HER MAJESTY THE QUEEN .....APPELLANT;

AND

LARRY PARISH .....RESPONDENT.

1968

*Mar. 25
Apr. 29

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Sexual intercourse with girl under 14 years of age—Whether corroboration of complainant's evidence—Criminal Code, 1953-54 (Can.), c. 51, s. 138(1).

The respondent was acquitted on a charge of having sexual intercourse with a female under the age of 14 years, contrary to s. 138(1) of the *Criminal Code*. The complainant, who was admittedly under 14 years of age, gave evidence that the offence was committed when the respondent took her, in company with another couple, to a room with twin beds in a motel. Each couple occupied one of the beds. The lights were turned out and the complainant says that the respondent lay on one of the beds with her for more than two hours during which time they had some drinks and were "necking", that he undid her clothes and had intercourse with her. The respondent admitted to "necking" but denied that intercourse took place. The

* PRESENT: Cartwright C.J. and Martland, Ritchie, Hall and Pigeon JJ.

second couple confirmed most of complainant's story, but they were unable to say whether or not sexual intercourse had actually taken place. The Court of Appeal, by a majority judgment, affirmed the dismissal of the charge on the ground that the evidence of the other couple was incapable of being corroborative. The Crown appealed to this Court.

Held: The appeal should be allowed and a new trial directed.

The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with it. In the present case, the evidence of the other couple was capable of being so construed. It was for the jury to say under all the circumstances whether or not that evidence in fact amounted to corroboration.

Droit criminel—Rapports sexuels avec fille de moins de 14 ans—Y a-t-il corroboration du témoignage de la plaignante—Code criminel, 1953-54 (Can.), c. 51, art. 138(1).

L'intimé a été acquitté de l'infraction d'avoir eu des rapports sexuels avec une personne du sexe féminin âgée de moins de 14 ans, contrairement à l'art. 138(1) du *Code criminel*. La plaignante qui, il fut admis, était âgée de moins de 14 ans, a témoigné que l'infraction a été commise lorsque l'intimé l'a emmenée, en compagnie d'un autre couple, à une chambre de motel où il y avait deux lits. Chaque couple a occupé un des lits. Les lumières étaient éteintes et la plaignante dit qu'elle et l'intimé se sont étendus sur un des lits durant plus de deux heures, qu'ils ont consommé de la boisson, qu'ils ont fait du «necking», que l'intimé a défait ses vêtements et qu'il a eu des rapports sexuels avec elle. L'intimé admet avoir fait du «necking» mais nie avoir eu des rapports sexuels avec la plaignante. Le second couple a confirmé en grande partie la version de la plaignante mais a été incapable de dire si en fait il y a eu des rapports sexuels. Par un jugement majoritaire, la Cour d'appel a confirmé l'acquittement pour le motif que le témoignage de l'autre couple ne pouvait pas servir de corroboration. La Couronne en a appelé à cette Cour.

Arrêt: L'appel doit être accueilli et un nouveau procès ordonné.

Il n'est pas nécessaire que la corroboration soit une preuve directe que l'accusé a commis l'infraction. Il suffit qu'elle soit simplement une preuve circonstancielle reliant le prévenu à l'infraction. Dans le cas présent, le témoignage de l'autre couple était capable d'être interprété de cette manière. Il appartenait au jury de dire si dans les circonstances cette preuve équivalait à une corroboration.

APPEL par la Couronne d'un jugement de la Cour d'appel de la Colombie-Britannique[1], confirmant l'acquittement de l'intimé. Appel accueilli.

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[1] (1967), 59 W.W.R. 577, [1967] 3 C.C.C. 360.

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APPEAL by the Crown from a judgment of the Court of Appeal for British Columbia[1], affirming the respondent's acquittal. Appeal allowed.

W. G. Burke-Robertson, Q.C., for the appellant.

J. R. White, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought at the instance of the Attorney General of British Columbia pursuant to s. 598 of the *Criminal Code* of Canada from a judgment of the Court of Appeal for British Columbia[1] (McFarlane J.A. dissenting) whereby that Court dismissed the Attorney General's appeal from the acquittal of the respondent before Mr. Justice Ruttan sitting with a jury on a charge of having sexual intercourse with a female under the age of 14 years contrary to s. 138(1) of the *Criminal Code.*

The complainant, who was under 14 years of age, gave evidence that the offence was committed when the respondent took her, in company with another couple, (Loreen Fischer and Malcolm Gagnon) to a twin-bedded room in a motel. Each couple occupied one of the beds. The lights were turned out and the complainant says that the respondent lay on one of the beds with her for more than two hours during which time they had some drinks and were "necking", he undid her blouse, loosened her brassiere and later a bedspread was pulled over them and he removed her slacks and panties and had intercourse with her.

The respondent admits going to the motel under the circumstances described by the complainant but says that as they lay on the bed they only "started to neck a little bit", that the bedspread was not pulled over them, her brassiere was not loosened, her clothes were not removed and no intercourse took place. In fact, the respondent testified that the complainant had said she would do anything he wanted but that he replied "Thanks, no thanks" because he "didn't want to get into any trouble."

Fischer and Gagnon confirmed the complainant's story as to the drinking and the fact that she and the respondent

[1] (1967), 59 W.W.R. 577, [1967] 3 C.C.C. 360.

were lying "necking" in the dark for more than two hours and Fischer confirmed the fact that the complainant's brassiere was loosened, but they were unable to say whether or not sexual intercourse had actually taken place between the respondent and the complainant.

In charging the jury, the learned trial judge read the provisions of s. 134 of the *Criminal Code* respecting the danger of convicting on the uncorroborated evidence of the complainant and proceeded to say that:

> ...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, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.

The learned trial judge then went on to tell the jury, in effect, that the evidence of Fischer and Gagnon did not fall within the definition of corroboration that he had given to them, and was not capable of being treated as corroborative because they "did not know whether the act of intercourse was taking place, or not". The learned judge appears to have regarded this evidence as corroborative only of the fact that there was opportunity to commit the offence and he clearly thought it necessary, in order to comply with the requirements of s. 134 of the *Criminal Code* that the corroborative evidence should be direct evidence of the commission of the offence. He expressed this view to the jury saying:

> Now I must tell you, in looking at the evidence in this case I am unable to point to evidence that falls within the definition of corroboration that I have given to you. That is, evidence that is entirely separate from the girl's story of sexual intercourse. The other persons in the motel didn't confirm it. They didn't know whether the act of intercourse was taking place, or not.

The only ground of appeal contained in the Crown's notice of appeal to the Court of Appeal for British Columbia was expressed in the allegation that:

> The learned trial judge failed to charge the jury that the evidence of Loreen Fischer and Malcolm James Gagnon was capable of corroborating the evidence of the Complainant.

This is the question upon which Mr. Justice McFarlane differed from the majority of the Court of Appeal and to which this Court is therefore limited under the provisions of s. 598(1)(*a*) of the *Criminal Code*.

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In the course of his reasons for judgment dismissing the appeal, Mr. Justice Bull agreed with the learned trial judge that the evidence of the couple in the other bed at the motel did nothing more than corroborate the fact that there was opportunity for sexual intercourse which was not denied by anyone and that as it did not amount to direct evidence of the act having taken place, it was not capable of being corroborative. His conclusion was expressed in the following terms:

> In the case at bar, I consider that the evidence of Miss Fischer and Gagnon could not possibly do more than support a mere opportunity for sexual intercourse, and that if it had been put to the jury as being capable of being corroborative of evidence of the commission of the crime alleged against the respondent, the jury would have been found wrong in making those corroborative inferences therefrom. The learned trial judge determined quite properly that the evidence was not so capable and hence it would have been an error to put it to the jury as being capable of being corroborative.

It is true that under certain circumstances corroboration of the existence of mere opportunity may be no corroboration at all, and in this regard the statement of Lord Reading made in the course of his reasons for judgment in *Burbury v. Jackson*[2] is often quoted. The Chief Justice there said:

> ...the question is whether where the parties by the nature of their employment have opportunity of intercourse that is of itself corroboration. In my opinion it is not.... The evidence here shows nothing more than that it was possible to have committed the misconduct at the material date. That is not enough. The evidence must show that the misconduct was probable.

In the case of *Rex v. Reardon*[3], McRuer J.A. makes reference to the reasons for judgment of Lord Dunedin in *Dawson v. M'Kenzie*[4] where, after saying that mere opportunity did not amount to corroboration, he went on to say:

> ...that the opportunity may be of such a character as to bring in an element of suspicion...

In my view evidence of the circumstances described by the witnesses Fischer and Gagnon and admitted by the respondent in this case was a great deal more than evidence of mere opportunity and was capable of being con-

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[2] [1917] 1 K.B. 16, 25 Cox C.C. 555.

[3] (1945), 83 C.C.C. 114 at 117, [1945] O.R. 85.

[4] [1908] S.C. 648.

strued as an account of preliminary activities calculated to culminate in the sexual intercourse which the complainant describes. Whether or not these circumstances amounted to corroboration of the complainant's whole story was a question which in my view should have been left to the jury.

Mr. Justice Norris, who agreed with Bull J.A. that the appeal should be dismissed, appears to have taken the view that because the evidence that the complainant and the respondent were lying on a bed in a darkened motel room "necking" for more than two hours was not denied by the respondent, it was therefore irrelevant. The learned judge said:

> Here the incidental matter, the so-called "necking" or love play was never in dispute. As it was not in issue, evidence of it was not "material" to the offence with which the respondent was charged. As it must "implicate" the respondent it must "involve" him in the offence. However reprehensible such action may seem, in the circumstances of this case and on a fair interpretation of a totality of the evidence of all the witnesses, it was an "innocent" act irrelevant to the issue.

This paragraph seems to be based on the assumption that the respondent admitted all "incidental matters" by which I take it that the learned judge means everything except the actual commission of the offence. The fact of the matter is, however, that the respondent categorically denied that the complainant's brassiere was loosened at all or that he ever had a bedspread or anything else over him. This was vital evidence and the complainant's statement that her brassiere was loosened was corroborated by Fischer whereas both Fischer and Gagnon testified that the bedspread was pulled over the complainant and the respondent.

It also appears to me that Mr. Justice Norris proceeded on the assumption that none of the matters admitted by the respondent were "in issue" and that it followed that corroboration of them "was not 'material' to the offence with which the respondent was charged". In this regard I agree with Mr. Justice McFarlane who, in the course of his dissenting reason for judgment, adopted the views expressed by Curran L.J. in *Regina v. Hodgett*[5], where he said, at page 8:

> ...we know of no authority for restricting the requisite corroboration to the part or parts of the accomplice's testimony that the accused

[5] [1957] L.R.N.I. 1, [1958] Cr. L.R. 225.

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chooses to put in issue. On the contrary, admissions have for long been held corroborative and it is hard to see how this could be so if the argument under consideration were sound.

If any other authority be needed to support the latter proposition, it is to be found in the leading case of *The King v. Baskerville*[6], where the accused was charged with having committed acts of gross indecency with two boys and it was argued that as they were accomplices their evidence required corroboration. In the course of his reasons for judgment in that case, Lord Reading, after pointing out that letters from the accused to the boys had been put in evidence, went on to say:

> The prisoner had admitted to the police that the boys had been at his flat, that he knew one as a page-boy at the Trocadero Restaurant, and that this boy had been to see him on several occasions with another boy, and the appellant suggested to the police that he belonged to a boys' club and, therefore, was entitled to invite any of the members to his place. The appellant was not a member of a boys' club. The appellant gave evidence at the trial and admitted that he had given money to the boys on various occasions, and that, on hearing a peculiar whistle outside his flat, he had gone downstairs to let the boys in. We entertained no doubt that this evidence afforded ample corroboration of the boys' testimony, even if we assumed that the corroboration required was corroboration "in some material particular implicating the accused".

I find myself in full agreement with the conclusion reached by Mr. Justice McFarlane and I would adopt the views which he expressed in the following paragraph:

> I think evidence which may be corroboration of the evidence of a female person in such a case is evidence which may, in law, be considered by the jury as evidence of a material particular implicating the accused in the commission of the crime alleged. A particular is material in this sense if it may, in the opinion of the jury, show or tend to show that the testimony of the female person that the offense was committed and committed by the accused is true, thus being relevant to the issue which the jury is called upon to decide. That issue in this case was simply whether or not there was an act of sexual intercourse. To be capable of being considered corroborative, evidence need not in itself prove the guilty act.

The last sentence of this paragraph is fully borne out by what was said in the following statement of Lord Reading in *Rex v. Baskerville, supra:*

> The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

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[6] [1916] 2 K.B. 658, 12 Cr. App. R. 81.

In my view, the evidence of Fischer and Gagnon was capable of being construed as circumstantial evidence of the respondent's connection with the crime of which he was charged. It was for the jury to say under all the circumstances whether or not it in fact amounted to corroboration.

For all these reasons I would allow this appeal, set aside the judgment of the Court of Appeal and the verdict of the jury and direct that a new trial should be had.

Appeal allowed and new trial directed.

Solicitors for the appellant: Boyd, King and Toy, Vancouver.

Solicitor for the respondent: F. W. Elliott, Quesnel.