[COURT OF CRIMINAL APPEAL.]

1941 *Present :* **Howard C.J., Moseley S.P.J., Hearne, Keuneman and Cannon JJ.**

THE KING *v.* ANA SHERIFF.

7—M. C. Puttalam, 27,146.

Evidence—Charge of rape—Absence of corroboration of complainant's evidence—Failure of Judge to warn the Jury—Misdirection—Nature of corroboration required.

Where in a charge of rape there is no corroboration of the evidence of the complainant, the Jury should be warned that it is not safe to convict on such uncorroborated testimony. In the absence of such a warning, the conviction will be quashed.

Where, having regard to all the facts of the case, there is substantial corroboration of the evidence of the complainant, no warning is required.

The evidence in corroboration must be independent testimony, which affects the accused by connecting or tending to connect him with the crime.

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

J. R. Jayawardene (with him *H. A. Koattegoda*), for the third accused, appellant.—The appellant who is the third accused has been convicted of rape and of abduction. The conviction for rape depends on the evidence of the complainant alone. There is no corroboration. In cases of rape and other sexual offences, the Jury may convict on the uncorroborated evidence of the prosecutrix, but the Judge should warn them that it is dangerous to do so—*R. v. Crocker*[1]; *Vol. 9 of Halsbury's Laws of England (2nd ed.), p. 224.* No warning was given in this case. The leading case on the law relating to corroboration is *R. v. Baskerville*[2]. See also *9 Halsbury p. 223.* It cannot be said that the evidence of the second accused implicating the appellant constituted corroboration. In Ceylon, where sworn evidence is given by a co-accused, the Jury should be warned that they should be very careful in acting upon such evidence—*Rex v. Ukku Banda et al.*[3] The trial Judge failed to give such warning.

[HEARNE J.—I see in the abduction itself very strong corroboration. Does not active participation in the abduction in circumstances which he has not troubled to explain connect the appellant with the commission of rape, which the complainant speaks of, and amount to corroboration?]

Apart from the complainant's, the only evidence implicating the third accused (appellant) was that of the second accused. It was the duty of the Judge to have warned the Jury about acting on his evidence.

[KEUNEMAN J.—Does the charge of abduction require corroboration like the charge of rape?]

I cannot go so far as to say that it does.

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

[2] *(1916) 2 K. B. 658.*

[3] *(1923) 24 N. L. R. 327.*

J. W. R. Ilangakoon, K.C., A.-G. (with him *M. F. S. Pulle, C.C.*), for the Crown.—The charge of abduction is clearly established. Where it is alleged that rape was committed after abduction the question whether the evidence as to the abduction is corroboration of the evidence of the prosecutrix that rape was committed on her will depend upon the facts of each particular case. It is submitted that the evidence of abduction is, in the circumstances of this case, strong corroboration of the evidence of the prosecutrix that rape was committed on her. It is inconceivable for what purpose other than that of having illicit intercourse the prosecutrix, a Sinhalese girl aged about 20 years, was abducted on the night in question by three young Moormen.

In the case of a sexual offence the corroboration required is such corroboration of the story of the prosecutrix as *tends* to prove that the accused has committed the offence—*Henry Rose*[1]. The evidence of preparation to commit the offence would be sufficient corroboration of the prosecutrix's evidence of rape. In the present case where the events have moved rapidly it would be unnatural to divide the story of the prosecutrix into two parts and to ask for separate corroboration of each part. The whole story stands or falls. If the most vital part of the story, namely, that of abduction is corroborated, then the story of rape is necessarily corroborated and the learned trial Judge's charge to the Jury on this point was correct.

Apart from the evidence of abduction the evidence of the second accused provides sufficient corroboration. His evidence clearly establishes that the girl was removed for the purpose of sexual intercourse and leaves no room for doubt that the first and third accused had possession of the girl after she had been taken to the house at Puttalam. The circumstances under which, according to the evidence of the second accused, the acts of sexual intercourse must have taken place point clearly to the absence of consent on the part of the girl.

It was not necessary for the Judge to give the warning contemplated in *Rex v. Ukku Banda et al.* (*supra*) because the second accused was not called as a witness for the prosecution and because he was called by the defence to give evidence on behalf of all the accused. The fact that the second accused was called was an invitation to the Jury that his evidence should be accepted on behalf of the accused. Further, neither the first accused nor the third accused challenged the evidence of the second accused concerning the part played by him and his co-accused in the events of the night in question. *Rex v. Ukku Banda et al.* (*supra*) is clearly distinguishable because in that case the evidence in respect of which the Jury had to be warned was that of an accused against a coaccused who was separately defended.

cur. adv. vult.

February 5, 1941. HOWARD C.J.—

This is an appeal by the third accused from his conviction of abduction of one Punchi Menika in order that she may be forced to illicit intercourse in contravention of section 357 of the Penal Code and two charges of rape on the said Punchi Menika in contravention of section 364 of the Penal Code. Counsel for the appellant has contended that, inasmuch as the

[1] *18 Cr. App. R. 141.*

learned Judge did not warn the Jury that it was unsafe to convict on the uncorroborated testimony of Punchi Menika, the convictions for rape cannot be maintained. It would appear that no such warning was given. We agree that where there is no corroboration such a warning should be given. This is a rule of practice equivalent to a rule of law and, in the absence of such a warning by the Judge, the conviction will be quashed: *R. v. Tate* [1]. In that case the Lord Chief Justice stated that the conviction would not have been quashed if there was substantial corroboration, looking at the whole of the facts in the case. If, therefore, there is corroboration of a substantial character the warning is not required and we are not aware of any authority for the contrary proposition. The only point, therefore, that arises for consideration is whether in this case there was what amounts in law to corroboration. This matter was exhaustively discussed in the judgment of Lord Reading L.C.J., in *Rex v. Baskerville* [2]. In this case the question is one as to corroboration of the complainant's story, whereas in *Rex v. Baskerville* (*supra*) it was one as to corroboration of the story of an accomplice. In *Rex v. Crocker* [3] Hewart L.C.J., after stating the law laid down in *Rex v. Baskeville* (*supra*) regarding the evidence of accomplices, went on to say that the Court could not accept the contention that the evidence of a girl, the victim of the offence, is on the same plane with that of the evidence of an accomplice. The objection in such a case is not on grounds of complicity but because the case is one of an oath against an oath. Although the reason for requiring corroboration of the evidence of the complainant in a sexual offence is not the same as in the case of the evidence of an accomplice, the principles applicable to the question as to what in law amounts to corroboration as formulated in *Rex v. Baskerville* (*supra*) have been followed in all subsequent cases of sexual offences.

Lord Reading in his judgment states that the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. And that it would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. It must confirm in some material particular the evidence that the accused committed the crime. The law stated as follows by Baron Parke in *Rex. v. Stubbs* [4] was also adopted by Lord Reading:—

> "There has been a difference of opinion as to what corroboration is requisite: but my practice has always been to direct the Jury not to convict unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the identity of the prisoner."

In accepting this statement Lord Reading said that it does not mean that there must be confirmation of all the circumstances of the crime.

[1] *(1908) 2 K. B. 680.*
[2] *(1916) 2 K. B. 658.*
[3] *17 Cr. App. Rep. 46.*
[4] *169 E. R. 843.*

It is sufficient if there is confirmation as to a material circumstance of the crime and of the identity of the accused in relation thereto. The statement of Baron Parke was, as pointed out by Lord Reading, accepted by the other Judges and has been much relied upon in later cases. Thus in *Rex. v. Wilkes*[1] Alderson B. stated as follows :—

> "The confirmation which I always advise juries to require is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged."

In *Rex v. Farler*[2] Lord Abinger, C.B., stated that the corroboration ought to consist in some circumstance that affects the identity of the party accused.

Applying the principles formulated by Lord Reading after his examination of the law as expounded in previous cases, the question arises whether the evidence adduced in this case apart from that of the complainant confirms not only the circumstances of the crime of rape, but also the identity of the third accused. Does it identify the latter as the person who committed this particular offence? In this connection Counsel for the appellant has not maintained that the conviction of the appellant on the charge of abduction cannot be supported. The evidence of the complainant was to the effect that the first two accused dragged her from her house to the road where there was a bus. They forced her into this bus which was being driven by the appellant. She was then driven to a house in Puttalam where she was given in charge of two women. The three accused went away and returned in half an hour's time when they took the complainant away in the bus. After some time the bus was halted, the first two accused got out and left the appellant and the complainant in the bus. According to the latter's story the appellant then forcibly had sexual intercourse with her. The first two accused came back and got into the bus and they all returned to the house at Puttalam where the complainant asserts that the appellant again forcibly had sexual intercourse with her. The first accused is then also alleged to have had sexual intercourse with her after which the complainant was taken back to her house in the bus by the first and second accused. The story of the complainant as to her being dragged out of her house by the first and second accused and put in a bus is corroborated by her brother Lama Tissa and Peter Singho. Neither of these witnesses testify to the fact that the appellant was either the driver of the bus or in the bus at the time. The second accused, however, elected to give evidence on oath. He stated that on the night in question he went along with the first accused in a bus to the house of the complainant, who he alleged was a prostitute, as the result of prior arrangement. The bus, according to the second accused, was driven by the appellant. The complainant who came along willingly was then taken in the bus to the house at Puttalam. The second accused stated that after the party went into this house he left them there and does not know what happened afterwards. Can it be said that the evidence as to the abduction coupled with that of the second accused identifies in any way the appellant as the person who committed the offence of

[1] *173 E. R. 120.*

[2] *173 E. R. 418.*

rape? Does it show or tend to show that the story of the complainant that the appellant raped her is true? Apart from that story, the only evidence against him is the fact of abduction and that of the second accused, an accomplice. The case of *Rex. v. Ukku Banda*[2] is authority for the proposition that where sworn evidence is given by a co-accused the proper direction to give to the Jury in such cases is that they should be very careful in acting upon such evidence, in view of the temptation which always assails a prisoner to exculpate himself by inculpating another, yet, subject to such warning they must weigh and consider evidence so given against another prisoner. No such warning was given with regard to the acceptance of the second accused's evidence. Although the question of the presence or absence of corroboration is one of law to be decided by the Judge, in reality it becomes one of fact as to whether certain evidence if believed shows or tends to show that the story of the complainant that the appellant raped her is true. The majority of the Court are not satisfied that the fact of abduction or the evidence of the second accused does in fact tend to show that the appellant committed the offence of rape. It seems to us that these matters do little more than indicate that the appellant had an opportunity to commit or prepare to commit the offence. It is not enough that they merely render the story of the complainant more probable. In our view, therefore, the conviction and sentence of the appellant on counts 3 and 5 must be quashed. Similar considerations apply to the conviction and sentence of the first accused on count 4 which must also be quashed. Apart from this, the findings and sentences are confirmed.

Convictions on counts 3 & 5 set aside.