APPELLATE CRIMINAL.

Before Guha and Lethbridge JJ.

1937

Aug. 17, 18, 19, 23.

ABDUL GAFUR KOTWAL

v.

EMPEROR.*

Misdirection—Absence of caution in sexual cases, if vitiates verdict—Opinion of the Judge, how to be expressed—Effect of charge to the jury, how to be construed.

The absence of the usual caution given to the jury in sexual cases to the effect that it is unsafe to rely on the uncorroborated evidence of the prosecutrix does not necessarily vitiate the verdict. The effect of such omission depends upon the facts of each case.

Merely because the Judge formed a strong opinion himself which coloured his presentation of the evidence to the jury or he gave expression to his opinion on the evidence strongly, the charge to the jury cannot be held to be vitiated, if he did not usurp the function of the jury but left the decision of each point fairly to them.

The charge to the jury must be taken as a whole. There may be passages to which exception may be taken, but the verdict will not be set aside if the cases of both sides had been fairly placed before the jury.

King-Emperor v. *Barendra Kumar Ghose* (1) referred to.

CRIMINAL APPEAL.

The material facts of the case and arguments in the appeal appear sufficiently from the judgment.

Noad and *Imam Hosain Chaudhuri* for the appellants.

Narendra Kumar Basu and *Nirmal Kumar Sen* for the Crown.

Cur. adv. vult.

*Criminal Appeal, No. 273 of 1937, against the order of S. C. Basu, Second Assistant Sessions Judge of Faridpur, dated Mar. 22, 1937.

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GUHA J. The judgment about to be delivered by my learned brother in this case has been read and considered by me carefully; and I have not thought it necessary or proper to record a separate judgment, as I am in entire agreement. The judgment of my brother is the judgment of this Court.

I consider it necessary to state this only that the observations contained in some of the recent decisions of this Court in cases relating to sexual offences, referred to by the learned counsel in support of this appeal, must be taken to be applicable to the facts of those cases only. It was, to my mind, never intended that any rule of general application was going to be laid down in these cases, departing from the rules of evidence applicable to trial of criminal cases in this country.

LETHBRIDGE J. The case against the appellants briefly was that on April 23, 1936, at Palong in the district of Faridpur, one Beenapani Debi, a married girl aged about 19, was abducted by deceit by her relative, the appellant Mati Lal Mukhuti, together with one Manu Das, who was not on trial, in pursuance of a conspiracy between them, and the appellant Abdul Gafur, a local shop-keeper and President of the Union Board, and taken to a boat, on the river where Abdul Gafur, representing himself to be the Chairman of the District Board, outraged her modesty.

On this, Abdul Gafur was tried on the complaint of Beenapani by the Second Assistant Sessions Judge of Faridpur and a jury on charges of abducting Beenapani and outraging her modesty, and Mati Lal Mukhuti with abducting her, and abetting the latter offence. Both were also tried under s. 498 of the Indian Penal Code on the complaint of the husband with enticing her away. A charge of conspiracy to abduct was added by the Assistant Sessions Judge against both and tried by him sitting with the same jurors as assessors. Both were convicted of all

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charges, the jury finding them guilty by a majority of 3 to 2, and the assessors giving their opinions in the same proportion. Abdul Gafur has, accordingly, been convicted under ss. 366, 498, 354 and Mati Lal Mukhuti under ss. 366, 498 and 354/109 and both under s. 120B read with s. 366 of the Indian Penal Code.

The practice of adding a charge under s. 120B in cases where it is not necessary, with the result that the jurors sit in the same trial as assessors, has been condemned by this Court more than once. In the present case, it was quite unnecessary. A charge of abetment by conspiracy under s. 109 would have served the same purpose and would not have been open to this objection.

The complainant, Beenapani, had been married some seven years before to Man Mohan Chakrabarti, P. W. 13, who had just served three years' imprisonment under s. 110 of the Code of Criminal Procedure and was under police surveillance. The prosecution case was that she had been brought to Palong by her mother during the *Phâlgun* before the occurrence and had not lived there before. Her mother also was not living with her husband. Shortly before the occurrence, Beenapani had been taken to the house of her mother's brother Surendra at Kurashi about 2 miles from Palong. On the evening before the occurrence, Mati Lal Mukhuti and Manu Das went there and said that the Chairman, District Board, would be in Palong next day, and suggested that she should apply to him for a stipend to learn midwifery. She agreed and next morning they came and took her to Palong Union Board. The prosecution case is that there they pointed out the accused Abdul Gafur, who was on the verandah, as the Chairman of the District Board. The pretended Chairman, however, said he was busy and asked them to come in the afternoon. The other two then left her with her mother in Palong. In the afternoon they came again and took her to the waiting room at the old steamer station,

where they left her till dusk. At dusk, they returned and said that the Chairman was going across the river in a boat to catch a steamer at the new station, and asked her to go with them to the boat where she could speak to him. She went to the boat and found there the appellant Abdul Gafur. Mati Lal Mukhuti boarded the boat with her, but Manu went away. The pretended Chairman began to talk about midwifery, but some time later, after the boat had started, Mati Lal went outside and got on the roof and Abdul Gafur caught hold of her and made immoral proposals. She shouted, but Mati Lal did not respond. She then came out and was about to jump into the river, when another boat approached, and she shouted for help. In this boat were three men, the Manager of the Madaripur Branch office, Singer Sewing Machine Co., and two of his canvassers. They brought their boat alongside and Beenapani, who was trembling and crying, jumped into it. She told them her story and they informed her that her assailant was not the Chairman of the District Board but Abdul Gafur.

She was taken back to her mother and told her story to the assembled neighbours, but no complaint was filed till the 1st of May, nine days later. Beenapani gave the explanation that her father was at Noakhali and her husband at Calcutta, and he had to wait till her father came home. She said that she did not lodge *ejâhâr* at the *thânâ*, as Abdul Gafur was intimate with the police.

The defence was a complete denial of the whole story. Abdul Gafur did not personate the Chairman. The Chairman himself was at Palong that morning. The girl was brought to him at the Union Board by Manu about 10-30 a.m. to apply for a stipend. Other influential persons, including the Circle Inspector, were present. Abdul Gafur protested on the ground that she and her mother were of loose character. At the time of the alleged incident in the boat Abdul Gafur was presiding over

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a meeting of the Union Board, which continued till 8-30 p.m. He had helped the police in fighting the Congress and Civil Disobedience Movement, and had thus incurred the displeasure of the local Hindus. His enemies had, for this and other reasons, brought this false case.

The trial lasted for three weeks. The prosecution examined witnesses to prove the proposals to Beenapani on the evening of the 22nd, the taking of Beenapani to the Union Board next morning, her going on board and rescue from the boat, and the narrative of the occurrence by Beenapani and her rescuers to neighbours. The defence also examined a number of witnesses, including the gentleman, who, at the material time, was Chairman, District Board, the Circle Inspector and other respectable witnesses to prove that when Beenapani was said to have been introduced to Abdul Gafur as Chairman, District Board, he was with the real Chairman elsewhere, that she was later in the morning introduced to the real Chairman, and presented a petition to him. Oral and documentary evidence was also produced to show that Abdul Gafur was at a meeting of the Union Board at the time he is alleged to have molested Beenapani on the boat.

The learned Judge charged the jury at great length, dealing in detail with the evidence relating to each phase of the case, and with the defence evidence. It is undoubtedly a charge for a conviction. The learned Judge had formed a strong opinion himself and that coloured his presentation of the evidence, particularly the defence evidence. It will be found, however, that, in his discussion of the evidence on each point, he always leaves it to the jury. He does not usurp the jury's functions, and that is the essential test. The Judge, as has been repeatedly held, not only may but should let his opinion appear, provided that he leaves the decision fairly to the jury and does not take it out of their hands. One of the chief points of misdirection, urged on behalf of

the appellants, was that the charge was altogether too positive and one-sided, and did not put the case fairly to the jury. As we have said, the learned Judge has set out the defence case and discussed the evidence led in support of it at great length, and if his presentation of it was at times coloured by the view he had formed, he at least left every point of any importance whatever to the jury. The words of Sir Asutosh Mookerjee J. in *King-Emperor* v. *Barendra Kumar Ghose* (1) apply very aptly to this case :—

> The impression left on my mind is that, taken as a whole, it is what is sometimes designated a charge for a conviction. But it cannot fairly be said that the facts were not left to the jury to decide and that the Judge usurped their function, merely because he gave expression, as he was entitled, to his opinion on the evidence strongly.

We are unable to hold that the charge in this case was, to use the words of the petition of appeal, biased throughout in favour of the prosecution, "entirely one-sided and calculated to suggest to the "jury that there was practically no doubt as to the "main facts, and constituted a direction to disbelieve "the large and respectable body of defence evidence."

Another point made on behalf of the appellants against the charge as a whole is that it did not contain the special caution that when a man is charged with a sexual offence it is dangerous to rely on the uncorroborated evidence of the prosecutrix. It is a fact that this caution, which has been held to be necessary in several recent cases of this Court, was not given, and learned counsel for the appellants has asked us to set aside the conviction on this ground. In those cases it will be found that the evidence of the complainant was uncorroborated; in the case before us it is otherwise. There is the evidence of the Singer Company's agent and his two canvassers, the three gentlemen who rescued Beenapani. If their evidence is believed, they actually heard the girl's cry, and saw Abdul Gafur trying to drag her under the roof of his boat. They understood then and there

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that the girl was under the impression that her assailant was the Chairman of the District Board. If this evidence is believed, it provides the strongest corroboration of the girl's story. Learned counsel for the appellants was forced, in order to make his point effective, to argue that the jury could believe these three witnesses about the rescue, and yet, because they had only the girl's word for what went on inside the boat, the accused might have committed no offence. He suggested that the girl might have come of her own accord to use her arts upon Abdul Gafur to induce him to give up his objection to her getting a stipend, in colloquial phrase to "vamp" him, and that when he tried to take advantage of her she got frightened. I hardly think that this suggestion would have been made by anyone familiar with village life, and we cannot say that the Judge ought to have put any such fanciful possibility before the jury. It is we think not too much to say that the central episode in the girl's story stands or falls with the evidence of these three witnesses. It follows that the absence of any caution, such as is usually given in sexual cases, could not have affected the verdict of the jury in the present case, and is therefore not a ground on which the conviction should be set aside. It was also argued that the girl's story is uncorroborated in other important particulars, *e.g.*, that she did not know Abdul Gafur before, and as to what happened in the Union Board in the morning. It is not necessary that her story should be corroborated in all important particulars. The part of it which is corroborated is the crucial part, which, if believed, establishes the guilt of the appellants.

To deal with the other points of alleged misdirection it will be simplest to go through the charge, and take them as they occur. The charge opens with some general observations on the nature of the case, which unfortunately had created considerable stir. The opening words are:—

> You have before you a simple case of abduction of a young married girl for immoral purposes.

It is objected that this is a misdirection at the very outset, that the case was in reality far from simple, and that the Judge in calling it a simple case was suggesting to the jury that they would have no difficulty in finding it a true case. Now, evidence had been given for nearly three weeks, and had wandered into bypaths of remotely connected fact; arguments had gone on for three days and it seems to us that the Judge struck the right note in reminding the jury that the issue before them was a plain and simple one. We are unable to read into these words the sinister intention which is suggested.

The case for the prosecution and defence are then set out and the law explained. No objection is taken to this part of the charge. The learned Judge then divided both the prosecution case and the defence case into four parts, and summarised the evidence relating to each. He then tells the jury that they must decide which they will believe. This, it is said, is a serious misdirection. He should have told the jury that though they did not believe the defence, it did not follow that they must believe the prosecution. That no doubt, was the proper direction, and the proper place to give it, but the Judge did give it at the end of the charge, where he says :—

> The failure of the defence would not necessarily establish the truth of the prosecution case.

Reading the charge as a whole, we cannot say that he did not direct the jury properly on this point.

The Judge then went back to the first part of the prosecution case and discussed the evidence relating to it in detail. This part, as learned counsel for the appellants pointed out, is really common to both cases. The controversies connected with it, *e.g.*, regarding Ex. L, were, therefore, not of great importance, except in so far as they affected the credit of witnesses. Exhibit L is dealt with at great length. It is, as the learned Judge says, a remarkable document. It is in Bengali, written in pencil,

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signed by Surendra, Beenapani's mother's brother, and states that Surendra's wife Hiran Mayi, P. W. 2, in whose house at Kurashi Beenapani was that evening, had gone to Calcutta a day or two before the end of *Mâgh*, and had returned seven or eight days before the end of *Baisâkh*. If that statement were true, it would mean that Hiran Mayi had given false evidence that she saw Mati Lal Mukhuti and Manu come to her house, but as the defence do not dispute that, it would not otherwise be of much importance. Nevertheless, much controversy centred round it. It bears a thumb-print, said to be that of Hiran Mayi, which Hiran Mayi explains as having been taken by a *dafâdâr* by misrepresentation. The learned Judge had evidently formed a strong opinion that this document was false, as he was entitled to do. He says that the learned pleader for the defence actually argued on the assumption that it was obtained by misrepresentation. Mr. Carden Noad suggests that no pleader would have argued so, but as to that we must accept the Judge's statement. Mr. Carden Noad's principal grievance in this connection is against the words :—

> You shall have to decide whether Hiran Mayi signed it by putting her thumb impression after being fully aware of its contents, or whether the defence created a spurious document with the help of the *dafadar*, and possibly also of the local police to wreck the prosecution story completely.

The document does not wreck the prosecution story even if it is proved genuine. Moreover, it is said, there is no basis in the evidence for suggesting that the police might have been a party to this fabrication. No doubt it had been argued before the jury with some degree of plausibility that this was the probable explanation of the letter, and we do not think the Judge can be blamed for mentioning it. Another point in this connection is that Surendra, by whom the document purported to have been written, was not examined, and it is said that the jury were not directed properly about this. In a case like this numerous points arise with a greater or less bearing on the main issue, and the Judge cannot be expected

to place them all before the jury, nor is it fair to criticise every phrase in this summing up. To quote Sir Asutosh Mookerjee in *King-Emperor* v. *Barendra Kumar Ghose* (1) again :—

> We are not called upon to consider whether this or that phrase was the best that might have been chosen or whether a direction which has been attacked might have been more fully or more conveniently expressed.

The learned Judge then discusses the evidence for the second part of the case, the production of Beenapani at the Union Board before Abdul Gafur who pretended to be the Chairman, District Board, and the third part, the incident in the boat. The latter is the crucial part of the case. It is the basis of the charge under s. 354 and the purpose of the alleged offence under s. 366. Regarding the learned Judge's discussion of this all-important evidence no complaint has been made before us (except as regards the failure to give the special caution, with which I have already dealt). In our opinion, the discussion is adequate and perfectly fair. The same is true of the last part of Beenapani's narration of her story to relatives and friends.

The learned Judge then deals with the defence evidence. He starts with the very fair observation that :—

> The first part of the defence story is the most important one and if it be believed will completely demolish the prosecution story.

The part referred to is the alleged presentation of a petition by Beenapani herself to the real Chairman of the District Board, D. W. 9, Badsha Miya, in the presence of a number of officials and other respectable persons, including the Circle Inspector.

It was admitted that the materials on record amply justified the learned Judge in presenting the evidence of D. W. 9, at the material time the Chairman of the District Board, very unfavourably to the jury. In the case of the Circle Inspector, however,

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it was strongly argued on behalf of the appellants that the evidence of this witness was unfairly presented to the jury. Firstly it is said that the Judge made too much of certain discrepancies between his evidence and that of the Chairman and Rai Saheb Amrita Lal Mukherji, a school master, as to whether both Abdul Gafur and Mati Lal Mukhuti spoke against Beenapani's character: the point was not a material one but that the Judge told the jury that the discrepancy was significant. Again he said:—

> This witness appears to be very thick and thin with accused Abdul Gafur who rendered him great assistance in his abortive Chaigaon B. L. Case.

Finally he said that it was the prosecution case that the Circle Inspector had a hand in the manipulation of the spurious document (Ex. L). We have already referred to this. It is argued that he should have told the jury that there was no evidence of this. Obviously there was no direct evidence or the Judge, who evidently did not believe the witness, would have referred to it. We must credit the jury with enough intelligence to see that for themselves. It is no doubt true that the unfavourable opinion which the learned Judge had formed of this witness very clearly appears in all this. But he then puts the other side of the case. "The Inspector" he says: "has got a fine "record of efficient work in the department to which he "belongs". Finally he fairly leaves the issue of the credibility of this witness to the jury.

The next evidence discussed is that of Ray Sahib Amrita Lal Mukherji, a school master. He was ill at the time of the trial, and his deposition before the Magistrate was put in and read. The learned Judge made an unfortuate slip when he said:—

> He also says that the said aspersions were made against the moral character of the girl alone and in this respect he contradicts Badsha Miya and Badaruddin, who stated that the aspersion was against both the girl and her mother.

Though in examination-in-chief he referred to the girl only, in cross-examination he said:—

> I was a bit surprised when Gafur started his allegations against the girl and her mother.

However, almost immediately before he made this comment, the learned Judge had read and translated the whole of this witness's deposition to the jury. We do not think that their estimate of him was seriously affected by this slip.

The learned Judge then proceeds to discuss the probability of the story told by these three witnesses. He uses some rather unjustifiable language about the part played according to the defence by Abdul Gafur. If he warned the Chairman in public that an applicant for a stipend was not suitable, being a woman of loose character, it is not fair to describe him as "foul-"mouthed" or to say that he "hurled a volume of "accusation" against the girl.

It was argued for the appellants that the Judge should have pointed out to the jury the uselessness of Abdul Gafur's alleged impersonation in the morning, when he did nothing. But he might, on the other hand, have said that no one with a free hand to concoct a probable false case would gratuitously deny an incident such as the presentation of a petition by the girl to the real Chairman in the presence of so many respectable witnesses for which apparently overwhelming evidence could be produced. He said neither. He might have said something about the improbability of the central episode, the decoying of the girl into the boat. The fact is that there is so much room in this extraordinary case for speculation and counter-speculation that it is difficult to criticise the Judge for not putting any particular point of probability to the jury. One statement which the Judge makes in the passage under consideration is that "Beena does not reside at Palong". It was argued that this is a misdirection of fact, and that the Judge should have told the jury that Beena probably knew Abdul Gafur before. The point is of great importance, as it was essential to Beenapani's case that she did not know Abdul Gafur by sight. The

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evidence on the point has been placed before us in detail, and it turns out that the learned Judge has summarised it correctly.

As regards Abdul Gafur's *alibi* for the time of the occurrence, namely, that he presided over a meeting of the Union Board in its office at Palong from about 4 p.m. to about 8-30 p.m., the learned Judge put the question to the jury in this way :—

> The prosecution case is that Beena was taken to the boat at about sunset. We find from the almanac that on 10th Baisâkh sunset was at 6-20 p.m. There is no doubt that a Union Board meeting was held that day in its office at Palong. The notice shows that it was timed to begin at 4 p.m. In order to establish his *alibi*, Gafur has got to prove that the said meeting continued till after sunset.

For the appellants it was argued that he need not prove that the meeting continued so long. P. W. 6 says he saw Abdul Gafur board the boat when the sun was about to set, so the error, if any, is very small.

Speaking of D. W. 5, the learned Judge says :—

> He seems to be what we in legal parlance, call an omnibus witness.

Now even genuine legal terms should be used as sparingly as possible in charging a jury, especially when the jurors do not know English, to drag in an epithet like this may be a source of positive prejudice.

Of the next witness the Judge says :—

> He appears to have come with the intention of giving perjured evidence.

Now as we have said, a charge must be read as a whole. In practically every charge in a hardfought case there are passages to which exception can be taken. What we have to decide is whether the defence case was fairly placed before the jury. The Judge's discussion was, no doubt, as we have said, coloured by the conclusion to which he had come, according to which the defence witnesses could not be witnessess of truth, but he put before the jury full details on which they could judge for themselves, and he invited them to judge for themselves.

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The learned Judge then touched on various matters, including the important question of the character of Beenapani. In our opinion, he put the material evidence fairly before the jury. It was argued that he should have said that she had been discarded by her own family, but there is no definite evidence of this.

As regards the character of the house in Calcutta in which Beenapani lived for some months with her husband, the learned Judge dealt with this point very fully and placed all the facts before the jury. He did not, it is true, put to them the absurdity of the statement that Beenapani and her husband only came to know the character of the house after a few months, though it was visited every night by the police. What he put to them was that Beenapani had to go where her husband took her, and that it was difficult for them to get other quarters. The jury were reminded of every detail of the evidence bearing on this point and there was nothing to prevent them forming their own conclusion.

There is also said to have been misdirection as regards some letters written to the girl's husband and father just after the occurrence, and presumably giving the earliest version of it. The objection is that although Beenapani's husband admits that he got several letters and that he handed over some to his *mukhteâr* in this case, the learned Judge suggests to the jury that the explanation of the absence of these letters may be that they were not in fact received by her husband and not in fact handed over to the *mukhteâr*. What the Judge said is:—

> Man Mohan admitted in the lower Court that he got some letters in Calcutta, and that he might have handed over one or two to the *mukhteâr* at Madaripur. This latter statement may not be true, as no letters were filed, or if true, those letters did not contain the particulars of the occurrence. It was undoubtedly the duty of the prosecution to produce such letters if they were in existence.

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Man Mohan said in the Sessions Court :—

I got letters from my mother-in-law, my wife, father and grandmother. I have not brought those letters with me as I did not think it necessary.

Cross-examined he said :—

Altogether I received four or five letters. I might have made over one or two of them to my lawyer at Madaripur. I don't remember if I stated in the lower Court that I made over those letters to my lawyer immediately after my arrival from Calcutta.

In the lower Court he had said :—

Some may be with my *mukhtear*; these are letters, not postcards. I made over these letters on my immediate arrival from Calcutta.

The Judge's statement of the evidence is, therefore, not altogether accurate, but as he said :—

It was undoubtedly the duty of the prosecution to produce such letters if they were in existence.

We think there was no material misdirection.

To sum up, there are no doubt, in the lengthy summing up of the learned Judge, some remarks to which exception may be taken, but he has placed before the jury very fully and on the whole fairly all the facts which support either the prosecution or the defence, and he has left the decision on all points in their hands. That being so, there is not, in our opinion, any ground for setting aside the verdict of the jury in this case. The conviction for conspiracy rests upon the same evidence, which we have carefully considered, and we see no reason to think that the two appellants were not rightly convicted.

We have given the question of sentence our careful consideration. We are of opinion that, having regard to what actually happened, the sentences on both the appellants are too severe and should be substantially reduced. The offence of Mati Lal Mukhuti is the more heinous of the two. He is related

to the girl, and she was entrusted to his care. He abused his trust, and played the most odious and despicable part in bringing the girl to the other accused. The sentence on Mati Lal Mukhuti is reduced to two and half years' rigorous imprisonment and that on Abdul Gafur to one and half year's rigorous imprisonment. With this modification the appeal is dismissed.

The appellants must surrender to their bail and serve out the sentences now imposed on them.

Sentences reduced.

A. C. R. C.