

## RAM KEWAL

v.

## REGINAM

[SUPREME COURT, 1963 (Hammett Ag. C.J.),  
27th September, 15th November]

## Appellate Jurisdiction

Criminal law—evidence—corroboration—essentials of—indecent assault—Penal Code (Cap. 8) s. 145 (1).

The appellant was convicted of indecent assault on a girl aged ten years. The case rested almost entirely upon her unsworn testimony and traces of soil found on the appellant's clothing similar to soil found at the place of the alleged assault and also on the complainant's clothing were relied upon as corroboration.

*Held.*—That corroboration in a sexual case based on the unsworn testimony of a child, must go to the allegation of assault, to the alleged indecency and to the identity of the perpetrator, and that the corroboration in the present case went only to the third of these matters.

Cases applied:

*R. v. Redpath* (1962) 46 Cr. App. R. 319; [1962] S.J. 412; *R. v. Farrelly* [1954] N.Z.L.R. 1.

*Appeal against conviction.*

*Patel* for the appellant.

*Palmer* for the Crown.

HAMMETT Ag. C.J. [15th November, 1963]—

The appellant was convicted by the Magistrate's Court, Lautoka, of indecent assault on a girl aged 10 years contrary to section 145 (1) of the Penal Code and sentenced to 18 months' imprisonment.

He appealed against both conviction and sentence on the following grounds:

(1) That the learned Magistrate erred in inferring that the mud on Exhibits "A", "C" and "D" were similar, such inference being unreasonable and not supported by the evidence.

(2) That the learned Magistrate erred in Law in holding that the mud found in Exhibit "A" was sufficient corroboration of the evidence of Shiu Kumari the prosecutrix on which to found a conviction.

(3) That the sentence is excessive.

The case against the appellant rested almost entirely on the unsworn testimony of the girl aged 10. Her evidence was to the effect that on her way to school soon after 8 a.m. on 22nd July, 1963, she met the accused who spoke to her. She says he then caught hold of her and took her into the bush where he laid her on her back and removed her underpants. She further says that when she shouted "Let me go" he pushed her away and said "Go" and that she left the scene.

A sample of soil taken from the place where the girl alleged the assault took place was found by the Government Analyst to be similar to traces of soil found on the girl's clothing and on the appellant's clothing.

The appellant lived some 10 chains from the scene and on his trousers no traces of soil were found similar to the soil in his own garden.

The Court below held that the only evidence capable of corroborating the girl's version was the evidence of the similarity of the soil on the appellant's trousers to the sample of the soil at the scene of the alleged assault.

After reviewing the evidence carefully, the learned trial Senior Magistrate convicted the appellant.

The conviction in this case is based on the unsworn evidence of this young girl. Her evidence was, of course, admissible under the provisions of section 24 of the Children and Young Persons Ordinance (Cap. 10) of which proviso (a) reads:

"(a) a person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused."

That her evidence did, in fact, require corroboration was clearly appreciated by the Court below. The extent of such corroboration was not, however, referred to in the Judgment. This being a case of a sexual assault, and particularly as it was based on the unsworn testimony of a child, it was required that there be corroboration of all the following matters:—

Firstly of the allegation that an assault had taken place;

Secondly of the identity of the appellant as the perpetrator of the assault; and

Thirdly of the indecency alleged by the female complainant.

See *R. v. Redpath* (1962) 46 Cr. All R. 319 and *R. v. Farrelly* [1954] N.Z.L.R. 1.

In this case the appellant denied that he was present at the scene or that he had assaulted the girl in any way. It was essential therefore that there be corroboration, not only of the girl's evidence of the identity of her assailant, but also of the indecency alleged.

The Court below held that the evidence of the similarity of soil samples taken from the scene and found on the appellant's clothing afforded the only corroboration of the girl's evidence. If it could amount to corroboration at all, all it could corroborate was the girl's evidence that the appellant came to the scene where she alleged she was assaulted. It would only therefore be corroboration of her evidence as to identity. It could not, and did not, corroborate her testimony that she was assaulted. Further it could not, and did not, corroborate her evidence of the alleged indecency involved.

I have been invited by the Crown to treat some of the other evidence before the Court below as affording corroboration. Even if this evidence was capable of affording corroboration I hardly think this would be an appropriate case in which an Appeal Court should treat it as such. I say this because it was clearly not believed to be such nor was it treated as such by the learned trial Magistrate who expressly found that the only evidence capable of corroborating the girl's version was that of the similarity of the soils at the scene and on the appellant's clothing.

In these circumstances it is not necessary for me to consider further the appellant's contention that the evidence which was treated by the Court below as corroboration was not, in law, in the particular circumstances of this case capable of affording any corroboration at all.

For these reasons the appeal is allowed, and the conviction and sentence set aside.

*Appeal allowed.*

Solicitor for the appellant: *R. D. Patel.*

*Solicitor-General* for the Crown.