[COURT OF CRIMINAL APPEAL]

**1951** *Present:* **Dias S.P.J. (President), Gratiaen J. and de Silva J.**

JARLIS, Appellant, *and* THE KING, Respondent

APPEAL NO. 17 OF 1951

*S. C. 40—M. C. Kalutara, 7,965*

*Court of Criminal Appeal—Rape—Father and daughter—Evidence of previous similar acts—Admissibility—*Mens rea*—Evidence Ordinance, ss. 9, 14, 15—Corroboration—Proper direction to jury.*

Where the accused was charged with committing rape on his daughter, and evidence was led by the prosecution of previous similar acts of misconduct by the accused with the same daughter—

*Held*, that the evidence was admissible, not to prove that the accused was a man of bad character or to prove *mens rea*, but, under section 9 of the Evidence Ordinance, to show that the father had conceived a guilty passion for his daughter. Such evidence may also be relevant under sections 14 and 15 of the Evidence Ordinance, or to rebut a defence which would otherwise be open to the accused.

*Held further*, that in a case of rape there is no duty upon the Judge to point out to the jury pieces of evidence which are capable in law of amounting to corroboration; it would be sufficient if he has told the jury what in law is meant by corroboration.

APPEAL, with leave obtained, against a conviction in a trial before the Supreme Court.

*E. B. Satturukulasinghe*, for the accused appellant—

[DIAS S.P.J.—Was the offence laid against the accused one involving *mens rea* ?]

The offence of rape does not involve any *mens rea*. The prosecution attempted to prove the offence charged by proving that the appellant had been guilty of previous offences of the same kind. Evidence of such previous acts is not admissible under our law. See *Empress v. Vyapoory Moodeliar* [1] where it was held that section 14 of the Evidence Act should not be extended to cases where guilt or innocence depends upon actual facts and not upon the state of a man's mind. Counsel also cited *Makin v. Attorney-General of N. S. W.*[2] and *Reg. v. Parbhudas Ambaram* [3].

Evidence cannot be led of the other facts relied upon before evidence is given of the fact charged. The course followed by the Crown

[1] *I. L. R. 6 Cal. 655 at 660.*

[2] *(1894) A. C. 57.*

[3] *11 Bombay H. C. R. p. 90.*

prejudiced the appellant in that it tended to make the jury consider the evidence in regard to the act charged with their minds already affected by the evidence as to the earlier acts.

Counsel also cited *R. v. Smith* [1]. The jury were prejudiced by the admission of evidence of bad character of the accused, viz., that he was a gambler and addicted to drink.

The trial judge misdirected the Jury on the question of corroboration inasmuch as he told them that the evidence of Uparis who stated that he saw the girl being shut up in the room was corroboration of the evidence of the girl.

*T. S. Fernando*, Crown Counsel, with *H. A. Wijemanne*, Crown Counsel, and *S. S. Wijesinha*, Crown Counsel, for the Crown,—called upon by the Court to reply only on the question of the admissibility of the evidence.—

This evidence was led to establish that the appellant entertained a guilty passion towards his daughter, a fact relevant as showing the existence of his state of mind or body or bodily feeling. Evidence of this nature has been regularly admitted in English Courts, and it is precisely on the principle applied in such Courts that this evidence is admissible here. See the cases of *R. v. Ball* [2] followed in *R. v. Shellaker* [3], *R. v. Hewitt* [4] and in *R. v. Hartley* [5]. In the last of these cases counsel did not seriously press the point that the evidence was inadmissible.

*In Hewitt's Case* [6] it was held that evidence of this nature was admissible even though the acts ranged over a period of four years. In the present case too, having regard to the fact that the appellant was persistently harassing his daughter for nearly a year prior to the culmination of his attempts in the offence charged, it is possible to urge, were it necessary, that the evidence led was admissible as part of one transaction which culminated in the act charged.

*Cur. adv. vult.*

May 4, 1951. DIAS S.P.J.—

The appellant, who is the father of the woman Eugin, was charged with committing a rape on her on June 24, 1950. He was convicted and sentenced to undergo a term of seven years' rigorous imprisonment. He now appeals with the leave of this Court on the following grounds:—

" (1) The evidence regarding the alleged rape which took place about a year prior to the 24th of June, 1950, is inadmissible and irrelevant.

(2) The learned trial Judge misdirected the jury when he said ' that earlier incident ought not to be made use of by you for any other purpose than as an indication that the accused was not beyond approaching his daughter '.

(3) The prosecution elicited evidence regarding the caste of the accused and also that he was addicted to gambling and drinking, all of which were irrelevant and prejudicial to the accused.

(4) The learned trial Judge misdirected the jury on the question of corroboration."

[1] *11 Cr. A. R. 237.*
[2] *(1910) 6 Cr. A. R. 31.*
[3] *(1913) 9 Cr. A. R. 240.*
[4] *(1925) 19 Cr. A. R. 64.*
[5] *(1940) 28 Cr. A. R. 15.*
[6] *(1925) 19 Cr. A. R. 64.*

The only substantial point raised by learned counsel for the appellant were grounds 1 and 2 which both deal with the same matter.

When the woman, Eugin, was under examination-in-chief, Crown Counsel elicited, without objection from the defending counsel, that previous to the alleged act of rape set out in the indictment, the appellant about one year previously had done the same thing to her in the absence of her mother from the house. She also stated that between the first coitus and the act alleged in the indictment the appellant had made improper suggestions to her and had attempted to molest her. In his summing-up the learned trial Judge directed the jury that this evidence was admissible as tending to prove that this father had developed a passion for his daughter. The question for decision is whether the evidence of those earlier acts was properly admitted, and if not, whether the learned Judge misdirected the jury.

We are of opinion that in the circumstances of this case that evidence is admissible and that there has been no misdirection.

Unlike in the majority of rape cases, this is a case where a father who was living with his daughter in the same house is charged with ravishing her. Such a man obviously has the opportunity of molesting his daughter if he entertained a guilty passion towards her. The relationship of father and daughter places each of them in a situation in which misconduct might take place. Therefore, apart from the practical difficulties of leading independent corroborative evidence to prove the girl's story that actual misconduct took place, the jury would normally call for strong evidence to support the woman's evidence that her father, who was living with her and who probably slept in the same room with her, was such an unnatural man that he actually misconducted himself with his own daughter, particularly when he had a wife of his own. It would also be open to the defence to urge with some force that where conduct is equivocal and is capable of an innocent as well as a guilty construction, the jury should adopt the former construction and reject the latter having regard to the presumption of innocence. The Crown, therefore, submits that in such a situation evidence of previous acts such as were proved in this case would be relevant to the issue as it would enable the jury to judge the precise relationship which had existed between the father and the daughter. For if it can be shown that previous to the act charged in the indictment the man had conceived a sexual passion for his daughter, such acts would indubitably throw light on the relationship which existed between the two parties on the date on which the offence alleged in the indictment took place. The Crown, therefore, submits that this evidence was not led to show that the prisoner is a man of bad character and is, therefore, a person who is likely or who is capable of ravishing his own daughter, but that it was led for an entirely different purpose. The Crown contends that such evidence under our law would be relevant under section 9 of the Evidence Ordinance in order to show the precise relationship which had existed between this man and this particular woman, and, therefore, tended to show that the act alleged in the indictment cannot be given an innocent interpretation, but indicates that this father had a guilty sexual passion for his daughter. We are of opinion that this contention is right and should prevail.

The point, however, is not devoid of authority. In *R. v. Ball* [1] a brother and sister were charged with having committed incest on a certain date. Besides tendering evidence as to what the police found when they raided their residence, the trial Judge admitted evidence of their conduct on an earlier date tending to prove that the parties had gratified a mutual passion. The Court of Criminal Appeal quashed the conviction (5 Ct. of Crim. App. Rep. 238). Darling J. said " If on the facts of this case an act of intercourse was proved, no question could arise as to the *mens rea* with which the act was done, for the statute forbids the act as in itself criminal . . . . It would be tendering evidence of the former commission of similar acts, not to show the *mens rea* with which the act was committed, but to show the commission of the act itself. We are of opinion that such evidence is not receivable ". If we may equate that reasoning to the provisions of our Evidence Ordinance, what Darling J. intended to convey is that the evidence of such previous acts would not be relevant under section 14 of our Evidence Ordinance.

The Attorney-General of England, however, by his *fiat* certified the case as one involving a question of law of exceptional public importance. The matter, therefore, came up before the House of Lords consisting of Lord Halsbury L.C. and seven other Law Lords. The House of Lords set aside the judgment of the Court of Criminal Appeal. It was held that the object of the evidence dealing with the previous conduct of the parties was to make good that the accused had a guilty passion towards each other and that, therefore, the proper inference from their occupying the same bedroom and the same bed was an inference of guilt, or, which is the same thing in another way, that the defence of innocent living together as brother and sister ought to fail. The Lord Chancellor said: " The law on this subject is stated in the judgment in *Makin case* [2]. It is well known, and I need not repeat it. The question is only of applying it. In accordance with the law laid down in that case, and which is daily applied in the Divorce Court, I consider that this evidence was clearly admissible on the issue that this crime was committed, not to prove a *mens rea*, as Mr. Justice Darling considered, but to establish the guilty relations between the parties, and the existence of a sexual passion between them as elements in proving that they had illicit connexion, in fact, on or between the dates charged. The passion for each other was as much evidence as was their presence together in the bed, of the fact that when there they had guilty relations with each other. I agree that the courts of law ought to be very careful to preserve the time-honoured law of England that you cannot convict a man of one crime by proving that he has committed some other crime. That, and all other safeguards of our criminal law, will be jealously guarded; but here I think the evidence went directly to prove the actual crime for which these parties were indicted ". All the other Judges agreed. This judgment has been consistently followed ever since—See *R. v. Shellaker* [3] (a charge of carnally knowing a girl under 16), *R. v. Hewitt* [4]

[1] *(1910) 6 Ct. of Crim. App. Rep. 31*
[2] *(1894) Appeal cases 57.*
[3] *(1913) 9 Ct. of Crim. App. Rep. 240.*
[4] *(1925) 19 Ct. of Crim. App. Rep. 64.*

(a charge of carnally knowing a girl under 16), *R. v. Hartley* [1] (sodomy). In the last case, although objection was taken to the evidence of previous conduct, the learned counsel for the appellant abandoned the argument in the Court of Criminal Appeal. This indicates that by this date the law was considered to have been fully settled.

There is no reason why the same principle should not be applied to cases of rape. We think this evidence is admissible, not to prove that the accused is a man of bad character or to prove *mens rea*, but, under section 9 of the Evidence Ordinance, to show that the father had conceived a guilty passion for his daughter, and to show that such conduct formed part of a series of similar acts of which the offence charged in the indictment was the culminating act, and that it was not an isolated act.

We think that the mere fact that the evidence adduced tends to show the commission by the prisoner of another or other crimes does not render such evidence inadmissible, provided it is relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental (sections 14 and 15 of the Evidence Ordinance), or to rebut a defence which would otherwise be open to the prisoner, or to prove the relationship between the parties.

We would, however, draw attention to certain limitations of this rule. In the first place, the evidence of previous conduct must relate to the prisoner *and the same person*. For example, in the present case, it would not have been proper for the prosecution to lead evidence of previous misconduct by this prisoner with a sister of Eugin. The evidence must refer to the relationship between the prisoner and the same person. In the second place, when evidence of previous conduct is given, although it may be strictly relevant, the evidence may be so trivial or so remote as to be practically valueless. In such cases, it is the duty of the trial Judge to decide whether such evidence should be shut out altogether. In *R. v. Shellaker* [2] Lord Reading C.J. said: "It is very easy, no doubt, to put cases where the application of the general principle might work hardships. The answer is that such cases may come within that class of case where, although the evidence is strictly admissible, it is of little value to the prosecution, but would indirectly so prejudice the fair and dispassionate trial of the prisoner, that the Judge would say that it ought not to be given. That does not conflict with the general principle, but in the ordinary course that is the direction that the Judge would give. Equally there are cases where the evidence is so remote that the Judge would say it was too remote and ought not to be admitted. One cannot further describe such cases unless all the facts are in evidence before us". In the present case the evidence tendered was not remote, and it bore directly on a question which was in issue between the Crown and the prisoner.

We, therefore, hold that the evidence was properly received, and that there was no misdirection on the part of the learned trial Judge.

We do not think there is substance in the third ground of appeal.

[1] *(1940) 28 Cr. of Crim. App. Rep. at p. 15.* [2] *(1913) 9 Cr. of Crim. App. Rep. 240.*

Finally, it was contended that the trial Judge misdirected the jury on the question of corroboration of the victim of the alleged rape. We do not think that this contention is justified. The learned Judge told the jury that in a case of rape it was the practice to warn the jury that it was unsafe to convict the accused on the uncorroborated testimony of the woman unless there was independent corroboration tending to show that she was raped, and that she was raped by the prisoner. We would draw attention to the words of Byrne J. in *R. v. Zielinski* [1]:— " It is not, in the view of the Court, the duty of the Judge to point out to the jury pieces of evidence which are capable in law of amounting to corroboration, though Judges frequently do so. Of course, if a judge points to a piece of evidence as being capable in law of amounting to corroboration, and it turns out that it is not capable of amounting to corroboration, then, the conviction may be quashed; but there is no duty upon the judge to point out every piece of evidence which is capable of amounting to corroboration, provided he has sufficiently told the jury what in law is meant by corroboration ". That duty the learned trial Judge has adequately discharged in this case.

The appeal is, therefore, dismissed.

*Appeal dismissed.*