IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

APPEAL NO. 7 OF 1992

IN THE MATTER OF an Appeal from the Senior Magistrate's Court of the Republic of Vanuatu by :-

THE PUBLIC PROSECUTOR Appellant

-V-

MICHAEL MEREKA Respondent

Coram : The Chief Justice

Mr John Baxter-Wright Public Prosecutor

Mr Michael Purcell Public Solicitor for the Respondent

This matter comes before the Supreme Court by way of an appeal by the Public Prosecutor against a finding of no case to answer made on the 29th day of May 1992, by the Learned Senior Magistrate, Mr Salatial Lenalia who was conducting a preliminary inquiry into an offence brought against the Respondent herein, Mr Michael Mereka in the following terms, namely :-

> That the said Michael Mereka on the 15th day of February 1991 at Port Vila had unlawful sexual intercourse with one Merie Hanna Wotlolap a girl under the age of 20 years who was at the time living with him as a member of his family Contrary to Section 96 (b) of the Penal Code Act CAP 135.

The Learned Senior Magistrate upon dismissing the complaint gave his reasons as follows :

> "The Court was of the opinion that there was insufficient evidence to commit the accused to stand trial in the Supreme Court on the following grounds :-
>
> 1. There was no evidence of recent complaint. For all sexual offence evidence of recent complaint is a must to determine the prosecutrix's behavior after the offence.
>
> 2. There is no evidence to corroborate the prosecutrix's evidence. For all sexual offenses corroboration is required as a matter of law or practice. A person cannot be convicted on the evidence of one witness only unless the witness is corroborated in some material particular by evidence implicating the accused"

It is important to remind oneself that the Learned Magistrate was conducting a preliminary inquiry and not a trial. In so doing, he has the duty to ensure that the correct charge has been brought in law and secondly that there is a sufficient prima facie case made out against the accused. He must in no way go beyond that and try the issue, that is a matter for the tribunal of fact. The preliminary inquiry was being conducted on the Statements. No live evidence was heard. The evidence consisted of two statements made by the complainant Merie Anna Wotlolan, which alleged that sometime in February 1991 her uncle had intercourse with her without her consent. In the first statement dated 30th March 1992, she alleges rape and says that she was at his house while his wife was away and that he is her uncle. Although the statement at the top bears her age as 19, there is no other evidence as to her age, nor is there anything said in that first statement as to the conditions under which she lived with him. In her second statement in which she also clearly alleges rape, that statement is dated the 14th March 1992, she states that she was his house girl. Again apart from the fact that the statement at the top contains a box which states her age to be 19, there is no evidence as to her age. Section 96(1)(b) states as follows :-

(1) No male person shall have or attempt to have sexual intercourse with any girl, not being his wife, who is under the age of 20 years and who

(2) Not being his stepdaughter, foster daughter or ward, and not being a person living with him as his wife, is at the time of the intercourse living with him as a member of his family and is under his care and protection.

The offence can only be committed with a female who is under the age of 20 years who is, at the time of intercourse or attempted intercourse, living with the accused as a member of his family and is under his care and protection. The prosecution in order to show a prima facie case must bring evidence to show three things :

i) that there was intercourse or attempted intercourse by the defendant

ii) on a female person who is at the time under the age of 20 years

and

iii) lives with him as a member of his family and is under his care and protection, but who is not his wife or living with him as his wife.

In this particular case the prosecution has failed to bring sufficient evidence of the age of the girl and of the fact that she was living with the accused as a member of his family. The fact that the girl claims that he is her uncle and assuming that to be correct, that does not show sufficient prima facie evidence that she is living with him as a member of his family; particularly so since she claims in her second statement that she is his house girl "mi house-girl blong hem". For those reasons I dismiss this appeal. Let me say straight away that had the charge brought against the appellant been one of rape, I would have considered that there would have been sufficient prima facie evidence to commit for trial. It does not follow of course that the defendant is guilty or not guilty of rape - that would have been the issue to be determined at trial. The remainder of the "evidence" brought by the prosecution, namely the statement of the boy-friend Roger Samson and of the custom chief Albi Jerry is not admissible and take the matter no further.

This brings me to the reason of this appeal. Although the Learned Magistrate was correct in not committing this appellant to stand trial on the charge as framed, the reasons he gave in law were not. There is no rule of law that requires recent complaint in order to convict, let alone to find a prima facie case and there is no rule of law that states that a person cannot be convicted of a sexual offence without there being corroboration evidence, let alone that there should be a finding that there is a prima facie case. Those are issues to be considered at trial not at the time of a preliminary inquiry.

The general rule of evidence is that statements may be used against a witness as admissions but that you are not entitled to give evidence of statements on other occasions by the witness in confirmation of the testimony - Jones v S.E. and Chatham Ry (1918) 87 L.J.K.B. 775,779 - The rule is sometimes expressed as being that a party is not permitted to make evidence for himself - R v Roberts (1943) 28 Cr. App. R. 102. Thus a defendant is not permitted to call evidence to show that after he has been charged with an offence he told a number of persons what his defence was. The value of such testimony is nil. The general rule was reaffirmed by the Court of Appeal in R v Oyesikle (1972) 56 Cr. App. R.240. There are exceptions to this general rule, e.g. statements constituting recent complaints is sexual cases, statements forming part of the res gestae and statements rebutting an allegation of recent fabrication. We are here concerned with the first of these exceptions.

STATEMENTS CONSTITUTING RECENT COMPLAINTS IN SEXUAL CASES

In R v Lillyman [1896] 2 Q.B. 167, it was held that upon the trial of an indictment for rape or other similar offenses against women or girls (including indecent assault and sexual intercourse with

girls under 13 and between 13 and 16) the fact that a complaint was made by a prosecutrix shortly after the alleged occurrence, and the particulars of such complaint may, so far as they relate to the charge against the defendant, be given in evidence by the prosecution; not as being evidence of the facts complained of but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as tending to negative her consent.

The mere complaint is no evidence of the facts complained of, and its admissibility depends on proof of the facts by sworn or other legalised testimony : see R v Brazier (1779) I East P.C. 443; R v Wood (1877) 14 COX 46. Evidence of recent complaint cannot constitute corroboration; it is not evidence from an independent source see R v Lovell (1923) 17 Cr. App. R 163; R v Evans (1924) 18 Cr. App. R 123. It should be noted that the recent complaint is not only admissible merely as negativing consent, but as being consistent with the sworn evidence of the complainant see: R v Osborne [1905] IK.B.551. In R v Wright and Ormerod (1990) 90 Cr. App. R.91 in the C.A. the point was made by the Court of Appeal that a mere complaint was not evidence of the facts complained of and its admissibility depended on proof of the facts by sworn or other legalized testimony, it therefore followed that if the terms of the complaint were not ostensibly consistent with the terms of the testimony, the introduction of the complaint had no legitimate purpose within the context of the trial.

Further, to be admissible the complaint must be made on the first opportunity which reasonably offers itself after the offence, and whether this has been done is a matter for the Court before which the complaint is offered in evidence to decide : see R v Ingrey (1900) 64 J.P. 106; R v Lee (1912) 7 Cr. App. R 31; R v Cummings [1948] 1ALL E.R. 551. If a considerable time has elapsed between the commission of the offence charged and the complaint, it is inadmissible see R v Rush (1896) 60 J.P. 777. But the complaint need not be on the very earliest opportunity see R v Kiddle (1898) 90 COX 77. The mere fact that the statement is made in answer to a question is not in itself sufficient to make it inadmissible as a complaint. The question for the court is whether the statement is spontaneous in the sense that it is an unassisted and unvarnished story of what happened. In each case the decision as to the character of any questions put, the relationship between the questioner and the complainant, as well as the other circumstances, are matters within the discretion of the judge see R v Norcott [1917] 1K.B. 347,& Cr. App. R. 166. The fact that the complaint might have been made to others before it was made to the witness who gives evidence of it does not render it inadmissible see R v Willbourne (1917) 12 Cr. App. R.280.

CORROBORATION

At Common Law, one witness is sufficient in all cases (with the exception of perjury) at the trial : see 2 Hawk C. 46, Section 2, 10; Fost. 233 and see D.P.P. v Hester (1972) 57 Cr. App. R. 212, H.L., Per Lord Diplock at p. 242. There may be certain statutory exceptions but these are not relevant here, as there are none that apply in the present case. Even though a case does not fall within a statutory category, judges are required to heed the warning of the danger of convicting on the uncorroborated evidence of witnesses who fall into one of the following categories : (i) accomplices or (ii) complainant in sexual offenses or (iii) the unsown testimony of a child. The requirement that one should warn oneself in respect of evidence given by witnesses falling into one of these categories is a rule of law : see Davies v D.P.P. [1954] A.C. 378; Cr. App. R. 11 (accomplices) R v Trigg (1963) 47 Cr. App. R. 94 (sexual offenses); "The danger sought to be obviated by the Common Law rule in each of these three categories of witnesses is that the story told by the witness may be inaccurate for reasons not applicable to other competent witnesses : Whether the risk be of deliberate inaccuracy, as in the case of accomplices, or unintentional inaccuracy as in the case of children and some complainants in cases of sexual offenses.

What is looked for under the Common Law rule is confirmation from some other source that the suspect witness is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged," per Lord Diplock in D.P.P. v Hester [1973] A.C. 296, 57 Cr. App. R.212.

> "It is for [the tribunal of facts] to decide whether witnesses are creditworthy. If a witness is not, then the testimony of the witness must be rejected. The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said ..... The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible; and corroborative evidence will only fill its role if it itself is completely credible evidence," per Lord Morris in D.P.P. v Hester (1973) 57 Cr. App. R. 212 at p. 229. Lord Hailsham in D.P.P. v Kilbourne (1973) 57 Cr. App. R; 381, H.L. at p. 402 said " corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible." Lord Reid (at p 402) states : "There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with the statements or circumstances relating to the particular matter; the better it fits in the more one is inclined to believe it. The

doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."

Lord Hailsham in D.P.P. v Boardman (1975) 60 Cr. App. R 165, 183, accepted that approach and went on to say :

"When a [tribunal of facts] is satisfied beyond doubt that a given witness is telling the truth, they can, after a suitable warning, convict without corroboration. What I said in Kilbourn was not that to give or require corroboration a witness must be believed without doubt. What I said [and meant] was that unless a witness evidence was intrinsically credible he could neither afford corroboration, nor be thought to require it. In such cases, the witness's evidence is rejected before the question of corroboration arises. Of course, a conviction in such a case can sometimes result if, notwithstanding the unreliable testimony, the independent evidence is strong enough. But this is because the independent evidence has proved the case independently of the unreliable witness, and not because the unreliable witness is corroborated."

The leading case on what constitute corroboration is R v Baskerville [1916] 2 K.B. 658,12 Cr. App. R.81 in which Lord Reading C.J. defines what evidence constituted corroborative evidence for the purpose of the Statutory and Common Law rules :

".... evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at Common Law or within that class of offenses for which corroboration is required by statute ..... The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as that corroboration except to say that corroborative evidence is evidence which shows or tends to show that the story of [the witness] that the accused committed the crime is true, not merely that the crime has been committed; but that it was committed by the accused."

Lord Hailsham L.C. in D.P.P. v Kilbourne, at p395 stated :

"In my opinion, evidence which is (a) admissible and (b) relevant to the evidence requiring corroboration, and, if

> believed confirming it in the required particulars, is capable of being corroboration of that evidence and, when believed is in fact such corroboration."

See also Lord Reid's observations in the same case:

> "We must be astute to see that the apparently corroborative statement is truly independent of the doubted statement. If there is any real chance that there has been collusion between the makers of the two statements, we should not accept them as corroborative."

The corroboration need not be direct evidence that the defendant committed the crime see R v Baskerville ante, it is not a consequence of the principles laid down in Baskerville that there should be independent evidence of everything which the witness relates, or his testimony would be unnecessary. Indeed, if it were required that the witness should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would merely be confirmatory of other independent evidence.

As a matter of law, injuries sustained by a complainant is capable of corroborating her evidence in relation to an alleged rape R v Pountney [1989] Crim L.R. 216, C.A. The evaluation of the effect of the evidence is for the tribunal of fact, as to whether or not it does in fact amount to corroboration. It does not follow that what is capable of being regarded in law as being corroboration, will necessarily be held as a matter of fact to be corroboration. It is the duty of the tribunal of fact having directed itself [or having been properly directed] in law as to what may amount to corroboration to assess the evidence and to determine whether or not in the particular circumstances it accepts the evidence to be corroborative in fact.

It follows from the requirement that the corroborative evidence must come from a source which is independent of the witness whose evidence is to be corroborated, that evidence of recent complaint in a sexual case cannot be corroborative : see R v Coulthread (1934) 24 Cr. App. R 44. Evidence of recent complaint is only admissible to show consistency of the victim's story [or to rebut allegation of recent fabrication] see R v Lillyman [1896] 2QB 167. It follows too that the physical appearance of a defendant, however singular, and however closely it corresponds with a description given by a victim, cannot, without more, amount to corroboration of her evidence see R v Willoughby (1989) 88 Cr. App. R. 91.

It is desirable in any event, in every case where corroboration is required, to hear submissions from counsel, at the close of the evidence, on the aspects of the ingredients of the offenses in respect of which the tribunal of fact should direct itself to look for corroboration and what evidence there was which was capable of amounting to corroboration.

Whether certain evidence is capable of being corroborative is a question of law for the judge. If the judge holds as a matter of law that the evidence is so capable, then it is for him as the tribunal of fact to determine also whether or not that evidence is corroborative. In Vanuatu, there being no jury, the distinction can easily be overlooked, but it should not be - see R v Farid (1945) 30 Cr. App. R 168. See also R v McInnes (1990)90 Cr. App. R. 99 C.A.

The warning as to the danger of convicting upon uncorroborated evidence " must obviously be given (i) where there is no evidence of corroboration, [in such a case it is not sufficient to give the warning if the judge fails to take into consideration [to tell the jury] as the tribunal of fact, that there is no evidence capable of constituting corroboration see R v Anslow (1962) Crim L.R. 101, R v Evans [1964] 3ALL ER.401 and R v Fisher (1965) 49 Cr App R 116] and (ii) where there is evidence capable of corroborating the complaint, but which the tribunal of fact might conclude does not amount to corroboration..... Where evidence is called which if accepted, indisputably must amount to corroboration, it is always necessary to remind oneself [to tell the jury] how dangerous it would have been to convict if there had been no such evidence [see R v Trigg (1963) 47 Cr. App. R 94)

The judge must use clear and simple language that will without any doubt convey the warning that there is a danger of convicting on the complainant's evidence alone. Bearing that warning well in mind, the particular facts of the case must be looked at with care and if, having given full weight to the warning that it is dangerous to convict, the tribunal of fact comes to the conclusion that in the particular case the complainant is without any doubt speaking the truth, then the fact that there is no corroboration does not matter, and they are entitled to convict, see R v Henry and Manning (1969) 53 Cr. App. R 158 C.A. Whenever a direction on corroboration is required, it is the judge's duty to identify the evidence which is capable of corroborating the relevant witness(es) see R v Cullinane [1984) Crim L.R. 420; C.A. r v Brennem [1990] Crim L.R. 118, C.A. I go on further to say that in our jurisdiction a careful note of the summing up ought to be made and such a warning, including a note identifying the piece of evidence relied upon as being capable of being corroboration must be kept for future use if necessary by any appellate tribunal.

In this case I have reviewed with care the law regarding recent complaint and corroboration as applied for many years, if not centuries by the courts of the United Kingdom. I note, of course, that we are not here bound as a matter of law by any such cases, but they do serve as persuasive authorities, by the sheer wisdom that they contain. They are well tried and tested principles of the Common Law, and for the purpose of these courts, I adopt them entirely. The greatest care should always be exercise to ascertain what evidence if any can amount to corroboration. One should

always be conscious of the real danger of convicting when there is no corroboration; but in a proper case, where one is sure beyond a reasonable doubt that the witness whose evidence should be corroborated is telling the truth, then having forewarned oneself of the danger of convicting without corroboration, one can and indeed, in those circumstance must convict, any other approach would be to fly in the face of the evidence.

To conclude, I would like to point out that there never has been a rule at common law that one cannot in an appropriate case, bearing in mind what I have already said above, convict in the absence of corroboration, however desirable it may be that there should be corroboration. The duty of investigating magistrates is to find out whether there is a prima facie case or not, if there is one, then they must commit for trial, if not they must discharge the defendant. They should not, in the course of a preliminary investigation, act as tribunals of fact determining the issue of guilt or innocence. That is the function of the tribunal which eventually tries the case.

DATED at Port Vila this 30th day of December 1992.

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CHARLES VAUDIN d'IMECOURT
Chief Justice

REPUBLIC OF VANUATU
COUR SUPREME COURT
LEX LEX
REPUBLIQUE DE VANUATU