

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

Criminal Appeal No.8-A/2004

Date of decision : 16th of May, 2007

Ghulam Mohd. Mir **V/s** **State of J & K**

Coram:

Hon'ble Mr. Justice Virender Singh

Appearing Counsel:

For the Appellant(s) : Mr. S.A. Salaria, Sr. Advocate, with
Mr. Raj Kamal, Advocate.

For the Respondent(s) : Mr. A.H. Qazi, Additional Advocate General.

- i) Whether approved for reporting in Press/Media : No.

ii) Whether to be reported in Digest/Journal : Yes

Appellant, Ghulam Mohd. Mir, (hereinafter to be referred to as Accused) aged 70 years and a handicapped person being paralytic, as stated by learned senior counsel, Mr. S.A. Salaria, was charged under Section 376 read with Sections 511 and 342 RPC on the allegations that on 28-05-1998, he allegedly made an attempt to commit rape with the prosecutrix (name not being disclosed) in his room situated in city of Poonch. Vide impugned judgment of learned Sessions Judge, Poonch, dated 20-02-2004, he stands convicted for the said charges and has been sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.5,000/- under Sections 376/511 RPC and in default of payment of fine to further undergo rigorous imprisonment for one year. Sentence imposed upon him for Section 342 RPC is rigorous imprisonment for one year and a fine of Rs.1,000/-; in default thereof to

undergo rigorous imprisonment for three months. Both the sentences were ordered to run concurrently. The fine, on realization, is to be paid to the prosecutrix as compensation.

Aggrieved by the same, the accused has preferred the instant appeal, which is already admitted, and the substantive sentence of the accused is suspended during the pendency of the appeal.

The case of the prosecution, in brief, is that, on 28-05-1998, the accused took the prosecutrix and also her husband to his room, from where he sent the husband of the prosecutrix to local bazaar to fetch milk and in his absence, he started pressing breasts of the prosecutrix. He even went to the extent of breaking open the string of her 'salwar' and had given a bite on her cheek. It is then the case of the prosecution that the prosecutrix swallowed 'naswar', which she was having with her and as a result whereof, she started vomiting and closed her legs to save her honour. Further case of the prosecution is that the accused confined the prosecutrix wrongfully in his room for about half an hour till her husband came back and saved her from his clutches. Ultimately, on a written report of the prosecutrix, the police of Police Station, Poonch, swung into action on 01-06-1998 and got registered a case bearing FIR No.58/98 for the offences punishable under Sections 376/511, 354 and 342 RPC. During the investigation, a rough site plan of the place of occurrence was prepared, the prosecutrix was got medically examined by Dr. Sakhi Mohd on 01-06-1998 itself, and

statements of the prosecution witnesses were recorded. After completion of the investigation, the challan was submitted against the accused in terms of Section 173 Cr. P.C. Consequently, he was charged for the offences punishable under Sections 376/511 and 342 RPC, for which he now stands convicted and sentenced.

Prosecutrix at the time of occurrence was about 45 years of age. When stepped into witness box, she stated that she did not know the accused prior to the occurrence and had gone to hospital for getting herself checked. Thereafter, she went to the bazaar in the company of her husband, where the accused met them and enquired about her problem from her husband, who told the accused that she was suffering from pain in her legs, to which the accused replied that he would cure her by ‘mantras’ and thereafter he took them to his house. She further stated that her husband was sent for fetching milk and in his absence, the accused caught hold of her forcibly and did not even allow her to open the door, which was bolted from inside. Some one had pushed the door from outside, which had emboldened her and she forcibly opened the bolt and while opening the bolt of the door, the accused broke open the string of her ‘salwar’ and removed her hand from the bolt. She then stated that the person, who had pushed the door from outside was the owner of the house. For explaining the delay, the prosecutrix stated that on that day, they remained in a mosque and on the next day, when her husband asked the accused as to what he had done, he admitted his fault and executed a ‘Mafinama’ and, thereafter, they went to the Police

Station and lodged a report. She further stated that the accused had kept her wrongfully in the room for half an hour. This witness proved her statement, which is the basis of the recording of the FIR.

In cross-examination, the prosecutrix stated that they had gone to the Police Station on the next day at about 2.00 p.m. She categorically stated that before lodging the report, she went to the hospital where she was medically examined and the medical report was given to the police. She also stated in her cross-examination that at the time of occurrence, the people were moving near the place of occurrence on the road, but due to fear of getting defame, she did not disclose this fact to any body.

PW Badar Din is the husband of the prosecutrix, who reiterated his case almost in the same manner. He, however, stated that when he reached back, he found that 'salwar' of the prosecutrix was undressed. The prosecutrix disclosed that the accused had not done any wrong to her. He further disclosed that the breasts of his wife were blood stained. This witness further talked of the 'Mafinama' tendered by the accused.

In his cross-examination, this witness stated that the application was moved to the police after four days of the occurrence, which was marked by SSP and handed over to SHO. He, however, denied the suggestion given to him that he owed some amount to the accused and for that purpose, the present case was foisted upon him.

PW Mohd. Akhtar Khan stated that on 01-06-1998, the accused had produced a ‘Razinama’ before the Investigating Officer, which was taken into possession vide seizure memo. He proved the same.

In cross-examination, this witness stated that the ‘Razinama’ was produced by the husband of the prosecutrix, which was taken into custody and the accused was locked up. He further stated that ‘Razinama’ did not bear any date and was also not witnessed by anybody.

PW Dr. Sakhi Mohd. has examined the prosecutrix on 01-06-1998 in District Hospital, Poonch, and found the following injuries:

- “1) A scratch over the left side of face.
- 2) Complain of pain over the memory glands.
- 3) Complain of pain over the right shoulder.
- 4) Complain of pain over the right buttock region.”

According to this witness, the injuries were simple in nature caused by a blunt object within the duration of less than 48 hours at the time of examination. He proved the medical certificate also.

This is all which is produced by the prosecution in evidence before the trial Court.

When examined under Section 342 Cr. P.C., the accused admitted that he had executed ‘Razinama’, but he denied to have committed any act with the prosecutrix. He pleaded his innocence. He further pleaded that, in fact, being a Munshi, he wrote an application of

the husband of the prosecutrix for his involvement in militancy, as a result whereof, he was falsely implicated in this case. He then pleaded that he had a paralytic attack and was unable and unfit to do such type of act.

In defence, the accused produced one Tito, who was a Sweeper and used to reside near the house of the accused. He stated that he had not heard about the present occurrence.

Another DW Narinder Singh stated that the accused was earlier in BSF and was working as Munshi in the Court premises and was also a paralytic patient.

After appreciating the entire evidence, the learned trial Court convicted and sentenced the accused, as stated hereinabove.

I have heard Mr. S.A. Salaria, learned senior Advocate, assisted by Mr. Raj Kamal, Advocate, and Mr. A.H. Qazi, learned Additional Advocate General, representing the State. With their assistance, I have gone through the entire evidence.

Mr. Salaria submits that, no doubt, in sexual offences, the conviction can be based on the solitary statement of the prosecutrix alone without any corroboration, but the rule of caution is that, before maintaining conviction, the Court should be satisfied that it depicts the true account of incident and is free from any shadow of doubt. In the present case, the evidence on record speaks volumes of the false

implication of the accused. He contends that the prosecution case is stumbling badly on account of its inherent weaknesses.

Mr. Salaria submits that the delay in lodging the report with the police, in the present set of circumstances, is denting the prosecution case to a great extent. He contends that may be the delay in lodging the report in a sexual offence is not to be taken that seriously against the prosecution, as held by Apex Court in various judgments, but each case has to be appreciated on its own facts. In the case in hand, the prosecutrix has categorically stated that on the next day of occurrence, she went to the Police Station to lodge the report, whereas the admitted position is that, the First Information Report is lodged on 1st of June, 1998. The prosecutrix could forget the date, but not the fact that the police was approached on the following day. She is very categoric about it and otherwise also, this material fact could not obliterate from her memory.

Strengthening his arguments with regard to delay, Mr. Salaria then submits that this is going to create doubt about the execution of 'Razinama' (Mafinama) also upon which the prosecution is harping very heavily and it appears that this all was done subsequently, may be when the accused was taken in custody. He then contends that even otherwise, the prosecution case is not clear with regard to execution of 'Razinama'/'Mafinama'. PW Mohd. Akhtar Khan, who was posted as Naib Mohrar in Police Station, Poonch, stated that the accused

produced the ‘Razinama’ on 01-06-1998. In his cross-examination, he stated that it was produced by the husband of the prosecutrix. If this Razinama was already in the possession of the husband of the prosecutrix, he should have produced the same to the police on the following day. The accused has otherwise tendered his plausible explanation for tendering the said ‘Mafinama’. All these weaknesses go to show that the story, as set up by the prosecution, is not free from doubt.

Mr. Salaria then submits that legally also, on the basis of evidence, the present case does not fall within the mischief of Section 376 read with Section 511 RPC, as it cannot be said that there was an attempt to commit rape. He submits that the story of break opening the string of the ‘salwar’ by the accused, as projected by the prosecutrix, would not appeal to the judicial conscience, and it appears that it has been coined up subsequently, so as to bring the case within the mischief of Section 376 read with Section 511 RPC. In this regard, Mr. Salaria has taken me through the relevant portion of evidence of the prosecutrix once again.

Mr. Salaria then submits that even if we stretch the case of the prosecution, so as to dilute the main charges for the purpose of bringing it within the mischief of Section 354 RPC, even then the said offence is not proved to the hilt in the light of evidence on record. The case set up by the prosecutrix is that the accused had given her a cheek bite, which

fact is missing in the medical evidence. Out of four injuries, three are just complaints of pain, which cannot be termed as injuries. The scratch over the left side of the face, according to the doctor, could be self-suffered or self-inflicted, possibly by striking nails. According to the learned counsel, once the basic prosecution case is doubtful vis-à-vis the main charge, it would not be safe to bring it within the mischief of Section 354 RPC and there appears to be no reason to believe the prosecutrix on this charge as well.

Mr. Salaria lastly contends that non-examination of the Investigating Officer in this case, is also fatal to the prosecution, as great prejudice has been caused to the accused on that count. In such type of cases, the role of Investigating Officer assumes great importance and his non-examination does cause dent to the prosecution case.

On the basis of the aforesaid submissions, Mr. Salaria prays for acquittal of the accused, which is opposed by Mr. Qazi on the ground that the prosecution case may not be dislodged on account of the delay caused in lodging the First Information Report with the police, as the honour of a married lady was involved in this case and, therefore, some delay in lodging the report with the police should not be taken seriously against the prosecution. He then submits that the prosecutrix had given the true account of the occurrence and even if some discrepancies have crept in, in her statement or even in the statement of her husband, the same are not that material so as to disbelief the case of the prosecution

in its entirety. Therefore, the accused had no escape from the charges, for which he already stands convicted and his appeal thus merits dismissal.

I have given my thoughtful consideration to the rival contentions of the learned counsel for both the sides and gone through the records minutely.

No doubt, the offences of sexual harassment are to be dealt with stern hands, but possibility of false implication in such type of cases is also not ruled out, especially in the case of attempt to commit rape falling within the purview of Section 376 read with Section 511 RPC or in a case of use of criminal force on any woman, intending to outrage her modesty falling under Section 354 RPC for the reason that in such type of situation, the case of the prosecution rests upon the statement of prosecutrix alone and, therefore, by a rule of caution the Court must see that her statement passes through a fine-toothed comb of appreciation so that no injustice is done to either side. Her evidence needs to be scanned very carefully in its entirety taking into account all the attending circumstances. Following the same yard-stick in appreciating the case in hand in its right perspective, it can be safely concluded by me that it is not free from the shadow of doubt. Therefore, benefit of doubt has to be extended towards the accused. I now enter into detailed discussion with regard to vital aspects of the case.

If one reads the statement of the prosecutrix along with the medical evidence on record, the main charge of attempt to commit rape, in my view, would fall on the ground. The case set up is that the occurrence had taken place on 28-05-1998 and the medical examination is done on the person of the prosecutrix on 01-06-1998. Even if we leave the injuries noticed by the doctor, which, in my view, are just no injuries or superficial one, which were possible by striking of nails or could be self-suffered or self-inflicted, a material fact, which has come on record is that the duration of the injuries noticed by doctor was less than 48 hours at the time of examination. No doubt, this point has not been developed by Mr. Salaria, but at the same time, this Court cannot escape notice of this weakness in the prosecution case, which, by itself, speaks volumes of the fact that the injuries on the person of the prosecutrix do not synchronize with the date of occurrence. How these injuries have appeared on her body is a mystery, which was to be made clear by the prosecution may be by re-examining the doctor. But the said exercise is not done. While recording the statement of Dr. Sakhi Mohd, it is observed by the learned trial Court that no further question was put to this witness in re-examination by the PP. In my view, the prosecution cannot get out of this vital flaw, which, in fact, is very damaging and creates a lot of doubt in the mind of the Court with regard to the very case set up by the prosecution.

Once the Court is of the view that the case of the prosecution is on a slippery footing on the basis of the aforesaid weakness, the

substantive statement of the prosecutrix also loses its credence and has to be seen with a pinch of salt and in case, certain material weaknesses have appeared in her evidence, it would further weaken the statement. The story projected by her when seen in its totality along with all the attending circumstances, does not stand the test of reliability so as to maintain the conviction. There are certain inherent infirmities in her evidence. She stated that she had swallowed 'naswar' and started vomiting. She even went to the extent of saying that she was shocked on account of this occurrence and was injected in the hospital on the following day and, thereafter, went to Police Station. Where is that evidence? However, her husband is silent on this aspect. After all, who is to be believed by Court on this aspect. There is discrepancy with regard to breaking of the string of 'salwar'. This is again a very important piece of evidence with regard to attempt to commit rape. The husband of the prosecutrix stated that when he came back, he saw that his wife was undressed and she was holding the 'salwar' in her hand. However, she stated that the accused had not done anything wrong to her. He further stated that the breasts of his wife were blood stained and the accused had given a bite on it. He rather went to the extent of saying that his wife (prosecutrix) told him that the accused was saying that he would prepare such type of tea for her husband that he would not awake till next day. The prosecutrix projects altogether a different story in this regard. These contradictions, in my view, cannot be just ignored by the Court and latitude can be extended towards the

prosecutrix. Therefore, it can be safely said that the prosecution case, as set up, is not free from doubt with regard to the main charge of Sections 376/511 RPC.

To be fair to the prosecution, I have appreciated the case with regard to the lesser offence, i.e., Section 354 RPC, but in my firm view, even on that aspect, the prosecution case is not free from doubt, as the evidence of prosecutrix deserves rejection in its entirety. I, therefore, do not find safe to convict the accused for offences punishable under Section 354 RPC from diluting it from the main charge.

With regard to the other charge of Section 342, for which the accused also stands convicted, prosecution case would fall on the ground automatically, as the very case set up by it is thickly covered in clouds of doubt. It is not believable that the accused, who was of the age of about 70 years, as stated by Mr. Salaria, would wrongly and illegally detain the prosecutrix, who was of the age of 45 years, for about half an hour, as stated by her without there being any resistance from her side. I, therefore, do not feel hesitant in holding that the prosecution case is very weak on all the counts for the purposes of convicting the accused for any of the charges and, as such, he deserves acquittal.

Resultantly, the instant appeal is allowed, impugned judgment of conviction and sentence is set aside and the accused is acquitted of

the charges. He is discharged of his bail bonds furnished by him during the pendency of the instant appeal.

Jammu
May 16, 2007
T.Arora, PS

(Virender Singh)
Judge

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

Criminal Appeal No.8-A/2003

Date of decision : May 16, 2007

Ghulam Mohd. Mir V/s

State of J & K

Coram:

Hon'ble Mr. Justice Virender Singh, Judge

Appearing Counsel:

For the Appellant(s) : Mr. S.A. Salaria, Sr. Advocate, with
Mr. Raj Kamal, Advocate.

For the Respondent(s) : Mr. A.H. Qazi, Additional Advocate General.

Heard learned counsel for the parties.

Vide my detailed judgment of even date, the instant appeal stands allowed.

Resultantly, impugned judgment of conviction and sentence is set aside and the appellant is acquitted of all the charges.

Jammu
May 16, 2007
T.Arora, PS