

Tukaram and Another

Vs

The State of Maharashtra

Criminal Appeal No. 64 of 1977

(Jaswant Singh, P. S. Kailasam, A. D. Koshal JJ)

15.09.1978

JUDGMENT

KOSHAL, J. –

1. This appeal by special leave is directed against the judgment dated October 12, 1976 of the High Court of Judicature at Bombay (Nagpur Bench) reversing a Judgment of acquittal of the two appellants of an offence under Section 376 read with Section 34 of the Indian Penal Code recorded by the Sessions Judge, Chandrapur, on June 1, 1974, and convicting Tukaram, appellant 1, of an offence under Section 354 of the Code and the second appellant named Ganpat of one under Section 376 thereof. The sentences imposed by the High Court on the two appellants are rigorous imprisonment for a year and 5 years respectively.

2. Briefly stated, the prosecution case is this. Appellant 1, who is a Head Constable of Police, was attached to the Desai Gunj police station in March 1972, and so was appellant 2, who is a police constable.

3. Mathura (PW 1) is the girl who is said to have been raped. Her parents died when she was a child and she is living with her brother, Gama (PW 3). Both of them worked as labourers to earn a living. Mathura (PW 1) used to go to the house of Nushi (PW 2) for work and during the course of her visits to that house, came into contact with Ashok, who was the sister's son of Nushi (PW 2) and was residing with the latter. The contact developed into an intimacy so that Ashok and Mathura (PW 1) decided to become husband and wife.

4. On March 26, 1972, Gama (PW 3) lodged report Exh P8 at police station Desai Gunj alleging that Mathura (PW 1), had been kidnapped by Nushi (PW 2), her husband Laxman and the said Ashok. The report was recorded by Head Constable Baburao (PW 8) at whose instance all the three persons complained against as well as Mathura (PW 1) were brought to the police station at about 9 p.m. and who recorded the statements of the two lovers. By then it was about 10.30 p.m. and Baburao (PW 3) told them to go after giving them a direction that Gama (PW 3) shall bring a copy of the entry regarding the birth of Mathura (PW 1) recorded in the relevant register and himself left for his house as he had yet to take his evening meal. At that time the two appellants were present at the police station.

5. After Baburao (PW 8) had gone away, Mathura (PW 1), Nushi (PW 2), Gama (PW 2) and Ashok started leaving the police station. The appellants however, asked Mathura (PW 1) to wait at the police station and told her companions to move out. The direction was complied with. Immediately thereafter Ganpat (appellant) took Mathura (PW 1) into a latrine situated at the rear of the main

building, loosened her underwear, lit a torch and stared at her private parts. He then dragged her to a chhapri which serves the main building as its back verandah. In the chhapri he felled her on the ground and raped her in spite of protests and stiff resistance on her part. He departed after satisfying his lust and then Tukaram appellant, who was seated on a cot nearby, came to the place where Mathura (PW 1) was and fondled her private parts. He also wanted to rape her but was unable to do so for the reason that he was in a highly intoxicated condition.

6. Nushi (PW 2), Gama (PW 3) and Ashok, who had been waiting outside the police station for Mathura (PW 1) grew suspicious when they found the lights of the police station being turned off and its entrance door being closed from within. They went to the rear of the police station in order to find out what the matter was. No light was visible inside and when Nushi (PW 2) shouted for Mathura (PW 1) there was no response. The noise attracted a crowd and sometime later Tukaram appellant emerged from the rear of the police station and on an enquiry from Nushi (PW 2) stated that the girl had already left. He himself went out and shortly afterwards Mathura (PW 1) also emerged from the rear of the police station and informed Nushi (PW 2) and Gama (PW 3) that Ganpat had compelled her to undress herself and had raped her.

7. Nushi (PW 2) took Mathura (PW 1) to Dr. Khune (PW 9) and the former told him that the girl was subjected to rape by a police constable and a Head Constable in police station Desai Gunj. The doctor told them to go the police station and lodge a report there.

8. A few persons brought Head Constable Baburao (PW 8) from his house. He found that the crowd had grown restive and was threatening to beat Ganpat appellant and also to burn down the police station. Baburao (PW 8), however, was successful in persuading the crowd to disperse and thereafter took down the statement (Exh 5) of Mathura (PW 1) which was registered as the first information report.

9. Mathura (PW 1) was examined by Dr. Kamal Shastrakar at 8 p.m. on March 27, 1972. The girl had no injury on her person. Her hymen revealed old ruptures. The vagina admitted two fingers easily. There was no matting of the pubic hair. The age of the girl was estimated by the doctor to be between 14 and 16 years. A sample of the pubic hair and two vaginal-smear slides were sent by the doctor in a sealed packet to the Chemical Examiner who found no traces of semen therein. Presence of semen was however detected on the girl's clothes and the pyjama which was taken off the person of Ganpat appellant.

10. The learned Sessions Judge found that there was no satisfactory evidence to prove that Mathura was below 16 years of age on the date of the occurrence. He further held that she was "a shocking liar" whose testimony "is riddled with falsehood and improbabilities". But he observed that "the farthest one can go into believing her and the corroborative circumstances, would be the conclusion that while at the police station, she had sexual intercourse and that, in all probability, this was with accused 2". He added however that there was a world of difference between "sexual intercourse" and "rape", and that rape had not been proved in spite of the fact that the defence version which was a bare denial of the allegations of rape, could not be accepted at its face value. He further observed : "Finding Nushi angry and knowing that Nushi would suspect something fishy, she (Mathura) could not have very well admitted that of her own free will, she had surrendered her body to a police constable. The crowd included her lover Ashok and she had to sound virtuous before him. This is why - this is a possibility - she might have invented the story of having been confined at the police station and raped by accused 2. Mathura is habituated to sexual intercourse, as is clear from the testimony of Dr. Shastrakar, and accused 2 is no novice. He speaks of nightly discharges. This may

be untrue, but there is no reason to exclude the possibility of his having stained his pyjama with semen while having sexual intercourse with persons other than Mathura. The seminal stains on Mathura can be similarly accounted for. She was after all living with Ashok and very much in love with him ...." and then concluded that the prosecution had failed to prove its case against the appellants.

11. The High Court took note of the various findings arrived at by the learned Sessions Judge and then itself proceeded to sift the evidence bearing in mind the principle that a reversal of the acquittal would not be justified if the view taken by the trial Court was reasonably possible, even though the High Court was inclined to take a different view of the facts. It agreed with the learned Sessions Judge in respect of his finding with regard to the age of Mathura (PW 1) but then held that the deposition of the girl that Ganpat (appellant) had had sexual intercourse with her was reliable, supported as it was by circumstantial evidence, especially that of the presence of stains of semen on the clothes of the girl and Ganpat (appellant). The fact that semen was found neither on the pubic hair nor on the vaginal-smears taken from her person, was considered to be of no consequence by reason of the circumstance that the girl was examined by the lady doctor about 20 hours after the event, and of the probability that she had taken a bath in the meantime. The High Court proceeded to observe that although the learned Sessions Judge was right in saying that there was a world of difference between sexual intercourse and rape, he erred in appreciating the difference between consent and "passive submission". In coming to the conclusion that the sexual intercourse in question was forcible and amounted to rape, the High Court remarked :

Besides the circumstances that emerge from the oral evidence on the record, we have to see in what situation Mathura was at the material time. Both the accused were strangers to her. It is not the case of the defence that Mathura knew both these accused or any of them since before the time of occurrence. It is, therefore, indeed, highly improbable that Mathura on her part would make any overtures or invite the accused to satisfy her sexual desire. Indeed it is also not probable that a girl who was involved in a complaint filed by her brother would make such overtures or advances. The initiative must, therefore, have come from the accused and if such an initiative comes from the accused, indeed she could not have resisted the same on account of the situation in which she had found herself especially on account of a complaint filed by her brother against her which was pending enquiry at the very police station. If these circumstances are taken into consideration it would be clear that the initiative for sexual intercourse must have come from the accused or any of them and she had to submit without any resistance. Mere passive or helpless surrender of the body and its resignation to the other's lust induced by threats or fear cannot be equated with the desire or will, nor can it furnish an answer by the mere fact that the sexual act was not in opposition to such desire or volition. On the other hand, taking advantage of the fact that Mathura was involved in a complaint filed by her brother and that she was alone at the police station at the dead hour of night, it is more probable that the initiative for satisfying the sexual desire must have proceeded from the accused, and that victim Mathura must not have been a willing party to the act of the sexual intercourse. Her subsequent conduct in making statement immediately not only to her relatives but also to the members of the crowd leave no manner of doubt that she was subjected to forcible sexual intercourse.

12. In relation to Tukaram (appellant), the High Court did not believe that he had made any attempt to rape the girl but took her word for granted insofar as he was alleged to have fondled her private

parts after the act of sexual intercourse by Ganpat appellant.

13. It was on these premises that the High Court convicted and sentenced the two appellants as aforesaid.

14. The main contention which has been raised before us on behalf of the appellants is that no direct evidence being available about the nature of the consent of the girl to the alleged act of sexual intercourse, the same had to be inferred from the available circumstances and that from those circumstances it could not be deduced that the girl had been subjected to or was under any fear or compulsion such as would justify an inference of any "passive submission", and this contention appears to us to be well-based. As pointed out earlier, no marks of injury were found on the person of the girl after the incident and their absence goes a long way to indicate that the alleged intercourse was a peaceful affair, and that the story of a stiff resistance having been put up by the girl is all false. It is further clear that the averments on the part of the girl that she had been shouting loudly for help are also a tissue of lies. On these two points the learned Sessions Judge and the High Court also hold the same view. In coming to the conclusion that the consent of the girl was a case of "passive submission", the High Court mainly relied on the circumstance that at the relevant time the girl was in the police station where she would feel helpless in the presence of the two appellants who were persons in authority and whose advances she could hardly repel all by herself and inferred that her submission to the act of sexual intercourse must be regarded as the result of fear and, therefore, as no consent in the eye of law. This reasoning suffers from two errors. In the first place, it loses sight of the fact which was admitted by the girl in cross-examination and which has been thus described in the impugned judgment :

She asserted that after Baburao had recorded her statement before the occurrence, she and Gama had started to leave the police station and were passing through the front door. While she was so passing, Ganpat caught her. She stated that she knew the name of accused 2 as Ganpat from Head Constable Baburao while giving her report Exh 5. She stated that immediately after her hand was caught by Ganpat she cried out. However, she was not allowed to raise the cry when she was being taken to the latrine but was prevented from doing so. Even so, she had cried out loudly. She stated that she had raised alarm even when the underwear was loosened at the latrine and also when Ganpat was looking at her private parts with the aid of a torch. She stated that the underwear was not loosened by her.

15. Now the cries and the alarm are, of course, a concoction on her part but then there is no reason to disbelieve her assertion that after Baburao (PW 8) had recorded her statement, she and Gama had started leaving the police station and were passing through the entrance door when Ganpat appellant caught hold of her and took her away to the latrine. And if that be so, it would be preposterous to suggest that although she was in the company of her brother (and also perhaps of Ashok and her aunt Nushi) and had practically left the police station, she would be so overawed by the fact of the appellants being persons in authority or the circumstance that she was just emerging from a police station that she would make no attempt at all to resist. On the other hand, her natural impulse would be to shake off the hand that caught her and cry out for help even before she noticed who her molester was. Her failure to appeal to her companions who were no others than her brother, her aunt and her lover, and her conduct in meekly following Ganpat appellant and allowing him to have his way with her to the extent of satisfying his lust in full, makes us feel that the consent in question was not a consent which could be brushed aside as "Passive submission".

16. Secondly, it has to be borne in mind that the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and that such onus never shifts. It was, therefore, incumbent on it to make out that all the ingredients of Section 375 of the Indian Penal Code were present in the case of the sexual intercourse attributed to Ganpat (appellant). That section lays down :

375. A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions :

First. - Against her will.

Secondly. - Without her consent.

Thirdly. - With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly. - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. - With or without her consent, when she is under sixteen years of age.

Explanation. - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception. - Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

17. The section itself states in clauses Thirdly and Fourthly as to when a consent would not be a consent within the meaning of clause Secondly. For the proposition that the requisite consent was lacking in the present case, reliance on behalf of the state can be placed only on clause Thirdly so that it would have to be shown that the girl had been put in fear of death or hurt and that that was the reason for her consent. To this aspect of the matter the High Court was perhaps alive when it talked of "passive submission" but then in holding that circumstances available in the present case make out a case of fear on the part of the girl, it did not give a finding that such fear was shown to be that of death or hurt, and in the absence of such a finding, the alleged fear would not vitiate the consent. Further, for circumstantial evidence to be used in order to prove an ingredient of an offence, it has to be such that it leads to no reasonable inference other than that of guilt. We have already pointed out that the fear which clause Thirdly of section 375 speaks of is negated by the circumstance that the girl is said to have been taken away by Ganpat right from amongst her near and dear ones at a point of time when they were all leaving the police station together and were crossing the entrance gate to emerge out of it. The circumstantial evidence available, therefore, is not only capable of being construed in a way different from that adopted by the High Court but actually derogates in no uncertain measure from the inference drawn by it.

18. In view of what we have said above, we conclude that the sexual intercourse in question is not proved to amount to rape and that no offence is brought home to Ganpat (appellant).

19. The only allegation found by the High Court itself has taken note of the fact that in the first

information report (Exh 5) the girl had made against Tukaram serious allegation on which she had gone back at the trial and the acts covered by which she attributed in her deposition to Ganpat instead. Those allegations were that Tukaram who had caught hold of her in the first instance, had taken her to the latrine in the rear of the main building, had lit a torch and had stared at her private parts in the torchlight. Now if the girl could alter her position in regard to these serious allegations at will, where is the assurance that her word is truthful in relation to what she now says about Tukaram ? The High Court appears to have been influenced by the fact that Tukaram was present at the police station when the incident took place and that he left it after the incident. This circumstance, in our opinion, is not inculpatory and is capable of more explanations than one, We do not, therefore, propose to take the girl at her word in relation to Tukaram (appellant) and hold that the charge remains wholly unproved against him.

20. In the result, the appeal succeeds and is accepted. The judgment of the High Court is reversed and the conviction recorded against as well as the sentences imposed upon the appellants by it are set aside.

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