

Arabinda Dey Vs. the State

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Court : Kolkata

Decided On : Mar-12-1952

Reported in : AIR1953Cal206,57CWN69

Judge : Harries, C.J. and ;S.R. Das Gupta, J.

Acts : [Evidence Act, 1872](#) - Sections 33 and 133; ;Indian Penal Code (IPC) - Section 376; ;[Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 256 and 297

Appeal No. : Criminal Appeal No. 181 of 1951

Appellant : Arabinda Dey

Respondent : The State

Advocate for Def. : J.M. Banerjea, Adv.

Advocate for Pet/Ap. : Sudhansu Sekhar Mukherji, ;Ajit Kumar Dutt, ;Jnanendra Mohan De and ;Kishore Mokerji, Advs.

Disposition : Appeal allowed

Judgement :

Harries, C.J.

1. The appellant was tried by a learned Sessions Judge and a jury upon a charge of rape. He was found guilty by a majority of 3 to 2. The learned Sessions Judge

accepted the verdict of majority, convicted the appellant under Section 376 and sentenced him to five years' rigorous imprisonment and also five, stripes.

2. The appellant being dissatisfied with the verdict, conviction and sentence, has preferred an appeal to this Court and the appeal is confined to questions of law, namely, whether there were any misdirections in the charge of the learned Judge to the jury. Before discussing the charge it will be convenient shortly to set out the facts which gave rise to the prosecution. The girl said to be raped was of the name of Dulali. She was about seven years of age and went about with her father, Gangasadhan Ghatak, earning their living by begging. It is said that they came to the town of Burdwan about two months previous to the incident which led to this charge. They were accustomed to sleep at night on the verandah of a Thakurbari which was owned by the appellant and actually adjoined his house. On 17-11-1950, the prosecution alleged that the little girl and her father were sleeping on the verandah, of this Thakurbari when at or about midnight the appellant came there and enquired who they were. On the father replying that they were beggars, Arabinda is said to have asked them if they had taken any food. They replied that they had, but Arabinda it is said, insisted that they must take something from him. Arabinda then sat beside the little girl passed his hand over her body and pulled down the pyjama she was wearing. He then it is said inserted something into her private parts. which caused her intense pain whereupon she cried out. Arabinda, it is said, then went into the house and hurriedly brought out some sweetmeats and offered them to both the father and the child. Shortly after, persons came by including one Sivada Mukherjee, carrying a powerful light and as he approached the appellant ran back into his house.

3. The father and the girl went to the thana which was nearby and made a first information report & it is interesting to note that in that first information report no allegation of rape is made. Investigation was made by the police and a charge-sheet was submitted to the Court. In that charge-sheet all that was suggested against the appellant was the crime of outraging this little girl's modesty. Upon that charge the case proceeded.

4. It seems that on the following morning the little girl was medically examined and a swab was taken. This swab it is said was sent to the Chemical Examiner on 3-3-1951 and later in the morning the report of the Chemical Examiner was received suggesting that the swab showed signs of spermatozoa. When this report was received by the Court of the Magistrate, the latter appears to have converted the case which was proceeding as a warrant case to an enquiry into the charge of rape. He eventually committed the appellant to stand his trial in the court of session on the charge of rape.

5. In the court of session the little girl gave evidence but her father it is said had died in the meantime. The evidence given by him in the court of the magistrate was tendered and accepted as substantive evidence in the Court of Session. The evidence of other witnesses was taken and eventually the Jury, as I have said by a majority of 3 to 2 found the appellant guilty.

6. Mr. Sudhansu Mukherji on behalf of the appellant had contended that the girl's evidence in this case was not corroborated and that it would be dangerous in a case of this kind to convict solely upon the little girl's statement. In a recent case in the Supreme Court --'Rameshwar v. State of Rajasthan', 1952 S C J 46 that Court has held that corroboration in cases of this kind is desirable though not essential. For reasons which will appear later, I think that this is a case where corroboration is essential. There are features in the case that would make it practically impossible for any court to act on the little girl's evidence unless it was corroborated.

7. The only corroboration suggested in (is?) the evidence of the girl's father, Gangashadhan Ghatak, given in the court of the magistrate. Mr. Mukherji has urged that deposition was inadmissible for a number of reasons. Where a witness had died before a Sessions trial the evidence given by him in the court of the enquiring magistrate is admissible in evidence under Section 33 of the Evidence Act. But before that deposition can be put in strict proof must be given of the death of the witness. The order-sheet shows that the learned Judge accepted the evidence merely because it was tendered by the Public Prosecutor and the only evidence of the death of the father is the evidence of the little girl who said that he

died four months before the date on which she gave evidence at some place called Galsi. Can the uncorroborated testimony of this little girl as to the death of her father be regarded as strict proof of death which is necessary to permit the deposition in the court of the committing magistrate being accepted as evidence

8. The father in this case would have been a very difficult witness for the prosecution. The little girl's story, to say the least of it, is amazing. She alleges that she was raped in the presence of her father who apparently was ignorant of it until the little girl cried out. In her examination-in-chief she tried to make out that her father was asleep when the rape was committed. But in cross-examination she admitted that he was awake throughout, and the first information report made by the father makes it clear that he was 'awake throughout. Is it conceivable that this little girl would be raped in the presence of her father? The father would have been met with cross-examination on those lines had he been alive and gone into the witness box.

9. Further it had been suggested that this case had been brought against the appellant by his arch enemy, one Jagabandhu. The father in a petition which he filed in court on November 21 stated that the appellant was not the person guilty, but that it was Jagabandhu, though on December 11 he filed another statement withdrawing his allegation against Jagabandhu and stating that the appellant was the guilty person. If the father had been alive and given evidence he would have been severely cross-examined on these matters. Further there was evidence that when the father went to the thana. Jagabandhu, the appellant's arch enemy, also appeared and was with the father, though how he came to join the party it is impossible to say. That is a matter which the father might have found difficult to explain.

10. There were therefore cogent reasons why the father, if alive, should be kept out of this case and one may well suspect that the story of his death was introduced in order to avoid cross-examination. Having regard to these factors it was I think incumbent on the prosecution to bring cogent evidence to prove that the father was dead and, as I have said, the evidence of this little girl which is very vague and wholly uncorroborated is not such cogent proof as the law requires.

The necessity of strict proof was stressed by their Lordships of the Privy Council in -- 'Chainchal Singh v. Emperor', AIR 1946 PC 1.

11. Having regard to the matters which I have indicated there was special need for strict proof in this case and it was not forthcoming. Therefore the deposition given by Gangasadhan in the court of the committing magistrate was wrongly admitted in evidence and once that is held it follows that there was no corroboration whatsoever of the little girl's story.

12. Mr. Mukherji has further pointed out that even if the father was dead his deposition in the court of the committing Magistrate was still inadmissible. Section 33, Evidence Act, makes the deposition admissible provided in the first place that the proceeding was between the same parties or their representatives in interest. Such was the case here. It is also admissible provided that the adverse party in the first proceeding had the right and opportunity to cross examine in such proceeding. The father Gangasadhan was cross examined in the first proceeding, but Mr. Mukherji has urged that the defence had no right to cross-examine as the case was proceeding as a warrant case when Gangasadhan gave evidence. That it was proceeding as a warrant case at that stage admits of no doubt and it is clear that by reason of Section 256, Criminal P. C., and the preceding sections the accused had no right to cross examine until the charge had been framed. It has been held by a Bench of this Court in Cri. Appeal No. 236 of 1949, D/- 3-3-1950 that it is immaterial whether the witness was cross-examined or not. The evidence is only admissible if the accused had a right to cross examine him and if he had no right then it does not become admissible because there was cross-examination. It seems to me, following that I decision, that we must hold that in the present) case, though there was cross-examination, the accused had no right to cross examine and therefore the deposition would not be admissible under Section 33 of the Evidence Act.

13. Lastly, to make the deposition admissible the questions in issue in the two courts must be substantially the same. When the father was cross-examined the matter in issue was far less serious, namely, outraging this girl's modesty by an act which at most would amount to an indecent assault. In the Sessions Court the

issue was grave, namely, rape and I have very grave doubts whether the issues can be said to have been substantially the same in both courts. However it is unnecessary to stress the point because it appears to me that there was no strict proof of the death of the father and that being so, the deposition could not be admitted.

14. But even if this deposition was admissible it appears to me that the learned Sessions Judge was guilty of a grave non-direction. If the deposition was admissible he of course would have to tell the jury that the deposition was a piece of substantive evidence. But he would also have to warn the jury as to the weight which they should attach to such evidence. He would have to tell the jury that as regards other witnesses they had had the advantage not only of hearing them, but seeing them and observing their demeanour, whereas with regard to the father's evidence all that they had before them was cold hard print. They ought to have been told that it would be for them to consider whether they could accept the evidence in the deposition having regard to the fact that they had not had the advantage of seeing and hearing Gangasadhan. The learned Judge made no reference whatsoever to that aspect of the case.

15. Mr. Mukherji also contended that the learned Judge had misdirected the jury on the admissibility of the first information report. At page 38 of the paper book the learned Judge in his charge does make it clear that the first information report is not substantive evidence. But in an observation he makes at page 42 he seems to suggest that the first information report is very much substantive evidence. He told the jury:

'In the F. I. R. the miscreant was described as a Babu of the house. His appearance was described and it was also specifically stated (hat he had a tuft of hair (Chaitan) which he has got even now. Dulali and her father identified him in Court as the man referred to.'

16. There he seems to. suggest that the first information report is evidence in itself and not merely a document corroborating the informant, the father. At page 43 it is stated that the witness Shivada Mukherjee was named in the first information report as having been told of the occurrence and that he supplied the name of the

accused. His name appears in the first information report as present when it was recorded. There again the suggestion is that the first information report is substantive evidence. Further there is another misdirection in this charge because Shivada Mukherjee denied that he ever gave the name of the accused to the father. That I think should have been stated by the learned Judge when dealing with this aspect of the case.

17. For the reasons which I have given the verdict of the jury cannot be sustained. This deposition was in my view inadmissible and therefore the jury were asked to consider evidence which should not have been placed before them. That in itself would be enough to vitiate the verdict. Further, once this deposition is eliminated there is no evidence at all corroborating the evidence of the little girl. Further it seems to me that some of the observations of the learned Judge concerning the first information report also amount to a misdirection.

18. The verdict of the jury must therefore be set aside and so must the conviction and sentence. The question arises what course should this Court pursue. The court can direct a retrial or it can in a proper case acquit the appellant. It appears to me that in this case the state of the evidence is such that it would be both a waste of public time and money to 'order a retrial of this appellant, because once the deposition of Gangasadhan is excluded there is no evidence at all corroborating the little girl's story and for the reasons which I have given the jury would have to be told that it would be highly dangerous to convict upon the little girl's evidence standing by itself. Further it appears to me that the story is far too improbable to be true. How could this little girl be raped or even interfered with in the presence of her father and who would dare to do it? Is it likely that a man of the position of Arabinda Dey would conduct himself in this fashion in the very presence of the little girl's father

19. Another very suspicious feature in this case is the evidence relating to taking a swab. That it is said was done on November 19 but for some reason it was not sent to the Chemical Examiner until March, 1951. Much can happen to swabs in the meantime : and therefore the evidence of the Chemical Examiner as to the examination of this swab is really worthless. In my judgment the case is so

improbable and the evidence so unsatisfactory that no jury properly directed could possibly convict.

20. Again a very valuable piece of evidence for the prosecution is that the witness Mukherjee came shortly after the occurrence carrying a strong light and he recognised and named the accused. But Mukherjee denies that. How could a jury in the circumstances convict the appellant of this crime when the prosecution version is so extraordinary. It appears to me that the only course that this Court can follow upon this evidence is to acquit the appellant.

21. In the result therefore this appeal must be allowed. The verdict of the jury and the conviction and sentence are set aside and the appellant is acquitted. He need not surrender to his bail and his bail bond is discharged.

S.R. Das Gupta, J.

22. I agree.

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