Sidheswar Ganguly

Vs

The State of West Bengal

Criminal Appeal No. 52 of 1955

(J. L. Kapur, B. P. Sinha JJ)

24.10.1957

JUDGMENT

SINHA J. -

This appeal on a certificate granted by the High Court at Calcutta, under art. 134(1)(c) of the Constitution, is directed against the order of a Division Bench of that Court, dated February 15, 1955, summarily dismissing an appeal from the judgment and order dated January 22, 1955, passed by the learned Second Additional Sessions Judge of Alipore, accepting the unanimous verdict of guilty returned by the jury, holding the appellant guilty under s. 376 of the Indian Penal Code, for having committed rape on a young girl, named Sudharani Roy, said to be about 14-15 years of age. The learned trial judge, accepting the unanimous verdict of the jury and agreeing with it, imposed a "deterrent punishment" of rigorous imprisonment for 5 years, in view of the fact that he was in loco parentis to the large number of girls who were the inmates of the Nari Kalyan Ashram of which the appellant had been the secretary for a pretty long time.

The learned counsel for the State of West Bengal raised a preliminary objection that the certificate granted by the Bench of the Calcutta High Court presided over by the learned Chief Justice, was bad on the face of the judgment given by him while granting the certificate. We have, therefore, first to examine whether the preliminary objection is sound. As already stated, the Division Bench before which the appeal came up for admission, summarily dismissed it without giving any reasons. Apparently, the Bench was not satisfied that there was any error of law or mis-direction in the learned Sessions Judge's charge to the jury which had returned a unanimous verdict of guilty against the appellant. On March 7, 1955, the Bench consisting of Chakravarty C.J. and S.C. Lahiri J. passed the order to the effect that having heard the argument on behalf of the applicant for the certificate of fitness for the proposed appeal to this Court on March 4, they had the opportunity of reading through the charge delivered by the learned trial judge, and that they had "come to feel that before the application is disposed of, we should see the depositions in full." Accordingly, they directed the records of the original trial to be called for and placed before them. The case, therefore, stood adjourned till the arrival of the records. The matter was heard again on March 17, and on March 18, the learned Chief Justice delivered a judgment which appears at pages 220 to 231 of the record. It is a full judgment giving the facts and history of the case and the evidence adduced on behalf of the prosecution. The learned Chief Justice, in the course of his very elaborate judgment, observed that the "learned Judge delivered and exhaustive charge to the jury from which he does not appear to have omitted any part of the evidence which was of any materiality whatsoever. The jury appear to have applied their minds critically....." Having examined the grounds taken in the appeal as presented to the High Court, he made the following observations :

> "I have gone through the grounds taken in the petition of appeal to this Court and I have no hesitation in saying that if those were the grounds urged before the learned Judges, no one need be surprised that their Lordships saw nothing arguable or worth attention in the case. Except one, not one of the grounds urged by Mr. Roy Choudhury before us is to be found in the petition of appeal....."

On an examination, in great detail, of the grounds urged before the Bench hearing the application for certificate, the learned Chief Justice observed :

> "Mr. Roy Choudhury, however, urged before us six several points. Except one, in respect of which there is something to be said, none of them impresses me."

It was not clearly indicated in the judgment what that single ground was. The penultimate paragraph of the order passed by the learned Chief Justice, contains the following :

> "We are oppressed by the feeling that there were arguable points, although they might not bear examination and the accused has not had the satisfaction of feeling that he has been fully heard by the Court of appeal. I would therefore grant him the leave he asks for, not because we take any view in his favour of the evidence in the case, but because justice should also appear to have been done and therefore the evidence ought to have received a full consideration by the appellate Court, although the result might be to confirm the conviction."

We have set out the findings of the learned Chief Justice while granting "leave to appeal" to this Court, in his own words, to appreciate the reasons for granting "leave to appeal". It appears that the learned Chief Justice and his brother judge, contrary to the legal position that one Bench of the High Court has no jurisdiction to sit in judgment on the decision of another Division Bench, have, in fact, done so. But in the instant case, the learned Chief Justice has gone further and observed that the summary dismissal of the appeal by the Criminal Bench, has not given satisfaction to the appellant that he had been fully heard, and that it did not appear to him that justice had been done. Such observations are not conducive to the maintenance of a healthy atmosphere for the administration of justice in the highest Court in the State. Furthermore, the observation almost amounts to a condemnation of the practice of summary dismissal of appeals, especially against orders passed in a case tried by a jury where the appellant has to make out clear grounds of law. Such a practice prevails, so far as we know, in almost all the High Courts in India and has the sanction of the statute law as contained in the Code of Criminal Procedure.

This Court has repeatedly called the attention of the High Courts to the legal position that under Art. 134(1)(c) of the Constitution, it is not a case of "granting leave" but of "certifying" that the case is a fit one for appeal to this Court. "Certifying" is a strong word and, therefore, it has been repeatedly pointed out that a High Court is in error in granting a certificate on a mere question of fact, and that the High Court is not justified in passing on an appeal for determination by this Court when there are no complexities of law involved in the case, requiring an authoritative interpretation by this Court. On the face of the judgment of the learned Chief Justice, the leave granted cannot be sustained vide the case of Haripada Dey v. The State of West Bengal [[1956] S.C.R. 639], and a number of decisions of this Court referred to therein. In view of those authorities of this Court, it is clear that the certificate granted by the High Court is not a proper one. The preliminary objection is, therefore, upheld. But the appeal having been placed before this Court, we have to satisfy ourselves whether there are any grounds on which this Court would have granted special leave to appeal under

Art. 136 of the Constitution.

In order to appreciate the grounds raised in support of the appeal by the learned counsel for the appellant, it is necessary to state the following facts : The appellant was the honorary secretary of a large institution for receiving and looking after young girls and women who had no homes of their own or had gone astray. It is called the 'Nari Kalyan Ashram' and is located in one of the quarters of the city of Calcutta. The appellant in his capacity as the secretary, used to come to the Ashram daily in the evening at about 7 p.m., and stay there till mid-night or past mid-night. In his office room, there was a bed-stead with a bedding spread thereon. He used to occupy the bed and requisition the services of girls to massage his body. Between January and April, 1954, the accused who was in the habit of calling the girls named Sudharani, Narmaya, Kalyani and others, for that purpose, is said to have committed rape on those girls. The subject-matter of the charge in this case is the offence of rape said to have been committed on the two girls Narmaya and Sudharani, one after the other, on the night of April 20, 1954. On April 29, 1954, at about 10 p.m., the officer-in-charge of the Maniktala police station, accompanied by Sub-Inspector Nirmal Chandra Kar, went to the Ashram in connection with collecting information regarding the escape of some girls from the Ashram. Narmaya and Sudharani are said to have given information to the said officer-in-charge of the police station, alleging rape on them. They also pointed out a steel locker in the room of the secretary, where, it was alleged, he used to keep rubber sheaths used by him before he had sexual intercourse with each of them. The police officers aforesaid obtained the key from the appellant, with which the steel locker was opened and a leather bag inside the locker was pointed out by the girls. The bag was found to have contained a rubber sheath along with other articles. After recording the information, the police officer-in-charge of the Maniktala police station, investigated the case and submitted a charge-sheet against the appellant. After the preliminary inquiry by a magistrate, the appellant was committed for trial to the Court of Session on a charge of rape upon the two girls, under s. 376, Indian Penal Code.

The defence of the appellant was that the case against him was completely false and had been concocted by the police with the help of the inmates of the Ashram and the Assistant Secretary, Tarun Kumar Sarkar who was one of the prosecution witnesses. At the trial, the prosecution examined 23 witnesses, in support of the case against the accused. The two victims of the alleged outrage by the appellant, were examined, namely, Sudharani Roy, P.W. 2 and Narmaya, P.W. 5, who both deposed that the appellant used to come to the Ashram in the evening at about 7 p.m., and used to stay there till after mid-night in his special room which contained a bedstead and a bedding and a steel almirah and other pieces of furniture. On the date of the occurrence in question, first Narmaya was called in by the appellant and then Sudharani, and the appellant is said to have committed rape first on Narmaya and then on Sudharani, in the presence of both of them, against their will and without their consent. They further deposed that the appellant had intercourse with them after putting on the sheath. In between the two acts, he had a cup of tea with which he swallowed "a black pill" which is suggested to have been an aphrodisiac. The accused paid them each eight annas and warned them not to divulge those acts on pain of being severely dealt with, if they disclosed the same. Kalyani, P.W. 19, is another young girl who was an inmate of the Ashram on the material dates. She is a girl who was both deaf and dumb, and her intelligence was below normal. As she was feeble-minded, she was not allowed to continue her studies at the school. She has given evidence by signs which were interpreted by the principal of the Deaf and Dumb School, who had taught her at that school. Her evidence, if accepted, would be a corroboration of the testimony of the victims aforesaid of the outrageous act of the appellant. Besides this direct oral testimony, there was also evidence tending to show that the appellant was in the habit of having himself massaged at night by the girls of the Ashram, and that the police found a rubber sheath in his bag kept in the

steel locker inside his special room. There was also the evidence of a women employee of the Ashram that she had been asked by the appellant to keep a number of rubber sheaths which she had buried underground, and which on her pointing out, had been discovered by the police. There was also the evidence of a complaint made the next day by the victim girls to the assistant secretary when he came to the Ashram in connection with his work there. The prosecution also led evidence to show the age of the girl Sudharani to be below 16. It produced the register of the girls in the Ashram which has a column for mentioning the age of the inmates. The estimate of her age by medical evidence, was given after X-ray examination and the stage of ossification and other indicia for determining the age of a person. The medical estimate of her age was that she was between 13 and 14 years on the date of the X-ray examination, that is May 19, 1954. That, in barest outline, is the prosecution case and the evidence adduced in support of it. Beyond cross-examining the prosecution witnesses and pointing out contradictions and omissions in their evidence, the accused did not adduce any positive evidence in support of his defence.

The appellant was tried by a jury assisted by the learned Additional Sessions Judge at Alipore. The jury returned a unanimous verdict of guilty against the accused in respect of the charge of committing rape on Sudharani and a unanimous verdict of not guilty in respect of the charge of rape on Narmaya. The jury answered the judge's question as regards the charge with respect to Narmaya in these words :

"Not guilty as we found with consent and she is above 16 years of age."

As the jury did not give any such clue in respect of their verdict of guilty so far as rape on Sudharani was concerned, it is difficult to say whether they found consent in her case also, and returned a verdict of guilty because they were of the opinion that she was under 16 years of age.

In this Court, the learned counsel for the appellant raised a large number of contentions, but as most of them concerned the appreciation of evidence with reference to omissions and contradictions, it is not necessary to deal with those arguments. It is only necessary to notice the following points raised, namely, (1) that the learned judge refused permission to counsel for the appellant to read out the written statement filed on behalf of the appellant at the Sessions stage, (2) that there was a serious misdirection in respect of corroboration of the testimony of the alleged victims of rape, and (3) that the direction as to the age of the girl Sudharani was not complete. In our opinion, there is no substance in any one of these contentions.

Firstly, as regards the refusal to permit the written statement of the accused being placed before the jury, it has to be observed that there is no provision in the Code of Criminal Procedure for such a written statement being filed at the Sessions stage. Section 256(2) which occurs in Chapter XXI, headed "Of the trial of Warrant-Cases by Magistrates", does contain the specific provision that if the accused person puts in a written statement, the magistrate shall file it with the record. But there is no corresponding provision in the Code, requiring a Sessions Court to accept a written statement at that stage on behalf of the accused. But the accused has the right to make a statement under s. 342 of the Code, which has to be considered by the Court for what it is worth. In a jury trial, the Court has got to be circumspect to see that nothing is allowed to be placed before the jury which is not evidence. It is not necessary to decide whether in the case of a Sessions trial without a jury, such a statement is receivable. But if such a written statement is allowed to be used at a Sessions trial by a jury, it may throw the door open to irrelevant and inadmissible matter and, thus, throw an additional burden on the presiding judge to extricate matter which was admissible from a mass of inadmissible statements which may have been introduced in the written statement. In view of these considerations, in our

opinion, the learned Sessions Judge rightly refused to allow the written statement put in by the appellant, to be read out before the jury.

On the question of corroboration, the learned judge in his charge to the jury, has, at more than one place, pointed out the necessity of corroboration of the evidence of the victims of the alleged crime. Referring to the evidence of Kalyani, P.W. 19, aforesaid, the learned judge has charged the jury in these terms :

> ".....whether her evidence is a corroboration with respect to the committing of rape by accused on Sudharani Roy on 20th April, 1954. If the evidence of Kalyani appears unreliable to you or the evidence of Tarun, there remain the uncorroborated testimonies of Sudharani and Narmaya. The rule of prudence demands that it is unsafe to convict an accused on the uncorroborated testimony of an accomplice or accomplices. But I must tell you, gentlemen, that it is within your legal province to convict upon such unconfirmed evidence, provided you can come to the conclusion in the particular circumstances of this case that corroboration can be dispensed with."

It will be noticed that if the learned judge has made any mistake, the mistake is in favour of the accused and not against him in so far as the learned judge refers to the evidence of the two girl victims as that of accomplices. A girl who is a victim of an outrageous act is, generally speaking, not an accomplice though the rule of prudence requires that the evidence of a prosecutrix should be corroborated before a conviction can be based upon it. Hence, the girl Sudharani was not exactly in the position of an accomplice though the judge may, as a rule of prudence, warn the jury that such a rule of prudence required corroboration of the testimony of the prosecutrix, but that it was open to the jury to convict even on the un-corroborated testimony of the prosecutrix if the jury, in the particular circumstances of the case before it, came to the conclusion that corroboration was not essential to conviction. Hence, the learned Sessions Judge was fully justified in telling the jury that there was no rule of law or practice that there must be corroboration in every case, before a conviction for rape. If the jury had been apprised of the necessity, ordinarily speaking, of corroboration of the evidence of the prosecutrix, it is for the jury to decide whether or not it will convict on the uncorroborated testimony of a prosecutrix in the particular circumstances of the case before it. In other words, insistence on corroboration is advisable but is not compulsory in the eye of law. In the instant case, apart from the evidence of the two victims aforesaid, there was the evidence of the deaf and dumb girl, Kalyani, and the other circumstantial evidence in support of the prosecution case. It is well established that the nature and extent of corroboration, necessary, vary with the circumstances of each case. The nature of the corroborative evidence should be such as to lend assurance that the evidence of the prosecutrix can be safely acted upon. See, in this connection, the observations of this Court in the case of Rameshwar v. The State of Rajasthan [[1952] S.C.R. 386] to the following effect :

> "The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand."

Lastly, we do not find anything basically wrong with the direction in the charge to the jury as regards the age of the girl Sudharani and as to the nature of the evidence to prove her age. The learned judge pointed out the several items of evidence which had been adduced by the prosecution bearing on the question of the girl's age. The only conclusive piece of evidence may be the birth

certificate, but, unfortunately, in this country such a document is not ordinarily available. The Court or the jury has to base its conclusions upon all the facts and circumstances disclosed on examining all the physical features of the person whose age is in question, in conjunction with such oral testimony as may be available. The girl's father was dead. Her mother apparently has left her to her own fate, and according to the evidence of the police, the mother's whereabouts were not traceable. It was sought to be argued that the police officer who himself made the inquiry, should have been examined, otherwise, the result of the inquiry is a mere hearsay. An inquiry whether made by one or the other police officer, would, almost in every case, be the result of hearsay. The girl is said to be a displaced person. The difficulty of tracing evidence of the parents of such a person is all the greater. Hence, in all the circumstances of the case, the learned Sessions Judge has not committed any error in this part of his charge to the jury. On this part of the case, the learned judge gave the following concluding directions :

> "In criminal trial the accused must get the benefit of doubt and there should not be any conviction unless it can be clearly and unequivocally said that the age of the girl was below 16. But, gentlemen, in this case you have seen the girls, you have heard the evidence of the experts and you should also take into consideration the various factors found out in cross-examination and in considering all these facts you can arrive at the conclusion that Sudharani Roy was under 16 years of age on the night of the occurrence on 20th April, 1954, taking into consideration the facts that ossification test is not a sure guide, even in spite of this, you can come to the conclusion that Sudharani Roy was under 16 years of age on the night of the occurrence, i.e., on 20th April, 1954. I would tell you, gentlemen, that the question of consent would be immaterial."

In our opinion, he learned Sessions Judge placed the evidence pro and con very fairly and fully, and left it to the jury to come to their own conclusion. According to the medical evidence, Sudharani was between 13 to 14 years of age on the relevant date, whereas the other girl in respect of whom, the accused was acquitted, was found by the medical test to be between 15 and 16 years. The jury, therefore, took the commonsense point of view and appeared to have come to the conclusion that Narmaya may well have been above 16, and that, therefore, the accused could not be convicted for rape on her. In respect of the girl Sudharani, they may have come to the conclusion that she was not above 16, and that, therefore, the prosecution had succeeded in bringing the charge home to the accused. We have read the charge of the learned judge to the jury more than once, and, in our opinion, it is a very fair and full charge, erring more on the side of verbosity than of brevity.

In our opinion, there is no merit in the appeal. It is accordingly dismissed.

Appeal dismissed.

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