

A quick take on the Trial Strategy in M.J. Akbar vs. Priya Ramani- Ajay J Nandalike

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The judgment in question is being lauded by many as a landmark judgment in the #MeToo movement. This article focuses only on the Trial Strategy adopted by both sides and how the Ld. Magistrate might have seen it. It is my view that the reasoning of the Ld. Magistrate which is recorded from pages 85 to 91 of the judgment is not sufficient to really discern the basis of acquittal of the Accused. Therefore, one will have to examine the detailed recording of the evidence in the judgment to understand what made an impact on the Ld. Magistrate.

The basis of the Complaint was an article published on 12.10.2017 in the VOGUE magazine titled as a 'open letter'. The article did not name the Complainant but stated that the Accused had been asked to come to a Hotel for an interview and interviewed in the Complainant's hotel room wherein she was offered alcohol and old Hindi songs were sung and she was asked to sit beside him which she refused. She claimed it to be sexual harassment. Later on, way of a Tweet dated 08.10.2018, she named the person in the article as the Complainant. By another Tweet on 10.10.2018, she named 10 persons who have been sexually harassed by the Complainant.

The Complainant contended that the article in conjunction with the tweets was defamatory and denied the allegations made in the tweet. The Complainant led evidence of six witnesses including

himself as CW-1. He established his journalistic and other credentials and that publication of the article and subsequent tweets gravely harmed his reputation. CW-2 to CW-6 spoke to the good reputation of the Complainant and that the tweets and the article lowered his reputation. They also stated that they did not know the Accused and could not speak as to her allegations.

In the cross-examination of CW-1, the strategy of the Accused was to destroy the statement that the Complainant had stellar reputation. This is a boilerplate strategy in defamation matters as the pre-requisite is that the defamation must adversely impact the reputation and if reputation was already bad due to various reasons, one more event could not possibly impact it adversely. Towards this end, the conviction for criminal contempt for false reporting, political ideological U turns viz. shifting from Congress Party to BJP, that while being married, he was in an extra-marital relationship were all pointed out. This seems to have had an impact as the Ld. Magistrate records that the Complainant is not a man of stellar reputation is proved through his testimony and testimony of DW-3 Ms. Ghazala Wahab.

The cross-examination of the Complainant to bring out examples of reputation had a huge impact on the finding that the Complainant did not have stellar reputation. This was because the touchstone of the case was the Complainant's reputation. If the Complainant had focused only on the aspect that the false allegation that he is a sexual predator harmed his reputation and his own family members had felt embarrassed by these statements, intended to lower his moral character vis-à-vis his working with women and he will never be able to work with women on account of these allegations, then one could have argued that the cross-examination of the Complainant on other issues impacting his reputation is not relevant to the facts of this case.

CW-2 was working with the Complainant at some point in time and testified that she had not heard about the Complainant being a sexual predator from any person in the office and that he was of stellar reputation and she had heard from friends who asked about the Complainant given her long association with the complainant after the tweets came out. There is a legal requirement to show that the tweets have lowered the reputation of the Complainant in the eyes of others and to fulfil the same, it is standard practice to lead evidence of acquaintances to show the impact on the person. Maybe, to fulfil this requirement CW-2 was examined.

Given that CW-2 had worked in the Asian Age newspaper where the Accused and DW-3 Ms. Ghazala Wahab had worked, if CW-2 had not spoken to Ms. Ghazala Wahab about the truthfulness of the allegations against the Complainant given that even Ms. Ghazala Wahab had written an article on the Complainant, then her evidence would not have sufficient probative value. This was the focus in the cross-examination wherein CW-2 admitted that she interacted professionally with Ms. Ghazala Wahab and not the others mentioned in the tweets. She also stated that she did not know the Accused. She did not confront Ms. Ghazala Wahab about the truthfulness of the allegations made by the Accused or by Ms. Ghazala Wahab.

The Trial Strategy of the Complainant was to just establish the good reputation of the Complainant and leave the burden of proving the truth of the allegations to the Accused. Hence, only general statements were made by the witnesses. On account of CW-2 not carrying out sufficient inquiries into the allegations made by other persons and also Priya Ramani, the statement that it was not possible that the Complainant was capable of such conduct could not be accepted. Thus CW-2 evidence could not be given sufficient value.

CW-3 and CW-4 also spoke to the reputation of the Complainant and that the tweets caused enormous damage to the Complainant's reputation. The cross-examination of CW-3 and CW-4 was also on same lines as CW-2. It becomes boilerplate evidence if all the witnesses say the same thing, but they did not bother to fully understand why more than 2 persons were making the same allegations against the Complainant. CW-3 did not know the Accused or the other women who had made similar allegations or the people who were named in the second tweet as people who knew the Complainant to be a sexual predator.

CW-5 also spoke similarly as CW-2, 3 and 4. The cross-examination was on similar lines as CW-2 to CW-4 but additionally it was admitted that CW-5 gave a TV interview claiming the Complainant to be of good character after the Complaint was filed and after she agreed to be a witness and the Complainant's son worked with the CW-5. CW-6 testified only as to the print outs of the articles and the 65B Certificate and did not give any substantial evidence.

The strategy of the Complainant through the evidence of CW-2 to CW-5 was to establish reputation and to contend that the Complainant was incapable of being a sexual predator. Unfortunately, none of the witnesses were personally able to refute the story of the Accused or that of DW-3 or had spoken to other persons named by the Accused. If any of them had spoken to any of the 10 persons named and gave evidence as to those aspects even to say that their story was unbelievable for xyz reasons, that would have strengthened the case of the Complainant. But as they gave boilerplate evidence for defamation matters regarding reputational harm, the strategy of the Accused during the cross-examination was to establish that they had not made any attempt to verify the truth of the allegations before evidence as to the Complainant's reputation. Also, if the Complainant witnesses had made very general statements regarding character and reputation of the Complainant. If they had cited specific events / incidents and contended that on the basis of these events / incidents they had come to believe that the Complainant was incapable of being a sexual predator, then the cross-examination would have been extremely limited on those aspects as those facts would not have been within the knowledge of the Accused. This would have also forced the Ld. Magistrate to weigh those incidents against the incident that Accused complained of to arrive at the truth of whether it could have happened i.e. to find as to whether the Complainant is indeed capable of being a sexual predator as alleged by the Accused.

The Accused examined herself as DW-1, her friend who dropped her to the hotel as DW-2 and another person who was allegedly sexually harassed by the Complainant as DW-3. One of the

most striking things about the evidence of all Accused witnesses was the amount of details in their story. Every event, timeline, location was matching between DW-1 and DW-2. The story of DW-3 was very much believable and corroborated with every other detail. They could not be contradicted in their cross-examination on any aspect. This shows the level of preparation of the witnesses to remember every fact that took place nearly twenty plus years ago.

Especially DW-1 remember every question that was posed, how uncomfortable she felt, and the behaviour of the Complainant. All of this was stated in the examination in chief thus leaving limited scope for cross-examination by elimination of all possible gaps. If one contrasts this with the evidence of the CW-1 who did not lead any evidence regarding the interview and in the cross-examination did not remember the interview of the Accused and various details that were put forth. So, the Accused established by the cross-examination that it was probable that the interview took place at the Oberoi Hotel.

If the examination in chief of CW-1 had referred to the events of Oberoi Hotel and giving the Complainant's take on it, it would have been difficult to cross-examination him on specifics. But it was probably the Trial Strategy of the Complainant not to lead evidence on that issue. This was because the defence of the Accused was that only a portion of the article referred to the Complainant and the remaining was in general. CW-1 denied that suggestion and wanted to establish that the contents of the entire article had to be proved by the Accused against the Complainant. The evidence of the Accused on these aspects could not be contradicted. The Ld. Magistrate therefore accepted the Accused's contention on this aspect.

The Trial Strategy of the Accused appeared to be two-fold. One to point out that there was sufficient evidence to establish that the Complainant indulged in sexual harassment by giving various examples. This would negate the strategy of the Complainant to show that he was of good character. The Ld. Magistrate records that a person may be well respected within his family and friends but can also be a sexual predator in private.

Second strategy was to establish that it could be the truth by utilizing the supporting tweets of various persons (the content of the tweets is not stated in the judgment and hence we cannot comment as to whether it was collaborative of the Accused's case or not). The impression that was sought to be created was that there was a pattern of harassment of junior female colleagues. It was implied that no action had been taken by the Complainant against those other persons as the allegations could be true. If that is the case, then there is a probability that the Accused's allegation of sexual harassment can also be true. The Complainant's explanation regarding this was lacklustre and did not inspire confidence in the Ld. Magistrate.

The Complainant sought to cross-examine the Accused and DW-2 on any other contemporaneous evidence such as telephone calls, hotel reservation etc, not approaching any authority against the Complainant in the wake of such serious allegations to establish falsity. But when the Complainant himself could not remember the events of 25 years, it would be unreasonable to

expect that physical evidence of the events would be preserved. Only oral collaborative testimony was available and had to be accepted.

The Complainant ought to have adopted another strategy of getting witnesses who knew the Accused and who contend that the Accused never confided in them about this matter. There was only one witness who spoke as to the events inside the room viz. DW-1. If there was any challenge to the testimony by any witness, then it would have made the Ld. Magistrate's job more difficult.

The appeal memo that the Complainant will draw up may not be kind to the Ld. Magistrate as the operative portion of the judgment does not clearly record does not reflect in great detail the impression that the evidence created on the Ld. Magistrate. It will be screamed from rooftops that the Ld. Magistrate completely failed to give a finding on whether the tweet was defamatory and whether the Accused proved that she came within the First, Third or the Ninth Exception, that the Ld. Magistrate failed to give any reasons as to why it was held that the Complainant did not have stellar reputation; that the Ld. Magistrate failed to give reasons as to how the Accused proved her case within the preponderance of probability.

Ultimately a judgment in a criminal matter is not just an exercise of testing whether the legal requirements are fulfilled but also a reflection of the Ld. Magistrate's conscience and sense of justice. The Ld. Magistrate records the difficulties that women face in the workplace, the absence of appropriate redressal mechanisms at that time and the courage it takes for victims of sexual harassment to speak up to hold that their right to dignity must not be stifled with the threat of criminal defamation. This may not be an established legal principle, but it is a reflection of the Ld. Magistrate's sense of justice. In a Trial, it is possible to appeal to a Judge's sense of justice which goes beyond laws and touches humanity and good conscience.

The Trial Strategy of the Accused was a combination of robust understanding of the law, forensic cross-examination of the Complainant, the Accused witnesses holding their own during the cross-examination and appeal to the conscience of the Ld. Magistrate. The Trial Strategy of the Complainant was to merely prove reputation and impose the burden on the Accused to make out their case fell within the Exceptions to the offence which is a very sound legal strategy in most situations. But in this case, the Complainant could not establish the falsity of the article and the tweets by way of cross-examination and the Ld. Magistrate held it against them. The possible reason why it happened that way was because the events in question happened in a private room. Even in offences regarding rape, the sole testimony of the victim in the absence of any other evidence is considered sufficient for conviction i.e. meeting the burden of 'beyond any reasonable doubt'. Contrast that to the requirement of proving the defence beyond 'preponderance of probability', the Accused strategy worked better and it resulted in acquittal.

{Disclaimer: I make post-facto and possibly unjustified and unwarranted assumptions and presumptions while analysing the Trial Strategy adopted by the parties in this article. This is no reflection on the lawyers who represented the parties who were brilliant and could not have

possibly foreseen how the Ld. Magistrate will look into the totality of the matter. It is also possible that the Appellate Court may reverse the finding rendering my observations baseless. Therefore, please take it only as an academic take on the matter.}

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