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In Re: Myilsami Alias Mylan

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Court : Chennai

Decided On : Apr-15-1970

Reported in : (1970)2MLJ422

Appellant : In Re: Myilsami Alias Mylan

Judgement :

K.N. Mudaliyar, J.

1. The appellant Myilsami alias Mylan appeals against his conviction for an offence under Section 376, Indian Penal Code.

2. P.W. 1 deposes that on or about the 5th day of June, 1968, at about 5 p.m. in the sugarcane field of Raju Chettiar the appellant committed rape on her. She is a minor girl who is more than 13 years and less than 14 years. She says she knew the accused who has his own lands 3 fields away from her fields. The appellant was cultivating his land. On the 5th day of June, 1968, she went to graze cattle on the morning as usual. At about 5 p.m. the appellant came from the east. He questioned her if she snatched a sugarcane. He pulled her by hand. She tried to extricate herself. He lifted her and took her into the sugarcane field, laid her on the ground removed her saree and pavadai and laid himself on her. He removed his dhoti, pressed his male organ on her female organ and pressed it inside. The male organ did not go inside. It went only a little. She did not bear the pain. He did all that he could do. P.W. 1 raised a cry. He caught hold of her throat and pressed. At

that juncture P.W. 3, P.W. 4 and Rangaswami Chettiar (not examined) came. They have lands next to her land. At that crucial time the accused was still lying on her. Seeing them, he attempted to run. The accused was caught by them. The accused caught hold of her breast and squeezed the same. There are nail marks on her breast. He forcibly had committed intercourse. P.W. 1 attempted to extricate herself but could not. There were nail marks on her breast and hands. She did not see what happened to her private parts. She felt pain in her private parts. Her father and mother came and asked her. She told them what happened. Her mother took her home. The other persons held the accused. Then her father, P.W. 5, and other witnesses took the accused to the police station. The head constable (P.W. 8) seized her clothes, M.Os. 1, 2 and 3. She was taken to the doctor, P.W. 2 who examined her.

3. It is suggested in the course of the cross-examination of P.W. 1 that it was usual for her to climb on the bull and ride it at the time of grazing. A faint attempt has been made in developing this alternative theory for explaining the injury on her private parts by the defence. But the suggestion itself lacks substance. It is also suggested to P.W. 1 that because the appellant charged her with having stolen sugarcane, her father P.W. 5 after consultation with P.Ws. 3, 4 etc., has given a belated complaint. I find no useful material in favour of the innocence of the accused from the entire cross-examination. I am of the view that the evidence of P.W. 1 remains absolutely unshaken.

4. P.W. 2 examines P.W. 1 on 6th June, 1968, at 3-30 p.m. She mentions the following injuries.

1. Axillary and pubic hair well formed. Four nail marks with small linear abrasions 1/2' subcutaneous deep 1/2' close to each other over the upper part of the right side of the neck.

2. A linear nail mark of 1/2' subcutaneous deep over the middle of the chest (body of sternum).

3. Two linear nail marks close to each other over the left side of the breast close to the nipple.

4. A linear nail mark of 1/4' subcutaneous deep over the Middle 1/3rd of the right fore-arm.

5. Hymen is reptured in an irregular manner with reddish tint around the orifice of the hymen. Slight blood and white discharge present, extensive tenderness over the hymen on the labia minora region. No nail marks over the region of vulva. Vagina smear taken and preserved for analysis of spermatozoa.

She sent the vaginal smear to the Chemical Examiner. But the report from the Chemical Examiner disclosed neither the presence of spermatozoa or inococci. She expressed her final opinion in Exhibit P-2 that there is no evidence of recent intercourse as the vagional smear does not show she presence of spermatozoa. Exhibit P-3 is the wound certificate. She admits that it is possible that hymen rupture is recent. I am afraid P.W. 2 seems to be suffering from a certain amount of confusion about the completed sexual act and rape in the legal sense of the term. She admits that the rupture of the hymen could have taken place on 5th June, 1968 at 5-30 p.m. The injuries on the chest, breast and arm could have been due to to the violence made on P.W. 1. She says that the rupture will be due to the penetration of the male organ in the vaginal orifice for the first time. She is of further opinion that the injuries had been caused in the manner alleged by the victim, P.W. 1. She further says that spermatozoa could not be washed by a mere bath. It must be brush washed. She admits shat the rupture of she hymen is one of the conclusive proofs. For constituting the offence of rape, the emission need not be inside the vagina. But, P.W. 2 wanted to satisfy herself whether the emission was inside the vagina.

5. P.Ws. 3 and 4 speak to the facts of the evidence that P.W. 1 was lying on her back and that the accused was lying on her after shifting her clothes. They heard the cry of P.W. 1 and ran there. The accused rose up, tied his veshti picked up his drawer and began to run. Both of them caught the accused. P.W. 1 rose up and told them that the accused had committed rape on her. P.Ws. 3 and 4 tied the accused. P.W. 1's mother and later her father (P.W. 5) came. Then they took the accused to the police station. P.W. 1 informed her father P.W. 5 what happened. They also took P.W. 5. These witnesses say that they reached the police station

by about 9 or 10 p.m. A suggestion has been made to these two witnesses that because the accused abused, P.W. 1, they have all colluded together and given a false' complaint. Nothing useful has been elicited to help the case of the accused.

6. P.W. 5 is the father of P.W. 1. He says that P.W. 1 was born on 2nd November 1954. This fact has not been controverted by the accused nor the fact that she has not yet attained puberty. P.W. 5 says that he and his wife went to the field at about 5-50 p.m. In the field he saw the accused being tied up by P.Ws. 3 and 4. P.W. 1 was lying weeping and exhausted. P.W. 1 told P.W. 5 that the accused lifted her into the sugarcane field and raped her. P.W. 5 cursed the accused for having committed this dishonour. P.Ws. 3 and 4 stated what they saw. Then P.W. 5 sat down hanging his head with shame. He sent P.W. 1 with his wife. Then P.W. 5, P.W. 3, P.W. 4 and Rangaswamy took the accused to the police station. P.W. 5 questioned the accused as to why he had done that crime. The accused said that he had done by mistake and wanted P.W. 5 (the father) to pardon him. P.W. 5 gave Exhibit P-5 a complaint which was recorded on 5th June, 1968, at 11-30 p.m.

7. P.W. 5 was subjected to cross-examination. In my view it is utterly useless. A suggestion is put to him in the following language. ' Is it not true to say that P.W. 1 stole sugarcane from his field and because he asked about it he has foisted this case against him.' This suggestion has been denied. The remainder of the evidence adduced by the prosecution and also Exhibit D.3 would show that neither semen nor blood was detected on the 7 items examined by the Chemical Examiner.

8. The plea of the accused is substantially one of denial.

9. It is argued that in the absence of spermatozoa in the vaginal wash of P.W. 1 there is really no proof of the offence of rape. I am afraid this argument lacks substance. I have carefully considered the facts of the evidence given by P.Ws. 1 and 2. The finding of the learned Judge on this matter is correct. The Explanation to Section 376, Indian Penal Code, is very clear. P.W. 1 says that the male organ of the accused went only a little when he pressed his male organ on her organ and pressed it inside. P.W. 2 says that the rupture of hymen of P.W. 1 has taken place on 5th June, 1968, at 5-30 p.m. The following observations found in paragraph 14

of the Bench decision reported in the Re Anthony (1960) 61 Cri. L.J. 927 : A.I.R. 1969 Mad. 308, are apposite.

The authorities have uniformly laid it down that, while there must be penetration in the technical sense, the slightest penetration would be sufficient, and a completed act of sexual intercourse is not at all necessary. As observed in Gour's ' The Penal Law of India ' 6th edition (1955) Vol. II page 1678 : ' Even vulval penetration has been held to be sufficient for a conviction for rape'. In the present case, there was certainly penetration, as the medical evidence shows, though it was slight.

10. On the evidence of P.Ws. 1 and 2, I have no hesitation in holding that the accused is guilty of the offence of rape and his conviction under Section 376, Indian Penal Code, is proper and correct. It is also argued that there is no proper corroboration of the evidence of the raped girl P.W. 1. I am afraid this argument is totally baseless. This case has the additional merit of the evidence of P.W. 1 being corroborated amply and sufficiently by the evidence of P.Ws. 3 and 4 who have actually seen the accused lying over the body of P.W. 1. There is also the further evidence of P.W. 5 who says that P.W. 1 informed them as to what happened. P.W. 1's complaint or statement to her father relating to the crime that she had been ravished by the accused is relevant and material as corroborative evidence under Section 157 of the Evidence Act and also as the evidence of her conduct under Section 8 of the Evidence Act. I have no hesitation in holding that the evidence of P.W. 1 is corroborated by the testimony of P.Ws. 3, 4 and 5. It is further corroborated by the medical testimony of P.W. 2.

11. Let us examine the few leading authorities on the question of corroboration. In Emperor v. Mahadeo Tatya : (1942)44BOMLR216 , it is observed:

It is a very well settled rule of practice in this country, following the English rule that in rape cases the evidence of the complainant must be corroborated. It has been pointed out many times that a charge of rape is a very easy charge to make and a very difficult one to refute, and in common fairness to accused persons, the Courts insist on corroboration of the complainant's story. The nature of the corroboration must necessarily depend on the facts of each particular case. Sometimes rape is clearly proved or admitted, and the only question is whether

the accused committed the offence. At other times, as in this case, the association of the accused and the complainant is admitted, and the question is whether rape was committed. Where rape is denied, the sort of corroboration one looks for is medical evidence showing injury to the private parts of the complainant, injury to other parts of her body, which may have been occasioned in a struggle, seminal stains on her clothes or the clothes of the accused, or on the places where the offence is alleged to have been committed ; and in all cases importance is attached to the subsequent conduct of the complainant. Whether she makes a charge promptly or not is always relevant.

12. In another ruling Pollock, J., in Conroy v. Emperor follows the ratio of the Full Bench decision of the Bombay High Court in Emperor v. Mahadeo Tatya : (1942)44BOMLR216 .

The complaint of the prosecutrix is, of course, admissible in evidence, not as evidence of the truth of the charge but as corroborating the credibility of the prosecutrix : See The Queen v. Lillyman L.R. (1896) 2 Q.B. 167, and Rex v. Osborne L.R. (1905) 1 K.B. 551 . It is well settled that in England the proper direction to be given to the jury in such a case is that, it is not safe to convict upon the uncorroborated testimony of the prosecutrix, but that the jury, if they are satisfied of truth of her evidence, may, after paying attention to that warning, nevertheless convict : See R. v. Thomas James Jones (1925) 19 Cr. App. R. 40, and Surendranath Das v. Emperor I.L.R. Cal. 534. In Harendra Prasad Bagchi v. Emperor I.L.R. (1940) Cal. 180, there was independent corroborating evidence and the jury were warned in the above manner, so that this question apparently did not arise ; but Bartley, J., remarked that there was no presumption of law which differentiates the evidence of the complainant in a rape case from that of the complainant in the case of any other offence, and Sen, J., said that there was no inflexible rule that in every case of rape the Judge must direct the jury as above and that the laying of such a rule would be tantamount to saying that every prosecutrix in a rape case should be treated as if she were an accomplice. Whether there is any inflexible rule or not, it seems to me certainly desirable that such a direction should be given to the jury, but that is a point with which we are not here concerned. It is open to jury to convict without corroborating evidence, if

they consider it safe to act on the uncorroborated evidence of the prosecutrix, and will therefore not necessarily be wrong for a Court to do so, if there are special circumstances that justify such a course.

13. In Emperor v. Mahadeo Tatya : (1942)44BOMLR216 , Beaumont, C. J., in delivering the judgment of the criminal appeal said:

It is a very well settled rule of practice in this country, following the English rule , that in rape cases, the evidence of the complainant must be corroborated. It has been pointed out now many times that a charge of rape is a very easy charge to make and a very difficult one to refute, and in common fairness to accused persons, the Courts insist on corroboration of the complainant's story....When rape is denied, the sort of corroboration one looks for is medical evidence showing injury to the private parts of the complainant, injury to other parts of her body, which may have been occasioned in a struggle, seminal stains... and in all cases importance is attached to the subsequent conduct of the complainant. Whether she makes a charge promptly or not is always relevant... therefore, we really have no corroboration, apart from her own subsequent conduct; and subsequent conduct, by itself, although important, is not enough, because, as has been said, a witness cannot corroborate himself.

14. The learned Chief Justice went on to discuss the decision in Harendra Prasad Bagchi v. Emperor I.L.R. (1940) Cal. 180, and said:

It is of course obvious, as pointed out by the Calcutta High Court... that a prosecutrix in rape cases is not an accomplice.... But in our view the Calcutta High Court has not thrown any doubt on the general rule that the evidence of the prosecutrix in a rape case must be corroborated.

15. In Chinnappa v. State I.L.R. (1951) Mad. 973 : (1951) 1 M.L.J. 110 : (1951) M.W.N. 8, Somasundaram, J., held:

In law, the evidence of a prosecutrix in a rape case does not require corroboration like that of an accomplice. On the question whether as a rule of prudence corroboration in required, each case depends upon its facts and if after taking all

the circumstances into consideration the evidence of the prosecutrix could be believed, then the accused should be convicted on her evidence alone, although there is no corroboration by independent testimony connecting the accused with the crime. If she is proved to be a credible and a satisfactory witness, no corroboration is necessary.

In assessing the value of her evidence her conduct immediately after the offence is committed is of great value. Such conduct is relevant under Section 8, Evidence Act. A complaint relating to the crime in circumstances under which it was made and the terms of it are relevant, whereas a mere statement that she was revished is not relevant under Section 8, though it may be under Section 157 or Section 32 (1). The complaint in this section does not mean a complaint to Court. It means merely an allegation against a person who has committed the outrage on the prosecutrix.

16. In the ruling of the Supreme Court in Rameshwar v. State of Rajasthan : 1952 CriLJ547 , it has been observed as below:

The rule, which according to the cases has hardened into one of law, is not that corroboration is essential, before there can be a conviction but that the necessity of corroboration, as a matter of prudence , except v here the circumstances make it safe to dispense with it, must be present to the mind of the Judge, and in jury cases must find place in the charge before a conviction without corroboration can be sustained. The tender years of the child which is the victim of a sexual offence, coupled with other circumstances appearing in the case, such for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present in the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must in every case, be corroboration before a conviction can be allowed to stand.

Further, when corroborative evidence is produced it also has to be weighed and in a given case, as with other evidence even though it is legally admissible for the purpose on hand, its weight may be nil.

It may be that all mothers may be sufficiently indepedent to fulfil the requirements of the corroboration rule but there is no legal bar to exclude them from its operation merely on the ground of their relationship. Independent merely means independent of sources which are likely to be tainted.

17. Ramaswami, J., appears to go to the extent of saying that for the proof of the offence of rape, corroboration of evidence of the victim is not required as a matter of law. The learned Judge in paragraph 19 of the judgment reported in In re, Anthony , observes as follows:

The learned advocate asked us to look for corroboration of the evidence of the victim on the ground that rape has often been described as the easiest charge to make and most difficult to refute ; Kari hiappa Goundan, In re : AIR1942 Mad285 . The question of corroboration has been the subject-matter of a decision of the Supreme Court in Rameshwar Kalyan Singh v. State of Rajasthan : 1952 CriLJ547 . In that case the appellant was. charged with committing rape on a young girl, eight years of age. The learned Sessions Judge held that the evidence was sufficient for moral conviction but : fell short of legal proof because, in his opinion, the law requires corroboration of the story of the prosecutrix connecting the appellant with the crime. He was satisfied, however that the girl had been raped by somebody.

Accordingly he acquitted the accused. In she appeal by the State against acquittal the High Court held that the law requires corroboration in such cases, but held that the girl's statement made to her mother was sufficient corroboration and setting aside the acquittal convicted the appellant. On appeal to the Supreme Court, it was held : The first question is whether the law requires corroboration in these cases. The Evidence Act nowhere says so. A woman who has been raped is not an accomplice. If she was ravished she is the victim of the outrage. In the case of a girl below the age of consent, her consent will not matter. The learned High Court Judges were wrong in thinking that they could not, as a matter of law, convict without corroboration. The tender years of the child, coupled with other circumstances appearing in the case, such, for example, absence of motive to falsely implicate the accused its demeanour, unlikelihood of tutoring and so forth,

may render corroboration unnecessary but that is a question of fact in every case.

In this case no corroboration beyond the statement of the child to her mother was necessary. The appeal was dismissed. How the principles laid down in the Supreme Court decision should be applied are set out in Public Prosecutor v. Mohini Sankara Das (1956) An.W.R. 572; State Government of M.P. v. Sheodayal Gurudayal A.I.R. 1956 Nag. 8, and-Duli hand v. State (1952) Crl.L.J. 1575 : A.I.R. 1952 Ajmer 54. See also In re B. Chinnappa : AIR1951 Mad760 . As to how tell-tale stigma on the person of the accused will also corroborate the prosecutrix, see Ramkala Prasad v. Emperor : AIR1946 All191 , and Harendra Prasad v. Emperor : AIR1940 Cal461 .

18. It has been held by the Court of Appeal (Criminal Division) consisting of Lord Justices Salmon, Lord Justice Fenton, Atkinson and Mr. Justice Milmo in Re Meville Benson Henry Jeffrey Patrick Manning 53 Crl. Appeal R. 150 about the need for corroboration. : that on a charge of a sexual offence against a woman or girl, the judge should direct : the jury in clear and simple language that it is dangerous to convict on the uncorroborated evidence of the complainant because human experience in the Courts has shown that women and girls for all sorts of reasons and sometimes for no reason at all tell a false story which is very easy to fabricate, but extremely difficult to refute. He should go on to tell them that, bearing that warning in mind, they have to look at the particular facts of the particular case and if, having given full weight to the warning they come to the conclusion that the woman or girl without : any real doubt is speaking the truth, the fact that there is no corroboration does not matter and they are entitled to convict.

19. Bearing these principles in mind, I hold that the evidence of P. W. 1 the minor girl is affirmatively and satisfactorily corroborated by the evidence of P. Ws. 2, 3 4 and 5. Some criticism has been made in regard to the delay in making the complaint by P. W. 5. It is true there appears to be some delay. On behalf of the defence, nothing has been elicited from P. W. 5 as to this delay. In fact, the accused did not even attempt to make some point out of this delay in filing the complaint Exhibit P-5. It may be recalled that P. W. 5 says in his evidence that after hearing the complaint from his daughter P. W. 1 he sat down hanging his

head with shame. In India, parents, influenced by social manners and customs, are unwilling to rush to the Police to make complaints of the eternal dishonour and disgrace inflicted by the brutalised accused inflamed by animal passion on their young and innocent daughters. Therefore P. W. 5 must have hesitated for a few hours whether to make a complaint or not in these circumstances of degrading mortification and eternal infamy to the fair name of his family. In a similar case dealing with a similar situation Anantanarayanan, J., says in In re Anthony .

When we bear in mind the considerable reluctance of parents in Indian society to complain about or even to divulge an act of defilement of a daughter of tender years, the delay can hardly be termed suspicious or unnatural.

20. Ramaswami, J., observed:

Finally I agree with my learned brother that on account of the stigma which gets attached after the commission of the offence of rape and which would seriously jeopardise the chances of getting married in decent circumstances, the victims and their relatives are often thoroughly unwilling to come forward promptly with reports of the offences. In fact it requires a lot of probing and persuasion by the police officers for the affected parties to disclose the details of the commission of the offence. That is why is in assessing the infirmities attached to delay in preferring a first information report, due regard must be paid to the manners, customs and the mode of life of women and girls in this country which are very different for instance, from those in England, and therefore, a delay which may be considered sinister in England might get very legitimately explained in these parts.

21. I therefore find that the delay on the part of P. W. 5 in filing the complaint Exhibit P. 5 does not really give room to any infirmity in the prosecution case.

22. I have no hesitation in acting on the extra-judicial confession made by the accused to P. W. 5. In fact that has not been challenged in the course of the cross-examination of the father of P. W. 1 by the accused.

23. It is also argued that the accused appellant must have been subject to medical examination. I am of the view hat when the accused was produced by P. Ws. 3, 4

and 5 at the police station, the concerned officers in that police station ought to have lost no time in getting the accused medically examined for signs of recent intercourse. In this, the concerned officers have signally failed to discharge their duties. In the circumstances of this case and also in view of the facts proved by the prosecution, I hold that the non-examination of the accused immediately after the offence of rape committed by him is not an infirmity vitiating the prosecution case. The following authorities are cited at the Bar : Shafi v. The State : AIR1953 All502 Ram Kala v. Emperor : AIR1946 All191 , Mazarali Inayatali v. Emperor A.I.R. 1933 Bom. 226, and Maung Ba Tin v. The King A.I.R. 1938 Rang. 298. But these authorities, in my view, are not apposites relevant to the facts proved in this case.

24. Before parting with this case, I regret to notice that the learned Public Prosecutor has not chosen to mark Exhibit D-3 as a prosecution document. It is his duty to have marked that document in support of the prosecution although the contents of Exhibit D-3 are not helpful to the prosecution. The Public Prosecutor is a Minister of Justice; it is not his duty to obtain a conviction by hook or crook. He is an officer of Court and his first duty to the Court is to place the entire material before the Court on behalf of the prosecution. He ought not to have left it to the defence to mark Exhibit D-3. The omission on his part maybe due to his ignorance. I presume it is not out of any design.

25. The conviction of the appellant is correct and it is confirmed;

26. In the various circumstances of this case, I consider that the ends of justice will be met by reducing the sentence of imprisonment awarded against the accused-appellant to three years rigorous imprisonment. It is ordered accordingly.

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