BIR CHAND

A **v.**

THE STATE

[HIGH COURT, 1996 (Fatiaki J), 12 August]

Appellate Jurisdiction

B *Crime: evidence and proof- indecently annoying a female- relevance of complainant's state of mind- need for corroboration. Penal Code (Cap. 17) Section 154 (4).*

On behalf of an appellant it was argued first, that the prosecution had failed to prove that the appellant's indecent action had in fact annoyed the complainant
C and secondly, that the complainant's evidence had not been corroborated. The High Court HELD: (i) that the accused's actions had to be viewed objectively and not subjectively but (ii) that the complainant's daughter was not an independent witness and could not provide corroboration.

Cases cited:

D *Boardman v. D.P.P.* (1974) 60 Cr. App. R. 165
D.P.P. v. Hester (1973) 57 Cr. App. R. 212
R. v. Baskerville (1916) 12 Cr. App. R. 81
R v. Cyril Mayling (1963) 47 Cr. App. R. 102
R. v. Prater (1959) 44 Cr. App. R. 83
R. v. Redpath (1962) 46 Cr. App. R. 319

E

Appeal against conviction and sentence in the Magistrates' Court.

A. Sen for Appellant
Ms. L. Laveti for Respondent

Fatiaki J:

F

On the 10th of January 1996 the appellant was convicted after trial in the Labasa Magistrates' Court of an offence of Indecently Insulting a Female and sentenced to 6 months imprisonment. On 7th February, 1996 Pathik J. released the appellant on bail pending the determination of his appeal against both the conviction and sentence.

G

The grounds of appeal are as follows:

"1. THAT the Learned Trial Magistrate erred in law and fact in convicting the appellant when there was no evidence that the accused had indecently annoyed a female or the female was annoyed by the actions of the accused.

2. THAT the Learned trial Magistrate erred in convicting the

Appellant when the evidence was:

(a) insufficient for the required standard of proof ; and

(b) there was insufficient corroboration.

3. THAT the verdict of the trial Magistrate is unreasonable and can not be supported having regard to the evidence before him.

4. THAT the sentence imposed by the trial Magistrate is harsh and excessive having regard to the nature of the offence."

Before dealing with the grounds of appeal however it is necessary to briefly canvass the evidence in the lower Court. The prosecution case was that on the day in question the appellant in full view of the complainant and her daughter had exposed to them his pubic hair and uttered indecent suggestions with the intention of insulting the complainant's modesty. The appellant for his part denied in his police interview that any such thing occurred. He further attributed the complainant's false complaint to the long-standing animosity that existed between their respective families.

I turn next to the grounds of appeal in respect of which the submissions of counsel for the appellant were generally confined to grounds 1, 2(b) and 4.

Firstly ground (1). In this regard counsel argued that the prosecution's evidence failed to establish that the complainant was annoyed or insulted by the appellant's actions and much was made of the complainant's reaction and response to them.

In particular, counsel emphasised the complainant's own highly vulgar retort(s) to the appellant in the hearing and presence of her daughters and her failure to immediately leave or turn away, and counsel asks rhetorically, are those the actions and behaviour of a modest woman whose modesty has been insulted ? Attractive as the submission may at first appear, it is in my view, wholly misconceived.

The offence under the first limb of Section 154(4) of the Penal Code (Cap.17) does not in terms require positive proof that the complainant did in fact feel insulted or annoyed by the accused's conduct and utterances, although in the present case the complainant was recorded in the trial as saying in her examination-in-chief : "I felt bad and angry"; Nor in my view is it a necessary requirement of the section that the complainant should be a woman or girl of modest or virtuous character. The law exists for the protection of all women both wanton and virtuous.

In my view it is not so much the effect that an accused's actions or utterances might or might not have on the particular complainant that matters, rather it is his intent at the time which is relevant, and this may be inferred from his words

and actions which must of necessity be of a nature and gravity which, when viewed objectively, would tend "to insult the modesty of any woman or girl." (my underlining)

Were this not so and the sole test was the subjective reaction of the complainant to the accused's actions and utterances, then the offence would depend not on the accused's actions and words however indecent or obscene; lewd or vulgar they may be according to the common and accepted norms of behaviour and mores in society, but on the uncertain variable test depending upon the sensitivity or upbringing of the particular woman. I cannot accept that this could have been the intention of the Legislature in enacting Section 154(4) of the Penal Code which created an offence additional to Indecent Assault.

I am fortified in my view by the judgment of the Court of Criminal Appeal (U.K.) in R. v. Cyril Mayling (1963) 47 Cr. App. R. 102 where the Court in rejecting a submission that it was a requirement that the act of indecency in fact disgusted and annoyed persons within whose purview the behaviour was committed, said at p.108:

> "... in the judgment of this Court, it was not necessary for the prosecution to go further and prove actual disgust or annoyance on the part of any observer ... if positive disgust or annoyance had to be proved, it is difficult to see how the offence could be established by evidence that persons could have seen the act, but did not in fact do so."

A fortiori where the victim is an immature infant girl of tender years or where the woman is sleeping and did not wake up or was under anaesthesia or in a stupor and therefore unaware of the accused's actions and utterances.

Needless to say the offence created by Section 154(4) is as much in the interest of the woman or girl concerned as in the interest of public morality and decent behaviour, and therefore, any interpretation which would tend to promote such objects ought to be preferred in the absence of convincing reasons to the contrary.

In the present case there can be little doubt that the public exposure of a man's pubic hair directed at a woman and accompanied by indecent suggestions and language is an indecent act clearly intended to insult the modesty of a woman and if accepted by the trial magistrate is an offence contrary to Section 154(4) of the Penal Code, whatever might be the reaction or effect on the particular woman.

There is no merit whatsoever in the appellant's first ground of appeal which is accordingly dismissed.

As for ground 2(b), counsel for the appellant forcefully submits that the complaint in this case being of a sexual nature and given the accepted long-standing animosity between the families of the parties, the trial magistrate ought to have warned himself and looked for corroboration of the complainant's evidence.

Undoubtedly experience shows that accusations connected with indecency and sexual immorality are very easy to make, and when made, very difficult to rebut and Courts recognising this, have developed rules of law and practice that the tribunal in such a case must be warned that it is dangerous to convict upon the evidence of the complainant alone unless it is corroborated or confirmed in material particulars. (per Lord Morris in D.P.P. v. Hester (1973) 57 Cr. App. R. 212 at 219.)

In this regard the trial magistrate states in his judgment (at p.33 of the record) :

> "Her daughter Praveen Lata's evidence corroborates this evidence (of the complainant) in all material particulars, as regards the words uttered by the accused and the act done by the accused. There is only one discrepancy which is as regards the underwear."

and later (at p.35 of the record) :

> "There has been previous enmity between the parties due to a land dispute. There had been earlier complaints to police too. Previous enmity is a double-edged weapon which cuts both ways. It could be the real reason for an act complained of or it may be the basis for a false complaint. Hence previous enmity plays little role in the presence of two eye witnesses who corroborate each other in such a remarkable manner."

Quite plainly the trial magistrate was aware of the need to look for corroboration in the case and this he found in the evidence of the complainant's daughter which he believed after explaining away an apparent discrepancy in her evidence.

In R. v. Baskerville (1916) 12 Cr. App. R. 81 the Court of Criminal Appeal said of the nature of the court's power on appeal, at p.88 :

> "In considering whether or not the conviction should stand, this Court will review all the facts of the case, and bear in mind that the jury had the opportunity of hearing and seeing the witnesses when giving their testimony. But this Court, in the exercise of its powers, will quash a conviction even when the judge has given to the jury the warning or advice above mentioned if this Court, after considering all the circumstances of the case, thinks the verdict unreasonable, or that it cannot be supported having regard to the evidence."

and later in defining the nature of corroborative evidence said at p.91 :

> "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime."

In this case with all due regard to the trial magistrate there can be little doubt that

the complainant's daughter hardly fits the description of an independant witness (per Edmund Davies L.J. in R. v. Prater (1959) 44 Cr. App. R. 83 at p.86) and accordingly in my view, was incapable of corroborating her mother's evidence.

As was said by Lord Parker C.J. in R. v. Redpath (1962) 46 Cr. App. R. 319 at p.321 when speaking of corroboration :

> "... the circumstances will vary enormously, and in some circumstances quite clearly no weight, or little weight could be attached to such evidence as corroboration. Thus if a girl goes in a distressed condition to her mother and makes a complaint, while the mother's evidence as to the girl's condition may in law be capable of amounting to corroboration, quite clearly the jury should be told that they should attach little, if any, weight to that evidence because it is all part and parcel of the complaint."

Similarly in this case, at the very least the daughter's testimony ought to have been subjected to the closest scrutiny and this the trial magistrate plainly failed to do for had he done so he would have noticed that in her recorded evidence-in-chief, the daughter said (at p.15 of the record) :

> "He was exposing his penis at the time."

That was a clear unexplained exaggeration which was neither confirmed in her mother's (the complainant) evidence, nor did it form any part of the 'Particulars of Offence' alleged against the accused.

Furthermore unlike the mother, the daughter stated without elaboration that the accused "pulled his pants down". Was this one single act ? or was it an up and down motion as described by the complainant ? and if the former, does it not materially conflict with what her mother said her daughter saw the accused doing? (see: penultimate paragraph on p.17 of the record.)

The complainant also stated that two of her daughters Joyti Anjani Lata and Praveen Lata were present during the incident (mid p.17) yet, Praveen Lata in her evidence says : Around 5.30 p.m. I was at home, in the verandah. I was alone (top p.15) and again, the complainant said that during the course of the incident : "My daughter called me in and I went in and closed the door" (mid p.17) but the daughter says : "I asked my mother to go (not come) inside and I closed the door." (mid p.15). The unanswered question that arises is : Did the daughter enter the house first or did her mother? and although these discrepancies may appear minor, they have an impact on the credibility of the complainant and her daughter had they been considered the trial magistrate.

Then there is the hedge between the complainant's house and the public road on which the appellant stood at the time of the incident. The hedge has been variously described as being : one foot high (the complainant's daughter) ; more than 3 feet (by the accused's younger brother) and about 4 feet thick (by the accused's

elder brother). No discussion or findings were directed to this aspect of the evidence either which appears to have been ignored by the trial magistrate.

A

Given the above, I agree with counsel for the appellant's submission that the bare statement of the trial magistrate : "I believe the prosecution witness ... I don't believe the defence evidence" is an inadequate answer, nor in my view are generalisations on the expected behaviour of young girls (top p.35); or an exhibitionist; or how neighbours behave in neighbourhood disputes (p.35); or what outsiders could or could not see of an incident (pp.35 to 37) ; or the relative ease of removing clothing (bottom p.33), of any assistance in the absence of concrete evidence.

B

There has been a clear misdirection in my view on the question of corroboration in this case. In such circumstances Lord Salmon said in Boardman v. D.P.P. (1974) 60 Cr. App. R. 165 at 190 :

C

> "If a judge rules that evidence is admissible and capable of corroborating that of another witness when it is not, this is a misdirection upon which, subject to the proviso, the conviction would be quashed."

D

The appeal is accordingly allowed, the conviction is quashed and the sentence set aside.

(Appeal allowed; conviction quashed; sentence set aside.)

E

F

G