APPELLATE CRIMINAL.

Before Cunliffe and Henderson JJ.

SIKANDAR MIYAN

v.

EMPEROR.*

1937

Feb. 18.

Misdirection—Rule of caution in sexual cases, What is—Previous statement, if comes within the rule—Indian Evidence Act (I of 1872), s. 157.

A rule of prudence has grown up both in England and India for the presiding Judge to tell the jury that they ought to scrutinise the uncorroborated evidence of a prosecutrix in a case involving sexual offence and that it is dangerous to convict a man on such uncorroborated testimony. The Judge should also say that nevertheless, if after proper scrutiny and considering the caution delivered by him, the jury are satisfied with the uncorroborated evidence, they may accept it.

Rex v. *Baskerville* (1) referred to.

Per HENDERSON J. A previous statement of the prosecutrix admitted under s. 157 of the Evidence Act is not corroborative evidence within the meaning of this rule.

CRIMINAL APPEAL.

The material facts and arguments appear from the judgments.

Sudhangshu Shekhar Mukherji for the appellant.

The Deputy Legal Remembrancer, Khundkar, and *Nirmal Chandra Chakrabarti* for the Crown.

CUNLIFFE J. This is the appeal of one Sikandar Miyan who was convicted by a majority verdict of a jury sitting with the Additional Sessions Judge at Alipore of an offence against a small girl under s. 376 of the Indian Penal Code. The learned Judge took a very grave view of the appellant's crime. He sentenced him to ten years' rigorous imprisonment.

*Criminal Appeal No. 946 of 1936, against the order of S. S. Hathiangadi, Additional Sessions Judge of Alipur, dated Oct. 5, 1936.

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The appeal was admitted on the question of the possible misdirection on the part of the learned Judge in his charge to the jury and also on the question of the sentence imposed. It was a very unpleasant case indeed. The prosecution story was that the little victim of the criminal assault was a child of about nine years. She had no mother, but lived with her sister and brother, both younger than herself and with her father, who was a widower, and it is said that he kept a shop and attended to his duties there during a greater part of the day. The child, whose name was Taramani, was an attendant at a school and the evidence was that the school authorities usually provided a maid servant to take certain of the girl day-scholars backwards and forwards from the school to their houses, but on this particular occasion the little girl was walking back from the school by herself. She knew the appellant; he used to come to her father's house, he sometimes helped her with her home lessons and she used to call him by a name which is the equivalent of "master." Before he committed the crime, the inducement which he held out to the little girl was that, if she came to his house, he would give her some guavas and on this pretext he got her into his house and committed criminal assault upon her inside his room. Then he gave her, according to her story, some guavas, told her to go home and warned her not to tell any one about what had happened. Before he committed the assault, she said, he took off the frock which she was wearing and he threatened her saying that if she made any resistance or cried out, he would use a dagger. When the little girl got home she did not tell anybody about this until about two days later, when feeling acute pain she told her father everything, who took her to a doctor. The doctor discovered that she had been violated and he also found out that she was suffering from gonorrheal infection. She named the appellant as her assailant. He was arrested and on being examined, the same doctor discovered that he was suffering from gonorrhea also. The examination of the child and the appellant took

place five days after the date on which the prosecution said the assault took place. No one was called before the Court who witnessed the appellant and the child together on this particular day.

It has been often laid down by Criminal Judges that charges brought against a man by one of the opposite sex accusing the male of having committed a sexual offence should be very carefully presented to the jury and it has been pointed out, both in England and in India, a rule has grown up that Judges when they charge juries in cases of this kind ought never to omit delivering a serious caution to the jury with regard to accepting the uncorroborated evidence of a woman to support a sexual charge against an accused person. The way the rule has developed now is that the presiding Judge should tell the jury that they ought to scrutinise the uncorroborated evidence of a woman or girl with the greatest possible care, because it has been found by experience extending over many years that it is often dangerous that a man should be convicted on such uncorroborated testimony. At the same time, it is not for the Judge to substitute his view of the facts entirely and take away from the jury their privilege of being the judges of facts alone; so that now-a-days after giving the warning which I have described the Judge generally adds a rider to the effect that nevertheless if after proper scrutiny and considering the caution delivered by the Judge they are satisfied with the uncorroborated evidence, they may accept it. In this case, the learned Judge did not deal with this question of warning the jury with regard to the child's evidence, because I think he took the view that there was corroboration of some kind. What exactly amounts to corroboration of the main evidence in cases of this kind is always a difficult question. It need not be the direct oral evidence of another person. It may be only independent evidence of such a character that it connects the accused directly or indirectly with the crime that he was said to have committed. That was, I think, the view

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which was taken by the Court of Criminal Appeal in England in the well known decision in *Rex* v. *Baskerville* (1), a case which is often cited in the Indian Courts and is looked upon in England as the leading case upon the point now and it is relied upon in Archbold's text book. Now, applying that test here, there was certain independent evidence not of a very direct character which the jury could well have considered carefully with regard to the question whether the accused was guilty or not. It will be remembered that the prosecution case depending on the child's evidence was that she was lured into the accused's premises on the promise of giving her some guavas. There was independent evidence that the accused had a guava tree bearing fruit in the compound. There was also the incident in the child's evidence that there was a *taktâposh* in the accused's room. When the accused's room was afterwards examined, it was found that there was a *taktâposh* there. There was evidence that there was gonorrheal infection, it having been discovered that the accused was suffering from gonorrhea when he was arrested five days after he was said to have committed the crime. It may well be said that none of this evidence is conclusive: But these aspects of the case ought to have been brought specifically and clearly to the notice of the jury. The learned Judge using his experience in trying criminal cases ought to have presented the evidence that I have mentioned in its true light with regard to the final view of the trial. He ought to have evaluated the evidence and ought to have given specific directions as to how they should consider the question of the discovery of the gonorreal infection. In short, he should have given the jury all the possible assistance he could in a rather difficult decision of fact. He has not done so satisfactorily and I doubt whether the jury, after hearing this charge, really appreciated that there was this question of the corroborating evidence to be taken into consideration.

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The case was also apparently not very satisfactorily tried if the record of the evidence is considered. There was, except for a very perfunctory evidence, no expert medical evidence given really before the Court. As I understand it, Dr. J. N. Basu, the Assistant Civil Surgeon, did testify before the committing Magistrate but he did not give his evidence before the jury. My learned brother points out to me that his deposition before the Magistrate was put in and he did say something before the jury but not very much. If I had been the trial Judge, what I should have liked to ask the doctor about was whether it was possible for a girl child who had been raped by a man suffering from gonorrhea to have developed the symptoms of gonorrhea within two days of the rape, a question which seems to me to be of great importance from the point of view of the defence. The defence do not seem to have directed their attention to this point confininig themselves to the questions as to the actual rape. In these circumstances and as these cases are of very great importance from the point of view of the proper administration of criminal justice, we are of opinion that a new trial should take place. We, accordingly, set aside this conviction allowing the appeal and ordering a retrial to take place. The appellant will be detained until such trial as an undertrial prisoner.

We further direct that the trial do take place before another Judge at Alipur.

HENDERSON J. The conviction of this appellant depends upon the testimony of the girl alone in the sense that, if her evidence is not accepted as true, the conviction of the appellant could not be supported. There was corroboration, but it did not amount to anything which can be called conclusive. Indeed, apart from the direct evidence of the girl, the corroborative evidence would not even suggest that it was the appellant who committed this crime. It was, therefore, inevitable that we should have raised before

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us again the question as to what is the duty of the Judge in cases such as these: in particular we were asked to say that the judgment of Lort-Williams J. in the case of *Surendranath Das* v. *Emperor* (1) goes too far.

Now, I do not think that there is any real difficulty in this matter at all. We had to consider it only the other day in the appeal by one Sarat Chandra Chakrabarti and, if I may say so with respect, I agree with the statement which was made by my learned brother on that occasion. Now, I do not think that any useful purpose would be served by taking the individual words of Lort-Williams J. and weighing them in a balance in view of the fact that his judgment was delivered *ex tempore* as far as I remember. I do not think he intended to lay down any more than what was laid down by my learned brother in *Sarat Chandra Chakrabarti's* case. Speaking for myself, I have no hesitation whatever in assenting to that proposition.

One of the principal duties of a Judge presiding over a jury trial is to afford such assistance as is possible to a jury to help them to arrive at a correct decision. As a result of long experience and as a result of the *dicta* of many eminent Judges, it cannot be denied that it is dangerous to convict men of sexual offences on the uncorroborated evidence of the prosecutrix. I do not suppose there is a single practising criminal lawyer who would attempt to dissent from that proposition. That being the case, a Judge who omitted to give the jury the benefit of that experience would, in my opinion, be very seriously neglecting his duty and I should never be satisfied that a jury who convicted without that warning really understood the case properly. It was indicated to us that some difficulty has been caused in the trial of these cases in the *mofussil*, because of some doubt whether evidence admitted under s. 157 of the

(1) (1933) I. L. R. 62 Cal. 534.

Evidence Act is corroboration within the meaning of this rule. The rule is a rule of prudence based on experience, and it is unnecessary to dilate upon the reasons for it. It seems to me that a previous statement made by the prosecutrix cannot possibly be corroborative within the meaning of this Rule. If it were, instead of regarding it as a rule of prudence, I should regard it as a rule of folly. If a Judge were not to give the jury the necessary warning as to the evidence of the prosecutrix within the meaning of this rule, then in my opinion he would have misdirected the jury.

Now, the present case is not one in which there was no corroboration at all; but yet in my opinion, the learned Judge ought to have warned the jury, because as I have already shown, the conviction cannot stand unless the girl is believed *in toto*. My learned brother has indicated what circumstantial evidence the prosecution brought as corroboration. It is absolutely necessary that this should have been put clearly before the Jury. I only propose to discuss in detail the evidence with regard to gonorrhea.

The importance of this evidence was that the prosecution were able to show that some person suffering from gonorrhea must have had connection with this girl. They, therefore, relied upon the fact that the appellant was also suffering from this disease. Now if they wanted to use this as corroboration of the girl's story, the first thing to prove was that the appellant was suffering from gonorrhea not on the day the doctor examined him but on the day of the occurrence. The prosecution never attempted to give such evidence. We do not know what would have been the result if expert evidence had been given. On the actual record of the evidence the learned Judge certainly should have told the jury that there was nothing to show that the appellant was suffering from gonorrhea at the time of the occurrence.

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Then again, this evidence does not go very far. It merely narrows the circle, if I may say so; as to the weight to be attached to it, it is important to know whether gonorrhea is a rare or common disease amongst the class to which the appellant belongs. The more common it is, the less valuable is the evidence against the accused. This aspect of the case was never put before the Court at all either by the prosecution or by the defence. The learned Judge ought to have pointed out to the jury the precise significance of this evidence and should have taken steps to see that the evidence with regard to gonorrhea was properly explained and appreciated.

Retrial ordered.

A. C. R. C.