**CASE ANALYSIS**

**BHARWADA BHOGINBHAI HIRJABHAI v. STATE OF GUJARAT**

BY

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**BHARWADA BHOGINBHAI HIRJABHAI AND**

**THE EVOLUTION OF RAPE CORROBORATION IN INDIA**

**BACKGROUND:**

In the present case, the appellant was accused of manipulating two minor girls (PW 1 and PW 2), aged 10-12 years, into entering his house. The minor girls were friends with the daughter of the appellant, and entered the house under the false impression that they were going to meet their friend. Upon their entry in the house, the appellant attempted to sexually assault PW 2. However, she managed to escape. PW 1, on the other hand, failed to escape from the clutches of the appellant and was consequently sexually assaulted by him.

PW 1 could not inform her parents about the incident immediately as they were out of town. Initially, the parents of both the minor girls were reluctant in lodging a complaint against the appellant. They tried to hush the matter. However, owing to the initiative of a female social worker in the neighborhood, a complaint was lodged. Interestingly, the women living in the neighborhood had given an opportunity to the accused to publicly apologize for his sexual misbehavior. But he refused to do so, therefore, leading to the initiation of the present case.

The medical examination conducted by the doctors revealed indeed an attempt to commit rape had been made on PW1. Both the Sessions Court and the High Court convicted the appellant upon accepting the evidence put forth by the Prosecution. The High Court confirmed the conviction of the appellant under Section 342 and Section 354 of the Indian Penal Code [‘IPC’]. But it modified the conviction under Section 376 to that under Section 376 read with Section 511 of the IPC. The appellant, thereafter, approached the Supreme Court under Article 136 of the Constitution of India. It is worth mentioning that this case, that is, **Bharwada Bhoginbhai Hirjabhai v. State of Gujarat,[[1]](#footnote-1)** is considered a landmark judgement on the issue of corroboration of the sole testimony of the rape victim.

**FACTS IN ISSUE:**

The pivotal issue considered by the Court in the present case was “whether corroboration to the testimony of the rape victim was essential to establish the charge” and if the answer to this is in the affirmative, in what circumstances and in to what extent is corroboration required. An ancillary issue that preceded this was whether a corroborated finding of fact, recorded by the Sessions Court and affirmed by the High Court, could be reopened in an appeal by Special Leave.

**ARGUMENTS:**

The defence counsel in the present case argued that, owing to the past rivalry between the appellant and the father of one of the minors, a false story of sexual molestation has been concocted by the Prosecution. Additionally, the defence contended that in the absence of any corroborating evidence in support of the testimony of the rape victim, Prosecution could not establish the charge.

**JUDICIAL PERSPECTIVE:**

The position of law on corroboration of the testimony of the rape victim has evolved over the years. There was a time when a class of cases classified rape corroboration into two groups, grown up women and children.[[2]](#footnote-2) In the case of grown-ups, the Court necessitated corroboration, while the same was not required in the case of children. However, a few years later the Privy Council ruled that it would be prudent for Courts to not base conviction on uncorroborated evidence of a child witness.[[3]](#footnote-3) Later on, in Rameshwar v. State of Rajasthan,[[4]](#footnote-4) the Court averred that it would be prudent for judges to keep in mind that corroboration can be sought where it is reasonable. But, if the facts of the case make it impossible for the testimony of the prosecutrix to be corroborated, the Prosecution’s case cannot lose its merit on that ground. This came to be known as the rule of prudence.

Thereafter, in Sidheswar Ganguly v. State of West Bengal[[5]](#footnote-5) the Court differentiated between an accomplice under the Indian Evidence Act, 1872 [‘IEA’] and the prosecutrix. It was observed that, the position of the prosecutrix and the accomplice is not the same, and cannot be subjected to a similar treatment. The victim of a heinous crime is not an accomplice, therefore, while the rule of prudence should always be kept in mind by the judges, it must also be remembered that the where the circumstances make it safe to dispense the need of corroboration, a conviction without corroboration can be sustained.

The difference between the position of an accomplice and a prosecutrix in a rape case can be better understood by a simple reading of some provisions of the Indian Evidence Act, 1872. Firstly, Section 59 of the IEA, that deals with proof of facts by oral evidence makes it clear that all facts, save for the contents of documents or electronic records, may be proved by oral evidence.[[6]](#footnote-6) Now let us consider Section 118 of the Indian Evidence Act, 1872. Section 118 tells us who may testify before the court; accordingly, it stipulates that every individual is competent to testify before the court unless the grounds stipulated in the section are proved. These grounds to discredit the testimony of an individual include the inability to answer questions put to them, the inability to give rational answers, extreme old age, tender age, disease (of body or mind or any other cause of the same kind.)[[7]](#footnote-7) Under the Indian Evidence Act, an accomplice is considered a competent witness and the uncorroborated testimony of the witness does not make the conviction illegal.[[8]](#footnote-8)

Now we come to the provision that helps us understand the difference. Section 114 of the Indian Evidence Act, 1872, allows the court to presume the existence of certain facts. Therefore, if the court thinks that, in the natural course of events, considering human conduct, public and private enterprise, a certain fact is likely to have happened, the court may presume the existence of the same. Illustration (b) appended to this fact states that a court may presume an accomplice is unworthy of credit, unless he is corroborated in material particulars.[[9]](#footnote-9)

Therefore, we see that while the courts have the power to presume that the testimony of an accomplice is unworthy of any credit without corroboration, no provision of the Indian Evidence Act allows the same presumption to be raised against a sole prosecutrix in a rape case. Consequently, the need for corroboration is subjective to the facts and circumstances of each case. This brings us to the conclusion drawn by the Supreme Court in the State of Maharashtra v. Chadraprakash Kewalchnad Jain[[10]](#footnote-10) wherein the Court opined, and rightly so, that the prosecutrix of a sex offence and an accomplice cannot be put in the same situation. The former is the victim of a crime; the latter has himself violated the law. The victim of such an offence, thus, must be given the same consideration as any other injured witness.

The courts have dismissed the notion that there is any need for independent confirmations for every material circumstance in a rape case – observing, that if circumstances so warrant, circumstantial evidence will suffice in convicting the accused.[[11]](#footnote-11)

 Justice V.R Krishna Iyer, in the case of Rafiq v. State of U.P,[[12]](#footnote-12) further reiterated the principle by establishing that the condition of corroboration is not a matter of law, but a prudent way of proceeding in such cases. Consequently, the Court averred that the condition of corroboration cannot be followed with ‘precedential tyranny,’ and so the difference in circumstance must necessarily be factored in by the judges while dispensing justice.

The Courts have gone a step further in ensuring that justice is delivered to the victims. The Supreme Court has permitted the prosecution to rely on the sole testimony of the prosecutrix even in the absence of any oral corroboration to the same.[[13]](#footnote-13) The only caveat introduced by Courts is that the testimony of the Prosecutrix should not suffer from basic infirmities that make it unreasonable for it be the sole consideration to convict an individual. A point to be noted here is that, at no point does the Supreme Court offer a strait-jacket formula to determine what would plague a testimony by basic infirmities so inexcusable, that it cannot be the sole consideration to convict an individual. In the case of State of Punjab Vs. Gurmit Singh[[14]](#footnote-14) (1996) 2 SCC 384, this Court pointed out:

 "*Rape is not merely a physical assault -- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Court, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations*."

**OVERVIEW OF THE DECISION IN BHARWADA:**

1. With regard to the issue of reopening of a concurrent finding of the Sessions and the High Court, the Supreme Court observed that the same cannot be done unless one of the following conditions are fulfilled: (1) the finding is not based on evidence, (2) the finding is perverse, in that no one could reasonably arrive at that conclusion even if the all the evidence is considered on its face value, (3) the court has considered inadmissible evidence in reaching the finding- this if excluded would negate the entire case of the Prosecution, (4) an important piece of evidence has been overlooked or discarded by the Court.

Upon considering the facts of the case, the Court concluded that in the present case corroborated findings of fact cannot be reopened on the basis of any of these grounds. The court concluded that, although some minor discrepancies have been highlighted by the defence counsel, the same cannot be considered for reopening the case as they do not merit re-appreciation or re-appraisal of the evidence. The Court based this reasoning by observing that victims of such heinous offences cannot be expected to have a photographic memory. Such incidents take them by surprise, and their mental faculties are unable to observe details. Furthermore, the Court added that the power of observation and the sense of time of a person are completely subjective in nature, and the same cannot be held against the victim of the crime. Minor discrepancies, in Court’s view, are only natural.

1. With regard to the main issue before the Supreme Court, another unequivocal observation was made. In considering whether corroboration to the testimony of the prosecutrix was indispensable, the court compared and contrasted how women in the West and in India are socialized. In doing so, the Court opined that women in the West could, perhaps, level false allegations of sexual misconduct against an individual. But, the women in India were incapable of doing so. The court went one step further in opining, that it is possible for the women in the West to be ‘gold diggers,’ or motivated by the want of vengeance, economic rewards, publicity, jealousy, however, the same was absolutely improbable in the Indian scenario.

The court averred that unless the testimony of the prosecutrix is plagued with some basic infirmity, it cannot be rendered unworthy of being considered on its own. It is only that the ‘probabilities factor’ must be in favor of the victim, and the only corroboration needed is that of medical evidence. However, the court added a qualification to this principle: if the woman had attained the age of majority, and is found in a ‘compromising position’ and, there is a possibility that the charges have been leveled on account of self-preservation, the ‘probabilities factor’ becomes out of tune, therefore, necessitating, corroboration.

The court in this case was firmly of the opinion that the fear of being ostracized is so deep and the stigma attached so ingrained in the social fabric of the country, that it was unimaginable that an Indian woman could level false charges of sexual molestation against an individual- a move that could possible jeopardize her social life. Lastly, given the fact that the medical evidence supports the finding of the Sessions and the High Court, the Court observed that the decision of the High Court could not be assailed on the ground of non-corroboration of the testimony of the victim.

**ANALYSIS:**

**THE STERLING WITNESS TEST:**

Over the years, a change in the perception of the courts can be observed. For a long time, and Bharwada Bhoginbhai[[15]](#footnote-15) was a part of that time, the Courts were of the opinion that unless the testimony of the prosecutrix in a sexual offence consisted of some basic infirmities or irregularities, or the prosecutrix herself was found to be in a compromising position, the Courts had the liberty to take into consideration the sole testimony of the victim without any corroborating evidence. As we have observed in a catena of judgments, the conviction cannot be assailed on the basis of this. For a long time, primacy was given to the victim. Minor irregularities were ignored by Courts in the hope to serve the ends of justice. However, this position has begun to see a gradual change.

The number of cases wherein false charges have been leveled against an individual have increased over the years. This has resulted in the Courts being skeptical in accepting the sole testimony of the prosecutrix. To be sure, the general rule of law that allows uncorroborated testimonies to be the basis of conviction continues to exist. However, skepticism pervades the minds of judges. They acknowledge the fact that rape causes great distress to the victim. At the same time, Courts are worried that false allegations too cause great humiliation and trauma to an accused. As has been reiterated time and again, it is also the duty of the Court to protect individuals against false implication. It is to serve this end that the ‘sterling witness’ test has been evolved by the Courts.

According to the Supreme Court in *Raj Sandeep alias Deepu*,[[16]](#footnote-16) a ‘sterling witness’ is required to be one whose version is so high in quality that it's unassailable in the court of law. A ‘sterling witness’ therefore leaves no scope for inconsistencies. She is natural, consistent, and in a position to withstand the pressure of cross-examinations. In her testimony, each fact correlates with the supporting material discovered, including the manner of offence committed, the scientific evidence as well as expert opinion. The Supreme Court has further added that the ‘sterling witness’ test should be evaluated along the same lines as circumstantial evidence wherein it is necessary that there are no missing links in the chain of circumstances that help convict the accused. Only if the sole prosecutrix testimony qualified this test can her uncorroborated testimony be considered to convict the accused.

It must be noted that the factors that help determine whether a sole prosecutrix is a ‘sterling witness’ are not exhaustive. On one hand, we have judgments like Bharwada Bhoginbhai that took into consideration psychological limitations that limit the version of the sole prosecutrix from being intact, on the other hand, we have Santosh[[17]](#footnote-17) wherein the court recently used the ‘sterling witness’ test in acquitting the accused.

At this point, it is difficult to establish which approach of the two is suitable for our criminal justice system. This change in jurisprudence can be credited to a change of perception. Both kinds of decisions are criticized in the legal fraternity. Bharwada is criticized for forwarding an arguably regressive view (some contend that the view was in line with the kind of society we live in) to premise the conclusions drawn. Now we have a recent wave of cases that dissolve this premise and its resultant conclusion, without overturning the previous decisions. As always, it is up to the Courts to decide how to navigate the space between the two kinds of interpretations. To be sure, there is a clear need for balance and one can only hope that prudence is reflected in future cases.

**THE PROBLEM WITH THE CORROBORATION REQUIREMENT:**

Lord Hale’s opinion on sexual offences echoes the perception built around it within the criminal justice system today. He said, in the context of a rape charge, “it is an accusation easily to be made, hard to be proved, and harder to defend.”[[18]](#footnote-18) The ‘Sterling Witness Test’ is a judicial innovation that endeavours to make it easier for the accused to defend charges levelled against him by calling into question every inconsistency so that a doubt can be planted in the mind of the judge. The obvious corollary is that it becomes difficult for the prosecutrix to prove the charges.

Legal theorists believe that relying on the testimony of the prosecutrix alone is inherently dangerous, in that it increases the likelihood of a false implication. This view is discriminatory on two grounds. Firstly, the courts have consistently held that a sole prosecutrix is a competent witness. Therefore, her testimony must be considered at par with that of a witness injured in cases of physical violence. The degree of care and caution in the evaluation of such evidence must be the same as in that of an injured complainant. However, the courts must keep in mind that she is interested in the outcome of the case. Clearly, the Sterling Witness Test is a shift from this view. It no longer allows the testimony of the prosecutrix to be at par with that of an injured witness. The possibility of  a false implication cannot be the sole ground to put this high a burden on her.

Secondly, and perhaps more importantly, in requiring corroboration in every case (I say, ‘every case’ because, although the rule of prudence still exists, the sterling test has made it virtually impossible for reliance to be placed only on the sole testimony of the prosecutrix), the courts have lost view of the circumstances surrounding the committal of sexual offences. This can be better understood by considering the nature of evidence accepted by courts and the difficulty in producing the same. The inherent nature of the offence eliminates the possibility of there being an eye-witness in every case. Over the years, the medical experts have testified to the fact that the absence of seminal fluids does not rule out the possibility of penetration. There have been many instances when no seminal fluids have been found.

The scope of the offence of rape is no longer limited to penetration. In cases of oral rape, there can be no stains of seminal fluids in most cases. Furthermore, studies have shown that women, when confronted with a weapon wielding assailant, do not put up a physical fight.[[19]](#footnote-19)Often, therefore, no physical signs of injury can be found as corroborative evidence. Even the subsequent conduct of the complainant, for instance, whether the report was filed promptly, is corroborative evidence. However, yet again, it must be borne in mind that our social conditioning intimidates women into silence. Consequently, delays in reporting cannot be held against the prosecutrix. This brief discussion attempts to showcase, illustratively, that, in many situations it is difficult for the prosecution to produce corroborative evidence. In such circumstances, the Sterling Witness Test results in an undue and disproportionate burden on the prosecutrix.

However, there is no denying the fact that there needs to be a balance. In cases wherein basic infirmities corrupt the very foundation of the case, the Courts must look beyond the sole testimony of the prosecutrix. To battle the problem of the lack of corroborating evidence, aggravating circumstances must be duly considered by the Courts. The Sterling Witness Test focuses on what the victim did/ did not do. It expects the mental faculties of the prosecutrix to be so enabled as to recall the incidents with accurate details and consistencies. The Court must be sensitive to the plight of the prosecutrix while examining her through this lens.

**CONCLUSION:**

In 1998, the Supreme Court of India in Ranjit Hazarika v. State of Assam[[20]](#footnote-20) made a laudable decision in holding that even if the medical evidence does not indicate a rupture of the hymne or any injury in the private parts of the victim, the otherwise cogent and trustworthy account of the prosecutrix will not stand negated. The Bombay High Court went one step further in Prashant Kate v. State of Maharashtra[[21]](#footnote-21) ruled, “that the presence of semen is not necessary for proving the offence of rape.” Clearly, we have no dearth of progressive judgments that take into consideration a wide array of factors and issues that influence and flow from the committal of rape. However, owing to a catena of judgments, lower courts have a wide spectrum of options to reason out the decisions they make, and cherry-pick the degree of burden they put on the prosecutrix or the accused. This paints a murky picture of the criminal justice system in the minds of the public. Although, the situation warrants a systematic approach, the criminal justice system is plagued with end number of interpretative issues ranging from death penalty to the very understanding of the term ‘cognizance.’ Thus, one can only hope that we do not fall prey to ‘precedential tyranny’ in our attempt to dispense justice.

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[2] *Bishram v Emperor*, AIR 1944 Nag. 363.

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[4] *Rameshwar v The State of Rajasthan*, 1952 SCR 377.

[5] *Sidheswar Ganguly v State of West Bengal*, AIR 1958 SC 143.

[6] Indian Evidence Act 1872, s 59

[7] ibid, s 118

[8] ibid, s 133

[9] ibid, s 133 (b)

[10] *Maharashtra v Chandraprakash Kewalchand Jain*, 1990 SCR (1) 115.

[11] *A.W Khan v State*, AIR 1962 C. 641.

[12] *Rafiq v State of U.P*, (1980) 4 SCC 262

[13] *Madan Gopal Kakkad v. Naval Dubey* (1992) 3 SCC 204

[14] *State of Punjab v Gurmit Singh,* (1996) 2 SCC 384

[15] *Supra*, note 1.

[16] *Raj Sandeep @ Deepu v State of NCT of Delhi*. Cr. Ap. No. 2487 of 2009.

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[18] ‘Corroborating Charges of Rape Source’ (1967) 67 6 Columbia Law Review Association <https://www.jstor.org/stable/1121047> accessed on May 06, 2020.

[19] ‘The Rape Corroboration Requirement: Repeal Not Reform Source’ (1972) 81 7 The Yale Law Journal, <https://www.jstor.org/stable/795246> accessed on May 6, 2020.

[20] *Ranjit Hazarika v. State of Assam*, (1998) 8 SCC 635.

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2. *Bishram v Emperor*, AIR 1944 Nag. 363. [↑](#footnote-ref-2)
3. *Mohamed Sugal Esa v The King*, AIR 1946 P.C. 3. [↑](#footnote-ref-3)
4. *Rameshwar v. The State of Rajasthan*, 1952 SCR 377. [↑](#footnote-ref-4)
5. *Sidheswar Ganguly v.State of West Bengal*, AIR 1958 SC 143. [↑](#footnote-ref-5)
6. Indian Evidence Act 1872, s 59 [↑](#footnote-ref-6)
7. ibid, s 118 [↑](#footnote-ref-7)
8. ibid, s 133 [↑](#footnote-ref-8)
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10. *Maharashtra v Chandraprakash Kewalchand Jain*, 1990 SCR (1) 115. [↑](#footnote-ref-10)
11. *A.W Khan v State*, AIR 1962 C. 641. [↑](#footnote-ref-11)
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13. *Madan Gopal Kakkad v Naval Dubey*, (1992) 3 SCC 204 [↑](#footnote-ref-13)
14. *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 [↑](#footnote-ref-14)
15. *Supra*, note 1. [↑](#footnote-ref-15)
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