[COURT OF CRIMINAL APPEAL]

1967 *Present:* T. S. Fernando, A.C.J. (President), Abeyesundere, J. and Manicavasagar, J.

M. DHARMADASA and others, Appellants, *and* THE QUEEN, Respondent

C. C. A. APPEALS 125 TO 127 OF 1967 (WITH APPLICATIONS NOS. 167 TO 169)

S. C. 174/1966—M. C. Horana, 41988

Evidence—Corroborative evidence—Misdirection.

In a case where corroborative evidence is required, the Court must not leave to the jury as corroborative evidence some evidence which is not capable of amounting in law to corroboration.

APPEALS, with applications, against certain convictions at a trial before the Supreme Court.

E. R. S. R. Coomaraswamy, with *Anil Obeyesekere, Kumar Ameresekere, U. de Z. Gunawardene, N. Wijenathan, C. Chakradaran, P. P. S. Fernando* and *P. A. de Z. Karunaratne* (assigned), for the accused-appellants.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

December 2, 1967. T. S. FERNANDO, A.C.J.—

The three appellants as the 1st, 2nd and 4th accused and another man, Karunatilleke, as the 3rd accused stood their trial before a judge and jury on an indictment containing three charges which alleged that all four of them committed the offences of (1) house-breaking by night (s. 443), (2) theft (s. 369) and (3) rape on one Karunawathie (s. 364) of the Penal Code. At the conclusion of a lengthy trial the jury by a unanimous verdict found the 1st, 2nd and 4th accused (the appellants) guilty on all three charges in the indictment and the 3rd accused not guilty of any offence.

In regard to the appeal of the 1st accused, who was well-known to the woman Karunawathie, the jury had before them the evidence of the woman herself who claimed to have identified him as a person who broke into her house on the night in question as well as the evidence of certain injuries found on the person of the 1st accused which could have tended to corroborate the woman's evidence that he was one of the persons who had forcible sexual intercourse with her. We found no reason for interfering in any way with the convictions of the 1st accused or the sentences imposed upon him. We accordingly dismissed his appeal.

A difficulty, however, arose in the case against the other appellants. As the 3rd accused was found not guilty of any offence, in spite of the woman's evidence that she identified not only the 1st accused but all three other accused as well, it was contended that it was unreasonable for the jury to have accepted her evidence implicating the 2nd and 4th accused while refusing to accept her evidence implicating the 3rd accused. There appears, however, to be some ground for the jury to have differentiated between the cases of the 2nd and 4th accused on the one hand and that of the 3rd on the other. While the woman's evidence in so far as it tended to implicate all the accused on the house-breaking and theft charges did not require corroboration, the learned judge, correctly in our opinion, directed the jury to look for corroboration of her evidence before returning a verdict against the accused on the charge of rape. While the judge in marshalling the evidence in the case pointed to some evidence as being capable of providing the necessary corroboration in so far as it tended to incriminate the 2nd and 4th accused, that evidence did not affect the 3rd accused. It is therefore probable that the jury, seeking corroboration so far as the charge of rape was concerned, and not finding any tending to criminate the 3rd accused found him not guilty on that charge, and then somewhat illogically went on to find him not guilty on the other two charges as well. No appeal is competent against an acquittal at a trial by jury, and we need not, therefore, consider any further upon the present appeals the correctness of the verdict in respect of the 3rd accused.

Learned counsel for the appellants has, however, pointed to the nature of the directions given by the learned Commissioner who presided at the trial in respect of the alleged corroboration, and contended that he

has here left to the jury as corroborative evidence some evidence which is not capable of amounting in law to corroboration. The evidence so left to the jury, while it may have tended in some slight measure to show that the 2nd and 4th accused were in the company of the 1st accused on the evening in question, fell short of evidence tending to show that rape was committed by these two accused persons. In the case of *Goddard and Goddard* [1] Chief Justice Lord Parker, after referring to the well-known observations of Byrne J. in *Zielinski's case* [2] stated as follows :

> "It is only right to say that in the experience of this Court that principle is seldom followed ; indeed, if it is to be treated as a general principle applicable to all cases of corroboration, this court feels that it goes too far. Quite clearly, it is idle to give that direction *simpliciter* in a case where in fact there is no evidence capable of amounting to corroboration because the very fact that the direction is given would leave the jury to infer that there was some evidence capable of amounting to corroboration if they looked for it. Equally, if you get a case, as in many sexual cases, where there is a danger that the jury will treat as corroboration something which is incapable of being corroboration, there must be a duty on the judge to explain to the jury what is not corroboration, as, for example, a complaint made by the complainant. In the general run of cases, where there is evidence capable of amounting to corroboration, the duty of the judge must depend on the exact facts of the case, bearing in mind that he certainly would not be expected to refer to every piece of evidence which is capable of amounting to corroboration but, in general, in the judgment of this court he should give a broad indication of the evidence which, the jury, if they accept it, may treat as corroboration."

In respect of the two bits of evidence which we are satisfied could not be treated as corroborative of the woman's complaint of rape in so far as they tended to criminate the 2nd and 4th accused, the trial judge referred to them respectively as (1) "a matter you are entitled to take into consideration" and (2) "a matter you will take into consideration". Pointing to an adequate direction given by the learned judge to the jury as to the circumstances in which they could convict on a charge of rape even where the woman's evidence was uncorroborated, Crown Counsel invited us to affirm the convictions. We did not, however, find it possible to agree to this course of action as this Court cannot now speculate on the actual basis on which the jury did act in returning the verdict on the charge of rape. The jury may well have, in the light of the judge's directions, considered as corroborative evidence which we are satisfied could not be deemed to be such. For that reason, while affirming the convictions and sentences imposed on the 2nd and 4th accused on the first two charges, we have quashed their convictions and the sentences imposed upon them on the 3rd charge.

Appeal of 1st accused dismissed.
Appeals of 2nd and 4th accused partly allowed.

[1] *(1962) 46 Cr. A. R. at p. 461.* [2] *(1950) 34 Cr. A. R. 193.*