PECELI VOSARARAWA

v.

REGINAM

[SUPREME COURT, 1970, (Hammett C.J.), 4th, 18th December]
Appellate Jurisdiction

Criminal law—corroboration—sexual offence—indecent assault on female—early complaint not corroboration—identity of assailant in issue—whether evidence of distressed condition of complainant can amount to corroboration-failure by court to warn itself of danger of convicting in absence of corroboration — Penal Code (Cap. 11) s. 148 (1).

The appellant was convicted in the Magistrate's Court of indecent assault on a female contrary to section 148(1) of the Penal Code. The complainant was the appellant's niece and the incident was alleged to have taken place at night while she was staying at the appellant's house. The complainant returned to her mother's house and complained to her mother, showing signs of distress. The appellant denied having interfered with his niece. The trial Magistrate accepted the complainant's evidence which he held was corroborated by her complaint to her mother.

Held: 1. The complaint to the complainant's mother was not corroboration in law.

2. While evidence of the complainant's distressed condition may in certain circumstances corroborate her evidence of indecent assault, it does not of itself, in every case, corroborate her evidence of the identity of the person who committed it.

3. The complainant's evidence being uncorroborated it was not open to the trial Magistrate to convict, in the absence of any warning by the Court to itself of the real danger of so doing.

Cases referred to:

R. v. Evans (1924) 18 Cr. App. R. 123; 88 J.P. 196.
R. v. Coulthread (1933) 24 Cr. App. R. 44; 97 J.P. 95.
R. v. Redpath (1962) 46 Cr. App. R. 319.
R. v. Gammon (1959) 43 Cr. App. R. 155; 123 J.P. 410.
R. v. Trigg [1963] 1 All E.R. 490; 47 Cr. App. R. 94.
R. v. Rolfe (1952) 36 Cr. App. R. 4.
R. v. Clynes (1960) 44 Cr. App. R. 158.

Appeal from a conviction in the Magistrate's Court.

Appellant in person.

D. I. Jones for the respondent.

The facts sufficiently appear from the judgment.

HAMMETT C. J.:[18th December, 1970]—

A In the Court below the appellant was charged with Indecent Assault in the following terms:—

"*Statement of Offence*

INDECENT ASSAULT ON FEMALE: Contrary to section 148(1) of the Penal Code, Cap. 11.

B *Particulars of Offence*

PECELI VOSARARAWA on the 26th day of June, 1970 at Varisi Settlement Moturiki in the Eastern Division indecently assaulted Unaisi Dicoga."

Section 148(1) of the Penal Code reads as follows:—

"148. (1) Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony, and is liable to imprisonment for five years, with
C or without corporal punishment."

He was convicted and sentenced to 12 months' imprisonment. He appeals ainst both conviction and sentence on the following grounds:—

"1. That the learned trial Magistrate erred in not fully considering the defence of Your Petitioner, and in not fully considering all the issues raised by him at the trial.

D 2. That having regard to all the circumstances, the learned trial Magistrate ought to have acquitted Your Petitioner.

3. That the sentence is harsh, and excessive.

4. The learned trial Magistrate erred in treating as corroboration namely the complaint of the witness Unaisi Dicoga to her mother and other
E unspecified material during the trial, and thereby erred in law since there was in fact no corroboration of the testimony of the said witness.

5. The learned trial Magistrate erred in law in not directing himself, and warning himself that it was unsafe to convict on the uncorroborated testimony of the said witness Unaisi Dicoga.

6. The appellant was not represented at the trial and the learned trial
F Judge erred in law in not giving the accused a specific opportunity to admit or deny that offences of indecent assault 'were prevalent in the islands'."

The case for the prosecution was that Unaisi Dicoga, the female complainant, aged 17, was the niece of the appellant. On the instructions of her mother she slept with two of her sisters at the appellant's house on the night of 26th June,
G 1970. The three sisters slept in one room and the appellant in a separate room. Unaisi gave evidence that in the middle of the night, whilst she was sleeping with her two sisters a man came into their room and touched her private parts. She cried out and jumped up and said she recognised the appellant as he got out from under her mosquito net and went to the door. She said he went out and then returned saying her cry had awakened him and asking "Who was the man who was in here?" She replied that it was him, the appellant, and he denied it.

H She then left his house and returned home with her sisters and complained to her mother what had happened. At that time her mother said she was shaking and afraid. The appellant arrived as she was making her complaint to her mother He again denied that he had touched her.

The girl's mother gave evidence of her complaint to her.

The appellant was later questioned by the Police and denied he had interfered with the girl in any way. A

In his unsworn statement from the dock the appellant again denied having interfered with his niece as she had alleged. He attributed her allegedly false complaint to her malice because he had been responsible for her father disciplining her about 10 days previously by cutting her hair, as a result of a complaint he had made about her. B

In his judgment the learned trial Magistrate said he accepted the evidence of Unaisi and held that it was corroborated by her complaint to her mother. He said that this was ample corroboration in law.

This is not so. The evidence of the female complainant was in fact not fully corroborated and her complaint to her mother was not corroboration in law. (See *R. v. Evans* 18 Cr. App. R. 123: *R. v. Coulthread* 24 Cr. App. R. 44). C

For the Crown it was submitted that the evidence of the girl's distressed condition was corroboration of her evidence that the appellant had indecently assaulted her. In this, reliance was placed on *Redpath's Case* 46 Cr. App. R. 319. The facts in that case were not only peculiar to that particular case but were altogether different from those in this case.

In cases of indecent assault a conviction may be based on the uncorroborated evidence of a female complainant if her evidence is believed but only if the Court expressly warns itself and seriously considers the very real danger of convicting on her uncorroborated testimony (*R. v. Gammon* 43 Cr. App. R. 155). D

Where, as in this case, the learned trial Magistrate did not so warn himself, it was not open to him to convict on her uncorroborated evidence (*R. v. Trigg* 47 Cr. App. R. 94).

E

In cases of indecent assault corroboration is required of two aspects of the female complainant's testimony, namely:—

(1) Of the indecency in the assault (*R. v. Rolfe* 36 Cr. App. R. 4), and

(2) Of the identity of the person who she complains so assaulted her (*R. v. Clynes* 44 Cr. App. R. 158).

F

Whilst evidence of the girl's distressed condition may in certain circumstances corroborate her evidence that she was indecently assaulted (as in Redpath's Case), it does not by any means, of itself, in every case, corroborate her own evidence of the identity of the person who committed the assault. It is in this respect that the peculiar facts in Redpath's Case are so different and distinguishable from those in this case.

In this case the female complainant's two sisters were not called to give evidence. They were probably asleep at the time and could not give any evidence that would have furthered the case for the prosecution. G

The female complainant's complaint to her mother was not, as is now conceded by the Crown, any corroboration in law. The Court below was in error in holding otherwise.

The case against the appellant, on the issue of the identity of the person who indecently assaulted the female complainant, depended therefore solely on the uncorroborated evidence of the female complainant herself. H

If this had been appreciated by the Court below it is doubtful whether the
A appellant would have been convicted. In the absence of any express warning of the danger of acting on the uncorroborated evidence of the female complainant on the issue of the identity of her assailant, this conviction cannot be sustained.

I would add one further point. I note that the words used in the particulars of offence in the charge do not correctly follow the words in the section under which the charge is laid. It is the duty of the officer laying the charge to see
B that this is done and of the Magistrate who signs the charge to check that it has been done.

I draw attention to this in order that the possibility of an entire trial being vitiated by reason of some such defect in the drafting of the charge may be avoided. Greater care should be exercised to ensure that such situations do not occur.

The appeal is, therefore, allowed. The conviction is set aside, the sentence
C is quashed and it is directed that a finding of " Not Guilty " to the offence charged be entered.

Appeal allowed.