

[COURT OF CRIMINAL APPEAL]

1948 Present : Dias J. (President), Nagalingam and Gratiaen JJ.

THE KING v. ATUKORALE

*Application 162 of 1948**S. C. 67—M. C. Colombo, 6,755*

Court of Criminal Appeal—Charge of rape—Corroboration of story of prosecutrix—Must come from independent source—Complaint of prosecutrix to Police—Treated as corroboration—Misdirection.

Where an accused is charged with rape, corroboration of the story of the prosecutrix must come from some independent quarter and not from the prosecutrix herself. A complaint made by the prosecutrix to the Police in which she implicated the accused cannot be regarded as corroboration of her evidence.

APPEAL on the law and application for leave to appeal against conviction and sentence on matters other than law.

M. M. Kumarakulasingham, with *S. Saravanamuttu*, for the accused, appellants.

H. A. Wijemanne, Crown Counsel, for the Crown.

Cur. adv. vult.

August 30, 1948. GRATIAEN J.—

The appellant was charged with having committed rape on a woman named Nandawathie on July 22, 1947. He was found guilty of this offence on the unanimous verdict of the jury, and was sentenced by the learned Commissioner of Assize who presided at the trial to undergo a term of 5 years' rigorous imprisonment.

It was submitted to us that the conviction should be quashed on the ground that the learned Commissioner, in his charge to the Jury, had misdirected them on the question whether there was corroboration of the evidence of the prosecutrix Nandawathie. In our opinion this submission is entitled to succeed. Although the learned Judge warned the jury as he should have done, that it was unsafe to convict an accused person on a charge of rape unless the evidence of the prosecutrix was corroborated in some material particular, the effect of this warning was vitiated when he directed the jury on more than one occasion that they could regard as corroboration of Nandawathie's story certain items of evidence which are clearly not corroboration at all.

The corroboration which should be looked for in cases of this kind is some *independent* testimony which affects the accused by connecting or tending to connect him with the crime, and it is settled law that although the particulars of a complaint made by a prosecutrix shortly after the alleged offence may be given in evidence against the prisoner "as evidence of the consistency of her conduct with her evidence given at the trial", such complaint "cannot be regarded as corroboration in the proper sense in which that word is understood in cases of this kind, and it is a misdirection to refer to it as such". *Rex v. Lillyman*¹; *Rex v. Coulthead*². As was pointed out in *Rex v. Evans*³, such evidence is not corroboration because it lacks the essential quality of coming from an independent quarter. It is in this respect that the learned Commissioner's charge to the jury is at fault. He directed the jury that a complaint made by Nandawathie to the Police on July 27, 1947, in which she implicated the appellant, could be regarded as corroboration of her evidence. The jury were similarly informed that certain cryptic allegations made against the appellant in a letter written by Nandawathie to her mother on or about July 24, 1947, might be regarded as corroboration of her evidence. These misdirections in a charge which was in other respects not open to attack might well have turned the scales against the appellant when the jury retired to consider their verdict, and we are unanimously of the opinion that the conviction must therefore be quashed. The facts of this case are very similar to those in *Rex v. James Phillips*⁴, where the accused was convicted of rape after the jury had been directed that they could treat as corroboration evidence which was not in fact corroboration. As Lord Chief Justice Hewart, in pronouncing the judgment of the Court of Criminal Appeal, said, "the warning relating to the importance of corroboration was undoubtedly given, but the effect of that warning was more than taken away by the Commissioners' enumerating matters as corroboration which were not corroboration. In these circumstances it is not possible for the Court to say that, with a proper direction, the Jury must have come to the same conclusion". This affords, in our opinion, a complete answer to the submission of learned Crown Counsel who, while conceding that the jury had been misdirected, invited us to dismiss the appeal in terms of the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance on the ground that no substantive miscarriage of justice had actually occurred. It has been established in a long chain of authorities in England (*vide* Archbold's *Criminal Pleading and Practice*, 31st Edition, page 307) that when misdirection as to the law is established by the appellant, the conviction must be quashed unless the prosecution can show that on a right direction the jury "would or must inevitably have come to the same conclusion". We have examined the evidence in this case, and we are satisfied that the prosecution cannot reasonably invite us to hold that the appellant would or must inevitably have been convicted if the jury had been properly directed. The appeal is accordingly allowed and the conviction of the appellant is quashed.

Conviction quashed.

¹ (1896) 2 Q. B. 167.

² 24 Cr. A. R. 44.

³ 18 Cr. A. R. 123.

⁴ 18 Cr. A. R. 115.