1927

*May 3.
*May 30.

LEO PAUL HUBIN .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal Law—Evidence—Corroboration—Cr. Code, s. 1002 (as amended, 1925, c. 38, s. 26)—Nature of evidence required for corroboration—Charge of offence, under Cr. Code, s. 301, of carnally knowing girl under 14 years of age.

The corroboration required by s. 1002 of the *Criminal Code* (as amended 1925, c. 38, s. 26) must be by evidence independent of the complainant, and it must tend to show that the accused committed the crime charged (*R.* v. *Baskerville,* [1916] 2 K.B. 658). The question whether there is any evidence within that description, on which a jury could find corroboration, is one of law; although, whether corroborative inferences should be drawn is a question for the jury (*R.* v. *Gray,* 68 J.P. 327).

On a charge of carnally knowing a girl under 14 years of age, under s. 301 of the *Criminal Code,* it was held (reversing judgment of the Court of Appeal for Manitoba, 36 Man. R. 373) that the identification, by its plate number and a certain cushion, by the girl, of accused's motor car as the one driven at the time of the offence by the person committing it, was not, in a proper sense, independent evidence tending to connect accused with the crime, and therefore did not fulfil the requirement as to corroboration of the girl's evidence that accused committed the offence. But the Court was of opinion that, while the evidence was not explicit that accused maintained silence when charged with the crime on his arrest, and again when confronted with and identified by the girl, his conduct on those occasions, so far as disclosed, and in subsequently voluntarily making two inconsistent statements, was such that a jury, or a judge trying the case without a jury, might infer from it some acknowledgment of guilt; whether such inferences should be drawn was a question of fact; (*R.* v. *Christie* [1914] A.C. 545, at pp. 554, 559-560, 563-564, 565-566; *Mash* v. *Darley* [1914] 3 K.B. 1226, at pp. 1230-1231, 1234; *R.* v. *Feigenbaum* [1919] 1 K.B. 431, at pp. 433-434, cited); had such conduct of accused been found by the trial judge to be corroborative of the girl's story the conviction could not have been set aside; but, there being no finding by the trial judge as to the inference to be drawn from such conduct of accused, nor any adjudication that it afforded the requisite corroboration, this Court could not, without usurping the exclusive function of the tribunal of fact, make such an adjudication; the trial judge's ruling that accused's admission of ownership of the car and its identification by the girl constituted corroborative evidence, was erroneous, and resulted in a mis-trial; the case did not fall within the saving operation of s. 1014 (2) (as enacted 1923, c. 41) of the *Criminal Code,* and the conviction should be set aside; but the Court, in the exercise of its discretion under s. 1014 (3), refused to direct accused's discharge, and ordered a new trial.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

1927

HUBIN v. THE KING.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) affirming, by a majority, the conviction of the appellant by His Honour Judge Stacpoole, in the County Court Judge's Criminal Court, for the offence of carnally knowing a girl under the age of 14 years, contrary to s. 301 of the *Criminal Code*.

The complainant, the victim of the alleged offence, stated in her evidence that, as she was on her way to the post office at Lockport, the accused overtook her in a motor car, and offered to take her to her destination, that she got in the car, that accused took her out of her way and committed the offence on a road; that after the offence was committed and as the accused was leaving her, she made a note of the plate number of the car. She subsequently picked out the car, recognizing it, according to her evidence, by its plate number and by a certain cushion on the seat. Evidence from other sources was given to show that this car belonged to the accused. The complainant also picked out the accused, as the one who had committed the offence, from a line of five men in the police office. After the complainant had picked him out and left the office, the accused made a statement to the police, which he immediately afterwards corrected by another statement, to show his movements on the day the alleged offence was committed. He admitted he owned a car with a plate number the same as that alleged by the complainant, and that he was driving it on the day in question, but at Winnipeg, which is nearly twenty miles from Lockport.

The question before the court on this appeal was whether or not there was evidence upon which corroboration of the complainant's evidence, as required by s. 1002 of the *Criminal Code*, as amended 1925, c. 38, s. 26, could properly be found.

J. M. Isaacs for the appellant.

R. W. Craig K.C. for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The appellant was convicted, on the 7th of March, 1927, in the County Court Judge's Criminal Court, at Winnipeg, of an offence under s. 301 of the *Crim-*

(1) 36 Man. R. 373; [1927] 1 W.W.R. 705.

1927
HUBIN
v.
THE KING.
Anglin C.J.C.

inal Code. On appeal, based on the grounds, (*a*) of non-corroboration of the evidence of the complainant, and (*b*) of absence of proof that the complainant was not the wife of the appellant, his conviction was affirmed by the Manitoba Court of Appeal, unanimously as to ground (*b*), and with Prendergast and Fullerton JJ.A. dissenting as to ground (*a*). These learned judges were of the opinion that there was no evidence upon which the corroboration required by s. 1002 of the *Criminal Code,* as amended by s. 26 of c. 38 of the statutes of 1925, could be found:

> 1002. No person accused of an offence, etc., shall be convicted upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused.

Since the decision of the Court of Criminal Appeal in *R.* v. *Baskerville* (1), the requirements of the provision now found in s. 1002 admit of no doubt. The corroboration must be by evidence independent of the complainant; and it

> must tend to show that the accused committed the crime charged.

The question we have to pass upon is whether the record before us contains any evidence within that description, on which a jury could find corroboration, Prendergast and Fullerton JJ.A., resting their dissent on the proposition that such evidence is entirely lacking. That question we regard as a question of law, although, no doubt, whether corroborative inferences should be drawn is a question for the jury. *R.* v. *Gray* (2); S. 1024, *Crim. Code,* as enasted by s. 27 of c. 38 of the statutes of 1925.

Of most of the matters relied upon by the Crown as implicating the accused, however, it cannot, in our opinion, be safely predicated that they are in evidence independently of the testimony and conduct of the complainant, or that, without her testimony, they "tend to show that the accused committed the crime charged." This defect affects everything in connection with the alleged implication of the accused because of the admission by him of the ownership and driving, on the morning in question, of the car identified by the complainant as that in which she was taken to the scene of the crime. While the verification of the details given by her no doubt adds to the credibility

(1) [1916] 2 K.B. 658. (2) (1904) 68 J.P. 327.

of the story she tells, everything in that connection, including the admitted facts of ownership and driving (not at or near the scene of the offence, but in and about Winnipeg) depends, for its evidentiary value, upon her statement that a certain license number was that carried by the car in which she was conveyed to the scene of the crime and her subsequent identification of a cushion found in the car bearing that number. This is not, in a proper sense, independent evidence tending to connect the accused with the crime. In themselves these facts and circumstances merely "relate to the identity of the accused without connecting him with the crime." *R.* v. *Baskerville* (1). They implicate the accused solely by reason of the complainant's statement as to the number of the car and her identification of the cushion in it. Without this additional factor they are quite irrelevant. Nor can any multiplication of such facts amount to corroboration. *Thomas* v. *Jones* (2). They are all admissible only by reason of the girl's own story connecting them with the crime. They lack, therefore, the essential quality of independence.

But there are in evidence certain other matters which, according to the view to be taken of, and the inferences to be drawn from, them by the tribunal of fact, may meet the requirements of s. 1002 of the *Criminal Code*.

When the accused was first charged with the offence by the constable who arrested him, so far as the record discloses he made no reply to the charge which was read to him; again, when, at the police station, he was identified by the complainant, who, going up to him, said: "That is the man," so far as the evidence shows, he made no denial in her presence. But, almost immediately after she had gone away, he asked to make, and made, a voluntary statement of his movements on the morning of the 20th of July, when the crime is charged to have been committed. Scarcely had that statement been signed by him when he said he had made a mistake and dictated a second statement which he also signed. The manifest object of these two statements was to show that during the material time he was in and about the city of Winnipeg, 20 miles distant

(1) [1916] 2 K.B. 658, at p. 665.

(2) [1921] 1 K.B. 22, at pp. 33-4, 48.

1927

HUBIN v. THE KING.

Anglin C.J.C.

from Lockport near which the crime was committed. Of these two statements the learned Chief Justice of Manitoba says:

> The first statement was to the effect that he, the accused, was driving his car in Winnipeg and conversing with various persons there at about the same time that the girl says he overtook her on the road to Lockport, which is twenty miles away, and induced her to enter his car. In the second statement, made immediately after the first, he gave a completely different account as to his movements on the day in question: He says he went in his car to his mother's place in St. Boniface and stayed there until 10.30, when he went to his sister's place in the same city and she came back with him to his mother's; that he stayed there about fifteen minutes and then went home, arriving there about noon.
>
> These statements were clearly made for the purpose of founding an alibi upon them. Probably, after he had made the first statement, he feared that the persons he mentioned as in conversation with him that forenoon might not support his statements. It would seem, therefore, that he made the second statement in the expectation that his mother and sister would assist him. However, no evidence for the defence was put in.

Mr. Justice Trueman, with whom Mr. Justice Dennistoun concurred, says:

> These statements carry nothing but conviction that they are a tissue of lies. Each completely contradicts and refutes the other. It is not necessary to examine or compare them in detail. In the first statement there is no mention of visits to his mother and sister, to whom, with his wife, the proof of the alibi is left by the second statement. That both statements are false I have no doubt. That one is assuredly false need alone be stated.

While the evidence is not explicit that the appellant maintained silence when charged with the crime on his arrest and again when confronted with and identified by the complainant, his conduct on those occasions, so far as disclosed, and in voluntarily making the two inconsistent statements referred to, was such that a jury might—and in this case that the trial judge might—infer from it some acknowledgment of guilt. Whether such inferences should be drawn is a question of fact.

As put by Lord Atkinson, in *R.* v. *Christie* (1)—where there was a question of the admissibility of evidence of a statement made by the complainant (a boy of 5, who testified without being sworn) in the presence of the accused, who was charged with indecent assault—

> As to the second ground, the rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or

(1) [1914] A.C. 545, at p. 554.

denial from him, is not evidence against him of the facts stated, save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct, or demeanour at the time when a statement was made amounts to an acceptance of it in whole or in part. It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgment may be inferred by them.

Lord Moulton, in the same case, at pp. 559-560, said:

It is common ground that, if on such an occasion he admits it, evidence can be given of the admission and of what passed on the occasion when it was made. It seems quite illogical that it should be admissible to prove that the accused was charged with the crime if his answer thereto was an admission, while it is not admissible to prove it when his answer has been a denial of the crime, and I cannot agree that the admissibility or non-admissibility is decided as a matter of law by any such artificial rule. Going back to first principles as enunciated above, the deciding question is whether the evidence of the whole occurrence is relevant or not. If the prisoner admits the charge the evidence is obviously relevant. * * * The evidential value of the occurrence depends entirely on the behaviour of the prisoner, for the fact that some one makes a statement to him subsequently to the commission of the crime cannot in itself have any value as evidence for or against him. The only evidence for or against him is his behaviour in response to the charge, but I can see no justification for laying down as a rule of law that any particular form of response, whether of a positive or negative character, is such that it cannot in some circumstances have an evidential value. I am, therefore, of opinion that there is no rule of law that evidence cannot be given of the accused being charged with the offence and of his behaviour on hearing such charge where that behaviour amounts to a denial of his guilt.

Lord Reading, at pp. 563-4, said:

As to the second ground. A statement made in the presence of one of the parties to a civil action may be given in evidence against him if it is relevant to any of the matters in issue. And equally such a statement made in the presence of the accused may be given in evidence against him at his trial.

And he added, at pp. 565-6:

It might well be that the prosecution wished to give evidence of such a statement in order to prove the conduct and demeanour of the accused when hearing the statement as a relevant fact in the particular case, notwithstanding that it did not amount either to an acknowledgment or some evidence of an acknowledgment of any part of the truth of the statement. I think it impossible to lay down any general rule to be applied to all such cases, save the principle of strict law to which I have referred.

1927

HUBIN v. THE KING.

Anglin C.J.C.

Mash v. *Darley* (1), was a case of bastardy. The defendant had already been convicted of having had unlawful carnal knowledge of the complainant. On his preliminary hearing preceding that conviction he had deposed that the complainant was a fast girl and that that was the cause of her condition. On his trial no such suggestion was made. The question was whether proof of these facts could afford corroboration of the complainant's story in the bastardy case. Buckley L.J., said, at pp. 1230-1:

There are two matters, it seems to me, which are plainly admissible evidence. The first is that the superintendent of police said that he was present at the inquiry before the justices when the appellant gave evidence which suggested that the respondent was a fast girl and that that was the reason of her condition. That is admissible. The second is that the superintendent of police was in Court during the trial at the assizes and he says that no suggestion was then made by the appellant that the respondent was a fast girl, nor did the appellant repeat the evidence on this point, which he gave at the hearing of the charge before the justices in August, 1912. That is admissible. Corroborative evidence, I conceive, may be found either in admissions by the man or inferences properly drawn from the conduct of the man. Admission here, there is none. Conduct there is. Were or were not the justices entitled to take into account as a matter of evidence upon which they might come to some conclusion the fact that the man before the justices told a story, namely, that she was fast and that her condition was due to that state of things, and the fact that when at the assizes he stood in peril and when, if the defence was true, it was to his interest to set it forward, he did not set it forward at all? It has been argued before us as if he could not have set up that defence without going into the box and exposing himself to cross-examination. It appears to me that that is a mistake. The defence could have been set up in cross-examination of the girl when she was in the box. Nothing of the kind was done. So, upon matters which are admissible in evidence, it is established that the conduct of the man was this—that before the justices he took a particular course and at a subsequent date he did not take a particular course, and that that was a course which you would have expected him to take under circumstances of his innocence. It is not for us to say what weight ought to be given to that evidence. All that we have to look at is to see whether there was evidence. If there was evidence, it is not for us but for the justices to determine whether or not that was evidence which satisfied them. It appears to me that that was corroborative evidence and that the justices were entitled to take into account that the man so conducted himself as that there was reason from his conduct to infer that the girl's story was presumably true. It appears to me that that disposes of this case.

Kennedy, L.J., said, at p. 1234:

I also agree that there may be cases in which language, whether used in a Court of justice or outside a Court of Justice, may be considered as having the effect of corroboration, although there is nothing like an express admission. There may be such cases.

(1) [1914] 3 K.B. 1226.

Phillimore L.J., also thought the evidence admissible and such as the justices might act upon.

In the case of *R.* v. *Feigenbaum* (1), the Court of Criminal Appeal dealt with the question of corroboration in a case where the appellant had been convicted of inciting boys to steal. The boys were accomplices and their evidence, therefore, could not safely be relied upon unless corroborated.

Darling J., delivering the judgment of the Court of Criminal Appeal (Darling, Avory and Shearman JJ.), said, at pp. 433-434:

> In this case the deputy-chairman rightly directed the jury as to the danger of believing the uncorroborated evidence of the accomplices, and as to what was, or might be, corroboration; and, in our opinion, it would, in the circumstances of this case, have been wrong for him to say that in his opinion there was no corroboration of the boys' evidence. What had happened was this. After the boys had been arrested, and statements implicating the appellant had been made by them to the police, a police officer went to the appellant's house. He gave the appellant specific information as to the names of the boys, as to what they had told the police, and as to the charge against them. The appellant did not make any reply to the statement of the police officer. We are of opinion that, in these circumstances, it would be wrong to say that there was no evidence on which the jury could find that the boys' evidence had been corroborated. The deputy-chairman quite properly pointed out to the jury that the failure of the appellant to make any reply to the statement of the police officer might, having regard to the nature of the statement and to the circumstances in which it was made, be considered as being a corroboration of the boys' evidence, that it was for the jury to consider whether in their opinion it did, or did not, amount to corroboration, and, if they thought it did, it was for them to say whether they thought there was sufficient evidence on which to convict the appellant.

Mr. Justice Avory had been a member of the Court of Criminal Appeal in the case of *R.* v. *Baskerville* (*supra*) (2) and was also the dissenting judge in the Divisional Court in *Thomas* v. *Jones* (3), whose judgment was afterwards approved in the reversing judgment of the Court of Appeal (4).

We are of the opinion that, if the conduct of the appellant when arrested and again when identified by the complainant and in making the two inconsistent statements had been found by the trial judge to be corroborative of the story of the complainant, the conviction before us could not have been set aside.

(1) [1919] 1 K.B. 431.
(2) [1916] 2 K.B. 658.
(3) [1920] 2 K.B. 399.
(4) [1921] 1 K.B. 22.

1927

HUBIN v. THE KING.

Anglin C.J.C.

Unfortunately, however, the trial judge appears not to have considered this evidence or passed upon its sufficiency. In pronouncing judgment against the appellant he said:

> The evidence I regard as corroborative is contained in the statement of the accused whereby he admits the ownership of the car. The little girl claims that car was out there, and that was the car she was conveyed in to where the offence took place. The accused admits the ownership of the car, and that is a corroboration on a material point implicating the accused.

For reasons already indicated we are unable to agree with this view of the learned judge.

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.

This case does not fall within the saving operation of s. 1014 (2) of the *Criminal Code* (13 and 14 Geo. V, c. 41, s. 9). On the other hand the circumstances do not seem to call for an unqualified order quashing the conviction and directing the discharge of the appellant. While of the opinion that the ruling of the trial judge was erroneous and has resulted in a mis-trial, we think that,

> having regard to the nature of the offence and the circumstances under which * * * it was committed, the present case is one in which the discretion (conferred by s. 1018—now s. 1014 (3)—of the *Criminal Code*) should be exercised in such manner as to afford the Crown an opportunity of once more putting the law in motion * * * if it thinks fit to do so.

R. v. *Burr* (1).

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

Conviction set aside and new trial ordered.

Solicitors for the appellant: *Isaacs & Isaacs.*

Solicitor for the respondent: *The Honourable R. W. Craig, Attorney General for Manitoba.*

---

(1) (1906) 13 Ont. L.R. 485.