[COURT OF CRIMINAL APPEAL.]

1940 *Present :* **Moseley S.P.J., Hearne and Cannon JJ.**

THE KING *v.* ARTHUR FERNANDO.

74—M. C. Balangoda, 26,585.

Evidence—Charge of rape—Complaint by prosecutrix to father as a result of threat—Complaint inadmissible—Contradictory evidence of complainant Evidence uncorroborated—Verdict cannot be supported.

In a charge of rape, where the defence was one of consent, the prosecutrix made her first complaint to her father in consequence of a threat without which, on her own admission, the complaint would never have been made.

Held, that the complaint was inadmissible in evidence.

Where there were contradictory statements in the evidence of the prosecutrix, absence of corroboration together with the circumstances in which she made her first complaint, and her failure to complain previously when opportunities arose, and the inconclusive nature of the medical evidence,—

Held, that the verdict could not be supported having regard to the evidence.

[1] *25 Cr. App. R. 119.*

APPEAL from a conviction by a Judge and jury before the 4th Western Circuit.

J. A. P. Cherubim, for accused, appellant.

E. H. T. Gunasekera, C.C., for the Crown.

Cur. adv. vult.

December 17, 1940. MOSELEY J.—

This is an appeal by leave of the Court on questions of fact. The appellant was convicted at Colombo on October 31, 1940, of rape and sentenced by Nihill J. to five years' rigorous imprisonment. The verdict was by a majority of five to two.

The complainant, at the date of the alleged offence, was a few days short of sixteen years of age. The appellant admitted intercourse but said that it took place with the girl's consent. Consent, or no consent, was then the only issue before the jury. The appeal is brought on the ground that the verdict is unreasonable and cannot be supported having regard to the evidence. A further ground, which is not a question of fact, is put forward, viz., that the learned trial Judge did not in his charge to the jury, refer to the finding by the headman of a blood-stained mat which, it is contended, supports the version of the accused, and was not put in evidence in either the Magistrate's Court or Supreme Court. It seems, in fact, that the mat has in some mysterious fashion disappeared since it was handed by the headman to the police.

The story of the complainant was practically uncorroborated. There was a slight scratch on her face which was consistent with her allegation that the appellant placed his hand over her mouth to prevent her from crying out. On this point the trial Judge in scrupulous fairness to the appellant pointed out that the scratch might have been caused in a hundred other ways. The jury were warned in the clearest possible manner of the danger of convicting on what was described in so many words as the uncorroborated testimony of the girl. It would seem therefore that very cogent grounds would have to be presented to us before we would consider interfering with the verdict of the jury, even lacking unanimity as it does.

The medical evidence was not very helpful. The injuries found on the girl's body which, apart from the facial scratch, were confined to her pudenda, were consistent with intercourse with or without consent. Had there been more injuries, said the doctor, one would have come to the conclusion that there was no consent, an observation somewhat in favour of the appellant.

Then there was the question of the first complaint made to her father some few hours after the incident, and then only as the result of a threat. She said she had intended to tell her father on his return from work but did not do so. If she had not been threatened with assault, said she, she would not have come with the truth. This piece of evidence seems to raise the question of the admissibility of a complaint made in such circumstances. In *Rex v. Osborne*[1] in which the general question of the admissibility of

[1] *(1905) 1 K. B. D. 551.*

complaints of this nature, and in particular the question of a complaint elicited by questioning was considered by a Bench of Five Judges, Ridley J., in delivering the judgment of the Court, observed :

> "If the circumstances indicate that but for the questioning there probably would have been no voluntary complaint, the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first."

Later in the judgment the same learned Judge intimated that the judgment only applied "where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself." In the present case the complaint while it was made perhaps within a fairly reasonable time was made only in consequence of a threat without which, on the girl's own admission, it would never have been made. Moreover, before the girl under the inducement of the threat made her complaint, she had spent a considerable time in washing her clothes, an act which seems to negative her expressed intention of telling her father on his return from work, or anyone else. It seems to us that the girl's complaint to her father was inadmissible.

To return to the facts the main criticism of the girl's story is that it is unsatisfactory from the point of view of the number of contradictory statements made by her. In fairness to her it must be realized that in the Supreme Court she gave evidence nearly 12 months after the incident, and, as was pointed out by Crown Counsel, her self-contradictions were mostly in regard to her emotions. It does, however, appear to us a matter of some importance that she gave no less than four different reasons why she did not inform a sanitary inspector of the occurrence. The inspector must have come on the scene within a matter of seconds after the completion of the act and, while she may have felt a natural reluctance to discuss such a matter with one of the opposite sex who was a comparative stranger, she said, as well, that she kept silence because the appellant requested her to because she feared he might return and injure her, and finally that she had no opportunity. Another instance of the unsatisfactory nature of her evidence was that in the lower Court she alleged that the appellant had made overtures to her on four occasions. This number she reduced in the Supreme Court to two.

It was further suggested by the defence that she had sent her grandfather away from the house on a wild goose chase and that this fact indicated consent on her part. It does appear from the evidence that in giving the grandfather the information which prompted his excursion to the chena she elaborated upon a message which she had received from her father, but her action in this respect may have been innocent of guile. What we have to decide is whether the girl's evidence was of such an unsatisfactory nature that it was unreasonable on the part of the jury to accept it. In *Rex v. Crocker* [1] the Lord Chief Justice, in dismissing the appeal said :

> "The jury had the opportunity of seeing and hearing the witnesses, and there are persons—especially young persons—who somehow are

[1] *17 Cr. App. R. 46*

> able to convey the fact that the story they tell is true, and here, after the learned Judge's warnings, the jury came to the conclusion that the girl's story was true and ought to be acted upon."

That was a case of oath against oath. In *Rex v. James Phillips*[1] the trial Judge had pointed out one or two matters to the jury which, strictly speaking, were not corroboration of the woman's story. The Lord Chief Justice said that if the Judge had warned the jury that in the absence of corroboration it was unsafe to convict the appellant, and the jury notwithstanding, being convinced of the truthfulness of the prosecutrix, had convicted him, that conviction would no doubt have been unassailable. So here Crown Counsel urges us, in view of the adequate warning by the Judge, not to disturb the conviction.

A point which was stressed by Counsel for the Crown is that the appellant did not take an early opportunity of disclosing his defence. In support of this contention he relied upon the request of the appellant made in the Magistrate's Court on February 6 that a certain witness should be called to prove his character and that he (the appellant) was working on the land adjoining that of the witness on the day in question. This request does indeed appear at first glance to have been made with a view to proving an *alibi*. The appellant's explanation of the request was that he wanted the witness to bear out the statement which he (the appellant) made subsequently in the Supreme Court to the effect that he went to the proposed witnesses' land at about 9.30 A.M. which was one and a half hours after the time of the alleged offence. The explanation appears to us feasible. Moreover, it is contended by Counsel for the appellant, that the defence of consent was foreshadowed in the Magistrate's Court when the prosecutrix was asked in cross-examination whether she did not get her young brother out of the way by giving him two cents to buy sugar. This particular portion of the deposition of the girl was put before the jury in a somewhat irregular fashion, and Crown Counsel before us sought to attach a different meaning to the girl's evidence by equally irregularly referring to a further passage in the girl's deposition which, he argued, proved that the incident of the sugar took place in another connection altogether. We have therefore deemed it proper to examine the girl's deposition as a whole. She is recorded as having said that her brother told her he had gone to buy sugar for two cents which Arthur Baas (appellant) had given him that morning. It is quite clear therefore that the question asked of the girl in cross-examination in the Magistrate's Court to which she answered "I did not give my brother two cents to buy sugar. I had no money with me that day," was put with the suggestion that she was a consenting party.

In *Rex v. Hedges*[2] Phillimore J. in dismissing the appeal in a case of this nature said :—

> "The complaint, the doctor's evidence, and the prisoner's denials in cross-examination, and, finally, the statement he made when arrested, are all facts that the jury were entitled to take into consideration as being to some degree corroboration of the girl's story."

In the present case there are no such features. It is a case of oath against oath.

[1] *18 Cr. App. R. 115.*

[2] *3 Cr. App. R. 262.*

This Court, in *The King v. M. H. Andiris Silva and another*[1] expressed its views strongly upon its disinclination to question a verdict given by a jury on questions of fact. Nevertheless in view of the contradictory statements which occur in the evidence of the prosecutrix and the generally unsatisfactory nature thereof, the absence of corroboration, the circumstances in which the girl made her first complaint and her failure to complain previously when opportunities arose, and the inconclusive nature of the medical evidence, the majority of the Court feels that it may properly be said that the verdict cannot be supported having regard to the evidence.

We would therefore allow the appeal. The conviction and sentence are set aside.

Appeal allowed.