[IN THE COURT OF CRIMINAL APPEAL]

1956 *Present :* Basnayake, C.J. (President), Pulle, J., and Fernando, J.

REGINA *v.* W. G. DHARMASENA *et al.*

Appeals 115 and 116 of 1955, with Applications 176 and 177

S. C. 28—M. C. Matara, C. 1810

Rape—Prosecutrix's evidence—Corroboration—Evidence Ordinance, s. 134—Summing-up—Erroneous statement as to evidence—Duty of Counsel to invite Court's attention thereto.

In a charge of rape, it is not in law necessary that the evidence of the prosecutrix should be corroborated.

Obiter: **Where in a summing-up the Judge makes an erroneous statement as to the evidence, he should be invited by Counsel to correct it immediately. Otherwise, an appeal based on such error will not be encouraged.**

APPEALS, with applications for leave to appeal, against two convictions in a trial before the Supreme Court.

G. E. Chitty, with *A. B. Perera*, *M. S. M. Nazeem*, and *Daya Perera*, for 1st accused-appellant.

Colvin R. de Silva, with *M. L. de Silva*, for 2nd accused-appellant.

A. C. Alles, Senior Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 2, 1956. BASNAYAKE, C.J.—

The first appellant was convicted of the offence of rape and the second appellant of abetment of that offence. The first appellant was the Superintendent of his father's estate in Deniyaya and the second appellant was an English Schoolmaster and a friend of the first. The prosecutrix is the mistress of one Felix Fernando.

The story for the prosecution is that the witness Felix Fernando along with some others was arrested and remanded to the custody of the Fiscal in connexion with a charge of rape. In order to enlist his support for the defence of Felix Fernando, the prosecutrix went to the house of the first appellant accompanied by her younger brother Reuben about 11 a.m. on 3rd September 1954. Apparently moved by her appeal he undertook to spend even a lakh of rupees in the defence of Fernando and said that he would go to Galle where Fernando was on remand to see him, and asked her to come the following day at about 3.30 p.m.

When she went the next day again accompanied by Reuben the second appellant was also there. The appellants were seated on two chairs and were engaged in conversation. The first appellant asked her to sit down. She sat on the step while her brother sat under a tree in the compound. Thereupon the first appellant moved his chair close to her and after telling her not to worry about the case and assuring her that somehow or other he would get Fernando released, he held her hand. The prosecutrix showed her resentment at his action by brushing aside his hand and escaping from his grasp. But he followed her and held her by her jacket which got torn when she struggled to free herself. Failing in her attempt to escape she raised cries but they were of no avail for he lifted her bodily and took her inside the house, placed her on a bed, threatened to kill her if she raised cries, gagged her and tied her chin. He then summoned the second appellant who tied her ankles together. Thereafter the first appellant tied her hands together and placed them against her chest.

The second appellant then uttered these words of warning : " Kalu Nona, this Pangiriwatte Mahatmaya can spend even a lakh if he wants. He is the only ganankaraya in Deniyaya."

Then the first appellant having attempted to have intercourse with her got off her body and went out and fetched a gun which he showed her and said : " If you struggle I will shoot you with this and kill you." Thereafter he placed the gun against the bed, untied the hands and feet of the prosecutrix and had intercourse with her.

According to Reuben he was on the compound when he saw the first appellant hold his sister's hand. She pushed his hand and jumped out, but he held her by her jacket, which got torn, and she then fell down and raised cries. At this stage Reuben ran away.

The medical evidence of the injuries found on the prosecutrix three days afterwards strongly supported her story that she had been forced to submit to an act of sexual intercourse.

There was sufficient evidence for the jury, upon a proper direction, to hold that the first appellant committed rape. Hence the submission on his behalf that the verdict is unreasonable cannot be sustained.

The principal submission made on behalf of the first appellant was that the learned trial Judge failed to direct the jury that as against him there was in law no corroboration of the evidence of the prosecutrix. We are unable to uphold this submission as in our view the story of the prosecutrix was corroborated in several respects. Our Penal Code does not require that the evidence of the prosecutrix in a charge of rape should be corroborated although it does provide that in the case of charges of procuration under section 360A no person shall be convicted upon the evidence of one witness, unless such evidence be corroborated in some material particular by evidence implicating the accused. Another such provision is to be found in the Maintenance Ordinance. There is no presumption, as in the case of an accomplice, that a prosecutrix in a case of rape is unworthy of credit unless she is corroborated in material particulars. Except where corroboration is expressly required by statute, our rule of evidence [1] is that no particular number of witnesses shall in any case be required for the proof of any fact.

Counsel also complained that the evidence given by Reuben in the Magistrate's Court, which was elicited for the purpose of discrediting that witness, was put to the jury as corroboration of the prosecutrix.

The learned trial Judge rightly directed the Jury that corroboration of the story of the prosecutrix was not in law necessary but that it was not safe to convict upon the uncorroborated testimony of the prosecutrix, and that nevertheless they were free to return a verdict against the prisoner if they were convinced of the truth of the story of the prosecutrix even though she was uncorroborated. Under the English common law too the testimony of a prosecutrix was alone sufficient evidence to support a conviction ; neither a second witness nor corroborating circumstances were necessary [2].

[1] *Evidence Ordinance, Section 134.*
[2] *illiam Crocker, 17 Cr. App. R. 45.*
Thomas James Jones, 19 Cr. App. R. 40.

The law is thus stated in Hale's Pleas of the Crown, Volume I, page 633 :—

" Touching the evidence in an indictment of rape given to the grand jury or petit jury.

" The party ravished may give evidence upon oath, and is in law a competent witness, but the credibility of her testimony and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact, that concur in that testimony.

" For instance, if the witness be of good fame, if she presently discovered the offence and made pursuit after the offender, shewed circumstances and signs of the injury, whereof many are of that nature, that only women are the most proper examiners and inspectors, if the place, wherein the fact was done, was remote from people, inhabitants or passengers, if the offender fled for it, these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself."

Hale's statement of the law is reflected in the pronouncements of the Courts of England and of those American States whose statute law does not require that the evidence of the prosecutrix in a charge of rape should be corroborated. The view of the Courts of England is quoted in our reports and need not be repeated here. The American view can be gathered from the following extracts from the judgments of Parker J. and Brickell, C.J.—

Parker J. in Ellison v. State, 19 N. M. 428, 144 Pac. 10.

" But in the absence of a statute a man may be convicted of rape on the uncorroborated testimony of a strumpet, or he may be convicted on the uncorroborated testimony of a girl below 10 years of age . . .

" It is of course true that in a sense the testimony of a prosecutrix must be corroborated. That is, it must bring together a number of surrounding facts and circumstances which coincide with and tend to establish the truth of her testimony. Without such surrounding facts and circumstances, the bald statement and charge of a woman against a man would be so devoid of testimonial value as to render it unworthy of belief, and to cause it to fail to meet the requirements of the law, namely, evidence of a substantial character. In this sense there must, of course, be corroboration. "

Brickell, C.J. in Boddie v. State, 52 Ala. 395, 398.

" No principle of law forbids a conviction on her uncorroborated testimony, though she is wanting in chastity, if the jury are satisfied of its truth. Her testimony should be cautiously scrutinised, and Court and Jury should diligently guard themselves from the undue influence of the sympathy in her behalf which the accusation is apt to excite. If she did not conceal but immediately discovered the offence, and the offender is known to her ; if the place of its commission was such that if she made outcry it would not probably be heard and bring her assistance and defence,—these and other circumstances should be considered

by the Jury. The manner in which she testifies, the consistency of her testimony, should also be carefully considered. If, viewed fairly and carefully, the Jury are satisfied of the truth of her evidence, it needs no corroboration from other witnesses to support a conviction."

Objection was also taken to the following passage in the learned trial Judge's summing up. But we are unable to hold that the direction is wrong in law or prejudicial to the prisoners.

"Gentlemen, in charges of sexual offences it is always the duty of the Judge to warn the jury that it is unsafe to act upon the uncorroborated testimony of the woman who makes the accusation. It is not a rule of law but it is a rule of prudence and it is a rule of common sense to take up the view that is so often expressed and to which I have referred to on earlier occasions that these charges are very easy to make and very difficult to disprove. So that you must warn yourselves that it is generally and nearly always quite unsafe to act on the woman's uncorroborated evidence even if you think she is speaking the truth unless there is some independent evidence, that is evidence coming from an independent source which confirms in material detail not only there was intercourse between the parties but also that it took place without her free will and consent.

"Obviously you cannot expect this rule to mean that everything that the woman has said in regard to the crucial matters must be corroborated by independent evidence because then you see it really amounts to this. You may well keep the woman out of the witness-box and you get independent evidence to prove the essential elements of the crime. I can hardly imagine that there would ever be such a situation that there would be independent evidence to prove what happened within a secluded spot.

"The rule of common sense does not go to that extent. You must ask yourselves whether there is some independent evidence which you believe to be true which tends to connect the accused with the crime, which tends to make her allegation which is more probable than not on a material important detail."

Learned counsel also criticised the following directions of the learned trial Judge in regard to the evidence of the boy Reuben :—

"Now, gentlemen, what is the corroborative evidence in the strict sense, namely, independent evidence on material points which tend to implicate the accused and convict him with the crime ? There is the evidence of the boy Reuben. Are you quite satisfied at least when he says that on the 4th September in the afternoon when he went there with Premawathie he saw the 1st accused carrying Premawathie into the house ? If you are convinced that is true that is corroborative evidence to the extent that it shows that the 1st accused was acting in a most suspicious manner in regard to a woman whose husband was away from the village at the time and if you are quite satisfied

that Reuben is speaking the truth, there was certainly an opportunity afforded to the 1st accused to commit the crime. If you believe the evidence of Reuben, it is certainly a very suspicious piece of evidence against the 1st accused.

"Well, I shall refer to criticism of the evidence of Reuben as a witness in a few minutes."

Later on in the charge he said :—

"Reuben's evidence has been criticised. You saw the boy himself. There was the controversy about the age. He was not quite 15 at the time of the alleged incident. You saw him as he appears 15 months later. He seems to be an extremely unintelligent young man, which I imagine if his intelligence quotient, if tested, would be extremely low which the experts call it. He cannot even sign his name, cannot read a clock, and he apparently had left school 6 or 7 years ago, a strange time to leave school. He is obviously an unsatisfactory witness where matters of recollection are concerned. He first said that he saw the 2nd accused there on both visits and then in answers to questions he was unable to reply at all. One knows these young children are easily tutored, but this was an unsuitable boy for tutoring at all. He could not remember the piece of recitation which apparently he was taught to recite before a jury, but it is for you, realising his lack of intelligence and his youth, to say whether you believe him when he says that he went with his elder sister on the 4th in the afternoon and that he saw her being carried away by the 1st accused. If you are convinced that is true, that is an item of evidence which you will consider as corroboration, for what it is worth, not obviously of the fact of intercourse, but corroboration that there was an opportunity for the commission of the crime, and that is evidence of a piece of conduct which was suspicious in nature because the superintendents and members of estates do not carry women forcibly into their houses on occasions particularly when the gentleman's wife and children were not there at all."

Learned counsel urged that the above direction contained a misdirection of fact on a very vital point. The defence proved through the Clerk of Assize the following passage from Reuben's deposition in the Magistrate's Court :—

"When she fell down the 1st accused lifted her bodily and took her to the room."

But at the trial Reuben did not say that the first appellant lifted the prosecutrix and carried her away. His evidence was as follows :—

"The 1st accused had a little chat with my sister and he held my sister's hand and my sister pushed aside his hand and jumped out. Then the 1st accused held her by the jacket. Then my sister raised the cry 'Budu Amme'. . . . . When he held her by the jacket the jacket got torn and she fell down. At that moment she raised the cry 'Budu Amme' and I ran away.

To Court :

1138. Q. At the time you ran away your sister was on the ground ?
I did not see him move away from the compound.

Examination continued :

1139. Q. Where did you run ? I ran along the road in the direction of our house.

1140. Q. Did you get to your house ? No.

1141. Q. Why what stopped you ? I waited on the road to see whether my sister would return and after waiting there for some time I went again to see my sister and then I met her near the river.

1142. Q. At that time what was her condition ? Her jacket was torn and there was an injury on her lip and she was crying."

It would appear from the evidence of Reuben quoted above that Reuben corroborated the prosecutrix in the main and that the obvious slip of the trial Judge in stating that she was corroborated in respect of her evidence that she was bodily lifted and taken inside the house, though it be incorrect, is not in view of the other evidence of Reuben such a mistake as would call for interference with the verdict.

But there is, however, the criticism that he failed to direct the jury in regard to the statement of Reuben before the Magistrate which was inconsistent with his evidence in the trial Court.

In the light of the other evidence of Reuben the inconsistency cannot be regarded as one which is so important as to call for specific mention as a statement which seriously affects the value of the boy's evidence, as the learned Judge had in his introductory remarks, sufficiently cautioned the Jury as to the way in which his evidence should be approached.

Strong reliance was placed on the judgment of the Court of Criminal Appeal in *The King v. Atukorale* [1] in which a verdict of rape was set aside on the ground that complaints made by the prosecutrix shortly after the alleged offence were wrongly presented to the jury as being corroboration of her evidence, but in the present case the charge except for the unfortunate slip in dealing with the boy's evidence is not open to objection.

As we have already held, the first appellant was rightly convicted by the jury. His conviction necessarily involved the complete acceptance of the evidence of the prosecutrix as to the circumstances in which she was raped by the first appellant. That evidence clearly implicated the second appellant as well, and having regard to the warning duly administered by the Judge that there was no corroborative evidence as against the second appellant, we are unable to hold that the verdict against him was in any way unreasonable.

[1] *(1948) 50 N. L. R. 256.*

As the question has arisen in this case we should like to add that it is important that both counsel should follow the Judge's summing up and bring to his notice any erroneous statement as to the evidence. In the instant case the record shows that the learned trial Judge inquired from both the counsel for the prosecution and the counsel for the defence whether there was anything more that he should tell the Jury and both answered in the negative. The slip in question appears to have passed unnoticed by both counsel.

For the guidance of counsel we should like to add that where in a summing up the Judge makes an erroneous statement as to the evidence, he should be invited to correct it immediately. An appeal based on such error will not be encouraged where correction would obviously have been made if the Judge's attention had been drawn to the matter [1].

It has been held both in England and elsewhere that if some irregularity comes to the knowledge of counsel before the verdict is returned he should bring it to the attention of the Court at the earliest possible moment and that it ought not to be held in reserve with a view to taking it before the Court of Criminal Appeal.

Where counsel has failed to bring timeously to the attention of the Court of trial any such irregularity which would undoubtedly be corrected by the trial Judge if his attention were drawn to it, the Court of Criminal Appeal will not allow advantage to be taken of it when it is too late to remedy it except by quashing the conviction [2].

For the reasons given above the appeals are dismissed. The period between the final date of hearing of this appeal, 12th January 1956, and the date of this judgment, should be deducted from the sentence which the prisoners have yet to undergo.

Appeals dismissed.