

**HIGH COURT OF JAMMU & KASHMIR AT
JAMMU**

Cr. Apl. No. 5/2006

Date of Decision: 27.4.2007

Bashir Ahmed v. State

Coram:

Hon'ble Mr. Justice Hakim Imtiyaz Hussain

Appearing Counsel:

For the petitioner(s) : Mr.O.P.Thakur, Advocate

For respondents(s): : Mr. Ajit Singh, Dogra, Dy. AG

- i/ Whether to be reported in
Press, Journal/Media :
- ii/ Whether to be reported in
Digest /Journal :
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Bashir Ahmed S/o Ghulam Hassan Wani R/o Village nagam Tehsil Banihal District Doda has been convicted and sentenced by the Additional Sessions Judge, Ramban under Section 376, 366 and 457 RPC. The appellant is aggrieved of the same and has through the medium of the present criminal appeal prayed for setting aside of the conviction and sentence so passed against him.

Brief facts relevant for the disposal of the present appeal are that a criminal challan under sections 457, 366 and 376 RPC was filed by Police Station, Banihal against the present appellant in the Court of Sub Judge, Ramban wherefrom it was committed to the Court of Additional Sessions Judge, Ramban. The allegations against the appellant are that on the intervening night of 26th/27th of November, 2001 he with a

criminal intention trespassed into the house of the complainant and abducted his daughter forcibly and took her to Jammu, Hoshipur and Dehradoon where he had intercourse with her against her consent. A missing report was in this behalf lodged by the complainant in Police Station Banihal on 27th Nov. 2001 on which FIR No. 215/01 for the offences under sections 363,456 and 109 RPC was registered and the investigation started. On completion of the investigation offences under sections 457, 366, 376 RPC were made out against the appellant accordingly the said challan was filed before the Court.

The police challan gives the names of five more persons namely Abdul Majid , Abdul Wahid, Manzoor Ahmed and Nissar Ahmed alongwith the present appellant as, according to the prosecution, they assisted the appellant in the commission of the crime but during the trial of the case learned Additional Sessions Judge, Ramban acquitted all these accused persons from the case vide its order dated 28.9.2004 and the trial proceeded against the Bashir Ahmed-the present appellant only.

The Court framed charges on the appellant under section 456, 366 and 376 RPC. The contents of the charge sheet were read over and explained to the appellant on 24.9.2002 but he pleaded not guilty to the same. Prosecution examined prosecutrix, her father Gh. Mohd., Abdullah Malik, Dr. Rabia, Gh. Mohd. Dr. M.Iqbal Bhat and Irshad Ahmed I.H.C while as the appellant examined Mushtaq Ahmed, Mohd. Yousuf in defence.

The learned Additional Sessions Judge, Ramban on consideration of the matter found that the prosecution had succeeded in establishing the case against the appellant. The

learned Sessions Judge found that the case squarely fell within the ambit and scope of the offence under section 366,376 and 457 RPC he, therefore, convicted the appellant under these offences and sentenced him to 7 years rigorous imprisonment and fine of Rs. 10,000/- under section 376, in default of payment of fine the appellant was sentenced one year imprisonment, to rigorous imprisonment for five years and fine of Rs. 5,000/- under section 366 in default of payment of fine he has to undergo simple imprisonment for six months and to rigorous imprisonment for two years and fine of Rs. 2,000/- under section 457 in default of payment of fine the appellant has to undergo simple imprisonment for two months. The Court has directed that the fine if realized from the appellant be paid to the prosecutrix as compensation. The Court has further directed that the sentence of the imprisonment imposed for all the offences shall run concurrently except the sentence of fine.

The appellant is aggrieved of the conviction and the sentence imposed on him and has challenged the same on various grounds inter-alia that the trial Court has not properly appreciated the evidence on file, the Court has not considered various contradictions which emerge in the prosecution witnesses the judgment and the order impugned are contrary to the facts of the case and law on the point and that the prosecution case was unbelievable but the trial court has by wrong appreciation of the facts convicted and sentenced the appellant on the basis of insufficient evidence.

Heard. I have considered the matter.

I have gone through the trial Court's record the particularly statement of the witnesses recorded and relied upon by the learned trial court in arriving at the conclusions

of guilt of the appellant. Out of the seven witnesses examined by the prosecution, the prosecutrix, whom the trial Court has described as ‘Mst. A’ is the only witness who has narrated about the occurrence, rest of the witnesses have no personal knowledge of the occurrence.

PW1 complaint has lodged a missing report in Police Station Banihal he states that the police came on the spot and took photographs of the house and about one month and 10 days after it he lodged the written report against the appellant in the police station, when he heard that the appellant had abducted his daughter. He has admitted the contents of the written report. EXPW1/1. According to him the Police arrested accused Manzoor Ahmed and Wahid Ahmed who disclosed the whereabouts of his daughter and on this information his daughter was recovered for which a proper recovery memo was prepared.

PW Abdullah Malik has stated that on hearing the hue and cry of PW1 he went on the spot and found blood stains on the verandah. The police came on spot and took photographs of the place of occurrence. Abdul Rashid told him that some persons had dragged the girl and abducted her. Later on he came to know that the appellant abducted ‘Mst. A’.

PW5 Gh. Mohd. has stated that on 21.2.2001 ‘Mst-A’ was recovered from Nagam and that the investigation of the case was conducted by the Head Constable Irshad Ahmed.

Dr. Rabia and Dr. Mohd. Iqbal Bhat are the medical witnesses. Dr. Rabia has examined the prosecutrix and found that her secondary sexual characters were well developed. According to the witness the age of the prosecutrix was 20 years. She has on examination of the prosecutrix found no

scratch marks on her body. In her opinion the prosecutrix was habitual to intercourse and was carrying pregnancy of about 2 months. She has issued medical certificate EXPW6/1.

Dr. Mohd. Iqbal Bhat has examined the appellant and was found to be a potent report man. He has issued certificate EXPW9/1.

PW Irshad Ahmed IHC has conducted investigation of the case. He states that the complainant filed a written report on which FIR 215/01 was registered. He went on spot and prepared the site plan EXPW9/1 and also recorded the statement of prosecution witnesses.

Thus these witnesses have not seen the occurrence. Only 'Mst A' who is the prosecutrix in the case has narrated about the occurrence. The relevant portion of 'Mst A' statement has been reproduced by the trial Court in the judgment impugned, as under:-

"The witness stated that she knows the accused. One year ago while she was sleeping in her kitchen, the accused No.1 entered there in the night. All the accused entered the house. The accused No. 1 gagged her mouth and she fell unconscious. Some medicine was smelled to her and she became un-conscious. On the next day when she gained conscious she found herself out of Jammu. She saw the accused No.1 there also, who has kept her in a house. The accused committed the sexual intercourse with her without her consent. For 21/2 month she stayed with the accused No.1 and during this period the accused repeatedly committed sexual intercourse with her without her consent. During this period the accused No.1 also used to beat her. She made a commitment with the accused No.1 that she will marry with him in case he takes her back to her home. The accused No.1 brought her back to her home and she threatened her that she will not disclose his name to any body. When she returned back her father did not

allow her to enter the house. She went to the house of Mst. Zarina and stayed there during the night. Her uncle Mohd. Ramzan brought the police on the next day and she was taken to the police station. The accused filed away after committing the crime. She was medically examined by the police. The police recorded her statement. The accused No.1 is a Govt. employee and is resident of Ashar, Banihal but now he is residing in the same village where she is residing. She has been disreputable due to this act of the accused. Accused No.1 is a married person having four children. Her parents were sleeping in the adjoining room.”

The learned counsel for the appellant would vehemently argue that the trial Court has not properly appreciated the defence of the accused and has believed the solitary statement of the prosecutrix and convicted the accused whereas this statement does not inspire confidence as the prosecutrix has given completely a false statement about the occurrence. According to the learned counsel the court has not taken into consideration the circumstances under which the alleged occurrence has taken place and has not properly gone into the version of the prosecutrix on the alleged act committed by the appellant as well as other accused persons. From the evidence, argues the learned counsel, the story of abduction as put forth by the prosecutrix or the police, appears to be on an after thought as from the statement it appears that the girl has gone with the appellant out of her own free will and has enjoyed the company of the appellant for more than 1 ½ month. According to the prosecutrix herself she has travelled to Jammu, Hoshiarpur and Dehradoon etc. The challan was originally filed against six accused persons as the prosecution tried to show that the accused persons had forcibly entered the house of the prosecutrix and had taken away her with a criminal

intention, later on the appellant allegedly committed rape on her but the Court has during the trial of the case acquitted rest of the accused from the case and has proceeded only against the appellant which belies the whole prosecution case that the accused persons forcibly abducted the prosecutrix and took her away to Jammu.

The trial Court has reproduced the relevant portion of the statements of the prosecution and defence witnesses and has relying only on the statement of the prosecutrix come to the conclusion that the statement was sufficient enough to convict the accused. The trial court has found that the accused can be convicted on the solitary statement of the prosecutrix and that on perusal of the statement of the prosecutrix it has being proved that the appellant had sexual intercourse with her without the consent of the prosecutrix. The Court has in this behalf observed as under:-

“ The counsel for the accused lastly argued that on the solitary statement of the prosecutrix the accused cannot be convicted but in my view the contention of the counsel for the accused is devoid of any force. The statement of the prosecutrix in this case inspires confidence and is convincing and clinching. It is further corroborated by the medical evidence in all material facts of the case. From the perusal of the statement of the prosecutrix it has also to be borne in mind that she is an illiterate and rustic villager and since the sexual assaults have been committed upon her by the accused, in my view, therefore, even if her statement is not corroborated the accused can be convicted on the basis of that statement only.

In view of the introduction of Section 114(B) 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 the prosecutrix, who, in the present case, has specifically stated that the sexual intercourse was without her consent and rather by force by the accused. The said presumption

is further strengthen by the evidence of the medical witness that the prosecutrix was pregnant at the time or her medical examination and was carrying pregnancy for the last two months.”

The court has also observed that in the society in which we live no woman would come forward to make a humiliated statement against her honour unless it was true. The court feels that if the statement of the prosecutrix inspires confidence and is believed to be cogent, convincing and clinching there is no bar to convict the accused on her sole testimony. The Court further found that there was no reason for any woman to make false implication of the accused. The court has observed:-

“The duty of the court handling such matters is important and it was to keep in mind the heinousness and gravity of such offence as well as the sensitivity of the matter. The broader probabilities of a case should be examined and contradictions of insignificant nature in the statement of the prosecutrix should not be made use of to throw out the otherwise reliable prosecution case. Refusal to act on the testimony of the victim of the sexual assault when corroborated by the medical evidence as a rule is adding insult to the injury.

Rapes are not committed in presence of general public or on public places. The accused selects the victim as well as the place where witnessing such occurrence by any other persons/person is excluded.”

On appreciation of the evidence led by the prosecution I find the trial Court has completely misdirected itself by relying on the statement of the prosecutrix without properly appreciating it and looking for its corroboration.

The case of the prosecution originally was that six accused persons named in the police challan entered the house of the prosecutrix and abducted her, took her to Jammu Hoshiarpur and Dehradoon etc. where the appellant had

intercourse with her against her will. The prosecutrix has in this behalf stated that when the accused entered her house some medicine was administered to her due to which she fell unconscious and was abducted by the accused persons and when she regained consciousness she found herself at Jammu. This story put-forth by the prosecutrix appears to be false as the court has found that the other accused persons were not involved in the crime at all. The only accused who remained in the case was the appellant and in the circumstances it is difficult to believe that the accused single handed took away the girl from her home, against her free will. Removing the girl from her house was possible by the appellant only when she had gone with him with her consent. In the circumstances emerging from the evidence particularly from the statement of the prosecutrix one comes to the only conclusion that the girl has gone with the appellant with her own will. If it was not so, then how was it possible for the appellant to take her to Jammu, Hoshiarpur and Dehradoon etc. and keep her with him for more than 1 1/2 month. The doctor has found that the girl was habitual to sexual intercourse and that there were no marks of violence on her body which also suggest that she had subjected herself to sexual intercourse out of her own free will the fact that she had 2 months pregnancy at the time of examination again shows that the girl has enjoyed the company of the appellant and never objected to it. Admittedly the girl was major at the time of occurrence as such the consent given by her, which is implied in the circumstances is very material and goes to the very root of the prosecution version. These circumstances belie the statement of the prosecutrix that she was subject to sexual intercourse against her consent. All these circumstances have not been looked into and appreciated by the trial court at all.

The court has relied on surmises and conjunctures. The concern of the Court over the offence of the rape deserves appreciation but it is relevant only when the rape has in fact taken place. Where the circumstances suggest that a major girl has gone with the accused out of her own free will, the court cannot be moved by the sentiments convict the accused in absence of a positive proof of the commission of the crime.

It is true that there is no rule of law that the testimony of a prosecutrix cannot be acted upon without corroboration but her statement should be such which reposes confidence and from it one can come to the only conclusion or the guilt of the accused. In the cases of present nature, it must be shown that the abduction/rape has taken place without the consent of the girl. The burden is on the prosecution to prove that there was absence of consent. Apart from the evidence of the prosecutrix, there is no other evidence which could lead us to show that there was absence of consent. Even the prosecutrix's statement is not such from which one can say that there has been a sexual intercourse with the girl against her consent. If the Court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony.

In the circumstances I find due force in the pleas raised by the appellant in the present appeal. I find there was no sufficient evidence before the trial Court to convict the accused and pass sentence on him. The present appeal is, therefore, allowed. The order of conviction and sentence passed by the trial Court on the appellant is hereby set aside. In the circumstances I do not find any merit in the police challan

lodged by the Police Station Banihal against the appellant which is hereby dismissed. The appellant be released from custody forthwith and the bail bonds furnished by him stands discharged.

Order accordingly.

Jammu

27.4.2007

(Hakim Imtiyaz Hussain)
Judge

Mujtaba *PS*