

CASE NO.:  
Appeal (crl.) 1368 of 2005

PETITIONER:  
Santosh Kumar

RESPONDENT:  
State of M.P.

DATE OF JUDGMENT: 25/08/2006

BENCH:  
G.P. Mathur & R.V. Raveendran

JUDGMENT:  
J U D G M E N T

G. P. MATHUR, J.

Santosh Kumar has preferred this appeal, by special leave, against the judgment and order dated 13.12.2004 of Madhya Pradesh High Court, by which the appeal filed by him was dismissed and the judgment and order dated 23.10.1989 of Sessions Judge, Raisen, convicting him under Section 376(2)(g) IPC and imposing the sentence of 10 years RI and a fine of Rs.500/- and in default to undergo six months RI was affirmed.

2. The case of the prosecution, in brief, is that the prosecutrix Halki Bai, who was resident of village Modakpur had been deserted by her husband and in order to maintain herself she was doing some work as labour. She came by a bus to Silvani in search of work in the night of 20.5.1985. After she had boarded the bus the conductor Munim Mishra enquired where she was going and when she informed him that she was going to Silvani in search of some work, he did not ask for money for issuing to her a ticket. The bus reached Silvani at about 10.00 p.m. and when she was trying to get down, Munim Mishra told her that she may sleep in the bus itself rather than going anywhere in the night and in the morning he would arrange some work for her. Halki Bai then slept on the rear seat of the bus. At about midnight, when all the shops at the bus stand had closed, the driver of the bus, viz. Santosh Kumar (appellant) pressed her breasts and started removing her dhoti which she was wearing. When she tried to raise an alarm, Munim Mishra caught hold of her hands and also gagged her and then the appellant Santosh Kumar ravished her. Thereafter, Santosh Kumar caught hold of her hands and Munim Mishra ravished her. Hearing her alarm, three constables who were on patrol duty and some others came near the bus, but both the accused managed to run away. The policemen brought Halki Bai to P.S. Silvani, where she lodged the FIR of the incident at 1.00 a.m. on 21.5.1985. Halki Bai was sent for medical examination where PW.3 Dr. Z. Fezi examined her at 2.00 a.m. and prepared a medical examination report which is Ex. P-8. After completion of the investigation, charge sheet was submitted against both the accused viz. Santosh Kumar (appellant) and Munim Mishra.

3. The learned Sessions Judge framed charge under Section 376 IPC against both the accused, who pleaded not guilty and claimed to be tried. In order to establish its case, the prosecution examined 10 witnesses and filed some documentary evidence. The appellant and co-accused Munim Mishra in their statements under Section 313 Cr.P.C. denied the prosecution case and examined two witnesses in their defence. The learned Sessions Judge believed the case of the prosecution and convicted and sentenced both the accused as stated

earlier. The appeal preferred by the accused was dismissed by the High Court by the judgment and order dated 13.12.2004.

4. During trial the prosecution examined four witnesses of fact. PW-10 Halki Bai in her deposition gave details of the incident and stated that first she was ravished by the appellant Santosh Kumar and then by Munim Mishra. PW-1 Mukhtar Hasan, who was working as a helper in the Forest Department, deposed that he was going to the Range Office and at about 12.00 p.m. when he reached the bus stand, he saw some persons standing near a bus which had come from Sagar. Shortly thereafter, some police constables also came there. He saw Halki Bai and both the accused inside the bus. Halki Bai informed them that both the accused had ravished her. The witness was declared hostile and was cross-examined by the State counsel. PW-7 Dinesh Kumar, who is a constable, deposed that he along with PW-8 Hari Narayan and Narayan Singh were on patrol duty and when they reached near the bus stand, they heard the shrieks of a lady coming from the bus. They immediately rushed and entered the bus from the rear side, when he saw that the appellant Santosh Kumar was catching hold of the hands of the prosecutrix and Munim Mishra was committing rape upon her. Both the accused jumped from the bus and ran away after seeing the police personnel. Similar statement has been given by PW-8 Hari Narayan, constable.

5. The prosecutrix PW-10 Halki Bai has clearly deposed in her statement that both the accused, viz., Santosh Kumar and Munim Mishra had ravished her one after another. There is absolutely no reason why Halki Bai would falsely implicate the accused as they were strangers to her. The testimony of prosecutrix finds corroboration from the testimony of two constables, namely, PW-7 Dinesh Kumar and PW-8 Hari Narayan. PW-1 Mukhtar Hasan has also supported a part of the prosecution case in his examination-in-chief, namely, that after hearing the shrieks of a girl, he went inside the bus where he found the two accused holding the hands of Halki Bai. He further deposed that Halki Bai had informed them that the accused had ravished her. Though PW-1 was declared as hostile, his evidence is not to be treated as effaced from record and can be relied upon in part. In *Sat Paul v. Delhi Administration* AIR 1976 SC 294 after referring to several decisions on the point, it was held :-

" Even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as matter of prudence, discard his evidence in toto. "

In *Gura Singh v. State of Rajasthan* AIR 2001 SC 330 it was held :-

" It is misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party

calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the Court of the fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the Court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy. "

Therefore, the testimony of PW-1 Mukhtar Hasan to the extent that he went inside the bus after hearing the shrieks of Halki Bai and that he saw the accused holding her hands and also the further fact that Halki Bai immediately stated that the accused had committed rape upon her can be believed. The learned Sessions Judge and also the High Court have placed reliance on his testimony as he is an independent witness. Thus the oral evidence on record fully establishes the case of the prosecution.

6. Learned counsel for the appellant has submitted that the medical evidence does not disclose that PW-10 Halki Bai had been subjected to rape as there were no injuries on her private parts and, therefore, the entire prosecution case becomes doubtful. The prosecutrix had been medically examined at 2.00 a.m. on 21.5.1985 by PW.3 Dr. Z. Fezi, Woman Assistant Surgeon, at Silvani. She had prepared a medical report, Ex.P-8 and the relevant part thereof is being reproduced below :-

" Marks of External Injury on body :- (1) Three abrasions on breast right upper and outer quadrant which are nail marks as they are crescentic in shape of sizes 0.5 cm to 1.0 cm.

(2) Three abrasions on breast left upper and inner quadrant which are nail marks as they are crescentic in shape of sizes 0.5 to 1.0 cm.

(3) One bruise left upper arm (below post fold of axilla) Posterolaterally = " x =" red in colour.

Public Hair \026 Present, black in colour.

External Genitals \026 No seminal stains, no bruising or laceration seen.

Hymen \026 Torn, several small granular tags present, no fresh tear present. Fourchette and posterior commissure are intact.

Vagina \026 Admits two fingers with resistance. No laceration seen.

Cervix \026 Firm, cleft transversely. No laceration seen.

Uterus \026 Retroverted, normal size, fornices clear.

Perineum \026 Normal.

Opinion \026 (1) No definite opinion regarding rape can be given till report of vaginal smear is available.

(2) External injuries are of within 24 hours duration and simple in nature.

(3) One sealed packet containing two slides of vaginal smear another sealed packet containing clothes (sadi and petticoat) and one sealed vial containing cutted public hair \026 advised to send for chemical examination. "

In her deposition the doctor has stated that the age of Halki Bai was about 18 years and she was of average built having a height of 159 cms. and her weight was 100 pounds. She has also deposed that no definite opinion could be given regarding rape till the report of vaginal smear was received. It is noted by the High Court that till the

conclusion of the session trial, the report of chemical examination had not been received.

7. The question, which arises for consideration, is whether the proved facts establish the offence of rape. It is not necessary for us to refer to various authorities as the said question has been examined in considerable detail in *Madan Gopal Kakkad v. Naval Dubey* (1992) 3 SCC 204 and paragraphs 37 to 39 of the said judgment are being reproduced below:-

" 37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in *Medical Jurisprudence and Toxicology* (Twenty First Edition) at page 369 which reads thus:

" Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

38. In *Parikhs Textbook of Medical Jurisprudence and Toxicology*, the following passage is found:

" Sexual intercourse: In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

39. In *Encyclopedia of Crime and Justice* (Vol. 4) at page 1356, it is stated:

".....even slight penetration is sufficient and emission is unnecessary. "

Therefore, absence of injuries on the private parts of a victim specially a married lady cannot, ipso facto, lead to an inference that no rape has been committed.

8. The medical examination report of the victim shows that she received injuries on front portion of the body and also on her hands. The mere fact that no injuries were found on private parts of her body cannot be a ground to hold that no rape was committed upon her or that the entire prosecution story is false. It may be noted that Halki Bai is a married grown up lady and in such circumstances the absence of injuries on her private parts is not of much significance.

9. The accused in their defence examined two witnesses. DW-1 Gopi Aggarwal deposed that he has a hotel (restaurant) at a short distance from Silvani bus stand and the same remains open till about 11.00 in the night. The bus which is operated by the accused normally stops in front of his hotel at about 9.00-10.00 p.m. He

further deposed that no incident in the said bus had taken place so long as he was present in his hotel. The evidence of DW-1 is of neutral character and does not discredit the prosecution case. DW-2 Gopi Lal Yadav has deposed that he works as a driver on a bus which goes from Sagar to Silvani and normally his vehicle arrives at Silvani at about 8.30 p.m. and stops in front of the hotel. About 4-5 years back while he was taking food in the hotel, he saw that some talks were going on between Santosh appellant and a few police personnel regarding payment of 'hafta' (weekly payment). After exchange of some hot words had taken place, the police personnel caught hold of the appellant and took him along with them. At that time Munim Mishra accused was not present as he had gone for the purpose of repair of the tyre which had got punctured. Like the appellant, DW-2 works as a driver of a bus operating on Sagar-Silvani route. He did not make any protest when the police personnel allegedly took the appellant Santosh in their custody on the ground of non-payment of 'hafta'. Nor did he make any complaint to any superior authority regarding the alleged high-handedness of the police personnel at any subsequent point of time. He has come out with his version of the incident for the first time when he deposed in Court on 17.10.1989 i.e. nearly 4-1/2 years after the incident. The learned Sessions Judge and also the High Court have rightly discarded the evidence of DW-2 and we find no reason to take a different view.

10. Having given our careful consideration to the submissions made by learned counsel for the appellant, we are of the opinion that the prosecution has established its case against the appellant beyond any shadow of doubt. The learned Sessions Judge and the High Court have rightly convicted the appellant under Section 376(2)(g) IPC and there is absolutely no ground which may warrant interference by this Court. The appeal is accordingly dismissed.