## APPELLATE CRIMINAL.

*Before Bartley and Sen JJ.*

1940

*April* 19, 22.

# HARENDRA PRASAD BAGCHI

*v.*

# EMPEROR.*

**Misdirection**—*Direction to the jury in a case of sexual offence, what it should be—Corroboration of the victim's statement, What is.*

*Per* BARTLEY J. The proper direction to the jury in a case involving a sexual offence is that it is not safe to convict on the uncorroborated testimony of the prosecutrix, but the jury, if satisfied of the truth of her evidence may, after paying attention to that warning, nevertheless convict.

The case of *Surendranath Das* v. *Emperor* (1) is not an authority for the proposition that where no such warning is given, the conviction must be set aside.

There is no presumption of law which differentiates the evidence of the complainant in a rape case from that of the complainant in the case of any other offence. There can be no assumption, in the absence of evidence, that she is an accomplice.

*Per* SEN J. There is no inflexible rule that in every case of rape, the Judge must direct the jury that they should not convict the accused on the testimony of the prosecutrix unless it was corroborated in material particulars to the same extent as is required in the case of accomplice evidence. The Indian law of evidence nowhere suggests any such rule and, even if there be such rule or practice in England, the conditions in India do not warrant the engrafting of such a rule on the Indian system. The particular circumstances of a case may make it necessary for the Judge to give such warning to the jury and the omission to do so may in circumstances of that case render the charge bad.

*Surendranath Das* v. *Emperor* (1) explained and distinguished.

The statement of the victim of an alleged rape to her mother and neighbours shortly after the incident complaining against the accused is evidence corroborating the girl's testimony in Court.

CRIMINAL APPEAL.

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

*Criminal Appeal, No. 98 of 1940, against the order of B. M. Mitra, Sessions Judge of Nadia, dated Jan. 19, 1940.

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*Probodh Chandra Chatterjee* and *Bireswar Chatterjee* for the appellant.

*Nirmal Kumar Sen* for the Crown.

BARTLEY J. The appellant in this case was convicted under s. 376 of the Indian Penal Code in accordance with the majority verdict of the jury and sentenced to four years' rigorous imprisonment. The case for the prosecution was that the appellant, a shop-keeper, was a neighbour of one Sudhir Bagchi. The complainant in the case, a little girl named Fudan Dasi, went to Sudhir Bagchi's shop to get some *âlo châl* and when she was returning the appellant got her into his shop on the pretext of giving her sweets, whereupon he shut the door, laid her on a *dhokrâ* and had sexual intercourse with her. After some time she was allowed to go, whereupon she informed her mother and other inhabitants of the village. The next morning the brother of the girl, who was away at the time of the incident, came back, heard this story and reported the matter to the *thânâ*.

The medical evidence supported the case of rape and there was other corroborative evidence. Certain witnesses deposed that on the day after the occurrence the appellant came to the house of the girl and caught her mother's hand and asked for mercy, whereupon the child's brother threw him out.

Chemical examination disclosed that spermatozoa was detected on the *dhokrâ* or quilt and that blood was found on the *dhooti* worn by the appellant, which was seized by the police.

The learned Judge in his charge to the jury said that, although a conviction based on the sole testimony of the girl in such a case was not illegal, it is extremely dangerous to convict the accused on her evidence alone unless that was corroborated in material particulars by credible evidence coming from

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independent sources. The corroborative evidence must be such as to confirm in material particulars the story that not only the crime was committed but that it was committed by the accused person.

In dealing with the question of corroboration, the learned Judge said that the mere facts that blood was found upon the appellant's *dhooti* and spermatozoa was found on the *dhokrâ* were of no value whatsoever.

Now, in so far as the charge to the jury goes, it certainly cannot be said that the learned Judge misdirected the jury in a way such as to prejudice the appellant. In point of fact his direction, in our opinion, went very far in favour of the appellant. The learned Judge was undoubtedly right when he said it was unsafe to convict an accused on the uncorroborated testimony of the prosecutrix in such a case, but he omitted to add that if, in spite of this warning, the jury came to the conclusion that they believed the girl and thought that the accused was guilty, they had the right to convict him on that uncorroborated testimony.

Much stress was laid in argument on the case of *Surendranath Das* v. *Emperor* (1) in support of the contention that the learned Judge had misdirected the jury in the present case.

What was laid down in that case, as the report shows, is that it has been the practice for many years for the Judge to warn the jury not to accept the evidence of the prosecutrix unless corroborated in some material particular incriminating the accused. But, the Judge ought to tell the jury that if, in spite of his warning, they believe the girl and think the accused guilty, they have the right to convict on her uncorroborated evidence.

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The proper direction in such a case is that it is not safe to convict on the uncorroborated testimony of the prosecutrix, but the jury, if satisfied of the truth of her evidence, may, after paying attention to that warning, nevertheless convict.

Corroboration is required in fact, but not as a matter of law.

The precise meaning of this last dictum, which is quoted from Russell on Crimes, is not clear.

Now the report in *Surendranath Das's* case (*supra*) makes it plain that both the learned Judges were satisfied that the prosecutrix was an unreliable witness.

Lort-Williams J. in his judgment, pointed this out at some length, and summed up by saying that, *in view of these facts*, it is clear that the utmost care must be taken by the Judge and Jury before convicting.

Henderson J. said that, in so far as the case for the prosecutrix was that she had been forcibly raped, that case was contradicted by the medical evidence, and such portions of her story as are capable of being tested *aliunde* were found to be untrue also.

The Judge in the Court below apparently did not advert to this aspect of the case and did not warn the jury as to the necessity for corroboration.

The conclusion arrived at by the appellate Court was that, from the facts stated, there was no proper direction in the case, on material points.

The proposition of law laid down was that the jury should be warned that it is unsafe to convict on the uncorroborated testimony of a prosecutrix, but that they might still do so, if satisfied that she was telling the truth.

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The case is not, in my opinion, an authority for the headnote, which states that where no such warning is given, the conviction must be set aside.

In this connection, it may be pointed out that there is no presumption of law which differentiates the evidence of the complainant in a rape case from that of the complainant in the case of any other offence.

There can be no assumption, in the absence of evidence, that she is an accomplice.

In the result the present appeal must be dismissed. Appellant must surrender to his bail and serve out the sentence.

SEN J. The appellant has been found guilty of having raped a young girl and sentenced to undergo rigorous imprisonment for four years.

The case for the prosecution is as follows :—

On the August 31, 1937, Fudan Dasi, a girl aged about nine years, was going home from the house of a neighbour named Sudhir Bagchi where she had gone to collect some special kind of rice. When she was returning home she was accosted by the accused Harendra Prasad, who lived nearby. He promised the girl some sweets and money and asked her to accompany him. She entered the shop room of Harendra Bagchi, who immediately shut the door, threw her down on a quilt and raped her. After a time the girl came out of the room crying and limping. She told her sister at once that she had been raped by the accused. A little later her mother came and was told the same story by the girl. Her cloth was blood stained. A little later the girl and her mother told the villagers about this incident. On the next morning, the girl's brother Foru returned home and was told about what happened. While he was there the accused Harendra came to the house and

begged the girl's mother for mercy. Foru slapped him and pushed him out of the house by the neck. At about 5 p.m. on September 1, 1939, an information was lodged at the *thânâ*. A Sub-Inspector of Police came to the scene and seized the *sârhi*, the *dhooti* and the quilt. On all these articles blood has been found and on the quilt in addition to blood, there was spermatozoa. The girl was medically examined. The doctor states that she was aged about nine years. The hymen was recently torn, the private parts congested and torn in the upper part. She was still bleeding when she was examined by the doctor. These are the main facts alleged by the prosecution.

The defence of the accused is a denial of any complicity in the occurrence. The accused stated that he had been falsely implicated by one Jatu Ghosh, cousin of Fudan Dasi, because of certain litigations between Jatu Ghosh's father and the accused's family.

The jury disbelieved the defence and by a majority of 3 to 2 they found the accused guilty.

Two points have been urged before us on behalf of the appellant. In the first place it is said that the learned Judge did not warn the jury sufficiently that, in a case of rape, they should not convict unless the testimony of the prosecutrix is corroborated in material particulars by independent evidence, which established not only the crime but also the identity of the ravisher.

The second point which was argued is that the learned Judge omitted to place an important piece of evidence before the jury. The girl was asked in cross-examination whether or not this rape had been committed by one Mohit, with whom the negotiations for her marriage were going on. The girl first said "yes" and immediately corrected herself and said "no". This evidence was not placed before the jury by the Judge in charge.

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There is absolutely no substance at all in the first criticism and for two reasons; firstly, there is ample corroborative evidence if the witnesses are to be believed and, secondly, the learned Judge did warn the jury in very strong terms that corroboration was necessary. The corroborative evidence consisted firstly of the girl's complaint to her sister and mother almost immediately after the occurrence. The second piece of corroborative evidence is the finding of blood on the quilt and the *dhooti* of the accused and the finding of the spermatozoa on the quilt. The third piece of corroborative evidence is the statement of the witnesses, who said that the accused came on the next day to the house of the girl and begged of her mother for mercy. The direction given by the Judge regarding the question of corroboration is, as I have said before, quite sufficient. This is what he said:—

> Although a conviction based on the sole testimony of the girl in such cases is not illegal, it is considered unsafe and extremely dangerous to convict the accused in such cases only on her testimony unless it is corroborated in material particulars by credible evidence coming from independent sources. The corroborative evidence must be such as confirms in material particulars the story that not only the crime was committed but the accused had committed it.

The Judge repeated this caution once again at a later stage. It seems to me that the learned Judge in warning the jury regarding the necessity of corroboration went too far and told the jury that certain evidence was not corroborative evidence when it most certainly was. He says that the statement of the girl to her mother and the neighbours shortly after the incident complaining against the accused is not corroborative evidence. It certainly is corroborative evidence. In this connection I would refer to s. 157 of the Evidence Act and to illustration (*j*) of s. 8 of the same Act. Again he says that the mere finding of spermatozoa on the quilt "is of no avail". True, by itself, it may not have much evidentiary value, but it is a strong piece of evidence when taken with the evidence given by the girl that the accused had raped her on the quilt. There is, therefore, no substance in this criticism of the learned Judge's charge.

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When urging this point the learned advocate drew our attention to the case of *Surendranath Das* v. *Emperor* (1) and he contended that in every case of rape the Judge should warn the jury that they should not convict the accused on the testimony of the prosecutrix unless such testimony is corroborated and that the corroboration should be of the kind required in the case of an accomplice's evidence. No doubt in that case Lort-Williams J. remarked that the charge was defective because it did not contain such a warning and that such a warning was necessary. It must be remembered, however, that the judgment of each case must be considered with reference to the particular facts of the case. There the girl was older and used to sexual intercourse before the occurrence. No signs of rape were found on medical examination. On the contrary the doctor said that the indications were that no force had been used. The Court found that the evidence indicated clearly that she had consented and that she told untruths in many matters. In such a case a warning to the jury of the kind referred to by the learned Judge would be necessary and I agree that the omission to give the jury such a warning on the facts of that case rendered the charge bad. But if the learned Judge was expressing the view that in every case of rape the Judge must direct the jury that they should not convict the accused on the testimony of the prosecutrix unless it was corroborated in material particulars to the same extent as is required in the case of an accomplice evidence, then I would most respectfully and emphatically dissent from it. The laying down of such a rule would be tantamount to saying that every prosecutrix in a rape case should be treated as if she were an accomplice so far as her credibility is concerned. Reference was made to certain observations of Judges in England in regard to this matter. The manners, customs and mode of life of women in this country are very different from those of women

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in England. A rule or practice which appropriately may be of general application there would not necessarily have the same utility or application here. If this be the English rule or practice, I do not think that it is desirable in cases of this description to import it without qualification here. The Indan law of evidence nowhere suggests such an inflexible rule and conditions here do not, in my opinion, warrant the engrafting of such a rule on our system.

I need say nothing further except repeat that I do not think that any such inflexible rule was actually laid down in the abovementioned case. I would also repeat what I have said before that the learned Judge did in the present case tell the jury that they should not convict the accused on the uncorroborated testimony of the girl.

As regards the second point it is entirely without substance. The girl was all along implicating the accused and there was no doubt regarding the question of whom she was charging with the offence of rape. She was a young girl of nine years of age, probably unused to deposing in Court. When the question was put to her, whether Mohit had committed the rape, she answered "yes" without knowing what she was asked. There can be no doubt whatsoever that the word "yes" was a mere slip of the tongue which was corrected immediately. The omission of the Judge to refer to this slip is, in my opinion, of no importance whatsoever.

The case has been amply and well proved. The charge, if anything, errs in being too favourable to the accused. I agree with my learned brother that the conviction should be upheld and the appeal dismissed.

*Appeal dismissed.*

A. C. R. C.