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NEKU KHAN & ORS.

v.

STATE OF RAJASTHAN

(Criminal Appeal No.100 of 2002)

JANUARY 07, 2009

B

**[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM
SHARMA, JJ.]**

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Penal Code, 1860 – ss.376, 147, 323/149, 342, 458 and 366 – Rape and abduction – Five accused – Conviction of, on the ground that they assaulted the brother of prosecutrix, abducted the prosecutrix and thereafter accused no.1 raped her – Appeal against conviction – Held: Plea that prosecutrix was married to accused no.1 and therefore there was no rape or abduction cannot be accepted, as there was no evidence of marriage – Conviction of accused no.1 thus upheld – Conviction of accused no.2 also upheld as his role was clearly established from evidence of prosecutrix and two other PWs – However, conviction of accused nos.3 to 5 set aside in the absence of any evidence to link them with the alleged offence – Crime against Women.

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According to the prosecution, on the fateful night while prosecutrix (PW5) and her family members including PWs 2 and 4 were sleeping in the house, the accused – appellants arrived there armed with iron rod and lathis, assaulted PW2 and abducted the prosecutrix.

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It is alleged that thereafter the accused stripped the clothes of prosecutrix and appellant no.1 raped her for two nights. Referring to the evidence of PWs 2, 4 and 5, the trial court convicted appellant no.1 under ss.376, 147, 323/149, 342, 458 and 366 IPC and the other appellants under ss. 147, 323/149, 342, 458 and 366 IPC. The High Court upheld the conviction.

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The conviction of the appellants was challenged

before this Court on the ground that two defence witnesses had categorically stated that the prosecutrix was married to appellant no.1 and therefore there was no rape or abduction. It was further contended that there was no evidence to link the appellants 3 to 5 with the alleged offence.

Disposing of the appeal, the Court

HELD: 1. There was no evidence of the marriage as claimed. The evidence of DW2 on which strong reliance was placed to contend that there was a marriage, it did not in fact substantiate the claim. DW2 in his cross examination admitted that the Kazi writes their nikah. No signature or thumb impression was obtained and the Kazi who is claimed to have solemnised the nikah was not examined. Though it was submitted that there is no need for such writing, but in any event DW1, who claimed to have settled the marriage, accepted that same is the procedure. Thus there was no other material adduced to say that the appellant no.1 and the prosecutrix were married. That being so the conviction of appellant No.1 as recorded by the trial court and maintained by the High Court cannot be faulted. [Para 5] [74-C-E]

2. So far as the role played by appellant No. 2 is concerned the same was clearly established by the evidence of injured witnesses PW 2 and PW 4, apart from the evidence of the PW 5. That being so the appeal fails so far as they are concerned. [Para 6] [74-F]

3. The submission that there was practically no evidence to link the other appellants with the crime is however accepted. Their conviction is set aside. [Para 7] [74-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.100 of 2002.

From the final Judgment and Order dated 19.3.2001 of the

A High Court of Judicature for Rajasthan at Jodhpur in Criminal Appeal No. 70 of 1985.

Shoaib Ahmad Khan and Anis Ahmed Khan for the Appellants.

B Naveen Kr. Singh, Shashwat Gupta and Aruneshwar Gupta for the Respondent.

The Judgment of the Court was delivered by

C **DR. ARIJIT PASAYAT, J.** 1. Challenge in this appeal is to the judgment of a learned single Judge of the Rajasthan High Court at Jodhpur upholding the conviction of appellant No.1 Neku Khan for offence punishable under Sections 376, 147, 323/149, 342, 458 and 366 of the Indian Penal Code, 1860 (in short the 'IPC') The other appellants were convicted for offence punishable under Section 147, 323/149, 342, 458 and 366 IPC.

D 2. Prosecution version as unfolded during trial is as follows:

E Between the intervening night 13.9.1984 and 14.9.1984 Muse Khan (PW-2), Janu Khan (PW-4), Prosecutrix (PW-5), wife Reshma, Indro (PW-6) wife of Bakhsu Khan, Makhni (PW-7) wife of Sachchu Khan were sleeping at the house of Bakhsu Khan in village Raivada, accused persons Neku Khan, Bakhsu Khan, Barkat Khan, Ali Sher and Same Khan arrived on a F Nisan vehicle, the accused Barkat was having the iron rod and the other persons were having lathis, they beat Muse Khan (PW-2) and placed Prosecutrix daughter of Bakhsu in Nisan vehicle forcefully and went away, the accused Same Khan shut her mouth with hand and then got down at Gida village with G Prosecutrix, for some time walked on foot, after a while the accused Same Khan came with a camel and made Prosecutrix ride the camel. Another man also rode and Neku Khan, Same Khan and Bakhsu Khan walked on feet and then H took her to the Dadi of the accused, stripped her clothes and dressed her with new clothes and ornaments and then Neku

Khan did bed work like husband-wife, she stayed there for two nights and for two nights Neku Khan did bed work with her, thereafter the police arrived there with her father, the accused persons ran away, the police brought her to Mandli Police Station.

After completion of investigation charge sheet was filed and since accused persons pleaded innocence they were put on trial.

Dr. Mangi Lal Bohra (PW 1) has proved the injuries caused to Muse Khan on the date of incident by the accused persons while abducting the prosecutrix. PW-2 is Muse Khan who is brother of prosecutrix and he has deposed that he was asleep when he was assaulted. He saw the accused assaulting his brother and then saw them taking away his sister. The fact that Muse Khan was assaulted by the accused, stands corroborated by the evidence of Doctor who is completely independent witness. Ishaqu (PW 3) at whose place, the accused is alleged to have kept the prosecutrix. The prosecution has proved the state of prosecutrix at the place of Ishaqu (PW 3). (PW 4) Janu Khan, was also present when the abduction took place. He saw the accused assaulting Muse Khan and abducting the prosecutrix. He is the person who has lodged the report of the incident to the police. The testimony of Muse Khan that he was assaulted and abduction of prosecutrix is thus corroborated by testimony of Janu Khan. The prosecution version relied primarily on the evidence of Prosecutrix (PW 5). Two witnesses were examined by the appellant to show that the victim was married to appellant no. 1 and therefore there was no rape as contended and no abduction. The trial court and the High court did not find any substance in the plea. They referred to the evidence of PWs 2,4 & 5 and held the appellant guilty and directed conviction and imposed sentence as aforementioned.

3. In support of the appeal, learned counsel for the appellant submitted that the trial court and the High Court lost sight of the fact that the DWs 1 & 2 categorically stated about

A the marriage of the victim with appellant No. 1. That being so the question of any rape or abduction as claimed does not arise. It is further pointed out that there is no evidence to link the appellants 3 to 5 with the offence.

B 4. Learned counsel for the State on the other hand supported the judgment of the trial court and the High Court.

C 5. We find that there was no evidence of the marriage as claimed. The evidence of Bhouware Khan (DW 2) on which strong reliance was placed to contend that there was a marriage, it did not in fact substantiate the claim. Bhouware Khan (DW 2) in his cross examination admitted that the Kazi writes their nikah. No signature or thumb impression was obtained and the Kazi Yusuf Khan who is claimed to have solemnised the nikah was not examined. It is submitted that D there is no need for such writing. But in any event DW 1 who is claimed to have settled the marriage accepted that same is the procedure. Thus there was no other material adduced to say that the accused no.1 and the prosecutrix were married. That being so the conviction of appellant No.1 as recorded by the trial court and maintained by the High Court cannot be faulted. E

F 6. So far as the role played by appellant No. 2 is concerned the same was clearly established by the evidence of injured witnesses PW 2 and PW 4, apart from the evidence of the PW 5. That being so the appeal fails so far as they are concerned.

G 7. It is rightly contended by learned counsel for the appellants, that there is practically no evidence to link with the other appellants i.e. Ali Sher, Bakhsu Khan and Barkat Khan with the crime. Their conviction is set aside. The bail bonds executed by them shall stand discharged. The appellants 1 & 2 Neku Khan and Same Khan shall surrender to custody to serve the remainder of sentence. The appeal is disposed of in the aforesaid terms.

H B.B.B.

Appeal disposed of.