EARL PAIGE.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1948

*May 12
*June 25

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Criminal Law—Evidence—Corroboration—Unsworn testimony of child of tender years—Offence, under section 301 (2) of Criminal Code, of carnally knowing girl between the ages of 14 and 16 years—Canada Evidence Act, section 16 (2)—Criminal Code, sections 301 (2), 1002, 1003, 1023.

Held: The corroboration required by section 301 (2) of the Criminal Code cannot be found in the unsworn testimony of a child of tender years, unless this unsworn testimony is corroborated by some other material evidence.

*PRESENT: The Chief Justice and Taschereau, Rand, Estey and Locke JJ.

(1) (1893) L.R. Probate 5. (2) 8 H. of L. 160.

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming (Letourneau C.J. and Casey J.A. dissenting) the conviction of the appellant on a charge of carnal knowledge of a girl between the ages of 14 and 16 years.

A. Chevalier, K.C. and *J. J. Bertrand* for the appellant.

P. E. Delaney, K.C. for the respondent.

The judgment of the Chief Justice and of Taschereau, Estey and Locke JJ. was delivered by

ESTEY J.:—The accused was convicted of having carnal knowledge of a girl between the ages of fourteen and sixteen, contrary to section 301 (2) of the *Criminal Code*. The latter part of the foregoing subsection reads as follows:

. . . no person accused of any offence under this subsection shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

The Court of King's Bench in Quebec (Appeal Side) (1) affirmed the conviction, but:

Messieurs les juges en chef Létourneau et Casey sont dissidents et feraient droit à l'appel, par le motif que le témoignage de la plaignante, Emélie Gauvin, n'est pas corroboré suivant les exigences des articles 301 et 1002 du Code Criminel du Canada.

The appellant, on the basis of this dissent, appeals to this Court under the provisions of section 1023 of the *Criminal Code*.

The Magistrate presiding in the Court of Sessions of the Peace in finding the accused guilty found the required corroboration of the girl's evidence in that of her brother, a boy at the time of the alleged offence about ten years of age, whose evidence was received without oath (at the trial about three years after the date of the alleged offence) under section 16 of the *Canada Evidence Act*.

The Magistrate in the course of his reasons for finding the accused guilty stated:

It is true that the boy's evidence was unsworn, but in a case of *Rex* v. *Hamlin*, (52 C.C.C. 149) it was decided:— "corroborative evidence of the complainant's evidence on a charge of carnal knowledge, may be found in the evidence of another girl of tender age tendered as a witness, although such evidence was given NOT under oath."

(1) Q.R. [1947] K.B. 404.

If a child of tender years does not understand the nature of an oath, it is provided in section 16 of the *Canada Evidence Act* that the evidence of such child may be received if, in the opinion of the judge trying the case, such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. Subsection (2) of section 16 provides:

> 16. (2) No case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

This statutory provision in section 16(2) and that in section 301(2) requiring corroboration of the evidence of the complainant, as well as the rule of practice requiring corroboration of the evidence of an accomplice, are all based upon the experience that long ago established the danger of accepting the evidence of any of these parties unless it be corroborated. The essentials of corroboration were considered in *Rex* v. *Baskerville* (1), where at p. 667 it is stated:

> 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 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 prisoner 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 offences for which corroboration is required by statute.

See also *Hubin* v. *The King* (2).

It is unnecessary to here consider the difference in the language of section 16(2) and sections 301(2) and 1002, as well as 1003, in which there is the identical provision for the reception of the evidence of a child of tender years, more than to observe that it has been held that the language of these sections should be construed to the same effect: *Rex v. Silverstone* (3). The rule of practice with respect to accomplices was stated in *Rex v. Noakes* (4), and has been consistently approved and followed. It has been repeatedly held that the unsworn evidence of a child of tender years will not constitute corroboration of the evidence of another child of tender years whose evidence

(1) [1916] 2 K.B. 658.
(2) [1927] S.C.R. 442.
(3) [1934] 61 C.C.C. 258.
(4) [1832] 5 C. & P. 326.

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is also given without oath. *Rex* v. *Whistnant* (1); *Rex* v. *McInulty* (2); *Rex* v. *Lamond* (3); *Brulé* v. *Regem* (4); *Rex v. Drew* (2), (5); *Rex* v. *Manser* (6).

In Great Britain, where the statutory provisions, (1908—8 Edw. VII, c. 67, sec. 30(*a*), as amended 1914—4 & 5 Geo. V, c. 58, sec. 28 (2)), are similar to section 1003 (2), the unsworn evidence of a child of tender years if not corroborated is entirely disregarded. As stated by Lord Chief Justice Isaacs:

> . . . it ought to be pointed out to the jury that they must not act on the evidence of the child alone, but that there must be corroboration of it before they are entitled to regard the child's evidence at all. *Rex* v. *Murray*, (7).

And as stated by Lord Chief Justice Hewart:

> In truth and in fact the evidence of the girl Doris ought to have been obliterated altogether from the case, inasmuch as it was not corroborated. *Rex v. Manser* (6).

Any suggestion that the corroboration of the brother might be found in that of the complainant was referred to as "mutual corroboration" and rejected in *Rex* v. *Manser* (6). The evidence of each of these parties is possessed of the same inherent danger. The purpose of corroboration is to remove that danger and this cannot be accomplished by evidence which itself cannot alone be acted upon because it is subject to the same danger and objection.

In this case section 301(2) requires that the evidence of the complainant must be corroborated "by evidence implicating the accused." This provision in section 301(2) is identical with that of section 1002 as applied to section 301, where:

> The corroboration must be by evidence independent of the complainant; and it "must tend to show that the accused committed the crime charged."

Hubin v. *The King* (8).

Such independent evidence must possess probative value, which is the very quality section 16 denies to the unsworn and uncorroborated evidence of a child of tender years. Such is the effect of the specific provision that "such evidence must be corroborated." It follows that if it is not corroborated it does not possess probative value and

(1) [1912] 20 C.C.C. 322.
(2) [1914] 22 C.C.C. 347.
(3) [1925] 45 C.C.C. 200.
(4) [1930] Q.R. 48 K.B. 64.
(5) [1933] 60 C.C.C. 229.
(6) [1934] 25 Cr. App. R. 18 at 20.
(7) [1913] 9 Cr. App. R. 248 at 250.
(8) [1927] S.C.R. 442.

should be ignored. The decision in *Rex* v. *Hamlin* (1) fails to give effect to this express provision and does not appear to be in accord with the principles underlying the authorities already mentioned.

The Magistrate, in so far as he adopted the statement of the law contained in that decision, misdirected himself and therefore the case should go back for a new trial.

In view of the fact that this case is to be retried, it may not be inappropriate to draw attention to the fact that the record discloses that when Willie Gauvin was called as a witness his evidence was accepted as a matter of course without oath. It does appear that counsel for the Crown at the outset of his examination elicited that he was thirteen years of age, attended school, knew he should not tell a lie in Court and if he did he would be punished, but he did not know what it was "to swear to something." The record however does not disclose that the Magistrate made either one of the two findings required by section 16. The procedure followed was not in accord with the requirement of that section, as explained in *Sankey* v. *The King* (2) where at p. 439 Anglin, C.J., writing the judgment of the Court, stated:

> Now it is quite as much the duty of the presiding judge to ascertain by appropriate methods whether or not a child offered as a witness does, or does not, understand the nature of an oath, as it is to satisfy himself of the intelligence of such child and his appreciation of the duty of speaking the truth. On both points alike he is required by the statute to form an opinion; as to both he is entrusted with discretion, to be exercised judicially and upon reasonable grounds. The term "child of tender years" is not defined. Of no ordinary child over seven years of age can it be safely predicated, from his mere appearance, that he does not understand the nature of an oath.

Some of the learned Judges in the Court of Appeal found the necessary corroboration in the evidence of Mayor Cousins, who deposed as to a conversation at his home with the accused when he came there the same day the child was born. It contains statements made by the accused from which, depending largely upon the conduct and attitude at the time he made same, certain inferences might be drawn therefrom, but that is a matter more particularly for a trial Judge who has an opportunity of hearing the evidence. The Magistrate, however, having

(1) 52 C.C.C. 149.

(2) [1927] S.C.R. 436.

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directed himself as already indicated, did not find it necessary to consider or make any finding based on the evidence of Mayor Cousins.

The position is therefore similar to that in *Hubin* v. *The King* (1), where Anglin, C.J., at p. 450 states:

> Unfortunately, however, the trial judge appears not to have considered this evidence or passed upon its sufficiency . . . There is no finding by the trial judge as to the inference to be drawn from the conduct of the accused, already adverted to, nor any adjudication that it affords the requisite corroboration. We cannot, without usurping the exclusive function of the tribunal of fact, make such an adjudication.

The conviction should be set aside and a new trial directed.

RAND J.—The accused appeals from his conviction under section 301(2) of the *Criminal Code*. By that section

> no person accused . . . shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

The evidence for the prosecution was given by the girl against whom the offence was charged to have been committed. Her testimony was followed by that of a young brother admitted under section 16 of the *Canada Evidence Act*. No further evidence of the circumstances of the offence was presented.

Subsection (2) of section 16 provides that "no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence." The trial Judge, treating the unsworn evidence of the brother as corroboration of that of the prosecutrix, convicted the accused, and on appeal and on the same ground the conviction was affirmed with Létourneau, C.J. and Casey, J. dissenting (2). There was other evidence given by the mother of the prosecutrix and the mayor of the village which together might have been found to furnish corroboration, but the trial Judge did not deal with it.

The first question is, therefore, whether the corroboration required by section 301 is furnished by the unsworn testimony alone of a witness admitted under section 16. Before the enactment of that section, the only evidence admissible was that given under the sanction of an oath or its equivalent. The introduction of an unsworn state-

(1) [1927] S.C.R. 442. (2) Q.R. [1947] K.B. 404.

ment must then be taken with the conditions annexed to it before it can be looked upon as evidence in the full sense of the term. When under section 301(2) corroboration is required by "evidence" the word is used in that sense and it calls for testimony possessing the essential sanction.

Under section 16 the statement as a condition of its completeness requires like corroboration which means corroboration by evidence satisfying the basic requirement. In the present case that subsidiary corroboration is discovered in the evidence of the prosecutrix itself; but the fallacy involved is perfectly obvious; it would mean that the evidence of the prosecutrix which must be corroborated by testimony formally complete can itself be used to corroborate imperfect testimony necessary to its own corroboration: that it can be used, in other words, to corroborate its own corroboration. That circular treatment is dealt with specifically in *The King* v. *Manser* (1), where the Lord Chief Justice examines "mutual corroboration", as it has apparently been called, and in rejecting it he expresses the view that "in truth and in fact the evidence of the girl Doris ought to have been obliterated altogether from the case, inasmuch as it was not corroborated. It clearly was not corroborated by the evidence of the girl Barbara (the prosecutrix)."

The question was considered in *Rex* v. *Cowpersmith* (2), where Smith, J.A., observing that he was not overlooking *Rex* v. *Manser* (1) says:—

> I think the Court there treated the evidence of the complainant in all respects as if it had been unsworn evidence and would appear to have drawn no distinction between the evidentiary value of sworn evidence corroborated by unsworn evidence and that of unsworn evidence corroborated by unsworn evidence.

That judgment followed *Rex* v. *Hamlin* (3) in which the Supreme Court of Alberta came to the like conclusion. The reasoning in both of these decisions does not, in my opinion, pay sufficient regard to the specific requirement, under section 301 (2), of corroboration by evidence carrying the necessary ritualistic obligation. If section 16, in creating a new mode by which evidentiary matter could be introduced into a trial, had intended the statement so presented to be sufficient for corroborative purposes without

(1) [1934] 25 Cr. App. R. 18 at 20.
(2) [1946] 1 Cr. R. (Can.) 314.
(3) [1930] 1 D.L.R. 497.

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its own corroboration, it must, I think, have declared so; I can see no intention of Parliament to stamp the unsworn statement as sanctioned evidence per se and then to require its corroboration for a certain use only, leaving all other use at large. If the statement is competent to corroborate so as to satisfy section 301(2), how can it logically be rejected for the same purpose under section 16? What difference in implication as to the quality of the corroborative evidence can be found between them? And yet the courts have uniformly held that such statements cannot support each other: *Rex* v. *Whistnant* (1); *Rex* v. *Lamond* (2); *Rex* v. *Drew* (3). The two sections must be so read as to render the statement admissible as corroboration only upon the independent performance of the condition annexed to it.

The remaining question arises from the failure of the trial Judge to deal with other evidence which might have furnished the basis of corroboration. I find that in *Hubin* v. *The King* (4), this Court had before it a similar situation, and it was decided that as no finding had been made by the trial Judge as to the "inference to be drawn from the conduct of the accused . . . nor any adjudication that it affords the requisite corroboration" this Court could not, without usurping the exclusive function of the tribunal of fact, make such an adjudication.

The conviction, therefore, should be set aside and a new trial directed.

Appeal allowed, conviction set aside and new trial directed.

Solicitors for the appellant: *J. J. Bertrand and A. Chevalier.*

Solicitor for the respondent: *P. E. Delaney.*

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(1) 8 D.L.R. 468; 20 C.C.C. 322.
(2) 58 O.L.R. 264; 45 C.C.C. 200
(3) [1933] 4 D.L.R. 592; 60 C.C.C. 229.
(4) [1927] S.C.R. 442.