SUNIL AND ANOTHER

v.

THE ATTORNEY-GENERAL

COURT OF APPEAL.
H. A. G. DE SILVA, J., DHEERARATNE, J. AND RAMANATHAN, J.
C. A. 76-77/83 - HIGH COURT, GAMPAHA 10/81.
SEPTEMBER 10 AND 11, 1985.

Criminal Law - Rape and abduction, s. 364 and s. 357 of the Penal Code - Corroboration - Burden of proving absence of consent.

Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness' evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible.

It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration.

The burden of proving absence of consent on the part of the complainant where the charge is one of rape or abduction is always on the prosecution and never shifts.

Cases referred to:

(1) *Director of Public Prosecutions v. Hester [1973] A.C. 296, 315 (H.L.), [1973] 3 All ER 1056.*

(2) *Director of Public Prosecutions v. Kilbourne [1973] A.C. 729, 746 (H.L.), [1973] 1 All ER 440.*

(3) *R. v. Manning [1969] 53 Criminal Appeal Reports 150, 153.*

APPEAL from verdict of the jury in High Court trial

Dr. Colvin R. de Silva with *Miss Saumya de Silva* for the accused-appellants

D. P. Kumarasinghe, S.S.C. for the Attorney-General.

Cur. adv. vult

November 8, 1985.

DHEERARATNE, J.

The accused-appellants were indicted in the High Court of Gampaha for the following offences alleged to have been committed on 19.01.1978:–

(1) That the 1st accused-appellant did commit rape on Kudapathgamage Margret, an offence punishable under section 364 of the Penal Code;

(2) That in the course of the same transaction the 2nd accused-appellant did abet the 1st accused-appellant in the commission of the offence referred to in charge No. 1; and that he did thereby commit an offence punishable under section 364 read with section 102 of the Penal Code;

(3) That both accused-appellants did in the course of the same transaction abduct the said Margret in order that she may be forced or seduced to illicit intercourse; and that they did thereby commit an offence punishable under section 357 of the Penal Code.

By an unanimous verdict, the jury found the 1st accused-appellant guilty on the 1st and 3rd charges and the 2nd accused-appellant guilty on the 2nd and 3rd charges. The 1st accused-appellant was sentenced to a term of 12 years rigorous imprisonment on charge No. 1 and to a term of 10 years rigorous imprisonment on the 3rd charge; both sentences to run concurrently. The 2nd accused-appellant was sentenced to a term of 12 years rigorous imprisonment on the 2nd charge and to a term of 10 years rigorous imprisonment on the 3rd charge; both sentences to run concurrently.

At the time of the alleged incident, 21 year-old Margret was living in a house at a place called Ihalakaragahamunna in the Kadawata area, with her mother, two younger sisters and a daughter of her elder sister. They had come to live in this area few months prior to the date of incident. The 1st accused-appellant was a total stranger to Margret, while Margret knew the 2nd accused-appellant by sight, having seen him previously on the road. On the day in question, about 2.00 p.m., when Margret was inside her room with one of her younger sisters, the two accused-appellants entered the room, armed with knives. The accused-appellants forcibly put her on a bed. While

the 2nd accused-appellant held her legs, the 1st accused-appellant committed rape on her. Before this incident the 2nd accused-appellant chased away Margret's mother and other inmates of the house, having threatened them. After the 1st accused-appellant raped her the 2nd accused-appellant, stating that the police might come, suggested that Margret should be taken to some other place. The two accused-appellants then led Margret along a jungle path and across a paddy field to several houses seeking accommodation. Ultimately, Margret was taken into a shanty inhabited by some females. In this shanty, Margret was made to lie on a camp-cot. There, the 2nd accused-appellant attempted to rape her.

Margret's mother Premawathie, had meanwhile left to make a complaint to the Kadawata police. On her way to the police station, Premawathie stopped an oncoming police jeep. In this jeep was the police sergeant Seneviratne, to whom Premawathie complained that two youths had entered her house and were keeping her daughter Margret without allowing her to escape. She also told sergeant Seneviratne that she does not know whether Margret had been even killed by that time. Sergeant Seneviratne then proceeded to the house of Premawathie and finding that Margret had been taken away from the house, made inquiries from the neighbourhood. In consequence of the information received, sergeant Seneviratne went towards the shanty where Margret was said to have been taken. When he was approaching the shanty, he overheard threatening words being used at Margret. Thereafter, sergeant Seneviratne entered the shanty and found Margret seated on a camp-cot. The 1st accused-appellant was keeping his head on her lap, the 2nd accused-appellant was seated on a chair and with him was a knife. On a nearby table was another knife, which sergeant Seneviratne took charge of. It was about 3.38 p.m. when the two accused-appellants were taken into custody.

Margret was taken to the police station and after her statement was recorded and the investigations were over; she was admitted to the hospital. She was examined by the judicial medical officer at 10.30 a.m. on 20.01.1978. On examination of Margret, it was found that she had a laceration on her hymen which was a scar of an old injury. There was also a contusion on the vagina which was a recent one. This contusion was consistent with Margret's story that she was raped forcibly. There were no other injuries on her.

In her evidence Margret stated that few months before this incident, she was deflowered by her fiance, who later married her sometime soon after this incident.

At the trial, besides Margret, her mother Premawathie, the judicial medical officer and the police officers who investigated the alleged offences gave evidence. The prosecution also called one Abraham, a neighbour of Premawathie who was subsequently treated as a hostile witness by the prosecution. The accused-appellants gave no evidence. However, suggestions were made under cross-examination that Margret was a consenting party to the act of intercourse.

Learned counsel for the accused-appellants assailed the learned trial Judge's summing-up to the jury on several grounds. Firstly, it was contended that the learned trial Judge failed to direct the jury, that, before proceeding to find corroboration of the complainant's evidence, they must find her evidence creditworthy. Learned Counsel for the accused-appellants carried his argument further by strongly urging that the jury may have understood the requirement of corroboration, as a process of inducing belief in the complainant's testimony, which could otherwise be uncreditworthy. To strengthen his argument, learned Counsel for the accused-appellants relied on the following passage in the judgment of Lord Morris of Borth-Y-Gest, in the case of *Director of Public Prosecutions v. Hester* (1):

> "The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said. Any risk of the conviction of an innocent person is lessened if conviction is based upon the testimony of more than one acceptable witness. Corroborative evidence in the sense of some other material evidence in support implicating the accused furnishes a safeguard which makes a conclusion more sure than it would be without such evidence. But to rule it out on the basis that there is some mutuality between that which confirms and that which is confirmed would be to rule it out because of its essential nature and indeed because of its virtue. The purpose of corroborating is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible; and corroborative evidence will only fill its role if it itself is completely credible evidence."

The requirement that the evidence of a complainant in a sexual offence should be found creditworthy is too obvious a fact to be stressed; for this requirement of creditworthiness is equally applicable to a complainant's evidence in respect of any criminal charge, if that charge is to be brought home. I would expect the stamp of creditworthiness to be borne by every witness for any court exercising criminal jurisdiction or a jury to act upon that testimony. I am inclined to think, that in *Hester's case (supra)*, this requirement came to be highlighted because, there, the court was called upon to decide an intricate problem which arose in the field of corroboration. That is, whether the sworn testimony of a 12 year–old girl, a complainant in a sexual offence, could be said to have been corroborated by the sole unsworn testimony of a 9 year–old girl, which by law, (proviso to section 38 (1) of the Children and Young Persons Act 1933) in turn needed corroboration; and, whether it could be said that this requirement of law was sufficiently met, by contending that the second girl's testimony is corroborated by the testimony of the first girl. It was in this context of the proposition of "mutual corroboration" that Lord Morris of Borth-Y-Gest was constrained to make those observations which were cited to us. Although our attention was not invited, I find that this aspect of the judgment in *Hester's case (supra)*, has been more lucidly dealt with by Lord Hailsham in the case of *Director of Public Prosecutions v. Kilbourne* in the following words:

> "In addition to the valuable direction to the jury, this summing-up appears to me to contain a proposition which is central to the nature of corroboration but which does not appear to date to have been emphasised in any reported English decision until the opinion delivered in *D.P.P. v. Hester*. . . . . by Lord Morris of Borth-Y-Gest although it is implicit in them all. Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of his own inanition the question of his needing, or being capable of giving corroboration does not arise."

Here again, Lord Hailsham was dealing with a similar problem:

> "Whether and in what circumstances, the sworn evidence of a child victim as to an offence charged, can be corroborated by the admissible but uncorroborated evidence of another child victim as to similar misconduct of the accused on a different occasion."

In the instance case, it is true that the learned trial Judge has not stated, at the point he dealt with the necessity to seek corroboration, that the evidence of the complainant should be first found credible. However, at the commencement of his summing-up and thereafter, at several points, he has paused to impress upon the jury the necessity to find the evidence of the complainant to be creditworthy. I find that the learned trial Judge has adequately directed the jury on the question of credibility of the complainant's evidence. The learned trial Judge has neither intended to direct the jury, nor could it be said, that the jury understood the judge, to mean that seeking corroboration of the complainant's evidence should be used as a process of inducing belief of the complainant's evidence if they were to find the complainant's evidence incredible. I must confess that, this is a ready pitfall, a jury consisting of layman, as it does, may easily walk into, if not properly cautioned. I do not think that the criticism made by the learned counsel for the accused-appellants of the learned trial Judge's summing-up on this matter is well founded.

The learned Counsel for the accused-appellants next submitted that the learned trial Judge presented the case to the jury on the basis that they should not look for corroboration of the evidence of the complainant. Our attention was drawn to the following passage in the learned trial Judge's summing-up:

> "As I stated earlier this is a sexual offence, therefore if there is any corroborative evidence it is very safe. One could easily fabricate a sexual offence. Similarly it is very difficult to escape a charge like this. I have explained to you that it is very dangerous to act on the uncorroborated testimony of the complainant. I gave that warning. You should bear that warning in your mind at all times. But, in addition to that I would like to tell you that if you believe that the story of the complainant has been proved, then you can bring your verdict on that accepted evidence. In that event the question of corroboration does not arise. If such a situation has arisen leaving aside my warning you can totally accept the evidence of the complainant. In such an event you have the right and freedom to act on her evidence."

I think it is perfectly legitimate for a judge, in a case of this nature, to direct a jury that if they find the evidence of the complainant so convincing, they could act on that evidence alone, even in the absence of her evidence being corroborated. I find that this proposition has been succinctly expressed by Salmon, L. J. in the case of *Rex v. Manning* (3):

> "What the judge has to do is to use clear and simple language that will without any doubt convey to the jury that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now innumerate, and sometimes for no reason at all. The judge should then go on to tell the jury that, bearing that warning well in mind they have to look at the particular facts of the particular case and if, having given full weight to the warning, they come to the conclusion that in the particular case the woman or girl without any real doubt is speaking the truth, then the fact that there is no corroboration matters not at all; they are entitled to convict."

I am satisfied that the learned trial Judge in the instant case correctly directed the jury, having first warned them of the danger of convicting the accused on the uncorroborated evidence of the complainant, that they could even convict the accused on the sole testimony of the complainant, if they are convinced that she was speaking the truth. I am not inclined to agree with the submission of the learned Counsel for the appellants that the case was presented to the jury on the basis that they should not look for corroboration.

Finally, the learned Counsel for the accused-appellants submitted that an unwarranted burden was placed by the learned trial Judge on the accused-appellants of proving the absence of consent on the part of the complainant in the commission of the alleged acts. Much was made of the following words of the learned trial Judge's summing-up:

> "Defence by cross-examination and by making suggestions suggested that she was a willing party to this. If you hold that this suggestion of the defence is reasonable, then you can find the accused not guilty."

In this instance, the learned trial Judge was placing before the jury the mere suggestion made by the defence that the complainant was a consenting party to the acts committed by the accused; and it appears to me, that these words used by the learned trial Judge were inappropriate and not quite happy. But, I find that the learned trial Judge has taken pains to exhort the jury adequately that the burden of proving the case, particularly, the ingredient of absence of consent on the part of the complainant, was on prosecution and the prosecution alone, and that this burden never shifted to the accused. By the words, the learned Counsel for the accused-appellants rightly complained of, I do not think that the jury understood the judge as having shifted the burden to the accused at any stage.

For the reasons stated above, I would dismiss the appeal and affirm the convictions and the sentences passed on the accused-appellants.

H. A. G. DE SILVA, J. – I agree.

RAMANATHAN, J. – I agree.

Appeal dismissed.