[COURT OF CRIMINAL APPEAL.]

1940 *Present :* **Moseley S.P.J., Soertsz and de Kretser JJ.**

THE KING *v.* BURKE.

22—M. C. Colombo, 41,852.

Court of Criminal Appeal—Notice of appeal—Leave to amend Notice of Appeal-Rape—Evidence of disease in accused—Evidence Ordinance, s. 11 (b).

Substantial particulars of misdirection or other objections to the summing up must be set out in the notice of appeal, and leave to amend the notice of appeal by adding a further ground of appeal will not be permitted except in a capital case.

In a case of attempted rape, in which the prosecutrix was found to be suffering from gonorrhœa one week after the assault, the presence of gonorrhœa in the accused at the same time was relevant under section 11 (*b*) of the Evidence Ordinance.

CASE tried by a Judge and Jury before the 2nd Western Circuit, 1940.

C. S. Barr-Kumarakulasinghe (with him *M. M. Kumarakulasingham* and *M. Ratnam*), for the accused, appellant.

E. H. T. Gunasekera, C.C., for the Crown.

Cur. adv. vult.

August 2, 1940. MOSELEY S.P.J.—

The appellant was convicted on July 3, 1940, before Howard C.J., of attempted rape, and was sentenced to four years' rigorous imprisonment. He appeals against the conviction on a question of law and applies for leave to appeal on questions of fact. At the outset, his Counsel applied for leave to amend the notice of appeal on questions of law by adding a further ground. After consideration of *Rex v. Wyman and Another*,[1] in which Darling J. wished it to be understood that "substantial particulars of misdirection or of other objections to the summing up must always be set out in the notice of appeal" and of *Rex v. Cairns*[2], in which leave to add to the grounds of appeal was granted "as it was a capital case", the application was refused.

The sole ground of appeal on a question of law appeared to be of no substance and was confined to the contention on behalf of the appellant that the verdict of the Jury was unreasonable, having regard to the fact that the evidence of the complainant was not corroborated in any material particular implicating the accused.

[1] *13 Cr. App. R. 163.* [2] *20 Cr. App. R. 44.*

The prosecution relied for such corroboration upon the fact that the complainant was found on July 29, seven days after the date of the alleged offence, to be suffering from gonorrhœa. On August 11, the appellant was examined by Dr. Thiagarajah, who was definite that on that date he too was suffering from the disease. The witness had previously examined the appellant on July 31, with negative results, but from what he found on August 11 he formed the opinion that the appellant had the disease on July 31 and that it was then in chronic form. The learned Chief Justice, in his charge to the Jury, referred to these facts as providing the only corroboration of the girl's story. His warning as to the weakness of such corroboration and as to the danger of convicting without corroboration was, if we may with respect say so, entirely adequate.

Counsel for the appellant argued that it had not been proved that the latter was suffering from the disease at the relevant date and that if he were, the fact did not tend to implicate him in view of the medical evidence as to the high incidence of the disease in a city such as Colombo. He further contended that there were many ways whereby the girl may have been infected other than by contact with the appellant. He went further and challenged the admissibility of evidence as to the presence of the disease in the appellant as being irrelevant. It seems to us to be relevant, if for no other reason, by virtue of section 11 (*b*) of the *Evidence Ordinance* (*Cap. 11*), since the fact of the appellant's infection enhances the probability of the girl's allegation that it was he who assaulted her.

The Jury had before them ample evidence upon which they could find that the appellant was suffering from the disease at the date of the alleged offence.

Had the disease been a rare one, the fact might well have been conclusive against the appellant. But the presence of the disease, prevalent though it may be, is, in our view, clearly a fact which, in some degree, has a bearing on the probability of the girl's story. Admittedly there were unsatisfactory features in her evidence, viz., that she made no complaint for several days, that no one came in response to her alleged screams, in spite of her statement that there were two people in the adjoining room, and that she admitted discussing with her grandmother what evidence she should give. There was also her statement that there was some animosity between the appellant and her grandmother. All these matters were before the Jury and it was for them to consider whether such corroboration as exists was sufficient to entitle them to adopt the complainant's story as being in the main true. The Jury were in retirement for an hour and it must be assumed that they came to no hasty conclusion but that they gave due consideration to the matter of corroboration on which they had received a careful direction. We are not here to retry the case and we are unable to say that the verdict is unreasonable or that it cannot be supported, having regard to the evidence.

We, therefore, dismiss the appeal and affirm the conviction and sentence.

Appeal dismissed.