1975 *Present :* **Thamotheram, J., Sirimane, J., and Vythialingam, J.**

S. RAJARATNAM, Accused-Appellant

and

THE REPUBLIC OF SRI LANKA, Respondent.

S. C. 85/75—H. C. Jaffna 55/74

Criminal Law—Charge of rape—Evidence of prosecutrix—Nature of corroboration required.

Questions by defence counsel suggesting consent—Identity of accused—No evidence given by accused—Direction by trial Judge that evidence of identity of accused may be provided by such suggestion.

Held : (1) That the corroboration required where the charge is one of rape is some independent testimony which affects the accused by connecting or tending to connect him with the crime. A statement made by the prosecutrix to her grandmother, after the event cannot constitute the kind of corroboration required.

(2) That a suggestion made by defence Counsel in cross-examination could not be considered as evidence in the case where the accused had not given evidence and taken up such position. To direct the jury to treat it as such would be a very serious misdirection.

Cases referred to :

King v. Atukorale, 50 N. L. R. 256.

Premasiri v. The Queen, 77 N.L.R. 86.

APPEAL against a conviction in the High Court, Jaffna.

T. Joganathan (assigned) for the accused-appellant.

U. Yapa, State Counsel, for the Attorney-General.

Cur. adv. vult.

October 29, 1975. THAMOTHERAM, J.

The accused was convicted in the High Court of Jaffna of committing rape on Thangamany Kandappu and sentenced to 15 years rigorous imprisonment. Thangamany gave her age as 20 years. She said that she stayed with her grandmother in Ward 15 at Delft. On 9.3.73, the date of the alleged offence, her grandmother went to Ward 14 to uproot palmyrah roots, having asked Thangamany to bring her noon day meal to where she went to work.

Thangamany carried out her instructions and was taking the meal to her grandmother when she met the accused and according to her he held her by the hand, caught her by the neck and dragged her towards the sea shore. She was put down, her blouse was opened, the skirt she was wearing was raised and then the accused had intercourse with her.

Her grandmother Valliammah supported the evidence of Thangamany. She said, she had to go hungry that day as her grand-daughter did not turn up till about 5 p.m. Then she came crying. She found her hair dishevelled and she complained to her that Sellan Annai's son had committed an offence on her. She then took her grand-daughter to the police who recorded her statement.

The doctor was asked whether, when he examined the prosecutrix he noticed any signs of violence. The doctor replied that he found the following injuries :—

(1) An oblique abrasion 1" long on the back of the middle of the right forearm.

(2) An oblique abrasion ½" long at the base of the right side of the neck.

(3) There was pain on the left angle of the lower jaw and on the left side of the neck.

(4) There was pain of coccyx between the buttocks.

(5) Pain on lateral side of the right ankle.

The doctor added that the external injuries were suggestive of struggle.

The doctor who examined the accused about 4 days after the alleged offence said that he found one injury on the accused, it was an infected inside wound, obliquely across the left forearm 4" long skin deep and 4" above the wrist. It could have been caused in the course of a struggle. He said a pointed stone could have caused this injury and the evidence was that there were many pointed coral stones in the Island of Delft. Doctor further said that this injury was consistent with having been caused on 9th March.

The police officer who went to the scene said that he obesrved marks of strugle on the beach.

Counsel for the appellant made the following points :

(1) That there was gross misdirection on corroboration.

(2) The wrong direction in regard to the medical evidence in the case caused prejudice to the accused.

(3) That the contradictions have not been properly put to the Jury.

(4) The case had not been proved beyond reasonable doubt.

While dealing with the medical evidence the learned Judge said, "The doctor was asked by the State Counsel, 'taking all these injuries together, do you say that rape has been commit-

ted' and his answer was 'a tear in the posterior fornix means that there has been penetration and there was rape." In doing so the learned Judge in effect told the jury that in the opinion of the doctor, the offence of rape had been committed. It was for the Jury to find out whether the offence of rape had been committed. The doctor could only speak to the question of penetration and the Jury should have been adequately warned not to be influenced by the doctor's opinion that rape had been committed. The learned Judge instead of doing this left the opinion of the doctor as something they could take into consideration.

The learned Judge had only this to say on the question of corroboration. "The counsel for the accused also cited the case reported in 50 NLR page 256, *King vs. Athukorale* where it was held that where a accused is charged with rape, corroboration of the story of the prosecutrix must come from some independent quarter and not from the prosecutrix herself. The complaint made by the prosecutrix to the police in which she implicated the accused cannot be regarded as corroboration of her evidence. But, in this case, the evidence of the girl is corroborated by her grandmother who says that she heard about the complaint of rape and also the medical evidence. There is also another case which I would like to cite which was decided in 1971 by the Court of Criminal Appeal. This was reported in 77 NLR page 86. The earlier case was in 1948. This case is *Premasiri vs. the Queen* where the Judges held that in a charge of rape it is proper for the Jury to convict on the uncorporated evidence of the complainant only when such evidence is of such a character as to convince the Jury that she is speaking the truth."

The law in regard to the need of corroboration in rape cases is well settled. "The corroboration which should be looked for in cases of this kind is some independent testimony which affects the accused by connecting or tending to connect him with the crime, and it is settled law that although the particulars of a complaint made by a prosecutrix shortly after the alleged offence may be given against the person 'as evidence of the consistency of her conduct with her evidence given at the trial,' such complaint 'cannot be regarded as corroboration in the proper sense in which that word is understood in cases of rape and it is misdirection to refer to it as such'....such evidence is not corroboration because it lacks the essential quality of coming from an independent quarter." 50 N.L.R. 256.

The learned Judge had presented the complaint made by the girl to the police as something that cannot be regarded as corroboration and in the same breath proceeded to present her complaint to the grandmother as corroboration, when he said "but

in this case the evidence of the girl is corroborated by her grandmother who says that she heard about the complaint of rape". In our view, this is a grave misdirection. Further when he referred to the case reported in 77 N.L.R. stating that the Jury could act on uncorroborated evidence of the complainant only, he seems to suggest that that was the latest position as the 50 N.L.R. case was in 1948. The Jury should have been told in clear terms what amounted to corroboration in law. He should have explained why it was necessary to look for corroboration in rape cases. While it was open to them convict on the uncorroborative evidence of the prosecutrix alone, where such evidence carried conviction that she was speaking the truth.

There was another very serious misdirection when the Judge told the Jury, "He (the defence counsel) said that the identity of the assailant is in question. At this stage, I like to draw your attention to the last question in cross-examination put by learned counsel for the accused to the witness, Thangamani :—

Q : I put it to you on behalf of the accused that the accused had sexual intercourse with your consent ?

A : I deny the suggestion.

No doubt the accused did not give evidence nor did he call any witnesses on his behalf, but the defence suggestion is that the act on this girl was committed with her consent. Therefore, it is not necessary to find out whether it was this accused who did it or some other person had committed the act. The defence says 'Yes, this happened, but it was with the consent of the girl.' In my view, your task has been made lighter because of this question." Towards the end of the charge there appears the following remarks of the defence counsel and the Judge's reply :—

"*Defence Counsel* : There is the suggestion of consent, but that does not stop the accused from taking any other defence.

Court : Your suggestion is that this intercourse took place with the consent of the complanant ?

Defence Counsel : I did not address the Gentlemen of the Jury on that point. The accused has never taken up the position that it was only with consent.

Court : I am perfectly entitled to say that this suggestion was made by learned counsel for the defence. If you had said, 'This accused never had sexual intercourse with her', that is a different matter.

Court to Jury : Gentlemen, as I stated earlier, the defence has not given evidence. I have also told you that the accused is perfectly entitled to sit where he is and call the prosecution to

prove its case. That burden never shifts from the prosecution However, you must also consider the fact that the last question put by the defence counsel to the witness Thangamani was "I put it to you that the accused had sexual intercourse with your consent." No other suggestion was put to her. There was no suggestion that it was not the accused who committed this offence. So that the suggestion put by the defence was that the sexual intercourse was done with the consent of the girl.

Defence Counsel : May I be permitted to say this with respect, this is a criminal case and that question was put as part of the other questions to test the veracity of the witness. In my address today, I never took the defence that the accused had sexual intercourse with the girl with consent.

Court (contd.) : Gentlemen of the Jury, yes, you can also take into consideration what counsel has stated in his address, but, the last question put by the learned counsel for the accused was 'this intercourse took place with consent.'

Gentlemen, now you can retire and consider your verdict."

The Jury can bring a verdict only on the evidence in the case and not on any suggestions or questions that may be put by the counsel. "Evidence" means and includes—

(*a*) all statements which the court permits or requires to be made before it by witness in relation to matters of fact under inquiry ; such statements are called oral evidence ;

(*b*) all documents produced for the inspection of the court ; such documents are called documentary evidence.

The accused had not given evidence. He had not taken up the position that he committed the act and limited himself only to a defence that the girl had given her consent. The Jury was invited by the Judge to take one of the vital ingredients of offence as proved merely because the defence counsel had put a question when the prosecutrix was given evidence on the basis that the accused had intercourse with the girl's consent. Before the charge was concluded, the counsel for the defence made clear his position in the matter, but the learned Judge persisted in his view that the counsel's question could be taken as amounting to an admission by the accused himself.

For these reasons, we quash the conviction and sentence. We further order a re-trial as there is sufficient admissible evidence on which the Jury properly directed could find the accused guilty of the offence.

SIRIMANE, J.—I agree.

VYTHIALINGAM, J.—I agree.

Re-trial ordered.