

**Mohd Yaseen Vs. State**

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**Court :** Jammu and Kashmir

**Decided On :** Mar-26-2004

**Reported in :** 2005CriLJ307,2004(2)JKJ346

**Judge :** Y.P. Nargotra, J.

**Acts :** Ranbir Penal Code (IPC) - Section 376

**Appeal No. :** Case No. 6-Cr. and 30-Cr. Appeal/1991

**Appellant :** Mohd Yaseen

**Respondent :** State

**Advocate for Def. :** Aruna Thakur, Adv.

**Advocate for Pet/Ap. :** Sunil Hali, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**Y.P. Nargotra, J.**

1. The appellant was tried for commission of an offence Under Section 376 RPC and was convicted and sentenced to undergo rigorous imprisonment for a period of seven years with fine of Rs. 1000/- and in default of payment of fine the accused has been directed to undergo further rigorous imprisonment for a period

of six months, by the court of learned Sessions Judge Rajouri vide his judgment dated 27.3.1991.

2. The story of the prosecution briefly stated is that on 5.9.1985 the prosecutrix (whose name is purposely being withheld) aged nine years was grazing her cattle in the forest. The accused-appellant came to her and inquired about her brother Mohd Iqbal. She told him that he had gone for cutting the grass. The appellant on finding her alone caught and laid her on the ground and committed forcible sexual intercourse on her. Due to forcible intercourse, blood started oozing out from her vagina and she became unconscious. The father of the prosecutrix; PW Munshi Khan, had gone to the watermill where one Babu met him and he told him that in the grazing field the accused had raped her daughter. On hearing this he left for this grazing field. On his way he was joined by Mohd Amin, Khazir and Alla Ditta. When he reached the spot he found her daughter lying unconscious in a pool of blood. He took her to his house and then on the next day he lodged the report, EX-PW1 before SSP Rajouri who forwarded the same to SHO concerned. On his application FIR was registered. The prosecutrix was taken to Rajouri hospital from where she was referred to Nowshera hospital and from there to a hospital at Jammu as no lady doctor was available at Rajouri and Nowshera hospitals. After 4/5 days the prosecutrix regained her consciousness and then disclosed the occurrence to her father. She remained in the hospital for 10/12 days.

3. During investigation police recorded the statements of the prosecution witnesses Under Section 161 Cr.PC including that of the prosecutrix. Bloodstained earth, shalwar and stone were seized. The pant of the accused was also seized. After completing other formalities a charge sheet against the accused was filed before the court of C.J.M. Rajouri who committed the same for trial to the Court of Session.

4. The accused was charged for commission of offence Under Section 376 RPC to which he pleaded not guilty. In order to prove the charge the prosecution examined the prosecutrix, her father PW Munshi Khan, her brothers PWs Mohd Bashir and Mohd Iqbal, besides PWs Sher Mohd, Mohd Azam, Mohd Sharief, Nazir Hussain, Alia Din, Abdul Aziz, Mushtaq and Mohd Din. PW Dr/Anita Sharma,

Registrar, SMGS Hospital Jammu was also examined besides the I.O. PW Ghulam Hussain ASI. In defence the accused examined Shamas Din only. Learned trial court after appreciating the evidence has recorded the conviction and sentence against the accused, as aforesaid.

5. Aggrieved by the conviction and sentence the accused-appellant has preferred this appeal and the prosecution has also preferred an appeal for seeking enhancement of the sentence.

6. I have heard the learned counsel for the parties and perused the record of the case thoroughly.

7. The prosecutrix when came in the witness box deposed that on the day of occurrence she had gone to the forest with her cattle-heads, accused Mohd Yaseen came there and inquired from her about her brother Mohd Iqbal. She replied that her brother had gone for cutting the grass. However, this accused caught her from her arms, laid her down in the field and forcibly opened string of her shalwar, took out his pant and thrust his male organ into her vagina. Blood started oozing out. She suffered a lot of pain in the stomach and after that she became unconscious. She has further stated that after the occurrence she did not know where the accused had gone. She regained consciousness at Jammu hospital where her father was present to whom she narrated the whole incident. She remained in the hospital for 8/9 days and after that her father took her to the village. She also identified her shalwar, EXP1, to be the same, which she was wearing on the day of the occurrence. She was cross-examined in which a suggestion was put to her that she had been raped by some unidentified person but she denied such suggestion and categorically reiterated that it was the accused present in the court who had raped her. She also stated that she knew the accused from her childhood.

8. Her father PW Munshi Khan in his testimony stated that on being informed about the rape of his daughter he left the spot, accompanied by Mohd Amin, Khazir and Allah Ditta and found his daughter in a pool of blood and unconscious. He took her to his house and on the next day he lodged the report with S.P. Rajouri who forwarded the same to the SHO. On his report EXPW1 FIR was

registered. He also admitted the fact that after 4/5 days when his daughter regained consciousness at Jammu hospital she narrated him the incident that the accused had raped her.

9. PW Sher Mohd deposed that he heard the cries of a girl and saw her being laid down by the accused from a hilltop. He ran towards the spot. He saw the accused named carrying his pajama in his hand. According to him meanwhile Sher Mohd and Mohd Iqbal too reached on spot. They lifted the girl. She was without shalwar and was bleeding and took her to their house. PWs Mohd Bashir and Mohd Iqbal have stated that they were cutting grass and while they were returning they heard the cries in the way. They threw the grass and rushed towards the spot. They saw the accused raping their sister. They made hue and cry upon which accused ran away from there. They have also stated that blood was oozing out from vagina of their sister. PW Mohd Azam has proved the seizure of bloodstained earth, a stone and shalwar of the prosecutrix and pant of the accused by the police. In the cross-examination he clarified that the shalwar was produced by Sher Mohd in the grazing field whereas pant of the accused was seized from his house when the accused was in custody. PW Mohd Sharief has deposed about the seizures whereas PW Nazir Hussain is a hostile witness. In the examination-in-chief he stated that the girl told him that some one had done bad with her but he in the cross-examination admitted that the prosecutrix was lying unconscious and blood was oozing out from her vagina. PWs Allah Din, Abdul Aziz, Mushtaq and Mohd Din are four hostile witnesses as all of them stated that some unknown person had raped the prosecutrix. PW Dr. Anita Sharma has deposed that she examined the prosecutrix on 7.9.1985 and found no mark of external or internal injury on other part of body. Bleeding per vagina present. Shirt was soaked in blood and clots were present on the pad, hymen was torn around 1 cm tear in three corners, tears were irregular, edges of hymen were bluish, black and bruised. Tear in fourchette \_' in length, extending backwards towards anus 1/3' deep. There was a transverse tear about 2 cm in length in the posterior wall near posterior fornix. The lateral end on right side was extending down up to 2 cm. Tears were bleeding. Edges were cedematous. Suturing of vaginal tears and prineal tears was done under G/A on 7.9.85 and girl was discharged on 16.9.85 after complete course. Two vaginal smears were taken from posterior F/X and were sent to pathological department

for spermatozoa H/P report No. 50/M/E of the two slides sent to the lab only show R.B.C. No spermatozoa were seen. X-ray report No. 1154 showed the radiological age of the girl less than 14 years. On the above said finding she opined that rape had been committed with the girl though H/P report is negative for spermatozoa. According to the doctor they might have been washed away due to excessive bleeding as the girl was referred to her after a lapse of many hours. She has proved her certificate EXPW14. On being cross-examined she admitted that there were no marks of violence on the body of the girl except presence of bleeding. She admitted that rupture of the hymen can be caused because of other reasons other than sexual intercourse. In her opinion the age of the girl was less than 14 years. The Investigating officer has stated about the investigational steps. That is all about the prosecution evidence.

10. In defence the accused examined DW Shamas Din who stated that on the date of occurrence he had met Munshi and his two sons (father and brothers of the prosecutrix) and both of them told him that some body had done bad act with their sister. They also showed their ignorance as to who committed the illicit act with her. On being cross-examined he denied that he had seen the prosecutrix bleeding but admitted that he saw her lying on the ground.

11. From the statement of the defence, as well as hostile witnesses, the accused projected a defence before the trial court that it was not he who had committed the rape on the prosecutrix but it was some unknown person. The defence of the accused did not find favour with the learned trial court. The trial court found the statement of the prosecutrix duly corroborated by the medical evidence which was further corroborated by the evidence of PWs Munshi Khan, Mohd Iqbal and Mohd Bashir. Therefore, in the opinion of the learned trial court statement of the prosecutrix was trustworthy and could be accepted for holding that it was the accused alone who had committed rape upon her. Thus accepting the prosecution evidence the trial court came to the conclusion that the prosecution had succeeded in establishing its case beyond all reasonable shadow of doubt against the accused and thus recorded conviction and sentence, as already stated, against the accused-appellant.

12. Mr. Hali, learned counsel for the appellant, has challenged the finding of trial court by arguing that the case of the prosecution cannot be said to be a case proved beyond all reasonable shadow of doubt. He has argued that all the witnesses who have supported the prosecutrix are her close relations. The medical evidence has not shown the presence of any spermatozoa's. The accused, according to him, has not been legally linked up with the offence by the prosecution evidence. He further submitted that the sole statement of the prosecutrix, without any due corroboration from the medical evidence, couldn't be accepted for recording a conviction. He further argued that it was also incumbent upon the prosecution to prove that the accused was physically capable of committing the sexual intercourse. In the present case the prosecution has not got the accused medically examined so as to prove that he was physically capable of committing the sexual intercourse. In the absence of such proof the whole story of the prosecution is rendered doubtful. So, according to him, the accused should be given benefit of doubt and acquitted.

13. On the other hand, Ms. Aruna Thakur, appearing on behalf of the State, has very vehemently argued that the evidence of the prosecutrix has conclusively established the guilt of the accused. The evidence of the prosecutrix has duly been corroborated by the other evidence, including the medical evidence; therefore, her version has been rendered completely trustworthy. The omission to get the accused medically examined in no way can go to show that he was not capable of committing sexual intercourse, in the face of the fact that no such defence was ever taken by the accused before the trial court. According to her the evidence of the prosecution has rightly been appreciated and from the evidence tendered by the prosecution the guilt of the accused has cogently been established and the learned trial court, though has convicted the accused for having committed the rape on a minor girl of nine years old yet has awarded a very meager punishment which does not commensurate with the gravity of the offence. She submits that the sentence should be enhanced and the accused should be punished severely.

14. I have considered the respective contentions of learned counsel for the parties and have gone through the evidence available on record meticulously.

15. The prosecutrix in the clear terms has indicted the accused for commission of rape on her. The identity of the accused is not disputed. The prosecutrix has claimed that she knew the accused from her childhood and this statement of her has not been challenged any further in the cross-examination. The prosecutrix has been submitted to a grilling cross-examination but nothing material could be elicited by the defence in its support. The evidence of the prosecutrix on all material particulars stands corroborated by the evidence of PWs Munshi Khan, her father and the evidence of PW Dr. Anita Sharma. Without going into the question as to whether the other evidence can be relied upon or not, it is the settled position of law that conviction can be recorded on the sole testimony of the prosecutrix. No corroboration as a matter of law needs to be insisted. The prosecutrix being the victim of the crime is required to be treated as an injured witness and not an accomplice to the offence. In the present case the testimony of the prosecutrix has found corroboration in abundance from the evidence of PWs Munshi Khan, Mohd Iqbal, Mohd Bashir and Sher Mohd, as well as Dr. Anita Sharma.

In AIR 1983 SC 753, titled Bhoginbhai Hirjibhai v. State of Gujrat, their lordships of the Apex Court observed as under:--

'Corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault, in the absence of corroboration as a rule, is adding insult to the injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in male dominated society.'

In another the case titled State of Maharashtra v. Chandraprakash Kewal Chand Jain, AIR 1990 SC 659, it has been held as under: --

'A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 18 of Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the

evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge leveled by her. If the court keeps this in mind and feel satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration.'

15. As regards the plea raised by learned counsel for the accused the omission to get the accused medically examined for determination of his potency is concerned in my view it is not incumbent upon the prosecution to prove it. If the accused takes the defence that he is not medically fit for having sexual intercourse with a lady it is for him to prove it. In the present case neither such defence was taken by the accused before the trial court nor there is any evidence on the record showing that the accused is incapable of having a sexual intercourse. From the reappraisal of evidence of the prosecution in my considered opinion too the prosecution has succeeded in proving the offence completely, cogently and beyond all reasonable shadow of doubt. Therefore, the conviction of the accused does not call for any interference.

16. As regards the sentence, Section 376 RPC provides that a person who commits rape shall be punished with imprisonment of either description for a term, which shall not be less than seven years but may be for life or for a term, which may extend to ten years and shall also be liable to fine. The section therefore leaves it to the discretion of the court to decide imprisonment of which term should be imposed upon an accused the only rider being that it shall not be less than seven years. Such discretion is judicial discretion and therefore must be exercised with circumspection and due care by taking notice of all the circumstances of the case and the gravity of the offence. For the proper exercise of the discretion the court is required to keep the cry of the society and of the victim for justice in sight. Only such sentence should be imposed which strikes a balance between the gravity of the offence and the mitigating circumstances of the case, if any. For a sentence to be just, It is necessary that it commensurate with the gravity of the offence. Foulter the crime the severer the sentence. It is only where mitigating

circumstances are brought to the notice of the court, the court can impose lesser term of sentence.

17. In the present case in view of the age of the victim at the time of the offence, the gravity of the offence was highest and therefore maximum punishment provided by law would have been proper but still I am not persuaded to enhance the sentence now because the offence was committed on 5.9.1985. Since then about 19 years have passed and by this time the victim must have also settled down in life. For the reasons stated above, the enhancement appeal of the State is dismissed and criminal appeal of the accused is also dismissed.

18. The bail bonds of the accused-appellant are cancelled. He shall surrender before the trial court for being sent to the prison for serving the remaining sentence and in case he fails to do so, warrants shall be issued for his arrest and after his arrest he shall be sent to the prison by the Trial Court.

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