Fernando

v.

The Republic of Sri Lanka

COURT OF APPEAL.
RATWATTE, J., RODRIGO, J. AND L. H. DE ALWIS, J.
C. A. 45/79—H. C. NEGOMBO 222/73.
JULY 30, 31, 1980.

Penal Code, section 303—Causing miscarriage—Woman voluntarily participating considered an accomplice—Rule regarding accomplice's evidence—Evidence Ordinance, sections 114 and 133—Corroboration—Need to explain meaning to Jury—Circumstantial evidence—Failure to explain to Jury how it should be approached—Misdirection—Administration of Justice Law, No. 44 of 1973, section 70 (6)

Held

(1) A woman who is a voluntary participant in the offence of causing herself to miscarry comes within the definition of an accomplice and it is a rule of practice that is now virtually a rule of law that an accomplice's evidence must be corroborated by independent evidence on material particulars.

(2) Corroboration of an accomplice's evidence must relate not only to the identity of the accused but also to the commission of the crime itself. Previous statements by an accomplice do not afford corroboration of his evidence.

(3) Failure of a trial judge to direct the jury in regard to corroboration of an accomplice's evidence is a serious misdirection that would vitiate the conviction.

(4) Failure of a trial judge to explain to the jury how they should approach circumstantial evidence is a misdirection which vitiates the conviction.

Cases referrd to

(1) *Queen v. Liyanage & others*, (1965) 67 N.L.R. 193.
(2) *Goddard v. Goddard*, (1962) 4 Cr. A.R. 461.
(3) *Dharmadasa v. Queen*, (1967) 72 N.L.R. 298.
(4) *Queen v. Jayasinghe*, (1965) 69 N.L.R. 314.

APPEAL from a conviction in the High Court, Negombo.

Dr. Colvin R. de Silva, with *Sarath Wijesinghe*, for the accused-appellant.

Asoka de Z. Gunawardena, Senior State Counsel, for the Attorney-General.

Cur. adv. vult.

September 10, 1980.

L. H. DE ALWIS, J.

The appellant is indicted on a charge of voluntarily causing one Janet Peiris, a woman with child, to miscarry between 16th November and 11th December, 1977.

The appellant is indicted on a charge of voluntarily causing one the charge by a divided verdict of 5 to 2 of the Jury and was sentenced to 1 year's rigorous imprisonment and to pay a fine of Rs. 1,000, in default to a term of 6 weeks imprisonment.

The appellant is an Ayurvedic physician. Janet Peiris is a married women with two children. She said that at the time of the alleged offence she found herself to be two month's pregnant. At the confinement of her last child she had been warned by her doctor that if she were to have another child she would die in child birth. She had mentioned this to her husband and he had said that when the time came he would somehow or other save her. However on 15.11.77 when her husband was away from home she went to the appellant's dispensary alone and told him that she was pregnant and about the warning she had been given. The appellant said that he would give her some medicine and that his charges were Rs. 150. He took her to a room and examined her. She then went on to say that he introduced two *Eramudu* stalks dipped in some red medicine from a jug like P1 into her vagina. She felt faintish and started to shiver but revived after being given a cup of coffee. She was also given some capsules and tablets to be taken if she became worse. On that day she paid the appellant Rs. 50. After she went home she started to bleed and this continued for two weeks. Thereafter her bleeding increased profusely and she was brought by car to the same dispensary by one Malini, a neighbour. She was in the appellant's dispensary on that occasion for about two hours but there is no evidence as to what transpired there. Two days later she developed tetanus and was taken to a private doctor and from there to the Government Hospital at Chilaw. There she was examined by the D.M.O. and treated for tetanus.

The medico-legal report of the doctor is produced marked P4. According to this report she was examined on 11.12.77 at about 6 p.m. and had signs and symptoms of tetanus. The doctor was of the opinion that there had undoubtedly been an interference with her pregnancy but could not throw any light on the mode of that interference.

The other witnesses called for the prosecution were Malini who took Janet Peiris to the appellant's dispensary on the second occasion, and Jenet's husband who knew nothing about the alleged incident except what Janet had told him.

Serious misdirections in the learned trial Judge's summing-up were pointed out by counsel for the appellant.

By virtue of the explanation to section 303 of the Penal Code under which the appellant is charged, a woman who causes herself to miscarry comes within the meaning of this section. In the present case Janet Peiris admittedly has been a voluntary participant in this alleged offence and would come within the

definition of an accomplice. It is a rule of practice that is now virtually a rule of law that an accomplice's evidence must be corroborated by independent evidence on material particulars. *Queen v. Liyanage and others* (1) at 212.

The learned trial Judge no doubt has cautioned the jury several times in his summing-up against accepting Janet's evidence without careful scrutiny for the reason that the whole prosecution case more or less rested on her evidence. But he has failed to direct them that her evidence must be treated as that of an accomplice and that it is tainted evidence which should be corroborated in material particulars by independent evidence. As a matter of fact he was about to conclude his summing-up without any direction on this aspect of Janet's evidence when prosecuting state counsel drew his attention to sections 114 illustration (*b*) and 133. But even then his emphasis was more on section 133 and section 114 was left to be dealt with only in the last paragraph of his summing-up. That was just a bare recital of the section with no attempt whasoever to explain to the jury what corroboration means or to point out to them the evidence that could constitute corroboration.

Corroboration of an accomplice's evidence must be by independent evidence on material particulars. It must relate not only to the identity of the accused but also to the commission of the crime itself. Previous statements by an accomplice do not afford corroboration of his evidence. In the present case corroborative eevidence that the prosecution relied on consisted of a statement made by Janet herself to the police, which was produced marked P2 and of certain statements made by her to Malini and to her husband. Malini stated that Janet asked her to take her to Cyril Veda Mahattaya's dispensary and that just as they overshot the place she pointed out the dispensary. Her husband Sugath said that on his return home from his trip Janet told him that she had been to Cyril Veda Mahattaya's dispensary to take some medicine for her pregnancy. The evidence of Janet and Sugath comprise of statements made by Janet to them and does not constitute independent evidence of corroboration. The learned trial Judge has nowhere in his summing-up explained to the jury what independent evidence is and the jury may well have acted on the assumption that these items of evidence were corroborative of Janet's evidence.

In the case of *Goddard v. Goddard* (2) cited by T. S. Fernando, A. C. J. in the case *Dharmadasa v. Queen* (3) at 300, Lord Parker said :

> " Equally, if you get a case as in many sexual cases, where there is a danger that the jury will treat as corroborated something which is incapable of being corroboration, there must be a duty on the judge to explain to the jury what is not corroboration, as, for example, a complaint made by the complainant. In the general run of cases, where there is evidence capable of amounting to corroboration, the duty of the judge must depend on the exact facts of the case, bearing in mind that he certainly would not be expected to refer to every piece of evidence which is capable of amounting to corroboration but, in general, in the judgment of this Court he should give a broad indication of the evidence, which the jury, if they accept it, may treat as corroboration."

See also *Queen v. Jayasinghe* (4) *at* 325.

I am of opinion that the failure of the trial Judge to direct the jury in regard to corroboration of an accomplice's evidence is a serious misdirection that vitiates the conviction.

As regards the statement P2 made by Janet to the Police I am of the opinion that it should not have been admitted in evidence in view of section 70(6) of the Administration of Justice Law, No. 44 of 1973. The statement was not the first information given to the Police. The first information evidently is the information given by the Chilaw hospital authorities to the Police which set the investigation in motion. The admission of P2 as corroborative evidence has gravely prejudiced the appellant and has occasioned a failure of justice.

The prosecution also relied on two items of circumstantial evidence to corroborate Janet's evidence, but the learned High Court Judge has totally failed to explain to the jury how they should approach circumstantial evidence. This is a grave misdirection that vitiates the conviction. One of the items referred to is that the appellant treated Janet on her second visit without even questioning her as to what was wrong or ascertaining the history of her illness indicating that she had been to his dispensary before. The second related to the recovery of a cup containing some red substance which the Government Analyst later identified as mercury, commonly used for abortions. This cup was found by the police about five weeks after the date of the alleged offence and the possibility that the substance found

its way into the cup sometime after the alleged incident cannot be ruled out. There is, besides, no evidence that it is the identical cup used by the appellant on the day in question.

It is evident from the short period of 20 minutes the jury took over their deliberations that they could not have given due consideration to the various aspects of the evidence and their verdict cannot be allowed to stand.

No purpose is served in ordering a re-trial, since there is hardly any corroboration of Janet's evidence. Janet herself has been contradicted on several matters and consequently cannot be said to be an absolutely trustworthy witness.

I therefore set aside the conviction and sentence imposed on the appellant and acquit him.

RATWATTE, J.—I agree.

RODRIGO, J.—I agree.

Conviction quashed.

G. G. Ponnambalam, Jnr.
Attorney-at-Law.