RAMESHWAR

v.

THE STATE OF RAJASTHAN.

1951

Dec. 20.

[SAIYID FAZL ALI and VIVIAN BOSE JJ.]

Indian Penal Code (XLV of 1860), s. 376—Indian Evidence Act (I of 1872), s. 114(b) 118, 133, 157—Indian Oaths Act (X of 1873), ss. 5, 6, 13—Rape on young girl—Necessity of corroboration of girl's testimony—Statement made to mother—Whether sufficient corroboration—Rule as to corroboration—Nature and extent of corroboration necessary—Admissibility of statement made "at or about" the time of occurrence—Admissibility of evidence of child under 12 years.

An omission to administer an oath, even to an adult, goes only to the credibility of the witness and not his competency; so also an omission of the Court or the authority examining a child witness formally to record that in its opinion the witness understands the duty of speaking the truth though he does not understand the nature of an oath or affirmation, does not affect the admissibility of the evidence given by that witness.

Though it is desirable that judges and magistrates should always record their opinion when a child is to be examined that the child understands the duty of speaking the truth, and state why they think so, whether a magistrate or judge was really of that opinion can be gathered from the circumstances when there is no formal certificate to that effect on the record.

Mohamed Sugal Esa v. *The King* (A.I.R. 1946 P.C. 3), *R.* v. *Sewa Bhogta* (14 Beng. L.R. 294 F.N.), *Samujh* v. *Emperor* (1907) (10 O. C. 337) referred to.

Though a woman who has been raped is not an accomplice, her evidence has been treated by the Courts on somewhat similar lines, and the rule which requires corroboration of such evidence save in exceptional circumstances has now hardened into law.

The rule laid down in *King* v. *Baskerville* (L. R. 1916, 2 K.B. 658) with regard to the admissibility of the uncorroborated evidence of an accomplice is the law in India also so far as accomplices are concerned and it is not any higher in the case of sexual offences. The only clarification of the rule that is necessary for the purposes of India is where this class of offence is tried by a judge without the aid of a jury. In such cases it is necessary that the judge should give some indication in his judgment that he has had the rule of caution in his mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case. There is, however, no rule of law or

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practice that there must in every case be corroboration before a conviction can be allowed to stand.

The view that though corroboration should ordinarily be required in the case of a grown-up woman, it is unnecessary in the case of a child of tender years is not correct. The true position is that in every case of this type the rule about the advisability of corroboration should be present to the mind of the judge; whether corroboration is unnecessary is a question of fact in every case.

Bishram v. *Emperor* (A.I.R. 1944 Nag. 363) not approved; *Mohamed Sugal Esa* v. *The King* (A.I.R. 1946 P.C. 3) followed.

The nature and the extent of the corroboration that is required when it is not considered safe to dispense with it, must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. It is however clear (i) that it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or accomplice, should itself be sufficient to sustain conviction; all that is required is that there must be "some additional evidence rendering it probable that the story of the accomplice (or the complainant) is true and that it is reasonably safe to act upon it."; (ii) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect the accused with it; (iii) the corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another accomplice; (iv) the corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

A previous statement of an accomplice or a complainant is admissible as evidence of conduct; it is also admissible as corroborative evidence provided it fulfills the conditions laid down in sec. 157 of the Evidence Act.

The main test as to whether a previous statement was made "at or about the time when the fact took place", within the meaning of sec. 157, Evidence Act, is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was an opportunity for tutoring or concoction.

Where a person was charged with having committed rape upon a girl eight years of age and the only evidence to corroborate the testimony of the girl connecting the accused with the crime was a statement made by her to her mother some four hours after the incident, that she had been raped by the accused: *Held*, that in the circumstances of the case the testimony of the mother was admissible as independent corroborative evidence and

the girl's previous statement was sufficient corroboration of the girl's testimony for convicting the accused.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2 of 1951. This was an appeal under art. 134 (1) (c) of the Constitution from the Judgment and Order of the High Court of Rajasthan (Nawal Kishore C.J., and Mehta J.) dated 16th October, 1950, in Criminal Appeal No. 63 of Samvat 2005, revising an order of acquittal of the Sessions Judge, Jaipur, in Criminal Appeal Case No. 200 of Samvat 2004, and convicting the accused of an affence under sec. 376 of the Indian Penal Code. The material facts are stated in the judgment.

K. N. Aggarwala, for the accused.

G. S. Mathur, for the State of Rajasthan.

1951. December 20. BOSE J. delivered judgment as follows. FAZL ALI J. agreed.

BOSE J.—The appellant Remeshwar was charged with committing rape on a young girl Mst. Purni, eight years of age. He was committed to Sessions and was convicted by the Assistant Sessions Judge, Sawai Jaipur, and sentenced to one year's rigorous imprisonment and a fine of Rs. 250.

An appeal was made to the Sessions Judge at Jaipur, that being the appropriate appellate tribunal in that area. The learned Sessions Judge held that the evidence was sufficient for moral conviction but fell short of legal proof because, in his opinion, the law requires corroboration of the story of the prosecution in such cases as a matter of precaution and the corroborative evidence, in so far as it sought to connect the appellant with the crime, was legally insufficient though morally enough. He was satisfied however that the girl had been raped by somebody. Accordingly, he acquitted the accused giving him the benefit of the doubt.

The State of Sawai Jaipur and Gangapur appealed against the acquittal to the High Court at Jaipur.

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The learned High Court Judges held that the law requires corroboration in such cases but held that the girl's statement made to her mother was legally admissible as corroboration and considering that sufficient they set aside the acquittal and restored the conviction and sentence.

The High Court later granted leave to appeal under article 134(1) (c) of the Constitution as the case involved questions of law of general importance.

The first point taken before us related to the admissibility of the evidence of the girl herself. Her age was stated to be seven or eight years at the time of the examination by the learned Assistant Sessions Judge who recorded her testimony. He certified that she did not understand the sancity of an oath and accordingly did not administer one to her. He did not certify the the child understood the duty of speaking the truth.

The proviso to section 5 of the Indian Oaths Act, 1873, prescribes that—"Provided that where the witness is a child under twelve years of age, and the Court or person having authority to examine such witness is of opinion that, though he understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of section 6 shall not apply to such witness, but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth."

The question is whether the opinion referred to must be formally recorded or whether it can be inferred from the circumstances in which the deposition was taken.

The proviso quoted above must be read along with section 118 of the Evidence Act and section 13 of the Oaths Act. In my opinion, an omission to administer an oath, even to an adult, goes only to the credibility of the witness and not his competency. The question of competency is dealt with in section 118. Every

witness is competent unless the Court considers he is prevented from understanding the questions put to him, or from giving rational answers by reason of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. It will be observed that there is always competency in fact *unless the court considers otherwise.* No other ground of incompetency is given, therefore, unless the Oaths Act adds additional grounds of incompetency it is evident that section 118 must prevail.

Now the Oaths Act does not deal with competency. Its main object is to render persons who give false evidence liable to prosecution. It is true a subsidiary object is to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth, but in view of section 118 these matters only touch credibility and not admissibility. In my opinion, section 13 of the Oaths Act places this beyond doubt. It states—

"No omission to take any oath or make any affirmation.....and no irregularity whatever, in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever....."

Section 5 is the main provision regarding the administration of oaths. The proviso only sets out the cases in which the oath is not to be administered. If, therefore, an omission to take the oath does not affect the admissibility of the evidence, it follows that an irregularity of the kind we are considering which arises out of the proviso cannot affect the admissibility either. Section 118 remains and *unless the judge considers otherwise* the witness is competent.

I do not think it will be useful to consider English authorities on the point because we are governed here by the terms of the various sections I have referred to. But a decision of the Judicial Committee of the Privy Council is in point. Their Lordships stated in *Mohamed Sugal Esa* v. *The King*(1):—

(1) A.I.R. 1946 P.C.3 at 5.

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"Section 13, Oaths Act, is quite unqualified in its terms and there is nothing to suggest that it is to apply only where the omission to administer the oath occurs *per incuriam*. If that had been the intention of the Legislature, it would have been simple to insert words in the section to that effect .....It may be observed that this question can no longer arise in India because in 1939 the Legislature passed the Oaths (Amendment) Act (Act XXXIX of 1939) which settles the law in accordance with the Bengal and Oudh decisions referred to above."

The decisions to which their Lordships refer are *R* v. *Sewa Bhogta* (1) and *Ram Samujh* v. *Emperor*(2). The decisions there were that the section being unqualified in terms did apply to a case where the Court accepted the evidence of a child to whom the oath was not administered on the ground that the witness did not understand its nature. The principle of the decisions applies here because, as their Lordships observe, the section is unqualified in its terms.

I would add however that it is desirable that judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the magistrate or judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate. In the present case, it is plain that the learned Judge had the proviso in mind because he certified that the witness does not understand the nature of an oath and so did not administer one but despite that went on to take her evidence. It is also an important fact that the accused, who was represented by counsel, did not object. Had he raised the point the Judge would doubtless have made a good the omission. I am of opinion that Mst. Purni was a competent witness and that her evidence is admissible. In

(1) 14 Beng. L.R. 294 F.N. (2) (1907) 10 O.C. 337

the Privy Council case which I have just cited, their Lordships said—

"It is not to be supposed that any judge would accept as a witness a person who he considered was incapable not only of understanding the nature of an oath but also the necessity of speaking the truth when examined as a witness."

That is the very point here. One can presume that the learned Judge had that in mind from the fact that he examined the child after referring to a fact which arises out of the proviso.

As regards her credibility, the learned trial Judge, who recorded her evidence and saw her in the box, has believed her, so has the High Court; and it is important to note that the learned Sessions Judge who aquitted the accused has not disbelieved her. On the contrary he says he is morally convinced. All he says is that in the absence of corroboration it will be unsafe to convict because the Privy Council and other cases advise corroboration as a matter of prudence.

We were taken carefully through the evidence, as elaborately as in a court of first appeal. I am of opinion that the learned High Court Judges were fully justified in accepting the evidence of Purni and in believing her mother Mst. Ghisi. I consider it unnecessary to recapitulate the reasons. After the careful analysis given by three Courts it is sufficient to say that I agree with the learned High Court Judges. We are left therefore with the questions of law.

The first question is whether the law requires corroboration in these cases. Now the Evidence Act nowhere says so. On the other hand, when dealing with the testimony of an accomplice, though it says in section 114(b) that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars, it makes it clear in section 133 that—

"An accomplice shall be a competent witness against an accused person; and a conviction is not

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illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

Now a woman who has been raped is not an accomplice. If she was ravished she is the victim of an outrage. If she consented there is no offence unless she is a married woman, in which case questions of adultery may arise. But adultery presupposes consent and so is not on the same footing as rape. In the case of a girl who is below the age of consent, her consent will not matter so far as the offence of rape is concerned, but if she consented her testimony will naturally be as suspect as that of an accomplice. So also in the case of unnatural offences. But in all these cases a large volume of case law has grown up which treats the evidence of the complainant somewhat along the same lines as accomplice evidence though often for widely differing reasons and the position now reached is that the rule about corroboration has hardened into one of law. But it is important to understand exactly what the rule is and what the expression "hardened into a rule of law" means.

In my judgment, this branch of the law is the same as in England and I am of opinion that the lucid exposition of it given by Lord Reading, the Lord Chief Justice of England, in *The King* v. *Baskerville*(1) cannot be bettered.

In that case, Baskerville had been convicted of having committed acts of gross indecency with the two boys. (There the boys were accomplices because they were freely consenting parties and there was no use of force). The learned Chief Justice says at page 663:—

"There is no doubt that the uncorroborated evidence of an accomplice is admissible in law.....But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is

(1) [1916] 2 K. B. 658.

within their legal province to convict upon such unconfirmed evidence....

This rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal came into operation this Court has held that, in the absence of such a warning by the judge, the conviction must be quashed....If after the proper caution by the judge the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated."

That, in my opinion, is exactly the law in India so far as accomplices are concerned and it is certainly not any higher in the case of sexual offences. The only clarification necessary for purposes of this country is where this class of offence is sometimes tried by a judge without the aid of a jury. In these cases it is necessary that the judge should give some indication in his judgment that he has had this rule of caution in mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case. I am of opinion that the learned High Court Judges were wrong in thinking that they could not, as a matter of law, convict without corroboration.

There is a class of cases which considers that though corroboration should ordinarily be required in the case of a grown-up woman it is unnecessary in the case of a child of tender years. *Bishram* v. *Emperor*(1) is typical of that point of view. On the other hand, the Privy Council has said in *Mohamed Sugal Esa* v. *The King*(2) that as a matter of prudence a conviction should not ordinarily be based on the uncorroborated evidence of a child witness. In my opinion, the true rule is that in every case of this type the rule about the advisability of corroboration should be present to the mind of the judge. In a jury case he must tell the

(1) A.I.R. 1944 Nag. 363. (2) A.I.R. 1946 P. C. 3 at 5.

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jury of it and in a non-jury case he must show that it is present to his mind by indicating that in his judgment. But he should also point out that corroboration can be dispensed with if, in the particular circumstances of the case before him, either the jury, or, when there is no jury, he himself, is satisfied that it is safe to do so. The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained. The tender years of the child, *coupled with other circumstances appearing in the case,* such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.

I turn next to the nature and extent of the corroboration required when it is not considered safe to dispense with it. Here, again, the rules are lucidly expounded by Lord Reading in *Baskerville's* case(1) at pages 664 to 669. It would be impossible indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear.

First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the

(1) [1916] 2 K. B. 658.

accomplice, should in itself be sufficient to sustain conviction. As Lord Reading says—

"Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony."

All that is required is that there must be "some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it."

Secondly, the independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime. This does not mean that the corroboration as to identity must extend to all the circumstances necessary to identify the accused with the offence. Again, all that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness's story that the accused was the one, or among those, who committed the offence. The reason for this part of the rule is that—

"a man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all... It would not at all tend to show that the party accused participated in it."

Thirdly, the corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. But of course the circumstances may be such as to make it safe to dispense with the necessity of corroboration and in those special circumstances a conviction so based would not be illegal. I say this because it was contended that the mother in this case was not an independent source.

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Fourthly, the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. Were it otherwise, "many crimes which are usually committed between accomplices in secret, such as incest, offences with females" (or unnatural offences) "could never be brought to justice."

Next, I turn to another aspect of the case. The learned High Court Judges have used Mst. Purni's statement to her mother as corroboration of her statement. The question arises, can the previous statement of an accomplice, or a complainant, be accepted as corroboration?

That the evidence is legally admissible as evidence of conduct is indisputable because of Illustration (j) to section 8 of the Evidence Act which is in these terms:

"The question is whether A was ravished. The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made are relevant."

But that is not the whole problem, for we are concerned here not only with its legal admissibility and relevancy as to conduct but as to its admissibility for a particular purpose, namely *corroboration*. The answer to that is to be found in section 157 of the Evidence Act which lays down the law for India.

Section 157 states that—

"In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

The section makes no exceptions, therefore, provided the condition prescribed, that is to say, "at or about the time etc." are fulfilled there can be no doubt that such a statement is legally admissible in India *as corroboration*. The weight to be attached to it is, of course, another matter and it may be that in some

cases the evidentiary value of two statements emanating from the same tainted source may not be high, but in view of section 118 its legal admissibility *as corroboration* cannot be questioned. To state this is, however, no more than to emphasise that there is no rule of thumb in these cases. When corroborative evidence is produced it also has to be weighed and in a given case, as with other evidence, even though it is legally admissible for the purpose on hand its weight may be nil. On the other hand, seeing that corroboration is not essential to a conviction, conduct of this kind may be more than enough in itself to justify acceptance of the complainant's story. It all depends on the facts of the case.

In the present case, Mst. Purni told her mother about the incident about four hours after it occurred. The reason for the delay was that her mother was not at home when she went there. She says that when she went home she lay down and went to sleep and that when her mother returned she asked her why she was sleeping, and then she told her mother what had happened. Her mother tells much the same story. She says she had gone out to her field in the morning and did not return till about 4 p.m. When she reached home she found her daughter lying there weeping. She has been believed by the learned trial Judge as also by the High Court and has not been disbelieved by the learned Sessions Judge. All he says is that she is not an "independent" witness and is therefore not sufficient for corroboration.

The first question is whether this delay fulfills the "at or about" condition. In my opinion, here also there can be no hard and fast rule. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction. It was suggested that the child could have complained to some women who were working in the neighbourhood, but that would not be natural in a child. She would be frightened and her first instinct would be to run home to her mother. The High Court

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was satisfied on these points and so am I. Consequently, the matter does fall within the ambit of section 157 read with section 8, Illustration (J).

The next question is whether the mother can be regarded as an "independent" witness. So far as this case is concerned, I have no doubt on that score. It may be that all mothers may not be sufficiently independent to fulfill the requirements of the corroboration rule but there is no legal bar to exclude them from its operation merely on the ground of their relationship. Independent merely means independent of sources which are likely to be tainted. In the absence of enmity against the accused there is no reason why she should implicate him falsely. It is true the accused suggested that they were on bad terms but that has not been believed by anyone.

The third question is whether there is independent corroboration connecting the accused with the crime. The only corroboration relied on for that is the previous statement of the child to her mother. That might not always be enough but this rule can be waived in a given case just as much as the necessity for any corroboration at all. In the present case, the learned High Court Judges would have acted on the uncorroborrated testimony of the girl had they not felt pressed by the corroboration rule. Viewing all the circumstances I am satisfied that the High Court was right. I am satisfied that *in this case,* considering the conduct of the girl and her mother from start to finish, no corroboration beyond the statement of the child to her mother was necessary. I am satisfied that the High Court was right in holding that that was enough to make it safe to act on her testimony.

I would dismiss the appeal and direct the appellant to surrender to his bail in accordance with the terms of his bond, serve out his sentence and pay the fine.

FAZL ALI J.—I agree. *Appeal dismissed.*

Agent for the appellant: *P. C. Agarwal.*

Agent for the respondent: *P. A. Mehta.*