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Dec. 7

GEORGHIOS
PANAGHI
MAKRIS
ALIAS
PETINOS
v.
THE POLICE

[O' BRIAIN, P., ZEKIA, VASSILIADES and JOSEPHIDES, JJ.]

GEORGHIOS PANAGHI MAKRIS ALIAS PETINOS,

Appellant,

v.

THE POLICE,

Respondents.

(Criminal Appeal No. 2436).

Evidence in criminal cases—Indecent assault on a male person contrary to section 152 of the Criminal Code, Cap. 154—Evidence—Corroboration required as a matter of practice in cases of indecent assault and other sexual offences—Failure of the trial judge to direct his mind to this requirement—Conviction should not be disturbed because there was in fact corroborative evidence of such a nature that if the trial judge had properly warned himself he would inevitably have come to the same conclusion—Therefore, no miscarriage of justice occurred in this case.

Evidence—Sexual offences—Evidence in such cases must be scrutinized with the particular care required by a long accepted and generally followed judicial practice.

Evidence—Sexual offences—Accomplices—Whether or not the rule that the evidence of an accomplice cannot corroborate that of another accomplice, extends to cases of indecent assault and the like.

The appellant was convicted of indecent assault on an adult male. The only evidence against him was that of the complainant corroborated by the evidence of the appellant's friend and companion, a taxi-driver. The trial judge failed to direct his mind to the need or desirability for corroboration and to make a finding as to whether or not on the evidence the taxi-driver was an accomplice of the appellant in the commission of the crime. It was not suggested that the complainant in this case was anything other but the innocent victim.

Held: (1) Following the English principles, in cases of indecent assault and other sexual offences corroboration is required as a matter of practice.

R. v. Burgess 40 Cr. App. R. 144, at p. 146, *per Ormerod*.
L.J., *applied.*

(2) (*Per ZEKIA AND JOSEPHIDES, JJ.*): Upon the record the witness taxi-driver cannot be regarded as an accomplice.

(3) (*Per VASSILIADES, J.*). As regards the taxi-driver, even if his conduct be considered to amount to aiding and abetting the appellant in the commission of the offence, he (the driver) could not be considered as the complainant's accomplice who was the innocent victim in this case; nor could his evidence be said to corroborate that of an accomplice, in so far as it supported the evidence of the complainant.

(4) (*O' BRIAIN, P. dissenting*): Although the trial judge failed to warn himself of the desirability of corroboration of the complainant's evidence, nevertheless no substantial miscarriage of justice occurred, as, even if corroboration of the complainant's evidence was required and looked for, it could be found in the evidence of the taxi-driver and that evidence was of such a nature that if the trial court had properly warned itself must inevitably have come to the same conclusion.

Appeal dismissed.

Per O'BRIAIN, P. AND VASSILIADES, J.: Judges dealing with sexual cases should scrutinize the evidence with the special care required by a long accepted and generally followed judicial practice.

Per ZEKIA, J.: I would expect in all cases where a judge elects to act on the uncorroborated evidence of an accomplice or of a complainant in a sexual offence, where corroboration is not required by statute, to state that he did so.

Per O'BRIAIN, P.: If in this case the taxi-driver were to be held to be an accomplice in the crime charged, his testimony could not be regarded as independent or untainted and could not afford corroboration of the complainant.

Per JOSEPHIDES, J.: Even if the taxi-driver is considered to be an accomplice, no authority was cited for the proposition that in a case of indecent assault an accomplice of the accused cannot corroborate the evidence of the complainant. The rule with regard to accomplices is that the evidence of one accomplice cannot be corroborated by the evidence of another accomplice: *R. v. Noakes* 5 C. & P. 326; approved in *R. v. Baskerville* (1916) 2 K.B. 658. So far as I am aware

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this rule has not been extended to cover cases such as the one under consideration. Moreover, in *R. v. Campbell* 40 Cr. App. R. 95, at p. 102, the Court of Criminal Appeal in England held that the sworn evidence, either of a child or an adult, may be corroborated by the unsworn evidence of a child, but the jury should be warned that the evidence of the latter child must be regarded with particular care. Having regard to the fact that I do not consider the taxi-driver to be an accomplice, I would leave this question open for consideration in a future case.

Cases referred to:

Reg. v. Farler 8 C. & P. 107;

R. v. Burgess 40 Cr. App. R. 144;

Police v. Sofocli and another 15 C.L.R. 122;

R. v. Davies 38 Cr. App. R. 11;

R. v. Noakes 5 C. & P. 326;

R. v. Baskerville (1916) 2 K.B. 658;

R. v. Campbell 40 Cr. App. R. 95.

Appeal against conviction.

The appellant was convicted on the 9.10.61 at the District Court of Limassol (Criminal Case No. 9333/61) on one count of the offence of indecent assault on a male, contrary to sections 152 and 35 of the Criminal Code, Cap. 154 and was sentenced by Kakathimis Ag. D.J. to 5 months' imprisonment.

Appellant in person.

S. Georghiades for the respondent.

Cur. adv. vult.

The following judgments were read:

O' BRIAIN, P.: The appellant was convicted of indecent assault on a male person contrary to sections 152 and 35 of the Criminal Code and sentenced to five months' imprisonment by the District Court of Limassol. He was not legally represented at his trial or on the hearing of his appeal in this Court. Accordingly, this Court had to scrutinize, with the utmost care, the record of the trial so as to satisfy itself that

no injustice was suffered by the accused through his not having had the assistance of an advocate.

The only evidence against the accused was that of the complainant Peter Jones an Englishman and the accused's friend and companion Demetrios Michael, a taxi-driver. Notwithstanding the nature of the charge, the record shows clearly that the trial court dealt with the evidence in exactly the same way as if the charge was larceny or common assault. Being satisfied as to his guilt it convicted him, treating the testimony of the witnesses as in an ordinary criminal case.

But the law in England, with respect to the evidence of the complainant, in sexual cases is now well settled. It may be briefly stated as follows : Corroboration is looked for and the Jury should be warned of the danger of acting without it in all cases of sexual offences irrespective of the age or sex of the complainant or other party involved.

There is nothing whatever on the record in this case to show that the learned trial Judge recollected the danger of acting on the evidence of the complainant Jones without corroboration. The prisoner being undefended and the case for the prosecution conducted by a Police Officer, the matter was not alluded to in Court and it is easy to understand how the matter came to be overlooked by the learned trial Judge.

The other witness, Demetrios Michael, may or may not be regarded as a participant in the crime charged against the accused. This depends upon the view of the evidence which the trial Court takes. No finding in regard to this appears on the record. His permitting his friend the accused to come into the front seat and to remain there without protest after he became aware of the alleged indecency, his continuing to drive his taxi notwithstanding what was happening therein until it was halted by shortage of petrol, and his chasing of the complainant in the company of the accused after the complainant's escape from the taxi might well be regarded as aiding and abetting the accused. I find it quite impossible, from a reading of the note and without hearing or observing the witnesses, to say whether or not he was an accomplice of the accused. I would emphasize as strongly as I can that it was the function and duty of the trial Court which had before it all the witnesses, to determine this question. The record is silent on the point. If the taxi-driver was not an accomplice of the accused, there was undoubtedly in this case, testimony

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corroborating that of Jones. But, on the other hand, if the taxi driver were an accomplice of the accused, in that he assisted and facilitated his friend in the commission of the offence charged, can his evidence be treated as independent testimony corroborating the complainant whose evidence from the nature of the case called for corroboration? Counsel for the Republic did not refer this Court to any decided case directly in point and I have been unable to find any decision on this matter one way or the other.

Going back to first principles, we have the position that the evidence of the complainant is, in practice in England, treated as on the same footing as that of an accomplice even where there can be no question about his being an accomplice of the accused. Assuming the taxi-driver to have been an accomplice of the latter, can his evidence corroborate that of the complainant? There can be no doubt that one accomplice cannot corroborate another accomplice. But, I think the true rule is that an accomplice cannot corroborate any testimony which needs corroboration. Hawkins "Pleas of the Crown" expresses it thus -

"It hath also been determined that a person may be legally convicted on the evidence of an accomplice though unconfirmed by any other evidence. But it seems to be the general opinion that unless some fair and unpolluted evidence corroborate and give verisimilitude to the testimony of an accomplice, a person convicted under such circumstances ought to be recommended to mercy".

As far back as 1837, Lord Abinger, C.B., said in *Reg. v. Farler* 8 C. & P. 107 -

"It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance".

Is not the reason underlying these statements of the law equally applicable to the case under consideration? I incline to the view that it is and, if the matter be free from authority, I would hold that the testimony of an accomplice of the accused, tainted and polluted as it necessarily is, cannot be relied upon by the prosecution to corroborate the testimony of a complainant in a case where that testi-

mony needs corroboration. The true rule is I think that a witness who is tainted with complicity in the crime charged cannot corroborate the testimony of any witness, at that trial, which requires corroboration. The purpose of the rule is to protect accused persons upon their trial. The basis of the rule I conceive to be that testimony which requires corroboration to confirm it needs evidence which is independent and untainted. Thus the Supreme Court of Cyprus laid down in the case of *Police v. Sofocli and another* (15 C.L.R. 122) that a wife cannot corroborate her accomplice husband because her testimony is not independent. If in this case the witness Demetrios Michael were held to be an accomplice in the crime charged his testimony, in that case, could not be regarded as independent or untainted and could not afford corroboration of the complainant.

It is clear that the trial of the appellant proceeded without the Judge who tried him advertent at all to the need for corroboration of the complainant's story, or considering whether the taxi-driver was or was not an accomplice. The law requires not merely a verdict that is correct but that the trial of every accused person should proceed observing all the safeguards strictly according to due form. Such a trial is not merely the legal right of the appellant, but also his Constitutional right in Cyprus. In my view, that has not been accorded to him in this case, and I find the trial unsatisfactory for the reasons I have given. There being, however, a prima facie case against the accused I would quash this conviction and order a re-trial.

ZEKIA, J.: The trial court in this case convicted the appellant of indecent assault on the evidence of the complainant, an adult male person, plus the evidence of the driver of the car in which the offence was committed.

In practice a court in a sexual offence even against a male adult is required to look for the corroboration of the complainant's evidence (see *R. v. Burgess* (40) Cr. App. R. 144, at p. 146). In this case the evidence of the complainant was fully supported by the evidence of the driver whom, with all respect to the views expressed to the contrary, I can only regard as an independent witness. The Court expressly stated that it acted on the evidence of both of these witnesses. There remains, therefore, no question as to the lack or inadequacy of corroboration of the evidence of the complainant in this case.

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Although the courts, unlike trials by jury, need not be so strict in expressing themselves in so many words that they warned themselves as to rules of evidence and practice relating to corroboration of a witness whose evidence is either by law or practice required to be corroborated, since rules of evidence and practice, not being laymen like the members of a jury, are presumed to be known and borne in mind by Judges; yet it is desirable when dealing with cases where the evidence of a witness has to be corroborated in law or practice to state in their judgment that they looked for corroboration and refer also to such corroborative evidence in the case. Otherwise this Court might entertain doubts as to whether the trial court adverted its mind to requirements of corroboration in a particular case where such corroboration is called for.

I would further expect in all cases where a judge elects to act on the uncorroborated evidence of an accomplice or of a complainant in a sexual offence, where corroboration is not required by statute, to state that he did so.

As there is ample evidence to support the conviction in this case I am of the opinion that the appeal should be dismissed.

VASSILIADES, J.: I had the advantage of reading the judgment of the learned President of this Court, and what I first have to say is that I fully appreciate his careful and strictly legal approach to the case, in view of the fact that the appellant did not have professional assistance, either at the trial court or here.

With due respect, I agree with the President's observations, regarding the absence of anything on the record to show that the evidence adduced by the prosecution in support of the present charge, was received and considered by the trial judge, with the special care required by a long accepted and generally followed judicial practice, in dealing with the evidence in sexual cases.

The rule that the judge has to warn the jury of the danger of acting on the uncorroborated evidence of the complainant in this type of cases, is deep rooted in good reason and long experience. So long as the reactions of human nature to social rules regarding sex, are as they have been known to be for many years past, this well established rule cannot be relaxed without jeopardizing justice in such cases. The

judge must, in every case of this nature remind the jury of the rule; and where the judge performs also the functions of the jury, he must remind himself.

Once, however, the record shows, that the warning-rule was brought into play, the evidence of the complainant alone, may be sufficient - (subject to statutory limitations if any) - to lead to a conviction, if the trial court be satisfied that the evidence actually before it, may be safely acted upon, although uncorroborated. Often in sex cases the victim's testimony is the only direct evidence available; and it frequently contains all the truth required to establish the offence.

But where corroboration is looked for, this must be found according to the rules governing corroborative evidence. And one of those rules, is that the testimony of one accomplice cannot be corroborated by that of another.

The reason behind this rule, is that accomplices, sharing the moral blame as well as the responsibility for the offence which they have committed together, (or with one another's support) are naturally inclined, if they come to give evidence in the case, to shape the picture of the facts in a manner most favourable, or less harmful to themselves, at the expense of truth. The evidence of the one is considered just as dangerous to act upon, as is the evidence of the other. And the corroboration, when required, must be found in independent testimony, free from such defects.

Now, in a sex-case where the complainant and the accused shared complicity in the offence under trial, their evidence must be scrutinized with the same care; and where corroboration is required, I agree that this must be found elsewhere than in the evidence of another accomplice. The fact that one figures at the trial as a witness, and the other as the accused, is, in this connection, I think immaterial.

But where one is the offender with the guilty mind behind his conduct, while the other is the innocent victim of the offence, - be it sexual or otherwise - they cannot be considered as accomplices in the commission of the offence; nor can their evidence be treated on that footing.

In this case, for instance, if the position were that the complainant, the accused and the driver, set out together for a drive connected in their mind with the indecency charged, and later for some reason or other, one of them found himself in the dock and the other two in the witness-box, I would be

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inclined to agree with the view that the evidence of the driver could not corroborate that of the Englishman.

But the case before us is put by both sides, on a very different footing. Nobody suggested, either at the trial or here, that there ever was community of purpose between the complainant and the accused, in connection with the offence charged, they cannot, therefore, be treated as accomplices.

And as regards the driver, even if his conduct be considered to amount to aiding and abetting the accused in the commission of the offence, he (the driver) could not be considered as the Englishman's accomplice; nor could his evidence be said to corroborate that of an accomplice, in so far as it supported the evidence of the complainant.

The view, which I take of the facts in the present case, as they appear on the record, is the same as that taken by the trial judge; namely that the complainant, Jones, was the victim of the assault committed by the accused. If this evidence required corroboration, in view of the nature of the charge, this, in my opinion, could be found in the evidence of the driver, as much as it can be found in that of the accused.

The trial judge apparently accepted the evidence of the complainant without warning himself; but, in the circumstances of this case, I am inclined to think that even if the judge had directed his mind to the nature of the charge, he would have reached the same conclusion. There is ample evidence to support the charge, and I think, that the verdict is fully justified. I would dismiss the appeal; and affirm both conviction and sentence of the trial court.

JOSEPHIDES, J.: In *R. v. Burgess* (1956) 40 Cr. App. R. 144 at page 146, Ormerod J., delivering the judgment of the Court of Criminal Appeal, said:

"There may be no direct authority but there is no doubt what is the practice. It is clear from the judgments in the various cases dealing with corroboration in sexual offences that it is just as necessary that the jury should be warned of the desirability of corroboration in a case of this kind as in any other case of indecent assault or other sexual offence".

That was a case of indecent assault on an adult male.

In the present case the record does not show that the trial Judge directed his mind to this requirement, but the complainant's evidence (who is admittedly not an accomplice)

is fully supported by the evidence of the taxi driver whom, with all respect to the views expressed by the learned President of this Court, I do not consider to be an accomplice of the accused in the commission of the crime. Different people act, or react, in different ways in a given situation, and I do not think that in the present case the taxi driver can be considered to come within the definition of the term "accomplice" (*R. v. Davies* (1954) 38 Cr. App. R. 11). In fact it was not the case of the appellant that the taxi-driver was his accomplice.

Consequently, although the trial Judge failed to warn himself of the desirability of corroboration of the complainant's evidence, nevertheless I consider that no substantial miscarriage of justice has occurred, as even if corroboration of the complainant's evidence was required and looked for, it could be found in the evidence of the taxi-driver, and that evidence was of such a nature that if the Court had properly warned itself must inevitably have come to the same conclusion. For these reasons I would dismiss the appeal.

But even if the taxi-driver is considered to be an accomplice, no authority was cited to us for the proposition that an accomplice of the accused cannot corroborate the complainant's evidence in a case of indecent assault. The rule with regard to accomplices is that the evidence of one accomplice cannot be corroborated by the evidence of another accomplice : *R. v. Noakes* 5 C. & P. 326 ; approved in *R. v. Baskerville* (1916) 2 K.B.658. So far as I am aware this rule has not been extended to cover cases such as the one under consideration. Moreover, in *R.v. Campbell* (1956) 40 Cr. App. R. 95, 102, the Court of Criminal Appeal in England held that the sworn evidence, either of a child or an adult, may be corroborated by the unsworn evidence of a child, but the jury should be warned that the evidence of the latter child must be regarded with particular care.

Having regard to the fact that I do not consider the taxi-driver to be an accomplice, I do not find it necessary for the purpose of this appeal to decide this question. I would leave it open for consideration in a future case after hearing full argument on both sides. I would dismiss the appeal.

O' BRIAIN, P. : In the result this Court by majority affirms the conviction and sentence. The sentence to run from the date of conviction.

Appeal dismissed.

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