have already detailed the prosecution story in the beginning of this judgment which is based on the examination-in-chief of Smt. Antar. It is her case that she is the second wife of Nathu, who has another wife living with him. Nathu lives at Mahi Dam whereas she stays at village Hariyapada. On the fateful day of 19-4-1985 she states that she was going to her husband at Mahi Dam and for that purpose she came from Hariyapada to Kutumbi in order to board a bus, although she admits that ordinarily she goes to Mahi Dam by boat as that is the nearer route and it was for the first time that she was going to Mahi Dam by a bus. She further states that Lala is known to her and he is a cleaner or conductor on the bus from Kutumbi to Banswara, although she states that it was for the first time that she was going by bus from Kutumbi to Banswara. She, however, does not give any other ground on which Lala may be known to her and, therefore, this part of her statement

appears to be with the intent of concealing her relation with Lala.

10. Now after boarding the bus she states that she was taken to Banswara and there she was forced to get down at the market by Lala instead of taking her to the bus stand where from she was to get another bus for Mahi Dam. She further states that she, however, managed to reach the bus stand and there she found that the bus for Mahi Dam had already left and, therefore, she thought of coming back to her village and for that purpose she back to the place where the same bus of which Lala was the cleaner was standing. Now it is very strange that she who had come to Banswara for the first time should know where she would get back the bus in which she had been brought to Banswara and forced to alight at the market. Therefore this story also appears to be a concocted one and the fact appears to be that she was travelling with Lala of her own accord. Now after having boarded this bus again for coming back to her village Kutumbi she states that the bus got out of order on the bridge where it took about three hours to be repaired. During all this time only Lala, the driver of the bus and Smt. Antar were there. The bridge is in the jungle. If Lala wanted to have forcible intercourse with her it was an opportune moment for him because the driver of the bus does not appear to have objected to Smt. Antar being treated in the manner in which she is alleged to have been treated by Lala & later on also when she is alleged to be forced to alight from the bus & board the tempo driven by Jahur the driver of the bus does not appear to have raised his little finger. The matter does not rest here. After the bus was repaired it went further Upto Nayala and from where it is stated to have been brought back to Banswara instead of going further to Kutumbi. At Banswara bus stand, again according to Smt. Antar she was forced to get down from the bus and threatened that if she did not get down from the bus she would be taken to the Kotwali. Not only this she was rather pulled out from the bus and made to sit in the tempo at the point of knife. It is impossible to accept that such a thing could have been possible at the bus stand where other passengers were present and Smt. Antar herself admitted that people had collected there but did not object. The very fact that she was made to alight on the threat that she would be taken to the Kotwali appears to be unnatural and improbable, in as much as there was no occasion for her being taken to Kotwali as she had not committed any offence. She admits that she had purchased tickets for both her journies up and

down.

11. The further story that in the tempo she was made to keep quite at the point of a knife by which injuries has been caused to her is also negated by the medical evidence as Dr. Vilash Rai Vyas has clearly stated that he did not find any injury on the person of Smt. Antar when he examined her on 20-4-1985

12. Going further we still find that Smt. Antar states that the tempo went upto the garden and there she was made to alight & walk upto a mango tree where she was felled on stones and there five persons committed rape upon her one after the other. In these circumstances one should certainly expect injuries on her body and Smt. Antar specifically states that she had received injuries. She states that the knife was pierced in her thigh. It caused injury and she bled. She further states that she had received a scratches on her back buttocks, elbows and that she had shown these injuries to the Station House Officer and the doctor. She further states that her private parts were swollen and bled. It was crimson red and the swelling continued for about 8 or 10 days but the doctor clearly negatives her statement which shows that her statement is a bundle of lies. According to the doctor there was no iota of any injury on any part of her body nor her private parts were swollen nor bleeding. The only sign of rape according to the doctor was the presence of sperms on the vaginal swabs The presence of the sperms do not necessarily indicate rape because even if the intercourse was with consent the sperms could be found.

13. According to Smt. Antar after committing rape the persons other than Subhash and Lala left the place in the tempo and Lala and Subhash stayed back. This also appears to be inconsistent with the theory of rape because according to her these persons had left after all of them had completed the act. If that was so there was no reason for Subhash and Lala to stay back and let the other accused persons go away in the tempo.

14. Still further according to her after the other persons had left, Lala and Subhash also left on foot and she followed them at a little distance and it was at that point of time that they came across the three constables Shambhu Singh, Shanti Lai and Chetanya Prabhu. If the accused had been guilty of rape then on seeing the

constables they would have tried to escape but they did not do so and these constables also state that although Smt. Antar had told them that she had been raped by these 2 accused along with 3 others, they did not find any injury on her person nor any blood on her clothes. This fact also further corroborates the evidence of the doctor and negatives the statement of Smt. Antar.

15. The learned Sessions Judge has brushed aside these discrepancies on the basis of the presumption under Section 114A of the Evidence Act referred to above. But as already stated above in the presence of all these circumstances that presumption stands fully rebutted and it clearly appears to be a case of consent. The learned Sessions Judge has also tried to explain the absence of injuries on the ground that the doctor may not have noticed them or may not have examined Smt. Antar from that point of view. This is not correct and is against the record, in as much as the doctor clearly states that he had examined Smt. Antar and did not find any injury on any part of her body.

16. Looking to all these circumstances I am clearly of the opinion that the learned Sessions Judge was entirely wrong in convicting the appellant under Section 376, IPC.

17. The appeal is, therefore, allowed. The conviction and the sentence awarded to the appellant is set aside. He is acquitted of the charge under Section 376, IPC. He is in custody and shall be released forthwith, if not required in any other case