## JURY REFERENCE.

*Before Lort-Williams and M. C. Ghose JJ.*

NOOR AHMAD

*v.*

EMPEROR.*

1933.

*July* 28.

*Misdirection—Corroboration in a rape case, Nature of—Indian Penal Code (Act XLV of 1860), s. 376.*

In a case of rape, the judge must caution the jury that it is dangerous to convict any man upon the uncorroborated testimony of the prosecutrix. The jury should be told that only in exceptional cases would they be justified in accepting such uncorroborated testimony.

The nature of corroboration will necessarily vary according to the particular circumstances of the offence charged. Corroborative evidence is evidence 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 kind of corroboration required by the rule must be independent evidence, that is to say, the evidence of some witness other than the prosecutrix herself. What the prosecutrix says to other persons is not corroborative evidence within the meaning of the rule.

*R.* v. *Baskerville* (1) and *R.* v. *Whitehead* (2) relied on.

CRIMINAL REFERENCE.

The material facts of the case and arguments in the appeal appear from the judgment.

*Debabrata Mukherji* for the appellant.

*The Deputy Legal Remembrancer, Khundkar*, and *Harideb Chatterji* for the Crown.

LORT-WILLIAMS J. In this case, Ohajuddin Molla and Noor Ahmad *alias* Nonia were tried by the Additional Sessions Judge at Alipur and a jury which consisted of three Hindus and two Mahomedans. They were convicted under sections 366 and 376 of the Indian Penal Code by a majority of 3 to 2. The learned judge considers that the verdict against Noor Ahmad was against the weight of evidence and unreasonable and that he ought to be acquitted under both the sections.

The facts were that a girl named Kiranbala Dasee of the Bairâgi caste lives in a small village near to

*Jury Reference, No. 10 of 1933, made by R. H. Parker, Additional Sessions Judge of 24-Parganâs, dated Feb. 18, 1933, with Criminal Appeal, No. 173 of 1933.

(1) [1916] 2 K. B. 658. (2) (1928) 21 Cr. App. Rep. 23.

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a much larger Mahomedan village. According to her story, sometime before the date of the offence alleged in this case, Ohajuddin made immoral suggestions to her, asking her to go and live with him. She said that she was highly shocked and screamed out with fear. This is alleged to have taken place at mid-day, while she was working in her hut and Ohajuddin is alleged to have called her from outside. Further, it is suggested that, before this incident, some persons approached her *bârhi* at night, but were chased away by male members of her family. There is the evidence of one witness that Ohajuddin was seen among those who were running away. This witness was Adel Molla. His evidence appears to be unsatisfactory, because it is clear that he told two entirely different stories before the magistrate and before the Sessions Judge. On the night of the alleged offence, the girl's husband was away. Her evidence was that two men, whom she did not name, came into her hut and gagged her with a piece of cloth. She tried to scream, but they brandished a knife. Then they dragged her away to their house and raped her one after the other. The next day, she was kept in the house and Ohajuddin forced her to eat and then raped her twice that day. The next morning Ohajuddin came with Maniruddi and let her out. Maniruddi was not there the previous night. Ohajuddin told her to go to her father's house and, on her way home, she met her *deor* and the *chaukidâr*, to whom she told what had happened. Then, "looking unwillingly" at the two men in the dock, she said "Ohajuddin and Maniruddi are in the dock." It will be noticed that in her examination-in-chief she did not mention either of the two accused when she described what happened in her hut, nor did she mention anybody else but Maniruddi who, she said, was with Ohajuddin when she was let out on the Thursday morning.

Not satisfied, however, with the paucity of evidence elicited in examination-in-chief, the learned pleader on behalf of the accused brought out a great

deal more evidence in cross-examination, which, in my experience, almost invariably seems to be the practice in this country. She said then that she had known both the accused for some four years, but neither of them had been to her hut before. She said that she could not see their faces in the dark, nor could she see any knife or whether they had a knife or not. Then she explained her former evidence by saying that she was threatened in the room twice by word of mouth. She said that the accused were outside the curtain when she awoke. She was pulled outside the curtain and then they seized and gagged her. In view of this evidence, it is difficult to understand why the girl was not able to scream before she was gagged and threatened. Then she said that she was taken by them to their house and it is apparent, from other evidence of witnesses who saw three persons going along together, that she was walking quietly between the other two. Her mouth was not gagged but she says it was "clogged" and explains that expression as meaning that she was threatened with a knife, although she did not see one, which seems difficult to understand. Then the court cross-examined her and elicited that at Ohajuddin's house that night she saw his face; still she persisted in not mentioning the other man. Then, there was further cross-examination, the pleader for the accused being still dissatisfied with the amount of evidence elicited against his clients, and after further cross-examination she said that she recognised them both on the Tuesday night and that she saw their faces clearly in the dawn. It appears from the evidence that she was confined the whole of Wednesday in a room in which there were two open windows. She made no effort to escape, though she was left alone there. She did not see Nonia the whole of that day. Finally, the jury put some questions in answer to which she said that on Tuesday night it was dark and she recognised the accused by their voices. Before the magistrate, she had sworn that she could not recognise either of the two men. They took her

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inside some one's house, where both of them raped her in the course of the night; they were with her the whole of the night, but she could not recognise them at all. She says, however, that the next morning when there was light, she recognised them both. This again sounds a somewhat improbable story. It is difficult to understand why they waited until she was able to recognise them when the light came. She did not make any complaint of actual hurt, nor were any marks found upon her. There was evidence of one or more witnesses who saw her leaving Ohajuddin's house on Thursday morning weeping. During the search for the girl, Ohajuddin assisted; in fact it was he who said "Let us all join "in search of the girl". They searched Hindu houses, but did not suspect any Mahomedan. When previously some men had been chased from the house at night, they did not suspect them of coming after Kiranbala, but thought they were thieves. Ohajuddin has a young wife aged between 18 and 20 and two daughters. One witness said that he saw two men, whom he did not recognise, carrying a woman off. He knew their voices to be those of Ohajuddin and Nonia, but he was not called as a witness. When the *chaukidâr* met her, she used a curious expression: "Ohajuddin took me away and dishonoured my religion". Kanai Bairagi, one of the witnesses, said that there had been a *mârâmâri* between him and the accused before, and there was friction between Ohajuddin and Chandra about the advances made to Kiranbala. This witness in the court below said that when he observed two men taking a woman away, he did not recognise any one. Elaj Molla said that he saw three folk walking together and he asked them where they were going. He vaguely recognised Ohajuddin from his voice chiefly. He did not feel suspicious of them. They were walking in the ordinary way. The accused being Mahomedans and the girl a Hindu, it is unfortunate that the jury was composed as it was.

It is obvious from the references which I have made to the evidence that this case is unsatisfactory from many points of view, apart from the direction given by the judge to the jury. His charge unfortunately is somewhat short and sketchy. There is little attempt to deal with the story in chronological sequence or to examine or weigh the evidence with care and point out its relevancy to the jury. The judge has quite properly warned them that in cases of this description, arising out of sexual matters, when charges are made against a man by a woman, it is dangerous to convict upon her evidence alone and that they ought to require corroboration of her story before they bring in a verdict of "guilty." He said that they were entitled to accept the evidence of the girl, but that they should be slow in accepting it. They should scrutinise her evidence very carefully and, unless her story convinced them so much that they felt that it did not possibly stand in need of any corroborative evidence, they should not accept her uncorroborated evidence. This direction was correct. But, in my opinion, the learned judge has not emphasized sufficiently the danger of convicting any man upon the uncorroborated testimony of the girl in cases such as this. He ought to have dealt with this part of the charge, so as to make the jury understand that only in exceptional cases would they be justified in accepting the uncorroborated testimony. Unfortunately also, he misdirected them by stating that there was corroborative evidence, and it was only this:—

> That the prosecution says that there were those two instances before, that she was missing all the night and the following day. But she could equally have been missing if she had gone of her own free will. The corroborative evidence consists of what the girl said to the *chaukidar* and to her *devr*.

This is not the kind of corroboration required by law. The leading case on this subject, in which the whole law was exhaustively discussed by Lord Reading, who was then Lord Chief Justice, is *R.* v. *Baskerville* (1). This being the leading case on the subject, I am surprised to find no reference to it in

(1) [1916] 2 K. B. 658, 667.

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some of the leading text-books, except a passing reference upon another point. In that case, the learned Lord Chief Justice said :—

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

Then, referring to the Criminal Law Amendment Act, (1885), sections 2 and 3, he says :—

> The language of the statute, "implicating the accused", compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence 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.

Again, at pages 665 and 664, he says :—

> What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. The corroboration must be by some evidence other than that of an accomplice and, therefore, one accomplice's evidence is not corroboration of the testimony of another accomplice.

It is clear, therefore, that the kind of corroboration required by the rule must be independent evidence, that is to say, the evidence of some witness other than the girl herself. If there were any doubt about this, it was made clear in the case of *R.* v. *Whitehead* (1), the head-note of which is that "A witness cannot be 'corroborated' by himself". The learned Lord Chief Justice, Lord Hewart, in that case said that "corroboration should come from another person "altogether". Therefore, applying the rule to the evidence in this case, it is clear that the evidence referred to by the learned judge is not corroborative evidence within the meaning of the rule, because what the girl said to the *chaukidâr* and to her *deor*, and what she said about Ohajuddin having made improper proposals to her were statements made by her, and equally dependent upon whether her testimony was to be believed or not. The fact that she was missing all the night and the following day was not a fact which

(1) (1928) 21 Cr. App. Rep. 23.

implicated either of the accused, and this the judge has realised, because he points out that she could equally have been missing, if she had gone of her own free will. The fact that some persons had been near the house at night on a previous occasion and one of them was Ohajuddin, even if the evidence of identification can be relied upon, is not evidence which implicates Ohajuddin in the offence charged. The only piece of corroborative evidence, which I can find in the record, is the statement of one or more witnesses that they saw her coming out of Ohajuddin's house on the Thursday morning weeping. But this has not been referred to by the judge as corroborative evidence within the meaning of the rule which the jury might take into consideration to confirm the story of the girl.

The learned judge has pointed out a number of reasons which induced him to think that there has been a miscarriage of justice in this case and we agree with him that the trial for various reasons has been unsatisfactory. Against Nonia, there is nothing but the girl's evidence and that is not very convincing. Against Ohajuddin, there is, as I have already pointed out, some evidence which might be accepted as corroboration within the meaning of the rule. It is true that if, after a careful and sufficient warning, the jury choose to condemn either or both of them upon the girl's statement alone, there is nothing in law to prevent them from doing so. That being the position, we think that the fairest and the best way of dealing with this case is to set all the convictions and sentences aside and to direct a new trial of both the accused. And we direct that they shall be tried by another judge, because this judge will not wish to try the same case all over again.

The accused who are on bail will continue on the same bail, pending further orders by the trial court.

GHOSE J. I agree.

A. C. R. C. *Retrial ordered.*