A

ATTORNEY-GENERAL

v.

B

MADAN GOPAL

[SUPREME COURT, 1967 (Knox-Mawer J.), 3rd, 29th March]

Appellate Jurisdiction

Criminal law—standard of proof—criminal case—beyond reasonable doubt—not beyond the "slightest" doubt—Penal Code (Cap. 8) s.145(5)—Criminal Procedure Code (Cap. 9) ss.199, 201, 205.

C *Criminal law—evidence and proof—corroboration—when lie by accused can amount to.*

Criminal law—evidence and proof—identification parade—variation from normal practice—whether identification wholly vitiated.

It is an error in law for a court to direct itself in a criminal trial that if there is the slightest doubt of guilt that doubt must be resolved in the D accused's favour. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt.

Where particular evidence requires corroboration a lie told by an accused person to the police does not necessarily amount to corroboration, but may do so if it is of such a nature and made in such circumstances as to lead to an inference in support of the evidence of which corroboration E is required, or if it gives to a proved opportunity a complexion different from that which it would have borne had no such lie been told.

Where a child complainant at an identification parade consisting of ten persons, stood opposite the fourth or fifth person in the parade, identified the third person in the line and burst into tears, but was not conducted along the remainder of the line, in which the then primary police suspect F was standing at number ten, it was an error in law for the magistrate to regard the identification as wholly vitiated by impropriety in the conduct of the parade. What happened could be the subject of comment by the defence to be weighed by the court along with all other relevant considerations.

Cases referred to: *Miller v. Minister of Pensions* [1947] 2 All E.R.372; 177 L.T.536: *Credland v. Knowler* (1951) 35 Cr.App.R.48.

G

Appeal by case stated against a decision of the Magistrate's Court.

B. A. Palmer for the appellant.

S. M. Koya for the respondent.

KNOX-MAWER J.: [29th March 1967]—

H

In this case the Crown appealed by way of case stated against the decision of the Magistrates Court of the First Class Lautoka in its Criminal Jurisdiction. I have already, by Order dated 3rd March 1967, remitted the case for retrial. I now give the reasons for my decision.

The Respondent pleaded not guilty to a charge of indecent assault contrary to Section 145 (5) Penal Code, of which the particulars of offence read as follow :—

> MADAN GOPAL s/o Ram Raj, on the 21st day of July, 1966, at Waiyavi, Lautoka in the Western Division unlawfully and indecently assaulted one SABITA DEVI d/o Hari Prasad a girl aged 7 years and 5 months.

It was adduced in evidence that during the course of the Police investigation the complainant had attended an identification parade. In the parade, along with the Respondent, there were nine other Indian males similar to him in height and build. The Respondent had first declined to participate in the parade and subsequently agreed. He stood third from the right in the line. The then primary Police suspect, one Prahalad, stood in the tenth position in the line. When the complainant was brought to the parade she stood five yards away, almost opposite to the fourth or fifth man in the parade from the right. She was asked if she could identify the man who had assaulted her. The complainant looked at the first and second men and then pointed at the Respondent. She burst into tears and declined to touch the Respondent who said to her "Muni come I won't hit you" but she, visibly frightened, said "No, you will hit me". The complainant was not taken from one end of the parade to the other. She was not shown the suspect, Prahalad, who looked like the accused.

In the course of his Judgment the learned trial Magistrate stated "The identification parade was not conducted properly and this gives the Court a reasonable doubt". The first question stated for the opinion of this Court reads :—

1. Did this Court err in law in finding that the identification of the respondent at the formal identification parade was vitiated due to the "improper conduct" of the parade?

In my view there was no such impropriety in the conduct of the identification parade as justified, per se, an acquittal of the appellant. What happened at the identification parade could properly form the subject of comment by the learned Defence Counsel, and this would be weighed, along with all other relevant considerations, by the trial Court when arriving at a decision. Here, as I have indicated, the learned Magistrate when much further. He held that the identification must necessarily be regarded as wholly vitiated and that for this reason alone the appellant had to be acquitted. In so doing I consider he erred in law, and the answer to the first question is therefore in the affirmative.

The next three questions can be disposed of together. They read as follows:—

2. Did this Court err in law in directing itself that if in criminal cases there is a slightest doubt, that doubt must be resolved in the accused's favour?

3. Did this Court err in law in concluding that the prosecution had not proved the respondent's guilt beyond reasonable doubt because there remained the slightest doubt that he might be innocent?

4. Did this Court err in law when, in considering the standard of proof to be discharged by the prosecution it equated the term a "reasonable doubt", with the expression "a slightest doubt"?

Learned Counsel for the Respondent has conceded that the learned trial Magistrate here misdirected himself as to the quantum of proof required in a criminal prosecution. The expression "slightest doubt", as used here, must be equated with the expression "shadow of a doubt". The degree of cogency required of evidence in a criminal case in order to establish guilt was stated by Denning J., (as he then was) in *Miller v. Minister of Pensions* [1947] 2 All E.R.372 at page 373 :—

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice."

Applying this principle to questions 2, 3, and 4, I answer each of them in the affirmative.

The next question, question 5, reads :—

5. Did this Court err in law in failing to direct itself that corroboration of SABITA DEVI's identification of the respondent as the person who indecently assaulted her, might be found in a false denial of opportunity to commit the offence which the respondent made to the Police prior to his arrest?

It has been laid down in the well-known authority *Credland v. Knowler* (1951) 35 Cr.App.R.48 that where particular evidence requires corroboration, a lie told by the defendant to the police or before the commencement of the proceedings does not necessarily amount to corroboration. It may do so, and whether it does or not must depend on all the circumstances of the particular case. Such a lie will amount to corroboration if it is of such a nature, and made in such circumstances, as to lead to an inference in support of the evidence of the complainant, or if it gives to a proved opportunity a different complexion from what that opportunity would have borne had no such lie been told. Thus in the present case the trial Court should first have decided whether or not it was established beyond reasonable doubt that the Respondent had lied. Assuming this was established, then the Court should next have considered whether this afforded corroboration of the complainant's evidence.

The sixth question stated by the Court below asks :—

6. Did this Court fail to evaluate material evidence adduced at the trial?

The answer again is in the affirmative. There was no evaluation by the learned trial Magistrate of the evidence of the witnesses. The learned Magistrate based his decision solely upon his view of the identification parade discussed above.

The final question reads :—

7. Did this Court err in law in not hearing the two final defence witnesses who the respondent wished to call, in his defence? A

In telling the respondent that there was no need for him to call his two final defence witnesses, the learned Magistrate was, of course, indicating to him that he was to be acquitted in any event and therefore this was unnecessary. However, it should be noted that Sections 199, 201 and 206 of the Criminal Procedure Code require the Magistrates Court to hear the evidence of all witnesses called by the prosecutor and the accused person. At the re-trial, the Court should hear the evidence of all the witnesses the Respondent may wish to call. B

Retrial ordered.