[COURT OF CRIMINAL APPEAL.]

1942 *Present :* **Soertsz, Keuneman and de Kretser JJ.**

THE KING *v.* MARTHELIS.

4—M. C. Chilaw, 17,565.

Rape—Corroboration—Evidence tending to show accused as culprit—Material circumstance connecting accused.

In a charge of rape the corroborative evidence should show or tend to show that the story that the accused committed the crime is true, not merely that the crime was committed, but it was committed by the accused.

It would be sufficient if there is corroboration as to a material circumstance of the crime and of the identity of the accused thereto.

The King v. Anna Sheriff (42 N. L. R. 169) followed.

APPEAL from a conviction by a judge and jury before the 3rd Western Circuit, 1942.

C. Renganathan for the accused, appellant.

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

October 14, 1942. SOERTSZ J.—

This was a case of rape, and the victim being a girl under twelve years of age, the two questions that arose for the Jury were whether this girl had been subjected to sexual intercourse at or about the time alleged; and whether the appellant was the culprit.

The evidence of the Medical Officer put the first point beyond the possibility of doubt.

In regard to the second question, the Crown relied on the testimony of the girl herself definitely implicating the appellant and also on the evidence of the witness, Mohideen, who said he saw the girl enter the house of the appellant at about 3 or 3.30 P.M. on this day. That would be, approximately, the time at which the offence was committed, according to the girl herself, if her evidence and the evidence of Asilin Nona, her foster mother, are read together. Other circumstances relied on by the Crown were, (*a*) that the Government Analyst found blood on three of the garments the girl wore on that day, as well as on the sarong the appellant had on at the time he was arrested. The appellant admitted that that was the sarong he was dressed in on the day on which the girl said he raped her; (*b*) the defence set up by the appellant. He gave evidence and affirmed that he was absent from the village on that day from 7.30 A.M. till about 4.30 P.M. and that he had nothing to do with this girl on that day or at any time at all. He also stated that the house pointed out by the girl as the place of the offence was not his house and that he lived in the adjoining house. He could not account for the blood on his sarong.

That was, substantially, all the evidence bearing on the question whether the appellant was the girl's ravisher or not. The learned Judge of Assize summed up all this evidence very fully to the Jury, and, in directing them on the law, pointed out to them that it was a rule of practice for Judges to warn Juries that, in these cases, it is dangerous to convict unless the evidence of the prosecutrix "is corroborated in some material particular", and he went on to say:—"Corroboration means this:—independent evidence implicating the accused in some material particular". He also told them:—"But the law also says that the Jury may, nevertheless, convict without corroboration, because they may be so impressed by the evidence of the woman or girl that they feel they do not need any corroborative evidence to convict the accused." Assuming, for the purpose of this case, that we are governed by what the later decisions of the Court of Criminal Appeal in England have laid down in regard to the proper direction to be given to Juries in these cases, the charge of the Assize Judge in this case is unexceptionable.

But, the objection is taken that he, at a later stage of his charge, misdirected the Jury when he told them that if they should look for corroboration, they would find it in Mohideen's evidence. It is contended that, in fact, Mohideen's evidence did not afford such corroboration as is required in law, inasmuch as that evidence does not implicate the accused in any material way.

In *Rex v. Baskerville*[1] the Court of Criminal Appeal dealt with the question of the corroboration of an accomplice and enunciated the rule that the corroboration required, in such a case, is corroboration "which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused". The reason why the practice of Courts has been to test the evidence of accomplices in this way is that as pointed out by *Best* at *page 161 of the 12th Edition* of his *Treatise on the Law of Evidence*, "the objection to the evidence of accomplices arises from the obvious interest which they have to save themselves from punishment by the conviction of the accused against whom they appear". That consideration does *not* apply in the case of a prosecutrix complaining of a sexual offence. In such a case, corroboration is sought for quite another reason, namely, that without it, it would be a case of oath against oath. In that view of the matter, it seems reasonable to say that any evidence that helps to tip the balance of the scales in favour of the oath of the prosecutrix in a significant manner. is sufficient corroboration of her evidence. Be that as it may, the rule in *Rex v. Baskerville* (*supra*) was not assumed for a long time to be applicable to cases of sexual offences. In 1919 the question arose in the case of *Rex. v. Benjamin Myro Smith*[2] and, curiously enough it arose before Lord Reading L.C.J., who had delivered the judgment in *Rex v. Baskerville.* and with him there were, on this occasion, Avory and Bray JJ., who had sat with him to decide *Rex. v. Baskerville.* Reading L.C.J. then made the following order :—

> "This appeal involves the important question whether it is essential that, where a person is accused of rape, the prosecutrix's evidence should be corroborated in a material particular implicating the accused. We think it is advisable that that point should be argued before a Full Court."

Accordingly, it went before a Full Court, the additional Judges being Lawrence and Sankey JJ., but, after a full argument, if I may respectfully say so, it produced this anti-climax :—

> "It is sufficient to say that we are of opinion that the verdict should not be allowed to stand as it is unreasonable, having regard to the evidence. It therefore, becomes unnecessary to decide the questions of law which have been argued before us." (*Lord Reading at p. 81 of 14 Cr. App. Rep.*).

The question still remains unconsidered by a Full Court. But in 1922, in the case of *Rex v. Crocker*[3], Hewart L.C.J., after referring to the rule in *Rex v. Baskerville* (*supra*), said this :—

> "Now that is the law regarding the evidence of accomplices, but this *Court cannot accept* the contention that the evidence of a girl, the victim of the offence, is on the same plane with that of the evidence of an accomplice. The objection in such cases as this is *not on the grounds of complicity*, but because the case is one of *oath against oath.*"

[1] *(1916) 2 K. B. D. 658.* [2] *14 Cr. App. R. 74.*
[3] *17 Cr. App. Rep. 16.*

In two earlier cases, *exempli gratia, Rex v. Henry Hedges* [1], and *Rex. v. John Graham* [2], corroboration not according to the standard of the rule in *Rex v. Baskerville* (*supra*) was considered sufficient. On the other hand, in two later cases *Rex v. Richard Manser* [3], and *Rex v. John Edward Freebody* [4], we have instances in which that rule was adopted. An examination of a large number of these cases drives one to the conclusion that there is not a constistent rule, but only a wilderness of single instances.

Our Court of Criminal Appeal considered this question in the case of *The King v. Ana Sheriff* [5] and the majority of the Judges adopted the rule in *Rex v. Baskerville* (*supra*). They held that, on the facts of that case, the conditions laid down by that rule were not satisfied by the independent evidence there relied on. Whether that was a correct view or not we can no longer inquire and we shall be bound to apply the whole of that decision, if or when a ease similar on the facts to that case arises. But in regard to this class of cases generally, we are bound by the principle there laid down, that is to say the principle adopted in *Rex v. Baskerville,* that the corroborative evidence should "*show or tend to show* that the story that the accused committed the crime is true, not merely that the crime was committed, but that it was committed by the accused".

Applying that principle to this case, we are of opinion that there is independent evidence here which, although it may not positively show, yet *tends* to show, *that* the appellant committed the crime. The evidence of Mohideen, that he saw the girl enter the house of the accused, of which, during this period, he was the sole occupant, about the time this offence was committed, that is to say at about 3.30 P.M., taken with the unexplained fact that there was blood on the sarong the accused, admittedly, wore on this day and with what, according to the view of the Jury, was a false denial by him that the house was not his house, and a false statement by him that he was away from the village at the time alleged, corroborates the girl 's story by *tending to* show that he must have been the culprit.

As observed by Howard C.J., Lord Reading said that the rule does not mean "that there must be confirmation of all the circumstances of the crime. It is sufficient if there is corroboration as to a *material circumstance* of the crime and of the identity of the accused in relation thereto".

Such was the corroboration that the Court of Criminal Appeal here accepted as sufficient in *Rex v. Burke* [6]. In that case, the only corroborative circumstance put to the Jury by the Presiding Judge was the fact that the accused was found to be suffering from chronic gonorrhoea, and that seven days after the date of the alleged offence, the girl in the case was herself found to be suffering from that disease. Counsel for the appellant contended, with much force, that the medical evidence in the case disclosed a high incidence of this disease in the city of Colombo and that "there were many ways whereby the girl may have been infected other than by contact with the accused". Counsel impeached the evidence regarding the diseased condition of the accused in that case as irrelevant. But, Moseley S.P.J., in delivering the Judgment of the Court, said, "It

[1] *3 Cr. App. Rep. 262.*
[2] *4 Cr. App. Rep. 218.*
[3] *25 Cr. App. Rep. 18.*
[4] *25 Cr. App. Rep. 69.*
[5] *42 N. L. R. 169.*
[6] *43 N. L. R. 465.*

(that is the evidence that the appellant was suffering from gonorrhoea) seems to us to be relevant, if for no other reason, by virtue of section 11 (*b*) of the Evidence Ordinance, since the fact of the appellant's infection enhances the probability of the girl's allegation that it is he who assaulted her ".

In the same way, in the present case, Mohideen's evidence and the other facts already referred to, enhance the probability of the girl's allegation that the appellant it was who assaulted her. In other words, they sufficiently *tend* to show that he was the culprit.

For these reasons, we dismiss the appeal.

Appeal dismissed.