

1932

*Present : Jayewardene A.J.*IYER *v.* HENDRICK APPU.378—*P. C. Colombo, 37,410.*

Evidence—Co-accused implicating another—Corroboration required from independent source—Previous statement of co-accused insufficient.

Where an accused person gives evidence implicating a co-accused, the evidence requisite for the corroboration of such testimony must proceed from an independent source.

Previous statements made by such co-accused are insufficient for such corroboration.

A PPEAL from a conviction by the Police Magistrate of Colombo.

H. V. Perera, for accused-appellant.

August 26, 1932. JAYEWARDENE A.J.—

In this case, two accused, Hendrick Appu and Velu, were charged with committing theft of half a Jarrah sleeper of the value of Rs. 5, belonging to the Ceylon Government Railway, and also with dishonestly retaining the stolen property. The learned Magistrate has convicted the first accused and acquitted the second accused holding that the second was only the agent of the first and is in an inferior position.

¹ 2 C. L. R., page 191.

² 1 A. C. R., page 72.

The facts in this case seem to be that Police Sergeant Iyer was on a visit to Maligawatta for an inquiry, and on his return at about 9.10 P.M., he met the two accused at a Railway tunnel near Maligawatta. The second accused was carrying a Railway sleeper and the first accused was following close behind. He arrested them both. The first accused lives about 20 yards from where he was arrested and the second accused near the level crossing at Dematagoda. The first accused is a Railway Shunter and the second accused is a Pointsman. According to Sergeant Iyer, after talking to the second accused he took both the accused to the Police station. He asked for their names only at that time and recorded their statements later at night about 2 A.M. at the Police station. He made this statement in cross-examination by counsel for the first accused. In answer to counsel for the second accused, he said, the second accused told him he was carrying the log at the request of the first accused to the first accused's house. I must take it from his previous statement that at the spot he only asked the accused for their names, but that the statements were made and recorded at the Police station later in the night. A peon called Makeen of the Electrical Department gives evidence for the prosecution. His evidence does not support the case much except that the first accused, he says, was standing behind when the Police Sergeant was questioning the second accused. He says, however, that all four of them were coming up on the same side as the Police Sergeant and following him. At the close of the case for the prosecution no evidence was called for the first accused, but the second accused gave evidence saying that the first accused told him to carry this piece of firewood to his house and that as he was going to the first accused's house, the Police Sergeant questioned him and that he said he was taking it to the first accused's house. It would seem that the first accused lives on the other side of the yard and he could have put the firewood over if he wished to on to his compound without the trouble of having to carry it, but the witness says he has to get over a big drain and that there is a watcher.

At the end of the case Mr. Advocate Jayatilleke contended that there was no case made out against the first accused. The learned Magistrate, however, convicted the first accused holding that the second accused at once told the Police Sergeant that he was carrying the log of wood for the first accused. He states that this evidence was got from the Police Sergeant in cross-examination by the second accused's Proctor and is, therefore, not only admissible, but is valuable corroboration of the second accused's evidence in this case. The Magistrate argues that the second accused's evidence, which is that of an accomplice, is thus corroborated and that, first, it is proved that the first accused was with him and second, that at once he told the Sergeant he was carrying the wood for the first accused. He says this is sufficient corroboration. He further says that the first accused said nothing at the time and he looks upon this also as a corroborating circumstance.

The question as to what is corroboration of an accomplice is a difficult one. Judges and juries do not usually convict on the evidence of an accomplice without corroboration. An accomplice's evidence is tainted and it has become a rule of practice of almost universal application that

an accomplice's evidence unless corroborated in material particulars should not be accepted. The corroboration required has to be independent of the accomplice or of the co-confessing prisoner. It has been held that previous statements made by the accomplice himself though consistent with the evidence given by him at the trial are insufficient corroboration for the reason that his statement whether made at the trial or before is still only the statement of an accomplice and is not improved by repetition or reiteration. In a recent case, *The King v. Whitehead*¹, Lord Hewart, Chief Justice of England, said in the Court of Criminal Appeal, Swift and Branson JJ. agreeing, "In order that evidence may amount to corroboration it must be extraneous to the witness who is to be corroborated", otherwise an accomplice has only to repeat his story in order to receive as many corroborations". This same idea seems to have been in the mind of Garvin J. in the case of *Dona Carlina v. Jayakoddy*² where he doubted whether a former statement of a mother was corroboration of her own evidence. I have myself considered the law in the case of *Bisomenika v. Danby*³. The point has arisen in India. In the Calcutta High Court it was held in the case of *Reg. v. Bepin Biswas*⁴ that the evidence which is used as corroboration must identify the prisoner with the commission of the offence with which he is charged and that the mere repetition of the same statement of facts without contradiction or material discrepancy although no doubt recognized by section 157 of the Evidence Act as some corroboration, must still be accepted with the greatest caution, and also that the exact correspondence in details even in statements made by an accomplice was not corroborative evidence such as is ordinarily required to make it safe to convict. He followed the case of *Reg. v. Malapabin Kapana*⁵ decided in the Bombay High Court where it was held that the evidence requisite for the corroboration of the testimony of an accomplice must proceed from an independent source, and previous statements made by the accomplice himself, though consistent with the evidence given by him at the trial, are insufficient for such corroboration. The language of Prinsep J. in *Reg. v. Bepin Biswas (supra)* is valuable in this connection—
 "The mere repetition of the same statement of facts without contradiction or material discrepancy is, no doubt, recognized by section 157 of the Evidence Act, as some corroboration of the truthfulness of that statement, but the Judge has lost sight of the fact that, from the position occupied by an approver witness, his evidence is necessarily regarded with very great suspicion as being tainted, and that although he may, on the main facts connected with the commission of the offence, be truthful and reliable, it is when he comes to implicate any particular person that his evidence should be accepted with the greatest caution. Nothing is easier for a man than to narrate events with accuracy, and yet more so, when coming to describe the acts of a particular person, to change his personality so as to exculpate a guilty friend, and to implicate an innocent person or an enemy.

¹ (1929) L. K. B. 99.

² (1931) 31 N. L. R. 165.

³ S. C. M. 18.8.1932.

⁴ 10 Cal. 970.

⁵ 11 Bom. H. C. R. 196.

It is for this reason that the rule stated in the case of *The Queen v. Nawab Jan*¹ has always been accepted. In that case Macpherson J. pointed out "there was no corroboration such as adds to the approver's evidence, against Nawab Jan; because there is no evidence, apart from that of the accomplice, which identifies the prisoner with the commission of the offence with which he is charged. Nothing which distinctly goes to prove that he was in any way connected with the commission of the principal offences. Facts which do not show the connection of the prisoner with the commission of the offence with which he is charged are no corroboration, in the sense in which the word is used in such cases, although they may tend to show that certain portions of what the accomplice says is true". He also referred to the cases of *The Queen v. Biakanthanath Banerjee*² and *The Queen v. Mohesh Biswas*³ as well as to *Reg. v. Malapabin Kapana* (*supra*).

In a case in the Madras High Court, *Muthukumaraswami v. King Emperor*⁴, there was a difference of opinion amongst the Judges, three of whom held that previous statements made legally amounted to corroboration. Benson J. seemed to think that the evidence would be important to prove that the witness had made a statement to the same effect if a suggestion were made by the defence that he was recently influenced to give his evidence. Some of the Judges, however, were of opinion that it would be a departure from the ordinary rule to admit such evidence. I do not think the Madras case can be considered an authority, particularly in view of the opinion of Lord Chief Justice Hewart in the Court of Criminal Appeal. Further, in the present case the learned Magistrate considers the fact that second accused at once told the Sergeant that he was carrying the wood for the first accused as a corroborating circumstance. From the evidence of the Sergeant it would seem that the statement was made and recorded, as I have already said, later in the night at 2 A.M., the arrest being at a little after 9 P.M.

I am of opinion that the corroborative evidence must be extraneous to the accomplice, that is to say, it must be the evidence of some person, not the accomplice, in some way implicating the accused and thus corroborating the accomplice. Such evidence in this case is wholly wanting. It was held in *Rex v. Gangappu*⁵ that the conviction founded solely on the confession of a co-accused could not be sustained and where the accomplice is a co-prisoner the corroboration should be cogent. *Rex v. Ganappubhap*⁶ referred to in *Chaudhari on Confessions*, p. 415.

The first accused has had long service and I am not at all satisfied that in this case he was taking part in this theft with the second accused. I could see from the record that the second accused felt, as the case was proceeding, his chances of escape improved the more he implicated the first accused. This is a dangerous feeling for an accomplice to entertain especially when he is also an accused.

In all the circumstances I do not think it is safe to convict the first accused. I set aside his conviction and acquit him.

Set aside.

¹ 8 W. R. 19.

² 3 B. L. R. 3 F. B.

³ 19 W. R. G. 16.

⁴ 35 Mad. 397.

⁵ 38 Bom. 156.

⁶ Unrep. Bom. C. 456.