

RAPE: The Victim Is The Accused

In this column, we reproduce legal cases concerning women. This is to educate ourselves not only about legal provisions as they exist but also about how in reality law operates. We invite readers to send in their comments, suggestions, and also the citations and details of any cases they may have in mind.

How Mathura was raped

Tukaram and another, Appellants vs. The State of Maharashtra, Respondent. All India Reports 1979, Supreme Court. Justices Jaswant Singh, P.S. Kailasam, AD. Koshal.

Mathura is a young girl who was in 1970 aged between 14 and 16. Her parents died when she was a child so she lived with her brother Gama. Both of them worked as labourers to earn a living. In the course of her work, Mathura had to visit the house of a woman called Nushi. There she met Nushi's sister's son Ashok. Ashok and Mathura decided to get married.

On March 26, 1972, Gama went to the Desaignuj police station and lodged a report that Mathura was a minor who had been kidnapped by Nushi, her husband Laxman, and Ashok. At the orders of Head Constable Baburao, the three persons complained against and Mathura were brought to the police station, at about nine p.m. The statements of the two lovers were recorded. After this, Baburao told them to go and instructed Gama to bring a copy of the entry regarding the birth of Mathura in the Births and Deaths register, to prove her age. Baburao then hurried home as he had not had his dinner. Head Constable Ganpat and Police Constable Tukaram were also present throughout while this affair was being conducted.

After Baburao had gone, Nushi, Ashok, Gama and Mathura were leaving the police station. It was now 10:00 p.m. As Gama and Mathura were passing through the front door, Ganpat caught hold of Mathura's hand, told her to come with him and ordered the others to leave. Mathura stated in court that Ganpat then took her to a latrine in the backyard of the police station. She tried to cry out but was prevented from doing so. In the latrine, Ganpat loosened her underwear, lit a torch and stared at her private parts. He then dragged her to the chhapri behind



This is not Mathura — but one of the myriad helpless Mathuras. If she chooses to have intercourse with a man, he can be prosecuted for rape because she is under 16. But she can be pushed into marriage and marital sex forced upon her would not amount to rape in the eyes of law. Even after the prohibition of child marriage!

the main building, knocked her down on the ground and inspired by her protests and stiff resistance, raped her.

After he had raped her, he left her lying there and then Tukaram who was seated on a cot nearby, came up to her and handled her private parts. He also wanted to rape her but was not able to do so because he was too heavily drunk.

All this time, Nushi, Gama and Ashok were waiting outside the police station. They did not know what to do. All the lights in the police station had been turned off and the doors had been locked from inside. They went to the rear of the building but everything was in absolute darkness. Nushi called to Mathura but there was no response. Some other local people collected at the place and then Tukaram emerged from the rear of the police station. Nushi asked him what had happened. He replied that the girl had already left. He then went away. Soon after he had gone, Mathura managed to pull herself together and came out. She immediately told Nushi and Gama that

Ganpat had forced her to undress herself and had then raped her.

Nushi took Mathura to Dr. Khune and told him the whole story. He advised them to lodge a report at the police station. Meanwhile Baburao had been called from his house. He found that an angry crowd had gathered and was threatening to beat up Ganpat and burn down the police station. He managed to disperse the crowd and then took down Mathura's statement as the First Information Report. The next day, March 27 at 8 p.m., Dr. Kamal Shastrakar examined Mathura. The doctor by the evidence of medical examination reported the girl's age to be between 14 and 16 years. There were no injuries on Mathura's person and no semen was found in the sample of pubic hair and vaginal smear stain which were sent for chemical examination. However, semen was detected on her clothes and on Ganpat's pyjama.

What was said in Defence of Ganpat

Ganpat's lawyer did not prove that sexual intercourse did not take place between Ganpat and Mathura. The only argument for defence was that since there were no injuries on the person of Mathura and she was not under any fear in the police station, the sexual intercourse was not forcible but was with her willing consent and was therefore not rape.

Sessions Court—Mathura and Medical Evidence both Liars

The learned Sessions Judge declared Ganpat not guilty

and stated that Mathura was a "shocking liar" whose testimony was "riddled with falsehood and improbabilities". (We may point out that what appears improbable to a judge may be possible, even highly probable in a village police station.) However, he accepted the probability of sexual intercourse between Ganpat and Mathura at the police station.

He added 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 allegation of rape could not be accepted at its face value either.

The fact which appeared to really influence his decision was that examination showed Mathura to have had sexual intercourse before the rape. A girl who has intercourse before marriage must of course, according to patriarchal moral standards, be a nymphomaniac, promiscuous and ready to fall into bed with any man! So the learned judge goes on: "Finding Nushi angry and knowing that Nushi suspected something fishy, Mathura could not very well have 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. So ... she might have invented the story of having been confined at the police station and raped. ..."

On the other hand, he held that the semen on Ganpat's and Mathura's clothes was not proof of sexual intercourse between

WHAT THE LAW SAYS

INDIAN PENAL CODE, 1860

Section 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 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 her consent is given because she believes that he is another man to whom she believes herself to be lawfully married.

Fifthly, With or without her consent, when she is under 16 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 15 years of age, is not rape.

Section 376: Punishment for rape. Whoever commits rape shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine, unless the woman raped is his own wife and is not under 12 years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.

HINDU MARRIAGE ACT

Section 354: Whoever assaults or uses criminal force to any woman intending to outrage or knowing it to be highly likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.

CODE OF CRIMINAL PROCEDURE, 1973

Section 160: Police officer's power to require attendance of witnesses... Provided that no male person under the age of fifteen years or woman shall be required to attend at any place other than the place in which such male person or woman resides.

them. It was possible they had both had sexual intercourse with other persons. So — either Mathura for no reason wanted sexual intercourse with a police constable she had never seen before or in the 20 hours between this incident and the medical examination, in such a state of perplexity, she had intercourse with some other man!

High Court — “Passive Submission” is not Consent

The High Court reversed the Sessions decision and came to the conclusion that the sexual intercourse was forcible and amounted to rape. The court held that Mathura’s testimony was reliable because it was supported by strong circumstantial evidence, especially that of semen on the clothes of Mathura and Ganpat.

The High Court made a very important observation: “The Sessions Judge erred in not appreciating the difference between consent and passive submission ... We have to see in what situation Mathura was at the time. Both the accused were strangers to her. It is not the case of the defence that Mathura knew either of them before the event. It is therefore indeed highly improbable that Mathura 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 advances. ...”

“The initiative must have come from the accused and if such an initiative came from the accused, indeed she could not have resisted the same on account of the situation in which she found herself, especially on account of the complaint filed by her brother against her which was pending enquiry at the very same police station ...” (where the accused was Head Constable).

“Mere passive or helpless surrender of the body and its resignation to the other’s lust cannot be equated with desire or will, nor can one 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 in the police station at the dead hour of night, it is more probable that the initiative must have come from the accused and that victim Mathura must not have been a willing party to the act of sexual intercourse. Her subsequent conduct in making a 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 a forcible sexual intercourse.”

The High Court therefore found Ganpat guilty of rape and sentenced him to five years rigorous imprisonment. Mathura’s evidence with regard to Tukaram’s having handled her private parts was also believed and he was sentenced to a year’s rigorous imprisonment under section 354, Indian Penal Code.

‘Supreme’ Justice

The Supreme Court reversed the decision of the High Court, declared both Ganpat and Tukaram not guilty and set them free. The Supreme Court accepted the contention of Ganpat’s lawyer that Mathura was not subjected to any fear which could compel her to passive submission. The absence of injuries on her body was seen by the Supreme Court as proof that the “intercourse was a peaceful affair and that the story of stiff resistance having been put up by the girl is all false.”

The Supreme Court also used a new argument— that Mathura was not alone when Ganpat ordered her to stay in the police station and she could have appealed to her brother who was ordered to leave the place! The Supreme Court said: “It would be preposterous to suggest that although she was in the company of her brother, she would be so overawed by the fact of the appellants being persons in authority and that she was in the police station, that she would make no attempt to resist...Her conduct in meekly following Ganpat makes us feel that her consent (was not) passive submission.” Would it be preposterous to suggest to the Supreme Court that dalit women have time and again been brutally raped by caste Hindu landlords and policemen in their own homes in the presence of their helpless brothers, fathers, husbands, and that dalit men have been tortured and murdered in our great democracy— that too in broad daylight with crowds watching. Is it necessary to remind them of Belchi, Pantnagar, Marathwada? Instead of blaming Mathura for meekly following the Head Constable, could they ask why Gama meekly obeyed the order to get out of the police station, leaving his sister alone there so late at night? Just because he happens to be a man, does that invest him with superhuman strength and courage? Is he not a dalit landless labourer and would he not be as terrorized as Mathura was? It is only in Hindi films that the solitary male hero fells ten villains to the ground. In reality, not even ten young dalit men, let alone one or two, could resist those armed and uniformed villains—our police. As far as Tukaram was concerned, the court was not prepared to rely on Mathura’s testimony, even though there is legal precedent for relying on the unsupported evidence of a woman victim, as in 1963. 2 Cr. L.J. 354. The Supreme Court said: “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 is capable of more explanations than one.” Without suggesting any of these “more explanations”, the court remarked: “We do not therefore propose to take the girl at her word and hold that the charge remains wholly unproved against Tukaram.”

Law Teachers Protest

Four university teachers of law—Lotika Sarkar, Vasudha Dhagamwar, Upendra Bakshi, and Raghunath Kelkar wrote an

open letter to the Chief Justice of India requesting him to have the case re-heard by the full bench of the Supreme Court. The letter raised several important questions:

“...Your Lordship, this is an extraordinary decision sacrificing human rights of women under the law and the Constitution. The court has provided no cogent analysis as to why the factors which weighed with the High Court were insufficient to justify conviction for rape. The fact remains that she was asked to remain in the police station even after her statement was recorded and her friends and relations were asked to leave. Why? The fact remains that Tukaram did nothing whatever to rescue the girl from Ganpat. Why? The court says in its narration of facts presumably based on the trial records that Tukaram was intoxicated. But this is not considered material either. Why not? Why were the lights off and the doors shut?

Your Lordship, does the Indian Supreme Court expect a young girl, 14-16 years old, when trapped by two policemen inside the police station, to successfully raise alarm for help? Does it seriously expect the girl, a labourer, to put up such stiff



resistance against well-built policemen so as to have substantial marks of physical injury? Does the absence of such marks necessarily imply absence of stiff resistance? If anything, it is Ganpat's body which would have disclosed marks of such resistance by Mathura like clawing and biting...

In restoring the decision of the Sessions Judge, does the Supreme Court of India really believe with him that Mathura had “invented” the story of rape and even of confinement in the police station in order to sound “virtuous” before Ashok? Does the court believe that Mathura was so flirtatious that even when her brother, her employer and her lover were waiting outside the police station, she could not let go the opportunity of having fun with two policemen and that too in the area adjoining a police station latrine? Does it ... therefore think that the semen marks on Mathura's clothing could have come from further sexual activities between the police station and the next evening when she was medically examined? What about semen marks on Ganpat's trousers? Why this double standard? Ganpat's sexual habits give him the benefit of doubt of having raped Mathura; her sexual habits make the court

disbelieve the story of rape altogether.

We also find it surprising that the Supreme Court should have only focussed on the third component of Section 375 of the Indian Penal Code which applies when rape is committed with the woman's consent, “when her consent has been obtained by putting her in fear of death or hurt.” But the second component of Section 375 is when rape occurs without her consent. There is a clear difference in law and common sense between ‘submission’ and ‘consent’ ... From the facts of the case, all that is established is submission and not consent. Could not their Lordships have extended their analysis of ‘consent’ in a manner truly protective of the dignity and rights of Mathura?...

“My Lord, the ink is hardly dry on the decision in Nandini Satpathy (1978) 2 S.C.C. 424 when the Supreme Court speaking through Justice Krishna Iyer, condemned the practice of calling women to police stations in gross violation of Section 160(1) of the Criminal Procedure Code. Under that provision, a woman shall not be required to attend the police investigation at any other place than her place of residence... Certainly the hope expressed by Justice Krishna Iyer that “when the big fight forensic battles, the small gain by the victory” has been believed. The law made for Nandini Satpathy does not, after all, apply to the helpless Mathuras of India...

There is not a single word condemning the very act of calling Mathura and detaining her at the police station in gross violation of the law of the land ... Nor is there a single word in the judgment condemning the use of a police station as a theatre of rape or submission to sexual intercourse. There is no direction to the administration to follow the law. There are no strictures of any kind.

The court gives no consideration whatsoever to the socio-economic status, the lack of knowledge of legal rights, the age of the victim, the lack of access to legal services, and the fear which haunts the poor and the exploited in Indian police stations. May we respectfully suggest that you and your distinguished colleagues visit incognito, wearing the visage of poverty, some police stations in villages adjoining Delhi?...

We can only appeal in conclusion, to have the case re-heard, as an unusual situation, by a large bench and if necessary even by the full court. This may appear to your Lordship as a startlingly unconventional, even naive suggestion. But nothing short of protection of human rights and constitutionalism is at stake. Surely the plight of millions of Mathuras in this country is as important as Golak Nath and His Holiness Keshavanand Bharati challenging the validity of restrictions on the right to property as a fundamental right, whose cases were heard by a full court.”

Victims of ‘Virginity Tests’

Throughout the series of events in this case, the girl herself was made the victim of various institutions of our society —

the family, the law enforcers and the law. She was taken to the police station because her brother wanted to refuse her the right to decide to live with a man of her own choice. So he filed a case of kidnapping whereas actually she had of her own free will gone with Ashok. So when she did choose, force was alleged, but after that, when force was used by Ganpat, the law decided that it was free choice!

At all levels, whether in the family or in court, a woman's motives are interpreted by our male-dominated society so as to suit its own moral standards. A young girl's marriage should be arranged by her male relatives so if she runs away, the law must compel her to return to their custody. On the other hand, a girl who has a sexual relationship outside marriage, a girl who is not a virgin, must have wanted to be raped. The logic is as follows: 'Good' girls do not enjoy sex. Any girl who enjoys sex will enjoy rape also and in any case deserves no pity because she is a 'bad' girl. Our society does not distinguish between rape and sexual relationships. The woman is supposed to be passive in both. That is why the law does not acknowledge marital rape. After all, it is the right of a man to have sex with his wife — any kind of sex — how can it be called 'rape' even if he uses violence?

These perverted standards deny a woman's right over her own body and mind, her right to have a sexual relationship as and when and with whom she wants. It is because of these standards that in every rape case the lawyer defending the rapist tries his best to 'prove' that the woman was 'immoral', had had previous relationships with men and therefore the rape must have been with her consent. By a curious irony, the psychology of the rapist who is ready to rape any woman, is attributed to us women — we are also supposed to be ready to have intercourse with any man. How is it that our courts hear and consider such entirely irrelevant evidence as to whether the woman was or was not a virgin before the rape? The Evidence Act nowhere allows the consideration of the victim's character as valid evidence. Even the character of the accused is relevant only in certain specific cases.

We as women must fight this categorization of women into the 'good' and the 'bad', the chaste, and the non-chaste. If we allow ourselves to be bought as virgin brides, we are only strengthening the moral standard which permits us to be legally raped within the institution of marriage, and offers us scant protection outside it. □