CALCUTTA HIGH COURT

A.W. Khan

Vs.

State (Calcutta)

Criminal Appeal No. 324 of 1961

(P.B. Mukharji and N.K. Sen, JJ.)

28.02.1962

JUDGMENT

P.B. Mukharji, J.

1. The appellant was tried on a charge of rape under section 376 of the Indian Penal Code. There were three charges of rape against the appellant. One was in respect of rape committed on the girl Hayatunnessa alias Hayatun on the 18th of March, 1960 at 10/1, Gurusaday Dutta Road, Calcutta. The second was in respect of rape on a girl called Kutchnur on the 17th of March, 1960 at the same place. The third charge was in respect of rape on another girl Arisha oh the 14th of March, 1960 at the same place. The jury unanimously found the appellant not guilty in respect of the charge of rape against the two girls Kutchnur and Arisha. But the jury by a unanimous verdict found the appellant guilty of rape under section 376 of the Indian Penal Code for committing rape on the girl Hayatunnessa alias Hayatun. It is against this unanimous verdict of the jury finding the appellant guilty of rape on Hayatunnessa that the present appeal is directed. The learned Assistant Sessions Judge accepted this unanimous verdict of the jury and convicted the appellant and sentenced him to rigorous imprisonment for five years.

2. The first task of Mr. Mitter, learned Counsel for the appellant, in challenging this unanimous verdict of the jury was to find misdirections in the learned Judge's charge to the jury. On this point of misdirection he confined himself to two main points. One is the First Information Report; it is submitted by Mr. Mitter that what the learned Judge treated as the First Information Report was not a first information report at all. The other is the learned Judge's charge on the nature of evidence of Hayatun who, it Was contended, should have been regarded as an accomplice.

3. Taking the second point of Mr. Mitter first on the question of the evidence of the prosecutrix as an accomplice, it is necessary to say that this point is now concluded by the decision of the Supreme Court in *Sidheswar Ganguly v. State of West Bengal*[1], At page 759 (of SCR) : (at p. 147 of A1R) the learned Judge observed :

> "It will be noticed that if the learned Judge has made any mistake, the mistake is in favor

of the accused and not against him in so far as the learned Judge refers to the

[1]1958 SCR 749 : AIR 1958 SC 143

evidence of the two girl victims as that of accomplices. A girl who is a victim of an outrageous act is, generany 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."

Here also the learned Judge very properly in the charge to the jury said :

"I may tell you here that in considering her evidence (Hayatunnessa's evidence), you will remember that the law is that sexual offence like rape as in the present case corroboration of the victim girl is not essential before conviction but being a matter of prudence, you must consider advisability, of corroboration. I should tell you here although the law does not require corroboration of the victim girl in order to substantiate, the, charge of rape, you should not readily, accept her testimony for it is not wise to do so in the absence of some corroboration of her testimony., In this case, specially the defence has suggested that the case has been fabricated against the accused by some designing persons in collusion with Idris (father of Hayatunnessa) who could not get back his girls at his desire or the money which he demanded of the accused".

Again the learned Judge before concluding his charge to the jury warned them by saying.

"You will also remember that there is hardly any corroboration of the story of the three victim girls. I must caution you once again that the conviction on uncorroborated testimony of the allegeed victim girls in cases of sexual intercourse as in the present case is dangerous. You must therefore took for corroboration of their story. Of course, the law is that corroboration is not essential before conviction and you may do without it in the particular circumstances, if you are satisfied that it is safe to do so. But it is wise and prudent to find some corroboration at least specially in the facts and circumstances of the present case as discussed above".

We think that in these circumstances and having regard to the charge as a whole there is no misdirection by the learned Judge to the jury on the question as to how the evidence of Hayatunnessa should be treated. The caution was given at innumerable places. A girl who is the victim of a rape is not necessarily nor always an accomplice. The rule of prudence that requires corroboration of the evidence of a prosecutrix is: satisfied in the facts of this case, from the circumstances which I shall presently discuss.

4. All that I need add on this point is to refer to another decision of the Supreme Court in *Rameshwar v. State of Rajasthan*[2], which discusses the nature and the extent of the corroboration that is required when it is not considered safe to dispense with it and that, it must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. It lays, down certain broad principles, namely, (i) that it is not necessary that

there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or accomplice, should itself be sufficient to sustain conviction; all that is required is that there must be some additional evidence rendering it

[2](1952) SCR 377 : AIR 1952 SC 54

probable that the story of the accomplice (or the complainant) is true and that it is reasonably safe to act upon it (ii) The independent evidence must no1 only make it safe to believe that the crime was committed but must in some way reasonably connect the accused with it; (iii) the corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another accomplice: (iv) the corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. In this connection the observations of Bose, J. delivering the judgment of the, Supreme Court may be seen at pages 386 to 390 of the report (SCR) : (at pp. 57 to 59 of AIR). I shall apply these tests laid Sown by the Supreme Court to find out whether there was corroboration or not of Hayatun's testimony in this case when I discuss the facts of this appeal.

5. Trie next point which Mr. Mitter has urged before us relates to the question of the First Information Report in this case. To put briefly, Mr. Mitter's whole case rests on this point on exhibit 33, described as the First Information Report and treated as such in the learned Judge's, charge to the Jury. Mr. Mitter's submission is that this exhibit 33 is not a First Information Report within the meaning of section 154 of the Code of Criminal Procedure because it is not signed by the informant and because .it was not made before an officer in charge of the police station. On a careful consideration of the objection raised by Mr. Mitter I have come to the conclusion that this objection is also not sustainable. I shall state my reasons briefly.

6. To appreciate this objection of Mr. Mitter some discussion about the contents and nature of exhibit 33 is necessary. Exhibit 33 is certainly described as a First Information Report. It is in the form of a First Information Report. The date and hour are shown to be 20-3-60 at about 8.25 a.m. the name and residence of the accused are given as those of the appellant. With regard to the description of the offence with the section it is stated there:

> "The accused person is charged with wrongfully confining after procuring two minor girls (1) Hayatunnessa and (2) Kutchnur Khatun for subjecting to illicit intercourse and Obtaining possession of them for purpose of illicit intercourse and committing rape on Hayatunnessa aged about 13 years at his own residence at 10/1 Gurusaday Dutta Road, Calcutta 19 during the time from about last 18 months and to this day under sections 344, 366A, 373 and 376, Indian Penal Code".

This is signed by one A. K. Roy, Sub-Inspector of the Detective Department of Calcutta. At the foot of the, document are written the words

> "First Information to be recorded below - Note - The signature, seal or mark of informant should be affixed at the foot of the information-" Then follows the statement-
> "For F.I.R. please see the enclosed letter of the complt. addressed to the Minister-in-charge, Home (Police), Govt. of West Bengal with the Hon'ble Minister's endorsement

Dt.4-3-60.

SD/- A.K. Roy, S.I.D.D., Cal. 20-3-60

7. On this document Mr. Mitter first says that signature of A.K. Roy, Sub-Inspector of the Detective Department does not comply with section 154 of the Code of Criminal Procedure which requires that the signature must be by the person giving the first information. Therefore, he contends that there should have been a signature by Idrish All, the father of the victim girl. There are two answers to this argument of Mr. Mitter. The first answer is that this document, exhibit 33, on the form of First Information Report does not stand by itself or alone but the petition to the Home Minister which is signed by Idris Ali is to be read as part of it. That being so, the lack of signature of the informant on the First Information Report cannot be put forward as a ground of objection. If both the formal document of the First Information Report and the petition to the Home Minister signed by Indris Ali are taken together as expressly said in the endorsement in the First Information Report, quoted above, the so called absence of the signature of the informant is cured by his signature appearing on the petition to the Home Minister annexed to it The second answer to Mr. Mitter's argument is that absence of signature to the First Information Report by the informant is not necessary to the extent that its absence will vitiate and nullify such report A Division Bench of Lort Williams and S.K. Ghose, JJ. in the case of *Mani Mohon Ghose v. Emperor*[3], lays down that :

> "If an information .relates to the commission of a cognizable offence' it is a first information admissible in evidence as such although the police officer may have neglected to record it in accordance with law."

At p.628 (of Cal WN) : (at p.748 of AIR) of the report the learned Judge delivering the decision of the Division Bench observed:

> "The conditions as to writing in Section 154 of the Code are merely procedural. If there is an information relating to the commission of a cognizable offence' it falls under Section 154 and becomes admissible in evidence as such, even though the police officer may have neglected to record it in accordance with law. Owing to this neglect in particular cases, the Courts have laid down from time to time that the information which starts the investigation is the real first information under section 154 and should be treated in evidence as such. It does not depend on the sweet will of the police officer, who may or may not have recorded it. But the condition as to the character of the statements is really two-fold; first, it must be an information and, secondly, it must relate to a cognizable offence on the face of it and not merely in the light of subsequent events. It was never meant to be laid down that any sort of information would fall under Section 154, so long as it was the first in point of time." This disposes of Mr. Mitter's objection on this ground.

8. He then tried to make another point on the First Information Report by saying that the portion of the statement there to the effect :

> ".....and committing rape on Hayatunnessa aged about 13 years at his own residence at

10/1 Gurusaday Dutta Road, Cal. 19 during the time from about last 18 months and to this day under section 344," 366A, 373 and 376, Indian Penal Code" is hit by section 162 of the Criminal Procedure Code which prohibits use of statement made by any person to a police officer in the course of an investigation

[3]35 Cal WN 623 : (AIR 1931 Cal745)

under chapter 14, for any purpose at any enquiry or trial in respect of "any offence under investisation at the time when such a statement was made". Mr. Mitter's argument is that the petition to the Home Minister made by Idris All though undated, must have been made before the 4th of March, 1960 when the Home Minister made an endorsement upon it to the effect - "For a thorough enquiry, necessary action and report." Mr. Mitter therefore contends that investigation had already started after the, 4th March, 1960. On the 20th March 1960 when the First Information Report was being recorded the investigation according to Mr. Mitter, was in progress and witnesses had been interrogated. It may also be pointed out here that the two girls Hayatun and Katchnur were actually recovered under Search Warrant on the 20th March, 1960 at the time noted in the First Information Report. During the search the father, Idris Ali, was present with the police officers who conducted the search, namely, Sub-Inspector Mukherjee and Sub-Inspector Roy. Therefore, Mr. Mitter contends that if the information about rape on Hayatunnessa is hit by Section 162 of the Criminal Procedure Code then there was no First Information Report at all about this rape, for which his. client, the appellant, had been charged, tried and convicted.

9. We have given our careful and anxious consideration to this point as urged by Mr. Mitter. We are satisfied that this point cannot succeed. The first broad answer to Mr. Mitter's argument on this point is that a First Information Report is not an indispensable requisite for the investigation of a crime specially where the accused was committed to sessions, the charges was framed and explained to him and he was tried on the charge. The lack of First Information Report in such a case would not and cannot vitiate the trial outright. But then Mr. Mitter argues that the learned Judge has used this exhibit 33 as the First Information Report and in so doing has misdirected the jury. In order to answer this point the question is, - Is exhibit 33 a First Information Report of rape on Hayatunnessa which was the subject-matter of the charge? Although it must be made quite clear that while the First Information Report covers a whole period of eighteen months for the commission of this crime the actual charge on which the appellant was tried was confined to one particular instance of rape on the particular date, on the 18th March, 1960 which was within the time stated in the to the Home Minister was not a charge for rape on Hayatunnesa because the rape for which the appellant was charged took place on the 18th March, 1960, a date subsequent to the petition to the Home Minister. What the petition to the Home Minister said was-

"I do hereby charge Jahanara Begnro and, A.W. Khan of the said. 10/1, Gurusaday Dutta Road, Calcutta along with their agents mentioned above for enticing my two minor daughters, Hayatunnessa ased about 13 years and Katchnoot Khatun aged above 10 years and keeping them into their unlawful custody without my consent and inducing my eldest daughter Hayatunnessa to remain with person or persons in order that she may be forced

> or seduced to illicit intercourse and also for procuring my said minor daughter along with other girls procured by them with intent that they may lead a shameful life and also keeping them in wrongful confinement for the said immoral purposes."

In the petition there the father asked for recovery of his minor daughters and to obtain custody of them. Now this charge in the petition is not a charge of rape against the appellant Khan on. Hayatunnessa on the 18th March, 1960. The investigation, therefore, that followed upon that petition on the direction of the Home Minister of the State could not be called an investigation under Chapter 14 for the offence of rape on Hayatunnessa on the "18th March, 1960. The statement hit by section 162 of the Criminal Procedure Code has to be a statement in respect of an "offence under investigation" at the time when such a statement was made." This is crucial. No offence of rape on Hayatunnessa on the 18th March, 1960 was under investigation at the time when this statement was made. There was no evidence of rape on Hayatunnessa by the appellant on the 18th March 1960 under investigation at the time i.e. 20th March, 1960 at 8.25 a.m. when the first information was recorded. Obviously it is clear in evidence that when these two girls were rescued; on the 20th March, 1960, Hayatunnessa must have given that information to her father who reported the matter to the police. In fact the father Idris and Hayatunnessa were at the police station on the 20th March, 1960 when this information was recorded. Therefore the portion in the First Information Report which is challenged by Mr. Mitter as hit by section 162 of the Criminal Procedure Code is not so hit in our view on the facts and circumstances of the case. Indeed here also the facts of the previous Division Bench decision reported in the case of 35 Cal WN 623 : (AIR 1931 Calcutta 745) are relevant because they deal with three informations. It was held there that the first information in that case was the third one which first indicated the commission of a cognizable offence and that the investigation into an offence having been commenced only on the third information, the previous two were not, hit by section 162, Criminal Procedure Code and were admissible in evidence.

10. Finally Mr. Mitter for the appellant contends that the learned Judge misdirected the jury on the First Information Report because he treated it as substantive evidence. No doubt a First Information Report is not a substantive piece of evidence. That is well settled; It was pointed out by the Supreme Court in *Nisar Ali v. State of Uttar Pradesh*[4]

> "A First Information Report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 157 of the Evidence Act or to contradict it under Section 145 of the Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses."

But the whole question is, has the learned Judge done so in his charge to the Jury? He has been careful enough to expressly point out to the jury- "The F.I.R. has been read over to you. You will remember that the F.I.R. is not a substantive evidence. You must seek for corroboration in it of the evidence of the informant at every step and see how far the statements made in the F.I.R. are consistent with the other evidence on the record. The importance of the F.I.R. lies in its being the first recorded statement of the occurrence....." Therefore, he has warned the jury not to take the First Information Report as substantive evidence. But then Mr. Mitter argues that although the

learned Judge said so he in fact used it as the First Information Report In support of his contention he has santched a portion of the Learned Judge's charge to the jury out of context as an example and the offending portion, according to him, is as follows :

> "You have heard that the F.11/ states that the "accused committed rape on

[4]1957 SCR 657 at p. 659: (AIR 1957 SC 366 at p.367)

> Hayatunnessa. It does not mention as regards rape of Kutchnur by the accused. Arisha was, of course; recovered later and you will consider if the offence as regards the commission of rape on her, might not have been entered in the F.I.R. for that reason." We do not think that this was user of the First Information Report as substantive piece of evidence. It was only a record of the fact mat the First In formation Report did state that the accused committed rape only on Hayatunnessa and not on anybody else. We are, therefore, satisfied that there was no misdirection by the learned Judge on First Information Report and there was no miscarriage of justice.

11. The next" submission of Mr. Mitter on the First Information Report was the non-examination of Sub-Inspector A.K. Roy who was the author of that document. This point has no sub-stance because at the time when the trial took place and evidence was taken, it is established that Sub-Inspector Roy had resigned from police service and was not traceable. The evidence of the Investigating Officer. P.W.25, says :

> "I deputed S. I. Ajoy Roy to Murshidabad. He has resigned in February last and is no longer in service. I tried to serve summons on him through my constable Shiben Battacherjee but he could not be traced."

Therefore, the non-examination of S.I. Roy was explained. In fact this Sub-Inspector Mukherjee P.W. 25 was with S.I. Roy at the time, when .the, statement was recorded and he has proved S.I. Roy's signature:"

12. We are, therefore satisfied that there is no misdirection by the learned Judge in his charge to the Jury which should justify us in setting aside the unanimous verdict of the Jury. In fact, reading the learned Judge's charge to the jury it appears that he repeatedly warned the jury not to act on the uncorroborated testimony of the victim girl Hayatun. Indeed he was not right in saying that Hayatun's testimony was uncorroborated because I find that there are circumstances which corroborate her and which corroborative circumstances I shall presently dismiss but then that was an error, entirely in favor of the accused. Reading the charge it appears and as the learned Counsel for the State urged, that it was a charge for acquittal. Nevertheless the jury returned a unanimous verdict of guilty against the accused. Again it appears from the record that immediately after the jury had returned a unanimous verdict of guilty against the appellant on the charge of rape on Hayatunnessa, the learned Counsel for the defense prayed before the learned Sessions Judge for a Reference to the High Court under Section 307 of the Code of Criminal Procedure on the ground that there was no corroboration of the testimony of Hayatun and therefore the learned Judge should not accent the unanimous verdict of the jury. In rightly rejecting the prayer of the learned Counsel for defense the learned Judge observed in his order of the 29th April, 1961.

"I do not think that this is a fit case for reference to the High Court as it is a case of belief or disbelief of the prosecution evidence by the Jury. If the Jury believed her notwithstanding the caution by me that as a matter of prudence they should seek for corroboration of the testimony of the victim girl, the verdict should not be dissented from. It is open to them to convict the accused even without corroboration if in the particular circumstances of the case they are satisfied that it is safe to do so. I therefore reject the prayer of the defense Counsel. I agreed with and accept the verdict and find the accd. guilty under section 376, Indian Penal Code for committing rape on Hayatunnessa and convict and sentence him to R.I. for five years." This recording shows that not only the learned Judge throughout his charge cautioned the Jury on this score but also short of saying that they should acquit the appellant, he said everything in favor of the accused. The learned Judge, therefore, was fully alive to the situation and most properly directed the jury and, if I may say so, properly accented the verdict of the jury.

13. As there is no misdirection the appeal can, therefore, be disposed of on this very short ground. But at the request of the learned Counsel for the defense we have gone through the entire evidence on record to see for ourselves whether in fact there has been any miscarriage of justice. Before we been the discussion of the facts it is always necessary and salutary, to bear in mind the provisions of section 537 of the Code of Criminal Procedure which expressly lays down that subject to the provisions contained in the preceding section of the Criminal Procedure Code, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any misdirection in any charge to the jury unless such misdirection has in fact occasioned a failure of justice. We, therefore, propose to address us to the question, even assuming there is a misdirection as contended by Mr. Mitter, whether in fact there has been any failure of justice.

14-17. (His Lordship after narrating the facts continued.)

18. Mr. Mitter learned Counsel for the appellant, contends that the testimony of the victim girl Hayatun in this case is entirely uncorroborated and should, therefore, not be relied upon for convicting the appellant. .

19. Now applying the broad tests laid down by the Supreme Court in the case of (1952) SCR 377 : AIR 1952 Supreme Court 54 and in the case of (1958) SCR 749 : AIR 1958 Supreme Court 143 we find there is corroboration. The main circumstances of corroboration may be briefly stated.

20-22. (After stating the corroborative evidence his Lordship proceeded.)

23. The tender age of Hayatun, the repeated unsuccessful efforts of the father to take her back, failure of the appellant to hand over the girl to the father on some excuse or another, failure to pay her wages, failure to permit her to go home within the last 18 months before trial and failure to inform the police when the first search for them proved abortive are all circumstances relevant on the point of motive and guilt of the appellant

24. The fourth outstanding corroborative circumstance is the presence and detection of spermatozoa in the vaginal swab and smears of Hayatunnessa both in Exhibit 9 and in Exhibit 27. In both these reports of the Chemical Examiner it is distinctly stated "Spermatozoa had been detected in the stains on swab and slides." On that chemical report the opinion of Dr. S.K. Ray, professor of Forensic and State Medicine, Medical College, Calcutta is :

> "In view of the report, I am of opinion that sexual intercourse was committed on Hayatunnessa within a period of about 4 or 5 days prior to my examining her on 23-3-60 at 1.45 p.m."

On Exhibit 27 Dr. Majumdar's opinion is :

> "She was subjected to recent sexual intercourse prior to medical examination."

25. Hayatunnessa was examined by two doctors on two dates. The first doctor was Dr. Nirmal Majumdar who was only an L.M.F. but he was the Medical Officer, Alipore police Hospital. He examined Hayatunnessa oh the 20th March, 1960 at 1 p.m. on the very day she was rescued from the appellant's home. He took the vaginal smears and swabs of Hayatunnessa and sent them to the Forensic Science Laboratory. Of course to the naked eye in the physical examination no semen or foreien body was seen in the private parts of Hayatunnessa by Dr. Majumdar and he, therefore, rightly reserved his opinion on the point, until the

26. Hayatunnessa was also examined by Dr. S.K. Ray, professor of Forensic and State Medicine, Medical College. Calcutta. He examined Hayatunnessa on the 23rd March, 1960 at 1.45 p.m. He also gave his opinion on the basis of the Chemical Examiner's report.

27. This medical opinion and the Chemical Examiner's report in support thereof establishing presence and detection of spermatozoa in the vaginal swabs and vaginal smears of Hayatunnessa are corroborative of the fact of sexual intercourse with Havatunnessa. This is a corroboration from independent source.

28. Mr. Mitter realised the gravity of this circumstance of the presence and detection of, spermatozoa. He, therefore, marshalled his attack on criticizing the legal weight of the oninion expressed and by suggesting that it has not been established that the spermatozoa was of his client, the appellant. That would involve getting the sperm of the Appellant by artificial means and then examining it. It is necessary to recall the observation of the Supreme Court in Rameshwar's case, (1952) SCR 377 : AIR 1952 Supreme Court 54 that independent confirmation of every material circumstance is not required and that corroboration need not be direct evidence that the accused committed the crime but it is sufficient if it is merely circumstantial evidence of his connection with the crime.

29. Mr. Mitter, therefore, argued on the life of spermatozoa stating that beyond a few hours spermatozoa could not live. Therefore, he argued that if any sexual intercourse had taken place on the 18th March, 1960, the spermatozoa could not be found on an examination on the 20th March, 1960, specially because the girl had washed her self and answered calls of nature during the period of time between the alleged crime and the medical examination. Therefore, Mr. Mitter

builds up the theory of artificial introduction of semen to Hayatunnessa by the police. He did not accuse the doctors. This suggestion of artificial insemination or artificial introduction was never made either to the investigating officer or to the Doctors. To say the least, we consider this suggestion to be wild. Opinions and views expressed in Medical text books that the life of spermatozoa is only for a few hours after, intercourse cannot help Mr. Mitter Dead spermatozoa, could still be found. It is not necessary to find live and active spermatozoa. Mr. Mitter tries to argue on the basis of Medical Authorities that the Spermatozoa after death disintegrates but he has not been able to show us how long it takes spermatozoa to disintegrate so completely that even chemically their presence cannot be detected. The fact remains that the Chemical Examiners definitely found spermatozoa in the vaginal smears and vaginal swabs of Hayatunnessa. The evidence leaves no scope for us and if we may say so to Mr. Mitter, to indulge in this wild speculation about artificial insemination, or artificial introduction of semen. The swabs and smears and the stains were taken by responsible Doctors, who, we believe, were true to their professional code. They were sent under sealed covers as Exhibit 37 shows. Not the remotest suggestion was made in cross-examination that the seals were broken or tempered with by anybody. We have nothing on record to suggest, far less to prove, that there was any outside interference before the Chemical Examiner started his examination of these vaginal swabs, smears and stains. We are, therefore, unable to accept Mr. Mitter's fanciful theory of artificial introduction of semen as a possible or even remotely probable explanation of the presence of spermatozoa in Hayatunnessa. We therefore hold that this medical opinion and the chemical Examinee's Report corroborate Hayatunnessa's evidence' of rape.

30. There were one of two other points which Mr. Mitter urged to which reference may be made. (His Lordship considered these and rejected them.) Again Mr. Mitter's further submission is that medical evidence shows that Hayatuhnessa's hymen was not ruptured. That is not conclusive as the Medical Authorities show that even with sexual intercourse hymen may hot be ruptured. The definite medical evidence in the case of Hayatunnessa is that she had recent sexual intercourse.

31. Lastly Mr. Mitter submits that the afternoon hour 4 O' clock in a house where the wife, the young adopted daughter and all the servants were about was an improbable time and situation for the commission of such a crime. He has also drawn our, attention to the social status of the appellant and his wife. It is unnecessary for us haying regard to the analysis of the evidence that we have made, the circumstances that we have indicated, to examine this argument in detail except to say that there was an allegation to begin with in this case against the wife of the appellant for abetment which no doubt has ultimately failed. We have given our anxious thought and consideration to the hour and time of the occurrence and the social status of the appellant but we are unable to hold that they are such as should prevail against the entire context of evidence relating to conduct and circumstantial factors independently of the allegations of the victim girl, or throw any reasonable doubt on the guilt of the accused.

32. Mr. Mitter tried to show us what ho stated to be an alleged transcript of the Public Prosecutor's opening address to the lower court with a view to indicate that an atmosphere of prejudice was created by the Public Prosecutor. We are unable to accept Mr. Mitter's submission on the point first because this so called transcript of the alleged opening speech of the Public Prosecutor is not part of the record of the lower court; it was introduced as an anexure to the petition for appeal in this Court and it is not even sworn by affidavit of the person who is alleged to have taken the transcript. But even then the alleged transcript shows that the Public Prosecutor

was rightly restrained and pulled up by the learned Judge.
33. For these, reasons we uphold the conviction and the sentence. Having regard to the facts and circumstances of this case we do not think the sentence is such that we should interfere.

34. The appeal is, therefore, dismissed. The appellant must surrender to his ball and serve out the sentence imposed upon him.

N.K.SEN, J.

35. I entirely agree with the reasons and conclusions stated in the judgment just delivered by my Lord. I, however, desire to add a few words of my own.

36. It appears that after the return of the unanimous verdict by the jury, a prayer was made to the learned Judge by the learned Counsel appearing for the appellant asking him to disagree with the verdict and to make a reference to this Court under the provisions of section 307 of the Code of Criminal Procedure. The learned Judge refused to do so and very rightly pointed out that the jurors were within their rights to believe the prosecutrix even without corroboration if in the particular circumstances of the case they felt justified in doing so. The learned Judge, however, himself agreed with and accepted the unanimous verdict of the jury and convicted the appellant.

37. On a reading of the summing up as a whole there can be no doubt that the learned Judge was more inclined in favor of the defense than the prosecution. In his summing up he placed all the discrepancies appearing in the evidence of Hayatennessa prominently before the jury and then gave them the caution that where the victim was a young girl the jurors should bear in mind that it was very easy to tutor her to tell a, got up story and then be repeated-that before the jury accepted the story of the girl although it was not essential to look for corroboration they should not readily accept her testimony in the absence of some corroboration of her evidence. Then he asked the jury to consider if Hayatunnessa's own testimony was credible at all in view of the fact that she spoke so many lies in her deposition. No warning in my view in clearer terms could be expected to be given by a Judge to the jury.

38. Having realised that the summing up was very much in favour of the defence Mr. Mitter took us through the entire evidence with his usual scathing criticism with the object of inducing us to hold that the entire story was fantastic and that it was concocted by some interested people. Mr. Mitter argued that to suggest that his client, who comes of a highly respectable family and who had travelled extensively all over, the world would commit rape on the young, maid servant in his own house, where he lived with his wife and child and a number of other servants at the time it was alleged to have, been committed, was hot only outrageous, but something unthinkable. As I have said that we were taken through the entire evidence in this case and even after going through the entire evidence we do not find that the verdict, of the, jury was perverse and could not have been arrived at by a reasonable body of men. This would ordinarily dispose of the entire appeal even in case we were entitled to look at the evidence on account of some material misdirection in the learned Judge's summing up or to a misunderstanding on the part of the jury of the law as laid down by the learned Judge.

39. One of the points raised, by Mr. Mitter against the summing up was that the learned Judge had not properly explained to the jury that in sexual offences there can be no conviction without

any corroboration of the evidence of the prosecutrix. On that point as has been pointed out by my Lord in his judgment, the learned Judge's directions were quite thorough and convincing. It is not the law that a prosecutrix must necessarily be disbelieved and that she is invariably in the position of an accomplice. It has been pointed out by their Lordships of the Supreme Court in the case of 1952 SCR 377 : AIR 1952 Supreme Court 54 and 1958 SCR 749 : AIR 1958 Supreme Court 143, that it was wrong to suppose that the prosecutrix stood in the position of an accomplice, but it was always desirable to look for corroboration of her testimony before it was accepted. In the, present, case, in my view, the circumstances were such that the corroboration of the testimony of the girl was not possible to be expected from any inmate of the house. Therefore, one has to look to the medical evidence. There can be no doubt from the medical evidence that the girl was below the age of sixteen years. V.W. 13, Dr. S.K. Roy examined the girl on the 23rd March, 1960. The Chemical Examiner's report shows the presence of spermatozoa in her vaginal canal. This in my opinion is sufficient corroboration of the fact that rape had been committed upon the girl. It may also be pointed out here that Mr. Mitter's criticism as to the contradictory nature of the evidence of the two Doctors is misconceived. So far as the presence of spermatozoa in the Vaginal canal of the girl Hayaturmessa is concerned, the Chemical Examiner's report is that on the swabs as sent to him by the two Doctors spermatozoa could be found. It does hot matter whether one Doctor in his examination with his naked eye could not detect the presence of spermatozoa when he examined the girl, but on scientific "examination by the Chemical Examiner the presence of spermatozoa was detected. Therefore, there is really no contradiction between the evidence of the two Doctors. From the nature of the injuries on the persons of Hayatunnessa it would appear that the girl's story as to how the alleged rape was Committed has also been corroborated.

40. The next question would be was me appellant responsible for it? On that point necessarily there would be the evidence of the girl alone. I find no reason why the girl would be implicating her erstwhile master without any reason. If her father wanted to take her away from the appellant he could have done so without implicating the appellant in a crime of this nature.

41. The next point is about the First Information Report. In the first place objection has been taken to its, admissibility in evidence and in the second place the use, that has been made of it by the learned Judge even assuming that the First Information Report was admissible. As regards its admissibility, I do not think there can be any doubt. It appears that P.W. 5 Idris Ali, made, the application to the Minister in, charge of the Home (Police) Department on the 4th March, 1961, wherein he made allegation of cognizable offences committed by the appellant. This letter was forwarded by the Hon'ble Minister to the Deputy Commissioner, Detective Department, for a thorough enquiry and necessary action. An information on this point resulted in the First Information Report which is Ext.33 in this case. It was drawn up by Sri A.K. Roy, Sub-inspector, Detective Department on the 20th March, 1960, on the basis of the letter to the Hon'ble Minister by Idris Ali. Mr. Mitter argued that the learned Judge fell into a very serious errors by overlooking the provisions of section 154 of the Code of Criminal Procedure. He submitted the document Ext.33 was not the First Information Report at all inasmuch, as it was not a First Information Report within the meaning of Section 154 of the Code of Criminal Procedure. He pointed out to us that the requisite conditions of First Information Report under section 154 namely, the it must relate to cognizable offences against definite person, must be signed by the Information and must be made before an officer in charge of Police station, were not complied with and as such this could not be taken to be a First Information Report. My Lord in his

judgment has pointed out that these conditions as have been mentioned by Mr. Mitter were merely procedural. If any authority is needed, it will be found in the case of 35 Cal WN 623 at p.628 : (AIR 1931 Calcutta 745 at p.748 and Shwe Pru v. The King[5], decided by Roberts. C.J. and Dunklev. J.

42. About the improper use at the F.I.R., Mr. Mitter has drawn our attention to paragraph of the learned Judge's summing up. The words taken exception to are "You must seek for corroboration in it of the evidence of the informant at every step and see how far the statements made in the F.I.R. are consistent with the other evidence on the record". If one wanted to be hypercritical perhaps the words "other evidence on the record" might be objected to. We have been taken through the entire summing up in this case by Mr. Mitter, but we have not found any instance in which the learned Judge had in fact compared the statement in the First Information Report with any other evidence on record. That being the position the complaint made by Mr. Mitter that it was actually used as a piece of substantive evidence loses all its substance. In this connection my Lord, has referred to the provisions of section 537, clause (d) of the Code where it has been enjoined

> "that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed on appeal on account of any misdirection in any charge to the jury unless such error or omission or irregularity or misdirection has in fact occasioned a, failure of justice."

43. A grievance has been made that the learned Judge has in his summing up made misstatements to the jury in stating the prosecution case. Certain alleged mis-statements have also been brought to our notice. To us they appear to be so very insignificant that they deserve no serious consideration at all. Hearing of the case lasted for about a week and the appellant had the advantage of being defended by a Counsel of the eminence of Mr. Mitter, who had the assistance of other eminent lawyers, We have no doubt that Mr. Mitter left no stone unturned to convince the jury about the worthlessness of the prosecution case, but upon the evidence the jurors returned a unanimous verdict of guilty.

44. We have not been able, however, to find any misdiection worth its name in the learned Judge's summing tip nor can we say that the verdict was the result of misunderstanding on the part of the jury of the law as laid down by the learned Judge. Nonetheless the evidence having been placed before us by Mr. Mitter, we cannot say that it was a case of no evidence and that no reasonable body of men could have acted on that evidence. We feel satisfied that the conviction in this case was amply justified.

45. I, therefore, agree with the order that has been made in this appeal by my Lord.
Appeal dismissed.

[5]AIR 1941 Rang 209