1975 *Present :* **Sirimane, J., Wijesundera, J. and Ratwatte, J.**

KARUNASENA, Appellant and THE REPUBLIC OF SRI LANKA, Respondent

S. C. 44/75—H. C. Negombo 30/74

Criminal Law—Rape—Defence of Consent—Conviction based on the uncorroborated testimony of the prosecutrix—Failure to give directions to the Jury on corroboration.

Where the accused-appellant was convicted on a charge of rape, in circumstances indicative of consent on the part of the prosecutrix—

Held, *in a charge of this nature, a proper direction would have been to tell the jury that it is not safe to convict a person on the uncorroborated testimony of the prosecutrix but that the jury, if they are satisfied with the truth of her evidence, may, after paying attention to that warning, nevertheless convict.*

The need for corroboration in cases of rape commented on.

APPEAL against conviction at a Trial before the High Court.

R. K. W. Gunasekera with *Q. Palliyaguru* for the Accused-Appellant.

Shibly Aziz, State Counsel for the State.

Cur. adv. vult.

June 12, 1975. SIRIMANE, J.—

The accused-appellant was convicted on a charge of rape and sentenced to five years rigorous imprisonment.

The case for the prosecution was that the prosecutrix on her way back from Church on 10th June, 1973 at about 5.30 p.m. went to the house of Police Constable Wijeyepala to borrow the newspapers. The appellant who is the brother-in-law of Wijeyepala dragged her into the house, put her on a bed 1½ feet high with her legs hanging on its side, stood between her legs closed her mouth with one hand to muffle her cries, held her legs down with the other and had forcible sexual intercourse with her.

The appellant admitted that he had sexual intercourse with the prosecutrix but claimed that she was a consenting party. There were a number of circumstances which supported consent or at least involved it in grave doubt.

The prosecutrix and the appellant were both of about the same age—23 years, and the former admitted that for about three years prior to the date of the alleged offence she had been coming daily, to the house where the appellant lived to borrow the newspapers. Yet, in Court she tried to make out that she had never spoken to the appellant though in her statement to the Police (which was marked) she had stated that she had spoken to him in the presence of the other members of the household.

The appellant's position was that he had been on friendly terms with her for a long time and in fact was having an "affair" with her. The appellant's witness Sumanawathie had seen the two of them talking to each other alone on many occasions. Her denial that she ever spoke to the appellant before is quite improbable and obviously an attempt to so far remove herself from the appellant as to negative consent.

It was admitted that Wijeyapala's house, where the appellant lived, was only a few feet away from a fairly frequented high road, yet though the prosecutrix claims to have cried out when she was dragged inside from the verandah no one appears to have heard these cries, not even the neighbour Sumanawathie who occupied the adjoining twin house.

The alleged position in which the sexual intercourse took place is not an easy one for forcible entry and seems improbable. This may well be the reason the prosecutrix was unable to give details when cross-examined on this aspect and preferred to remain silent. The appellant's version on the other hand was that they were on the bed for sometime and then had intercourse.

Another circumstance that strongly supported consent was the complete absence of any injury—even a scratch—on any part of the body of the appellant. In the position described by the prosecutrix her hands were free and if she was an unwilling party it is difficult to imagine how the appellant could have performed the act with the prosecutrix protesting and struggling without even receiving a nail mark on his body. Even the prosecutrix had no other injuries on her thighs or private parts except the tears of her hymen. She had some nail marks near her mouth which the appellant suggested had been caused after she left him and when her parents came to know what had happened.

Yet another circumstance was that though the incident is said to have taken place at 5.30 p. m., the first complaint was made at the Negombo Police Station only at 12.10 a.m. on 11.6.73. Why was there this inordinate delay ? It is true no doubt that the appellant was the brother-in-law of Wijeyapala who was a Constable attached to the Kochchikade Police Station. This Police Station was only 100 yards away from the house of the prosecutrix. It may well be that the prosecutrix and her parents wanted to avoid going to that Police Station but then why the delay till 12.10 a.m. to go to the Negombo Police Station which was only three miles away ? It also transpired that the prosecutrix's father had first gone to see a Proctor before the complaint was made and this partly accounted for the delay. The learned Trial Judge gave his own

reason to the Jury as to why the prosecutrix's father may have gone to see a Proctor which was favourable to the prosecution. He may have, in fairness to the appellant, also posed the question to the Jury for their consideration as to whether he went to see a Proctor to find out what to do as the act had been done with consent. It was in evidence that the prosecutrix's father had been a dealer in illicit liquor and it is not likely that such a person did not know what to do if his daughter complained of a straight forward case of forcible intercourse.

These are some of the main circumstances which make the story of the prosecutrix that she was forcibly raped seem improbable and doubtful. There was therefore a need for caution. The learned Trial Judge however completely failed to give the usual directions on corroboration that are given in cases involving sexual offences. I do not know whether he omitted to do so because the appellant admitted the act of intercourse. It must be remembered however that the " offence " includes not only the act but also the fact that it was done " against her will or without her consent. " It was therefore necessary on that aspect of the matter to warn the Jury. A proper direction would have been to tell the Jury " that in a rape case it is not safe to convict on the uncorroborated testimony of the prosecutrix but that the Jury, if they are satisfied with the truth of her evidence may, after paying attention to that warning, nevertheless convict." Corroboration means some additional evidence rendering it probable that the story of the prosecutrix is true and that it is reasonably safe to act upon it. In cases of this type one can hardly expect direct evidence of corroboration, but there can be circumstances which support the prosecutrix. Where however there are infirmities on such a vital matter as consent, even though corroboration is not essential before there can be a conviction, the necessity of corroboration, as a matter of prudence, must be present in the minds of the Jury before a conviction without corroboration can be sustained. It was therefore very necessary that the usual directions on corroboration should have been given in this case. Learned Counsel for the State (rightly) did not seek to support the conviction. For these reasons we set aside the conviction of the appellant and acquitted him at the conclusion of the argument before us on 23.5.75.

WIJESUNDERA J.—I agree.

RATWATTE, J.—I agree.

Appeal allowed.