

Bhadur Singh Vs. State of J and K

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Court : Jammu and Kashmir

Decided On : Dec-01-2005

Judge : J.P. Singh, J.

Acts : Evidence Act, Samvat 1977 - Section 114; ;Ranbir Penal Code (IPC) - Sections 341, 375 and 376; ;Code of Criminal Procedure (CrPC) , 1989 - Sections 161, 173, 342 and 540

Appeal No. : Cr. Appeal No. 27/2000

Appellant : Bhadur Singh

Respondent : State of J and K

Advocate for Def. : Ajit Singh Dogra, Dy. A.G.

Advocate for Pet/Ap. : Nirmal Kotwal, Adv.

Disposition : Appeal dismissed

Judgement :

J.P. Singh, J.

1. Bhadur Singh is in appeal against judgment of conviction under Section 376 Ranbir Penal Code (hereinafter referred as Penal Code) and sentence of seven years rigorous imprisonment and a fine of Rs. 5000/-, recorded by learned

Additional Sessions Judge, Ramban, dated 30th of November 2000.

Submissions by appellant/accused:

2. Sh. Nirmal Kotwal, learned Counsel appearing for appellant, made following submissions in support of the appeal:

1. Prosecution story has not been established:

(i) There are major contradictions in the statements of prosecution witnesses.

(ii) Statement of PW- Om parkash, is unbelievable and if believed, in its entirety, would demolish the other evidence produced by the prosecution.

(iii) The age of the prosecutrix was more than 14 years. The prosecution has not proved the age of the prosecutrix by leading cogent evidence.

(iv) There is variance between the ocular and the medical evidence.

(v) Absence of spermatozoa in the vagina negatives the story of rape.

(2) Non-production of investigating officer has resulted in Failure of Justice and prejudice to the accused.

Cases cited:

3. Learned Counsel refers to Appasaheb Maruti Shedge v. State of Maharashtra and Anr. reported as 2005 Criminal Law Journal 1503 and Rahim Beg and Ors. v. State of U.P. reported as : 1972 CriLJ1260 .

Submissions by State:

4. Sh. Ajit Singh Dogra, learned Dy. A.G appearing for State, makes following submissions:

1. The prosecution has produced requisite evidence to sustain the charge.

2. There is no discrepancy in the medical and ocular evidence.

3. Non-production of Investigating Officer, does not affect the prosecution case.
4. The age of the prosecutrix stands established from the statement of father of the prosecutrix and the Chowkidar of the Village.
5. Minor contradictions in the statements of prosecution witnesses, would not disprove the prosecution case.
5. I have heard learned Counsel for the parties and considered their submissions.

In order to deal with the submissions of the learned Counsel for the parties, facts of the case, need to be noticed.

FACTS

6. FIR No. 113/1993 of Police Station Batote, District Doda reads that Sham Lal S/o Kachra, Caste Bhagat, along with his minor daughter namely (identification kept confidential and referred hereinafter as 'A'), stated that at about 11.00 A.M of 14.12.1993, complainant's daughter 'A' had gone to forest known as SANA along with the cattle. At about 1 in the noon, Sham Lal's sister-in-law Smt. Bimla Devi. W/O Krishan Lal, brought his daughter home. Blood was oozing from the private part of his daughter.

7. On inquiry Miss 'A' told that at about 12.00 in the noon when she was in forest along with her cattle, Bhadur Singh S/o Jagtu, came there and demanded that he wanted to quench his bodily need. On refusal by Miss 'A', Bhadur Singh dragged her to a platform where he forcible, took out her Shalwar from one of her legs and against her will, committed rape on her, despite her cries. She disclosed that blood had started oozing because of this act of Bhadur Singh. After committing rape, Bhadur Singh ran away from the place of occurrence. Miss 'A' stood up with great difficulty to proceed towards her home, when Mst. Bimla Devi came there. Carrying her on the back, she brought her home.

8. After the arrest of Bhadur Singh accused and police investigation, a report under Section 173 Cr.P.C was submitted before the learned Magistrate who committed the case to learned Additional Sessions Judge, Ramban, who framed

charges under Sections 376/341 of the Ranbir Penal Code against accused Bhadur Singh.

9. Prosecution produced Sham Lal, Prosecutrix (A), Mst. Bimla Devi, Om Parkash, Mangat Ram, Krishan Lal, Dr. Dinesh Khajuria, Dr. Girdhari Lal Dogra, Dr. Umesh Gandotra, Krishan Singh- Naib Teshildar, as its witnesses.

10. Accused was examined under Section 342 of Code of Criminal Procedure, who produced Gouri Shankar, Kasho Ram, Suram Chand, Jat Ram and Jat Ram, as its witnesses.

11. During the currency of the trial, an application under Section 540 Cr.P.C was filed by Sham Lal and Bhadur Singh, this application reads, thus:

In the Court of Additional Sessions Judge at Ramban.

State v. Bahadur Singh

Offence Under Section 376 RPC.

An application of the parties praying that on discovery of actual truth the parties have compounded the case and as such the prosecutrix Sheema be summoned for re-examination in terms of Section 540 of the Cr.P.C.

May it please your Honour Sir,

The humble applicants parties in the case beg to submit as under:

1. That the parties have discovered the truth in the case and found that that the accused has been falsely and wrongly under misconception of fact been implicated. The parties have therefore entered into compromise and have exonerated the accused of all blames.

2. That in order to corroborate all this, the statement of the prosecutrix is necessary for corroboration of the compromise In the interests of justice she can be re-examined Under Section 540 of the Cr.P.C.

3. That the policy of the law is to allow compromise so that animosity comes to an end and the parties maintain good relations howsoever grave the offence may be. The case is fixed for 26th of Feb. 1999.

It is therefore prayed that the parties be allowed to compromise the case and the prosecutrix be recalled for re-examination Under Section 540 Cr.P.C. in the interest of justice.

Dated: 17.2.1999.

Sham Lal S/o Kanchra R/o

Sanasar Tehsil Ramban.

Bhadur Singh S /o Jagat Ram

R/o Sanasar.

This application too has been decided by the trial court, while passing final judgment in the case.

12. Learned Counsel for the appellant, has read the statements of the prosecution witnesses in the court, so as to support the submissions made by him in support of the appeal.

13. Learned Dy. A.G, too, with pointed reference to the statements of witnesses, supported his submissions. Statement of Prosecutrix 'A' was recorded on 15.2.1997. Before proceeding to record the statement, learned trial court put some questions to the witness and thereafter certified as under:

The witness from the above appears to be one having sufficient maturity to understand and capable of making the decisions and is, thus, a capable witness (competent).

14. This witness has supported the story projected in FIR, in her examination in chief. In her cross-examination, she states that she had stated to the police under Section 161 Cr.P.C that the accused had thrust a cap in her mouth during the

process of committing rape. She cannot say as to why it does not find mention in the FIR:

She states that the rape was committed in a meadow, which is different place than the one where people reside. In the meadow there were trees of KANTH and ANARDANA. The accused had not told her anything at the time he came at the place of occurrence and he straightaway dragged her to the place of occurrence.

She denies as incorrect the statement recorded in FIR that accused had expressed his desire to quench his bodily need. She does not know the time of occurrence, although it was noon. She had not taken meals. The whole occurrence had taken place in 2-3 minutes. When the accused caught hold of her, she cried 2-4 times, when accused thrust his cap in his mouth. She went unconscious and could not cry. Accused took out the cap from her mouth, and he ran away. Mst. Bimla Devi and Om Parkash came running when she cried. Blood was oozing, when she was lifted by Mst. Bimla Devi. Blood had stained the clothes of Mst. Bimla Devi because Mst. Bimla Devi had carried her on her back.

Houses are at a distance of about half a kilometer from the place of occurrence. Articles were not seized in her presence. She was later taken to Udhampur Hospital. Police had come after two days. Medicines had been given to her. She had been brought by her mother Mst. Guddi. She had identified the place of occurrence and told the police about the same and on the same day her father had taken her to the place of occurrence on his back. She was not treated at Batote but some medicine was applied on the injury. She had been told that her treatment would be done at Udhampur. Her cries were forceful. Police had been shown the Shalwar at the time of lodging of FIR. Police had seized blood stained Shalwar. The accused had torn her Shalwar but had not torn her shirt. Lady Doctor was there at Batote. A night was spent there and in the morning, Doctor had told her that she could not be treated at Batote.

15. Statement of Mst. Bimla Devi W/o Krishan Lal, was recorded on 28.4.1997, who has supported the version of the prosecutrix. This witness when subjected to cross-examination says:

She had brought prosecutrix along with Om Parkash to her place. She cannot state as to why this statement is not there in the statement, alleged to have been recorded and attributed to her under Section 161 Cr.P.C.

The place where prosecutrix had been raped was not cultivable. There were trees of ANARDANA and KANTH. Prosecutrix was grazing her cattle. Occurrence had taken place at a distance of 200 yards from the place where she was in the forest. She had seen the accused running from the place of occurrence and Om Parkash, too, had seen him running. Om Parkash had thrown stones and she, too, had thrown stones at the accused.

She does not have any relation with the accused. Police had not held any identification parade. She had heard the cries of the lady and when she heard the cries she saw accused running. She had not seen accused coming to the place of occurrence and neither performing the actual act. Where she was grazing cattle, there are MOHRU Trees besides bushes. Name of the father of Om Parkash is Amar Nath. Om Parkash was also grazing cattle. She had seen Om Parkash also coming on spot. When she heard cries, she called Om Parkash, Om Parkash is her brother-in-law. She had told about this to the Police that she had called Om Parkash on spot. The prosecutrix remained at home for about 2 hours, whereafter she was taken to Batote Hospital. She has denied the suggestion of the accused that it was Om Parkash who had committed rape.

16. Prosecution witness -- Om Parkash while reiterating the prosecution story, in examination in chief, submits that:

He had gone to the place of occurrence after hearing the cries of prosecutrix. He denies the statement that he had gone there on being called by Bimla Devi. Bimla Devi reached on spot before he had reached. He saw 'A' unconscious. He went running to the place of occurrence when he saw accused running across the Nallah. He pelted stones towards the accused. He had told the police that he saw accused committing rape. He had seen the accused committing rape from the place where he was grazing cattle.

He does not know as to why this statement does not find place in his statement under Section 161 Cr.P.C. Prosecution 'A' was unconscious, Prosecutrix was lifted by Mst. Bimla Devi and brought home. Mst. Bimla Devi had helped the prosecutrix to put on Shalwar. He told the police that he is an eye witness. He denies the suggestion that he had committed rape and that after committing rape he had shown Bimla Devi that accused was running from the place of occurrence.

No identification parade was held by the Police. He does not remember about the colour of the clothes worn by the accused. He had shown the place from where he had seen the occurrence and also the place where he had seen the accused running. Bimla Devi did not know that he was in the jungle. Bimla Devi was not there in jungle but had come from her house.

17. Prosecution witness -- Mangat Ram, is a Village Chowkidar who says that about five years ago he was Chowkidar of the Village. He proves the certificate Exhibit PW-1-D. This certificate is admitted to be correct. He says that:

One Chand was the earlier Chowkidar. Register of Births, at serial No. 973701, a daughter is stated to have been born to Sham Lal on 9.7.1982 and this entry has been made by the Chowkidar, of the time, who was Chand Chowkidar. He identifies the signatures of Chand Chowkidar.

In cross-examination, he says that entries in the Register of Births have not been made in his presence and nor these entries are in his handwriting. The name of the mother of the child is not mentioned. He does not know whether the eldest issue of Sham Lal is son or daughter. He does not know as to in respect of which daughter of Sham Lal, the concerned entry pertains to.

18. Prosecution witness -- Sham Lal, father of the prosecutrix was examined on 26.6.1996. He has proved the version given by him in the FIR.

In cross-examination, he says that:

Blood was oozing from the private part of his daughter, when he lodged the FIR and his daughter had narrated the story of rape to him and on this statement, he had lodged FIR. His wife's name is Mst. Guddi. Mst. Bimla Devi and Om Parkash

had told him about the occurrence.

Prosecutrix had given him the complete version as to how she was raped. He had gone to the Hospital with the prosecutrix, Doctor was not available and only compounder was there, who had suggested that the report be lodged in Police Station, whereafter the report was lodged in the Police Station. Only Bimla Devi and Om Parkash could tell whether they have seen the accused running from the place of occurrence.

Bimla Devi had brought prosecutrix from the place of occurrence to his place and Bimla Devi's clothes were also blood stained. Bimla Devi's clothes had not been seized by the Police. Police had reached on spot after four days of the occurrence. He has no litigation or dispute with Bhadur Singh and nor does he have any litigation with the brother of the accused or his father. The houses are located at the distance of 2-3 furlongs from the place of occurrence, which is irrigated land. Krishan Lal's house is situated nearby. Houses of Jagtu and Bhagat are not nearby, these are at a distance.

19. Prosecution witness -- Dr. Dinesh Khajuria, states that he has examined the X-rays film of the prosecutrix. On the basis of his Radiological analysis, he gives the age of prosecutrix as less than 14 years.

In cross-examination, he says that the age of the prosecutrix could be between 14-17 years.

20. Prosecution witness -- Dr. Girdhari Lal Dogra, who examined Bhadur Singh accused, says that Bhadur Singh is capable of performing the intercourse.

21. Prosecution witness -- Dr. Umesh Gandotra, Gyneacologist, submits that the prosecutrix was examined at 3.45 P.M, who looked feared and in agony. There was a tear of about 2 cms of posterior fourchette. The Hymen was torn on posterior aspect and old clotted blood was seen on both the injuries.

22. In her opinion, the injuries could have been caused by sexual assault. She proves the certificate issued by her after examining the prosecutrix. In cross-examination, she states that absence of spermatozoa in the vaginal smear raises

the possibility of causing the injuries as mentioned in Exhibit PW-10-M by mechanical violence. She says that it may be possible to prefer a false charge and create such injuries mechanically and not by sexual process. In such cases, absence of spermatozoa makes it difficult to positively say as to whether the injury in the private part was because of sexual intercourse or because of some mechanical method. No injury on the part of body is noticed. In the present case, there was no injury on any part of the body. If act of sexual assault is done at the rough place, possibility of getting scratches, bruises or injury on the buttocks or on parts of leg and backside could be there.

23. No explanation has been given nor any specific case has been set up by the accused in his examination under Section 342 of the Code of Criminal Procedure except the plea that rape has been committed by PW- Om Parkash.

24. I have considered the submissions of learned Counsel appearing for the parties, as also the evidence produced by the prosecution in support of its case.

I will now deal with the submissions raised at the bar.

25. I have not noticed any such contradictions in the statements of the prosecution witnesses, which may be termed as major contradictions. The prosecutrix knew the appellant/accused before the occurrence. Her version of the prosecution story, indicating presence of appellant/accused on place of occurrence, is supported by all the prosecution witnesses. Prosecution witness -- Bimla Devi, supports her version of the occurrence. She, in unambiguous terms states that she had carried the prosecutrix on her back from the place of occurrence where she was found to have been raped by the appellant/accused. Statement of prosecutrix and PW- Bimla Devi, are supported by PW- Om Parkash, who too has seen the appellant/accused running from the place of occurrence.

26. In view of evidence of these three prosecution witnesses, which could not be shaken in cross-examination, there is no escape except to hold that the presence of appellant/accused on place of occurrence stood established by the prosecution. Minor contradictions, in the statements of prosecution witnesses, as to the manner in which the occurrence had taken place and non-mention of some insignificant

portions of the statements recorded under Section 161 Cr.P.C, does not, in any way, affect the credibility of the prosecution witnesses, whose statements have been found by me to be natural, convincing and without any embellishment.

27. The statement of the prosecutrix, that she was raped, by the appellant/accused, without her consent, gets corroborated from the testimony of Prosecution witness- Bimla Devi, who, immediately after the occurrence had found the prosecutrix in an injured condition and blood was oozing from the private part of the prosecutrix.

28. No contradiction in this part of the prosecution version has been noticed from the reading of the statements of the prosecution witnesses. The first point raised by Sh. Kotwal, therefore, fails.

29. The second submission of Sh. Kotwal that statement of PW- Om Parkash, is unbelievable and if believed, would demolish other evidence produced by the prosecution, too is unconvincing. This witness has supported the prosecution version about the presence of appellant/accused on place of occurrence and as also the presence of prosecutrix and PW- Bimla Devi on spot. Even if, one were to disbelieve PW- Om Parkash, although there are no reasons to disbelieve this witness, yet, the evidence of the prosecutrix, stands corroborated by the evidence of the PW- Bimla Devi. Evidence of these two prosecution witnesses is sufficient to establish that it was appellant/accused who had sexual intercourse with the prosecutrix and that too, without her consent.

30. The second point raised by Sh. Kotwal, too is, thus, without any basis.

The third point raised by Sh. Kotwal, learned Counsel appearing for appellant/accused, that prosecutrix was more than 14 years and that prosecution has not proved the age of the prosecutrix by leading cogent evidence, too is untenable.

31. The prosecutrix has given her age as 13 years at the time when she had appeared in the witness box on 15.2.1997. She has not been cross-examined regarding her age by the appellant/accused. Her father's statement too supports

her age.

32. Prosecution witness- Dr. Dinesh Khajuria, Radiologist, has examined the prosecutrix for ascertaining her age. He has testified her age to be less than 14 years. This witness though in the cross-examination has deposed that the age of the prosecutrix could be between 14 to 17 years because an error of margin in the age determined on radiological examination could be plus minus three years. According to this witness the Epiphyses of Ankle, Shoulder, Knee, Wrist and Elbow joints, does usually take place between 14 to 17 years.

33. In this case it was noticed by him that Epiphyses of Ankle, Shoulder, Knee, Wrist and Elbow joints, have appeared but not fused.

34. In view of the statement of the radiologist, it can, be safely concluded that the age of the prosecutrix was, in any case, less than the prescribed minimum 16 years. Submission of Sh. Kotwal, learned Counsel appearing for appellant/accused, that age of the prosecutrix was more than 14 years is, thus, unfounded. That apart, even if, one were to hold that the age of the prosecutrix was more than 14 years, in that eventuality too, the appellant/accused cannot derive any benefit, because the age of the prosecutrix is relevant only if the accused, had to project the plea that sexual intercourse was with the consent of prosecutrix and was not rape as defined in Section 375 of Ranbir Penal Code.

35. In view of the introduction of Section 114B in the Evidence Act, Samvat 1977, a presumption is required to be drawn in favour of the prosecution case that the sexual intercourse was without the consent of prosecutrix, who, in the present case, has specifically stated that the sexual intercourse was without her consent and rather by force by the appellant/accused.

36. The appellant/accused has neither led any evidence nor projected any such case during the currency of the trial to prove or even suggest that the prosecutrix was a consenting party to the sexual intercourse. In this view of the matter, this submission of Sh. Kotwal, learned Counsel appearing for the appellant/accused, too, fails.

37. The next contention raised by Sh. Kotwal, learned Counsel appearing for the appellant/accused, that there is variance between ocular and medical evidence and that absence of spermatozoa in the vagina negatives the story of rape, too is unfounded and without any basis. The medical evidence, proves the injuries on the private part of the prosecutrix, it further testifies the injury being recent. The statement of the Doctor, proves the version given by the prosecution witnesses and I do not find any variance between the ocular and medical evidence. Absence of spermatozoa in the vagina, does not negate the prosecution case and the unimpeachable testimony of prosecutrix, Bimla Devi and Sham Lal, father of the prosecutrix. It has also not been pointed out as to how the non-production of Investigating Police Officer has caused any prejudice to the appellant/accused or resulted in Failure of Justice. The evidence of Investigating Police Officer, in such cases, is only of corroborative nature. His evidence is not of any substantive character. The contradictions, though of very minor nature noticed in the prosecution case, even if, put to the Investigating Police Officer, would not have negated the prosecution story, which stands amply proved by the prosecution.

38. I am, thus, of the view that non-production of the Investigating Police Officer has not resulted in Failure of Justice or prejudice to the accused as projected by Sh. Kotwal, learned Counsel appearing for appellant/accused.

Rahim Beg and Ors. v. State of U.P. reported as : 1972 CriLJ1260 cited by Sh. Kotwal, is not of any help to his case because in this case, rape was alleged to have been committed by a fully developed man on a girl of 10 or 12 years and whose hymen was intact, but in the present case, Doctor has proved that the hymen of the prosecutrix was torn and the age of the appellant/accused was disclosed as 16 years in his statement under Section 342 Cr.P.C on the day of occurrence.

The judgment is, thus, not applicable.

39. Likewise, judgment reported as 2005 Criminal Law Journal 1503 titled Appasaheb Maruti Shedge v. State of Maharashtra and Anr., is also not of any help to the appellant/accused, because the judgment refers to a case which was based on circumstantial evidence. In this case, no external injury has been found

on the private part of the patient and the hymen too in the case was not torn and had healed.

40. The facts and circumstances of the cases, cited by Sh. Kotwal, learned Counsel appearing for appellant/accused, do not provide any support to the case of the appellant/accused.

All the points raised by Sh. Kotwal, thus, fail.

41. It needs to be noticed that the appellant/accused, appears to have made all attempts during the trial to screen himself of the offence committed by him. His latest attempt was an application under Section 540 Cr.P.C whereby he sought to compound the case on the plea that the father of the prosecutrix, had, admitted that he had made a false statement in the Court. The application for compounding the case is reported to have been signed by father of the prosecutrix too.

42. Learned Additional Sessions Judge, Ramban, has rejected this application on good grounds. I do not see any illegality in the order passed by learned Additional Sessions Judge, Ramban. Power under Section 540 Cr.P.C cannot be invoked for such purposes. This tendency has been noticed amongst the accused who, on finding that they may be convicted for the offence committed by them, resort to tactics of either winning over the complainants or eye-witnesses by exerting undue influence or coercion and money power to compel the witnesses to change their statements, such tendency of the accused is required to be curbed. Power under Section 540 Cr.P.C, has to be exercised so as to advance the cause of Justice and not with a view to facilitate the accused to escape punishment and thereby cause Failure of Justice and affect rule of law.

43. Rape is not a merely physical assault. It is restrictive of the whole personality of the victim, whereas a rapist degrades the very soul of the helpless female. It is, therefore, the responsibility of the Courts, while trying an accused on charges of rape that they deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which may not be fatal to throw out an otherwise reliable prosecution case. If

evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason, it is found that it may be difficult to place implicit reliance on her testimony, it is only in this case that the Courts may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix has to be appreciated in the background of the entire case.

44. In the present case, I find the statement of the prosecutrix, quite convincing. Although no corroboration of her statement was needed, yet the prosecution has succeeded in corroborating her evidence too by the evidence of PW- Bimla Devi, PW- Om Parkash and the medical evidence.

45. I have gone through the judgment of learned Additional Sessions Judge, Ramban. Learned Sessions Judge has appreciated the evidence and analyzed the case of the prosecution in its right perspective and in accordance with law. There are no reasons to take a view, contrary to the one, which has been taken by the learned trial court. The view of the learned trial court is supported by the prosecution evidence.

46. I, thus, do not find any merit in this appeal, which is, accordingly, dismissed. Order dated 17.01.2001, of this Court, suspending sentence of the appellant/accused and directing his release on bail, is withdrawn. The appellant/accused shall serve the remaining sentence.

47. A copy of the judgment be sent to the learned Additional Sessions Judge, Ramban, for taking requisite proceedings pursuant to the dismissal of the appellant's appeal.