

**Abdul Jalil Vs. the State**

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**Court :** Kolkata

**Decided On :** Aug-17-2000

**Reported in :** (2001)1CALLT177(HC)

**Judge :** Satyabrata Sinha and; Prodyot Kumar Sen, JJ.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 376, 451, 506 and 606;; Offence Act, 1872 - Sections 27, 45, 114A, 134 and 154;; [Constitution of India, 1950](#) - Article 21;; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Section 313;; [Evidence Act, 1872](#) - Section 114A

**Appeal No. :** [Circuit Bench at Port Blair] Criminal Appellate Jurisdiction C.R.A. No. 04 of 2000

**Appellant :** Abdul Jalil

**Respondent :** The State

**Advocate for Def. :** Mr. A.K. Roy, Adv.

**Advocate for Pet/Ap. :** Mr. S.M. Mondal, Adv.

**Judgement :**

**P.K. Sen, J.**

1. This appeal is at the instance of the convict (hereinafter referred as the appellant) and is directed against judgment and order of conviction dated 12.4.2000 passed by the learned Sessions Judge, Andaman & Nicobar Islands at Port Blair.

2. The facts leading to the prosecution of the appellant are that, the husband of the informant (Janki Amma) i.e. the informant/prosecutrix, used to work in the Andaman Labour Board and about 9-30 P.M. on 18.7.96, the said husband of the informant went out of his residence to join his night duty. Soon thereafter the informant along with her four children went to sleep. Subsequently, at about 11-30 p.m. someone knocked front door of her house and on hearing the same PW-1, Janki Amma switched on the electric light and asked as to who was at the door whereupon one Surya who happens to be her neighbour, told that some person has come to their house and requested to give him shelter as police was chasing that person. On such request made by Surya, PW-1 opened her door and the said person who was unknown to her entered inside the room of PW-1 when PW-1 asked him as to why he had come there when her husband was away from the residence. The said person put off the electric light which the victim immediately put on and at that time the said person pulled off her saree and blouse and again put off the light. PW-1 tried to call the neighbouring house by raising alarm, but she was overpowered and as such none came to her rescue. The said unknown person who subsequently disclosed his name as Abdul Jalil i.e. the appellant pressed her breast, torn her blouse, removed her wearing apparele committed rape on her when PW-1 could not resist as the appellant pressed his hand on her mouth and so there was no scope for her raising any alarm. The prosecution case is that penetration was complete and thereafter the appellant left the place threatening her that if she discloses the incident to anybody he would kill her and also her children. Thus, PW-1 could not dare to go outside her room during the dead hours of night and on the following morning when her husband landlady i.e. P.W.-2 Smt. Urmila had narrated the incident A First Information Report was lodged with Inspector In-Charge, Chatham P.S. and thus the law was set in motion, investigation commenced and it ended in a charge sheet disclosing offence punishable under sections 376/451/506 of the Indian Penal Code.

3. The charge sheet having been submitted before the Court of Chief Judicial Magistrate, Andaman & Nicobar Islands, the learned Chief Judicial Magistrate committed the case to the learned Court of Sessions as it is a case exclusively triable by the Court of Sessions.

4. Thus, before the trial Court i.e. before the learned Sessions Judge, the appellant was charged for having committed offence punishable under sections 376/451/506 of the Indian Penal Code.

5. To prove the case, the prosecution examined 13 witnesses in all besides exhibiting some documents such as the First Information Report (Furd Bayan) (Ext.-1), Panchnama (Ext. 2), Requisition letter of SHO for medical examination of the victim (Ext. 3). Ikrarnama (Ext. 4), another Panchnama (Ext. 7) CFSL Reports (Ext. 11 to 13) Site Map (Ext.-14).

6. After having considered the evidence on record and after having examined the appellant under section 313 of the Code of Criminal Procedure and after having taken into consideration the defence case, as appeared from the trend of cross-examination and from the replies given by the appellant, when examined under section 313 Cr PC the learned Sessions Judge came to a conclusion that the appellant was guilty under sections 313 of the Indian Penal Code and convicted the appellant to undergo a rigorous imprisonment for seven years, rigorous imprisonment for two years and rigorous imprisonment for two years respectively for each of the offence as mentioned above. Besides some amount of fine were imposed under sections 451 and 506 of IPC.

7. On being aggrieved and dissatisfied with the judgment and order of conviction the instant appeal has been preferred by the appellant from Jail. Thus, the points for consideration before this Court of appeal is how far the judgment and order of conviction are sustainable in law.

8. While assailing the judgment under appeal. Sri S.K. Mondal, learned defence advocate has submitted before us that the judgment and conviction under appeal are bad both in fact and in law and liable to be set aside as the learned trial Judge failed to appreciate the evidence in its proper perspective. His further contention is

that the learned trial Judge did not consider the defence case and did not also consider the four case laws of the apex Court as cited by him before the trial Judge. It has further been contended that the prosecution has miserably failed to substantiate the charge and inasmuch as they could not bring some material witnesses nor the neighbours of the prosecutrix. There was discrepancy in the evidence and also according to defence version there is no consistency in between oral evidence and the medical evidence.

9. There is no dispute that PW-1 (Prosecutrix used to live with her husband in a house owned by Smt. Urmila (PW-2)] at Unarkali Estate having only one room with a kitchen. It has been alleged by the prosecution that on the fateful night i.e. on 28.7.96 at about 9-30 P.M., the husband of PW-1 left the residence for going to his office and soon thereafter PW-1 along with her four children went to bed. In her evidence PW-1 further stated that about 11-30 p.m. she was awakened on hearing a sound of knocking on the front door of her room. She had once put on the electric light and asked as to who was knocking, on which her next door neighbour Surya stated that somebody had come there and requested him to open the door and to give him shelter for the night as police was searching that person. PW-1 opened the door and that unknown person whom PW-1 identified as the accused before the trial Court, entered the room when PW-1 asked her as to why he had come there when her husband was absent, the accused i.e. the appellant then put off the electric light whereupon PW-1 switched on the light. At that time, the appellant put off the light again and pressed her breast and torn her blouse. At the time PW-1 was wearing terrycotton saree and coloured pettycoat and had a green blouse on her person. She raised alarm but that person pressed her mouth and neck and threatens to kill her along with her four children if she would try again to raise any alarm. All her children were then sleeping. PW-1 further stated that the appellant then put off her saree from her body and put down his black shorts and a brown (katha) coloured jangia. Thereafter PW-1 was forced to lie on the floor in between cot and the wall she could not raise any alarm as the appellant pressed her mouth and she became seared. At that time the appellant lifted her pettycoat and committed sexual intercourse with her as had been stated by PW-1 in her own language like BURA KAM KEYA. After that the appellant washed and ejaculated materials in her pettycoat. Therefore he put on the jangia and his shorts and left

the place with the threatening that she would be killed along with her four children if she would dare to disclose the incident to anybody. PW-1 further stated that she received nail scratch on her chest. Subsequently, PW-1 changed her pettycoat she was wearing on the floor. She further stated that she could not venture to go outside out of fear. On the following morning when her husband came, she narrated the incident of outraging of her modesty by the accused. As at that time she felt shy to disclose the incident of rape. But immediately thereafter she disclosed the incident of rape in presence of PW-2 and thereafter went to police station and lodged FIR.

10. In a case punishable under section 376, the only witness is the prosecutrix because there cannot be any other eye witness except the victim herself. In this case also PW-2 is the landlady of PW-1 to whom PW-1 narrated the incident on the following morning. PW-3, is the doctor who examined her after the occurrence. All other witnesses are either seizure or search witnesses or constable who are of formal witnesses. PW-13 is the investigating Officer.

11. Now with this oral evidence given by the prosecutrix herself, let us now examine the medical evidence on the point Ext-3 is the report of medical examination conducted by the PW-3. PW-3 made an enquiry from PW-1 as to whether the victim was subjected to forcible sexual intercourse and thereupon she examined the victim and found one abrasion over the right clavicle and PW-3 opined that the victim was subject to sexual intercourse. PW-3 collected swab from inside the vagina of the victim and handed over the same in two sealed container to the Police Officer. PW-3 collected the pettycoat which she was wearing at the time of the alleged occurrence and handed over the same to the police. Thus, on going through the report (Ext. 3) we found that the same is corroborated with the oral statement made by PW-1 that she was sexually intercoursed. The learned Advocate appearing for the appellants submitted that had there been any forcible intercourse marks or injury would have been found in the private parts of the body of the victim? But we find that PW-3 found abrasion in her private parts. Much has been said that there was no forcible intercourse but from the oral evidence we found that the victim was overpowered and, therefore there is no scope for any resistance from the side of the victim. In this connection,

the CFSL reports (Ext. 11, 12 and 13) are very crucial. Ext-11 is one of such report which runs as :--

'On biochemical and microscopical examination of yellowish starchy stains of the Exhibit 1 : Petticoat; Exhibit 2 : Chaddi, Exhibit 3 : 2 pieces of cotton swab were Cotton. Found positive for acid phosphatase test and have sperms similar in characteristics to human.

Regarding the group of the semen positive areas of the Exhibits, a separate report from the serology section, CFSL Calcutta is attached herewith.

The remnants of the Exhibits are being returned separately.' Ext. 12 which runs as :--

'The cuttings/pieces/parts of the exhibits mentioned below, provided by the Biology section of this Laboratory, were subjected to serological analysis and the results of their examination are given below. The grouping was done by Absorption Inhibition method. The details of the analysis are as follows :

Sl. No.	Description of Exhibit	Size/Qty. approx.	Control	Positive for	Group	Remarks
1.1:	Petticoat	20 sq. cm.	Present	Human semen	O	Secretary
2.2:	Chaddi	16 sq. cm.	Present	Human semen	O	Secretary
3.3:	Cotton Swab	12 sq. cm.	Present	Human semen	O	Secretary

12. These two Exts. are the result of the examination of the wearing apparels of the victim as well as the appellant the report is consistent with the oral evidence as also the evidence adduced by the medical officer i.e. P.W.-3.

13. Another important aspect of this case is that the wearing apperels of the victim was traced out by the offender i.e. the appellant himself. It is in evidence that it is the appellant himself who led the police party to his own residence and traced out those wearing apparels which he wore at the time of commission of the offence of rape. It was not the defence case before the trial Court that the chaddi never belong to the appellant rather the defence side kept mum in respect of the ownership of the Chaddi. Chaddi is such a garment which remained attached with

the private parts of the accused and there is every chance of getting its stained by the release of semen of the appellant. Medical examination showed that the said Chaddi had stains of human semen of 'O' group while the pettycoat seized from the custody of the PW-1 also had the said semen stains which was also found to be human semen of 'O' during medical examination at the Forensic Science Laboratory. The vaginal swab of the victim was taken within 12 or 13 hours from the time of alleged commission of rape and PW-3 put the same in a sealed container. It is in evidence that PW-1 had no access to any other sexual intercourse in between because it is also in evidence that her husband was then away from the residence. It is in evidence that her husband returned at 6-30 a.m. and took his wife i.e. PW-1 to PW-2 i.e. Urmila. So it can be safely presumed that PW-1 carried stains of semen inside her vagina all along soon after the alleged sexual intercourse by the appellant till the time of her examination by PW-3 or thereafter till she washed herself. Therefore, the medical evidence coupled report of CFSL goes to support the prosecution case as given by PW-1. Therefore, there is no escape from the conclusion that it was the appellant who committed rape on the victim i.e. PW-1. The learned Advocate appearing for the appellant has submitted before us that even if there was any rape committed by the appellant on PW-1, it must be said that PW-1 was a consenting party to such sexual intercourse. We have already found that PW-1 could not resist the appellant as she was overpowered. Now the question is whether she had consented. The defence definition prosecution case is that the appellant had forcibly committed the offence of rape upon PW-1. The learned advocate appearing for the appellant is of the opinion that it was a case of forcible rape. The learned advocate appearing for the appellant has submitted that since PW-1 was a consenting party, there cannot be any offence as alleged by the prosecution. In this connection, let us refer to the provision of section 114A of the Indian Evidence Act which runs as:

'(114A. Presumption as to absence of consent in certain prosecutions for rape-

In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), 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.)'

Therefore, we can presume that there was no consent.

14. In this connection, we may refer to a decision of the Supreme Court reported in : AIR 1996 SC922 wherein the Supreme Court observed that offence under section 376 IPC is a crime against the entire society and so the plight of the raped victim in the present legal system despite making the rule of corroboration of prosecutrix is not always necessary. In this judgment, the Supreme Court observed that rape is violative of the right to life which includes right to live with human dignity. Therefore, the offender of a rape case deserves deterrent punishment and no leniency can be shown to such an offender.

15. The learned advocate, appearing for the appellant has drawn our attention to the non-examination of some material witnesses inasmuch as Surya was not examined. It is true that it was Surya who came and knocked the door of PW-1 and introduced accused and also requested PW-1 to give her shelter. It appears from the judgment of the trial Court that the learned Public prosecutor submitted before the trial Court that said Surya had left for the mainland and his present whereabouts is unknown and so they could not examine him. In a case of this nature the prosecution is required to lead evidence on the point of rape and, therefore, the most material witness is the victim herself. No other witness is required to be examined because there cannot be any witness to sexual intercourse. Of course, medical evidence is necessary and in this case, medical evidence is satisfactory.

16. The learned Advocate has drawn our attention to a decision of the Supreme Court reported in SCC 1979 (2) 143. That was a case when rape was committed by the Policemen inside Police Station and the apex Court dis-believed the circumstantial evidence and as sexual intercourse was not proved and so acquitted the accused but here facts are different and, therefore, this decision is not application here. The next decision cited by the learned Advocate for the appellant is reported in : 1979 CriLJ867 . In that case, medical evidence was found contradictory and there was discrepancy with regard to between medical evidence

and oral evidence. In another decision cited by the learned advocate, appearing for the appellant is reported in : 1977 CriLJ817 . That was a case where learned sessions Judge dismissed the pleas of the consent on the ground that it was not pleaded by the accused. Besides, in that case there was a long gap between the time of the incident and the time of medical examination but here we find that medical examination was conducted within 12 or 13 hours. So this judgment is also not applicable. Another decision referred to by the appellant is reported in : 1972 CriLJ626 where the Court found that the prosecution failed to prove the motive and the confessional statement so the Supreme Court observed that confessional statement is not admissible and conviction was set aside.

17. Thus, the judgments referred to above do not have any application to the present facts and circumstances of the case. In this case we find that the offence was complete as the victim herself stated by saying BURA KAM KEYA which indicates that penetration was complete.

18. Since there is no argument advanced from the side of the appellant with regard to the findings of the learned trial Judge in respect of the offence punishable under sections 451 and 506 of the Indian Penal Code we do not like to interfere with such findings as arrived by the learned trial Judge. On perusal of the evidence, of course, we find that the learned trial Judge had come to a right finding with regard to the offence as punishable under sections 451 and 506 of the Indian Penal Code. So far as the findings of the learned trial Judge with regard to the offence punishable under section 376 of the Indian Penal Code are concerned, we hold that the evidence on regard both oral and medical fully supports the prosecution case and the judgment and order of conviction under appeal do not suffer from any illegality or infirmity. Thus, we do not like to interfere with the findings of the learned trial Judge. In that circumstances we find no merit in this appeal. The appeal is, accordingly, dismissed. The judgment and order of conviction are affirmed with the observation that the sentences awarded by the learned trial Judge should run concurrently and not simultaneously.

**S.B. Sinha, J.**

19. Although I agree with the judgment proposed to be delivered by my learned brother, I would like to add a few words of mine.
20. Section 114A of the Evidence Act had been inserted for suppressing a mischief. The said legislation is by way of welfare legislation having regard to mental trauma social stigma etc. faced by a woman subjected to the grave offence of rape.
21. In *Bodhisatwa*. (supra) the apex Court held that rape amounts to violation of the fundamental right guaranteed to a woman under Article 21 of the Constitution. The said decision has been followed by the apex Court in *Chairman, Railway Board & Ors. v. Chandrima Das* reported in : 2000 CriLJ1473 .
22. By reason of the aforementioned provision once a presumption is raised on the basis of the statements made by the prosecutrix, the onus would shift on the accused to rebut the same. Apart from the arguments advanced at the Bar, no evidence has been led nor any circumstances had been pointed out which would lead to rebuttal of the said presumption.
23. In the instant case, the case of the question of consent will have to be judged on the factual matrix in the matter. The prosecutrix was asked to give the Appellant shelter on the ground that he was wanted by the Police.
24. She opened the door only because Surya, her neighbour asking her to do so. In such a situation if there was a consent on the part of the prosecutrix, no offence can be said to have been committed whatsoever by the Appellant at all. The learned counsel has not questioned the conviction or sentence of the Appellant in relation to the other offence, viz. section 451 and 506 of the Indian Penal Code. Further had there been any consent on the part of the prosecutrix, the question of the blouse being not torn could not have arisen. The conduct of the Appellant in the matter of recovery of his garments including under-garments is also important.
25. Upon taking into consideration the entirety of the materials on records, I am of the view that no case of consent on the part of the victim had been made out.
26. Order of conviction affirmed

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