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KO MAUNG GYI AND OTHERS v. DAW TOK.

DAS, J.

It is argued on behalf of the respondent that clause (*c*) applies. There is no suit in which the appellants render themselves liable as sureties. The proceeding for the grant of Letters of Administration is not a suit though it may take the form of a suit. The appellants only render themselves liable under the terms of the administration bond and the only way to proceed against them would be to obtain an assignment of the administration bond as provided by section 292 of the Succession Act.

I agree with my brother Carr in holding that section 145 of the Civil Procedure Code does not apply to a surety under an administration bond.

The appeal is therefore allowed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Cunliffe.

KING-EMPEROR
v.
NGA HLAING.*

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April 20.

Corroborative evidence, admissibility and value of—Evidence Act (I of 1872), section 157—Substantive evidence, necessity of—First information reports and other reports.

Held, that unless there is substantive evidence before the Court, first information reports and other reports by a witness cannot be used in corroboration.

Held, accordingly, that where the prosecution witness gives a different account in evidence before the Court, his previous reports cannot be admissible as corroborative evidence against the accused.

Kyaw Zan Hla v. *King-Emperor*, Criminal Appeal No. 452 of 1927—*distinguished.*

In this case there was a single eye-witness to the crime alleged to have been committed by the accused. The eye-witness in his evidence before the

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* Criminal Revision No. 141B of 1928.

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trial Court did not identify the accused as the assailant; but his previous statements to other persons to the effect that the accused was the assailant was admitted in evidence. On appeal against a conviction, the Sessions Judge's attention was drawn by the Public Prosecutor to a decision of this Court in *Kyaw Zan Hla* v. *King-Emperor*. The learned Sessions Judge took the view that the decision lays down that secondary oral evidence of a report made by the witness can be used as substantive evidence against the accused, even when the witness who made the report subsequently in the trial denies all knowledge of the facts alleged to have been reported by him to the other witnesses. In the circumstances the case was submitted to the High Court in reference for further consideration of the law on this point.

CUNLIFFE, J.—The difficulty in this case which is the subject of the reference before me seems to be that certain corroborative evidence in the nature of hearsay was admitted in the Magistrate's Court, when, in fact, there was no primary evidence which required to be corroborated. I have no doubt that if the complainant had come up to his story (which the prosecution expected he would do) and had identified his assailant, this hearsay evidence would have been properly admitted; but, in the circumstances, in my view, it was wrongfully allowed to be given. In fact it corroborated nothing.

The case relied upon as an authority for the admission of corroborative evidence when the prosecution's chief witness has gone back on the original complaint made to the police is, I think, no authority at all. If it was an authority, I should disagree with it. That was a case which came up on appeal before Heald, J., from a conviction for rape passed by an

Additional Special Power Magistrate at Moulmein. The circumstances of the case were somewhat similar in principle to the case the subject of this reference. The evidence of the girl, who it was said had been violated, broke down in the witness box; broke down, indeed, much more strongly than the evidence of the complainant in the case before me. The girl in Heald, J.'s appeal absolutely denied that she had been interfered with by the accused. She advanced a bogus story to account for her having been hurt by saying that she had had a severe fall. In all probability her evidence in the box was perjured and was due to the influence of her aunt. She was not cross-examined as a hostile witness as she should have been, but corroborative evidence of the identity of the accused was admitted. In my view, it was wrongfully admitted. There was other testimony, however, which in my opinion justified Heald, J., in coming to the conclusion he did quite apart from the improperly admitted evidence of corroboration. There was specific evidence, for example, of the doctor who examined the girl. There was the evidence that a complaint had been made by her to the police on a certain date. There was the evidence that the girl had been alone in a hut with the accused shortly before the complaint was made. The trying Magistrate drew a conclusion of fact from this evidence against the accused. I think he was right in so doing. I respectfully agree with the general conclusion come to by Heald, J. I do not think, however, that the case decided by Heald, J., is any authority for the proposition that secondary evidence of a hearsay character which does not corroborate any primary evidence can be relied on to support a conviction of this kind. Nor do I think that evidence in detail could have been led to show the nature of the complaint, but I am of opinion that the fact that a

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complaint was made was properly admitted in the trial Court. In all these cases where the complainant, owing to undue influence or corruption, goes back on his or her story of how the crime was committed or who committed the crime, I think it most advisable for the presiding Judge to allow the complainant to be treated as a witness hostile to the prosecution; and I am quite sure that, if as a result of that cross-examination certain evidence emerges which supports the case for the Crown, the evidence of corroboration on the part of third parties would then be admissible in law. It is almost impossible for a Judge in a Criminal Court of first instance to disabuse his mind of the corrupt atmosphere which unfortunately prevails with regard to witnesses in the district and I hold the view strongly that a legitimate presumption of fact based on undisputed evidence, however scanty, as long as it may be relied upon, should be drawn.

For these reasons, I think that the learned Sessions Judge was justified in the view that he took that the corroborative hearsay evidence in question should not have been admitted or considered.

G.B.C.P.O.—No. 12, H.C.R., 20-7-28—3,000.