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## TUKA RAM AND ANR.

v.

## STATE OF MAHARASHTRA

September 15, 1978

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[JASWANT SINGH, P. S. KAILASAM AND A. D. KOSHAL, JJ.]

*Indian Penal Code Sec. 375—Rape—What is the meaning of without consent—Obtaining consent by putting fear of death or hurt—Criminal trial—Onus is on prosecution to prove all the ingredients of an offence.*

C

The prosecution alleged that appellant No. 1, the Police Head Constable and appellant No. 2 Police Constable attached to Desai Gunj Police Station raped Mathura (P.W. 1) in the police station. Mathura's parents died when she was a child and she was living with her brother, Gama. Both of them worked as labourers to earn a living. Mathura used to go to the house of Nunshi for work and during the course of her visits to that house she came in contact with Ashok who was the sister's son of Nunshi. The contact developed into an intimacy so that Ashok and Mathura decided to become husband and wife.

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On 26th of March, 1972, Gama lodged a report at the police station alleging that Mathura had been kidnapped by Nunshi, her husband Laxman and Ashok. The report was recorded by Head Constable Baburao, at whose instance all the three persons complained against as well as Mathura were brought to the police station at about 9 p.m. and the statements of Ashok and Mathura were recorded. By that time, it was 10.30 p.m. and Baburao asked all the persons to leave with a direction to Gama to bring a copy of the entry regarding the birth date of Mathura. After Baburao left Mathura, Nunshi and Gama and Ashok started to leave the police station. The appellants, however, asked Mathura to wait at the police station and told her companions to move out. The direction was complied with.

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The case of the prosecution is that immediately thereafter Ganpat, appellant No. 1, took Mathura into a latrine raped her and thereafter dragged her to a Chhapri on the back side and raped her again. Thereafter, appellant No. 2 fondled with her private parts but could not rape her because he was in a highly intoxicated condition.

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Nunshi, Gama and Ashok who were waiting outside the police station for Mathura grew suspicious. They, therefore shouted and attracted a crowd. Thereafter, a complaint was lodged. Mathura was examined by a doctor who found that she had no injury on her person. Her hymen revealed old ruptures. The vagina admitted two fingers easily. The age of the girl was estimated by the doctor to be between 14 and 16 years. The Chemical Examiner did not find the traces of semen in the pubic hair and vaginal-smear slides. The presence of semen was, however, detected on the girl's clothes.

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The Sessions Judge found that there was no satisfactory evidence to prove that Mathura was below 16 years of age on the date of occurrence. He held that Mathura was "a shocking liar" whose testimony "is riddled with falsehood and improbabilities". The Court came to the conclusion that she had sexual

intercourse while at the police station but rape had not been proved and that she was habituated to sexual inter-course, but finding that Nunshi and Ashok would get angry with her, she had to sound virtuous before them. Really speaking, she would have surrendered her body to the Constable. A

6. The District Judge, therefore, acquitted the appellants. The High Court reversed the order of acquittal. The High Court found that the sexual intercourse was forcible and amounted to rape. Since both the accused were strangers to Mathura, it was highly improbable that Mathura would make any overtures or invite the accused to satisfy her sexual desire. It is possible that a girl who was involved in a complaint filed by her brother would make such overtures or advances. However, the initiative must have come from the accused and if such initiative came from the accused, she could not have resisted the same. About appellant Tuka Ram, the Court believed that he had not 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. B

7. In an appeal by special leave, the appellant contended that :— C

- (1) there is no direct evidence about the nature of the consent of the girl to the alleged act of sexual intercourse. Therefore, it had to be inferred from the available circumstances and it could not be deduced from those circumstances that the girl had been subjected to or was under any fear or compulsion as would justify an inference of any "passive submission." D
- (2) The alleged intercourse was a peaceful affair and the story of stiff resistance is all false.
- (3) The averments of the girl that she had shouted loudly is false. E
- (4) The reasoning of the High Court that the girl must have submitted to sexual intercourse because of the fear does not amount to consent.

Secondly, the High Court lost sight of the fact that Mathura and Gama had started to leave the police station and the case is that at that time Ganpat caught her. F

Allowing the appeal, the Court

HELD : 1. The onus is always on the prosecution to prove affirmatively each ingredient of the offence. It was, therefore, incumbent on the prosecution to prove all the ingredients of Section 375 of the Indian Penal Code. The High Court has not given a finding that the consent of the girl was obtained by putting her in a state of fear of death or of hurt. Therefore, the third clause of section 375 will not apply. There could be no fear because the girl was taken away by Ganpat right from amongst her near and dear ones. The circumstantial evidence available 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. [817G-H, 818A, G-H, 819A] G

Secondly, the intercourse in question is not proved to amount rape and that no offence is brought home to appellant Ganpat. As far as Tuka Ram is concerned, the girl has made serious allegations against Tuka Ram in the First H

**A** Information Report. She went back on these allegations at the Trial. The presence of Tuka Ram at the police station is not inculpatory and is capable of more explanations than one. The appellants were acquitted. [819C-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 64 of 1977.

**B** Appeal by Special Leave from the Judgment and Order dated 12th/13th December, 1978 of the Bombay High Court (Nagpur Bench) in Criminal Appeal No. 193/74.

*M. N. Phadke, S. V. Deshpande, V. M. Phadke and N. M. Ghatate* for the Appellants.

**C** *H. R. Khanna and M. N. Shroff* for the Respondent.

The Judgment of the Court was delivered by

**D** KOSHAL, J.—This appeal by special leave is directed against the judgment dated the 12th October 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 the 1st of June 1974, and convicting Tukaram, appellant No. 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.

**E** 2. Briefly stated, the prosecution case is this. Appellant No. 1, who is a Head Constable of police, was attached to the Desai Gunj police station in March, 1972 and so was appellant No. 2 who is a police constable.

**F** Mathura (P.W. 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 (P.W. 3). Both of them worked as labourers to earn a living. Mathura (P. W. 1) used to go to the house of Nunshi (P.W. 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 Nunshi (P.W. 2) and was residing with the latter. The contact developed into an intimacy

**G** so that Ashok and Mathura (P.W. 1) decided to become husband and wife.

**H** On the 26th of March, 1972, Gama (P.W. 3) lodged report Ex-P8 at police station Desai Gunj alleging that Mathura (P.W. 1) had been kidnapped by Nunshi (P.W. 2), her husband Laxman and the said Ashok. The report was recorded by Head Constable Baburao (P.W. 8) at whose instance all the three persons complained against as well as Mathura (P.W. 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 (P.W. 8) told them to go after giving them a direction that Gama (P.W. 3) shall bring a copy of the entry regarding the birth of Mathura (P.W. 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.

After Baburao (P.W. 8) had gone away, Mathura (P.W. 1), Nunshi (P.W. 2), Gama (P.W. 3) and Ashok started leaving the police station. The appellants, however, asked Mathura (P.W. 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 (P.W. 1) into a latrine situated at the rear of the main building, loosened her under-wear, 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 (P.W. 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.

Nunshi (P.W. 2), Gama (P.W. 3) and Ashok, who had been waiting outside the police station for Mathura (P.W. 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 Nunshi (P.W. 2) shouted for Mathura (P.W. 1) there was no response. The noise attracted a crowd and some time later Tukaram appellant emerged from the rear of the police station and on an enquiry from Nunshi (P.W. 2) stated that the girl had already left. He himself went out and shortly afterwards Mathura (P.W. 1) also emerged from the rear of the police station and informed Nunshi (P.W. 2) and Gama (P.W. 3) that Ganpat had compelled her to undress herself and had raped her.

Nunshi (P.W. 2) took Mathura (P.W. 1) to Dr. Khume (P.W. 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 to the police station and lodge a report there.

**A** A few persons brought Head Constable Baburao (P.W. 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 (P.W. 8), however, was successful in persuading the crowd to disperse and thereafter took down the statement (Ex. 5) of Mathura (P.W. 1) which was registered as the first information report.

**B** Mathura (P.W. 1) was examined by Dr. Kamal Shastrakar at 8 p.m. on the 27th of March 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 public 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.

**C** 3. 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 No. 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 Nunshi angry and knowing that Nunshi 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 No. 2. .... Mathura is habituated to sexual intercourse, as is clear from the testimony of Dr. Shastrakar, and accused No. 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 *Paijama* 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. A

4. 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 (P.W. 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 public 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 : B

“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 C

EFGH

**A** 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 furnish an answer by the mere fact that the sexual act was not in opposition to such desire or volition. . . . .

**B** 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."

**D** 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.

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

**E** 5. 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 No. 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 torch. She stated that the underwear was not loosened by her."

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 (P.W. 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 Nunshi) and had practically left the police station, she would be so over-awed 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".

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

A 375 of the Indian Penal Code were present in the case of the sexual intercourse attributed to Ganpat appellatant. 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.

C 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.

D 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.

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

F 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 the 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 negatived 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

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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. A

6. 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. B

7. The only allegation found by the High Court to have been brought home to Tukaram appellant is that he fondled the private parts of the girl after Ganpat had left her. The High Court itself has taken note of the fact that in the first information report (Ex. 5) the girl had made against Tukaram serious allegations 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 torch-light. 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. C  
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8. 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. F

P.H.P.

*Appeal allowed.*