Supreme Court of Canada
Shorten v. The King, (1918) 57 S.C.R. 118
Date: 1918-06-25

Richard Robert Shorten Appellant;

and

His Majesty The King Respondent.

1918: June 25.

Present: Sir Charles Fitzpatrick, C.J. and Davies, Idington, Anglin and Brodeur J.J.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Criminal law—Indecent assault—Evidence—Complaint elicited by questions—Admissibility—Corroboration—Criminal Code, s. 1003.

The appellant was indicted for an indecent assault on a girl of seven years of age. At the trial evidence was admitted of the answers given by the girl to questions put by her mother immediately on her return home after the assault, the mother promising not to spank her if she told the whole truth.

Held, that the evidence was properly admitted as corroborating the credibility of the girl (who told what had happened without being sworn), as required by section 1003 of the Criminal Code.

Held, also, that the mother's promise not to punish the child did not make what she said her "assisted story."

APPEAL from the judgment of the Supreme Court of Saskatchewan, rendered on a case reserved for the opinion of the court by the trial judge.

The appellant was charged with carnally knowing Olive King, a girl of seven years of age. The evidence shewed that he met her and another girl of five years of age on the street and brought them into an empty house where the offence is alleged to have taken place. Both little girls made statements in court but did not give evidence under oath.

The mother of the girl gave evidence as to the answers given by her daughter when she was asked to explain the reasons of her prolonged absence; and the mother admitted having promised not to spank her if she would tell the whole truth.

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The questions for decision were whether the evidence of the girl was "corroborated by some material evidence in support thereof implicating the accused," as required by section 1003 of the Criminal Code, and whether the statements made by her to her mother were "spontaneous."

C. J. Bethune for the appellant cited The King v. McGivney[1].

Harold Fisher for the respondent referred to Rex v. Gray[2]; The King v. Daun[3]; Rex v. Scheller[4]; and The King v. Burr[5].

THE CHIEF JUSTICE:—I am of opinion that the statement of the child made to her mother immediately on her return home after the assault was properly admitted. It is true that the mother, irritated and alarmed at the prolonged absence of her daughter, was obliged to persuade her to explain the reason of that absence; but nothing that was said can be construed as questions of an inducing or intimidating character. The child understood that she was expected to explain the cause of her absence and nothing more.

There is also corroboration in other particulars, as pointed out by my brother Idington, and I have no doubt of the sufficiency of the proof of identification.

DAVIES J.:—The only doubt I entertained in this case of the admission in evidence of the young girl Olive King's statement to her mother as to what the prisoner had said and done to her arose, not from the fact that some natural and reasonable questions were put to the child by her mother which elicited the

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statement in question, but the fact that before making it the mother had promised not to spank her if she told the whole truth. I rather doubted whether this promise was not an inducement to make the statement, depriving it of being spontaneous.

After reading the evidence of the mother and the two late decisions of the Criminal Court of Appeal, *Rex* v. *Osborne*[6], and *Rex* v. *Norcott*[7], I am satisfied the evidence was under all the circumstances properly received. I am also satisfied that there was sufficient corroboration of the evidence of the child Olive King to convict the appellant.

The appeal should be dismissed;

IDINGTON J.:—As the majority of the Court of Appeal upheld the conviction, the only question within our jurisdiction and therefore which we can consider is what the learned dissentient judge may have expressed as his ground of dissent.

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[1] 22 Can. Cr. Cas. 222; 15 D.L.R. 550.
[2] 68 J.P. 327.
[3] 11 Can. Cr. Cas. 244.
[4] 23 Can. Cr. Cas. 1; 16 D.L.R. 462.
[5] 12 Can. Cr. Cas. 103.
[6] [1905] 1 K.B. 551.
[7] 86 L.J. K.B. 78.

That if I understand him aright was that there was no evidence of corroboration which, I take it, means of the story of the little girl who says she was assaulted, including, of course, the identification of the appellant as the party implicated.

I think there was sufficient evidence, apart from that of the other little girl, of corroboration to satisfy the statute.

It consists of many little circumstances which I think it needless to dwell upon.

The identification of the appellant is the weakest part of the case and yet so ample that it could not have been properly withdrawn from a jury had there been one in the case.

I think as part thereof that the mother's entire story was properly admitted and considered.

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I cannot agree with some of the expressions of the learned judge who gave the judgment of the court in the case of *Rex* v. *Dunning*[8]. The question of the weight to be given the evidence of those whom the law in a variety of cases requires to be corroborated varies so much that I should hesitate to attempt to define the limits thereof or what question may be put by a mother to her child. The case of *Rex* v. *Osborne*[9], illustrates the problem of admissibility but only governs so far as that case decided. Each case stands on its own bottom.

Judges must as well as Crown officers ever be on the alert in cases of this kind to see that there is no ground for suspecting the good faith of mothers or others in putting forward the charge. The possibility of inciting the child or other persons to make such a charge as herein must ever be jealously guarded against.

Once assured of that good faith I should be sorry to test the admissibility of the evidence by any requirements upon the expressions a mother may have used in order to elicit the truth.

Of course the possibility of the child being innocently as it were misled into an assent to the mother's suggestive questions must be guarded against.

[8] 14 Can. Cr. Cas. 461.
[9] [1905] 1 K.B. 551

That again may come back to the question of weight to be given the evidence rather than its admissibility.

I do not think such cases as this must necessarily be governed for example by the rule against accepting admissions of a prisoner when induced by some one in authority.

The appellant's identification as the man seen with the children seems complete and is corroboration which cannot be rejected.

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I should have preferred to have had related so far as admissible facts and circumstances the facts which led the police officer to arrest the accused.

The same line of thought which guided him if founded on circumstantial evidence might have aided the court in coming to the right conclusion as to the implicating of the accused.

It may, as experience teaches me, have been mere instinct, as it were, that guided the police officer or that he was told to get the man seen with the girls on the occasion in question.

In either such case his evidence could not furnish further facts.

I think the appeal should be dismissed.

ANGLIN J.:—I think there was evidence in corroboration of the evidence given by the child. Two witnesses identified the accused as a man who had been seen with the child not very long before the offence was committed. *(Rex* v. *Murray*[10]). He had no business whatever to be with her. When confronted with the child, he said:

"You never saw me before—you don't know me." This conduct aids in his identification.

The evidence of the child's statement to her mother was, in my opinion, admissible. It was made shortly after the occurrence. It was "spontaneous" in the sense indicated by Lord Reading C.J. in *Rex* v. *Norcott*[11]. Nothing more than mild persuasion led to its being made; there is nothing to indicate that it was "put into her mouth by some one else" or was not

[10] 9 Cr. App. R. 248.
[11] 86 L.J. K.B. 78.

"her own unvarnished and unassisted story," The evidence was not inadmissible by reason of the fact that "questions were put to the girl to get her to tell

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her own story." Nor does the fact that "the circumstances indicate that but for the questioning there would probably have been no voluntary complaint" justify the exclusion of the evidence as was suggested in *Rex* v. *Osborne*[12].

I would dismiss the appeal.

BRODEUR J.:—I concur with my brother Anglin.

Appeal dismissed.

[12] 74 L.J. K.B 311, at p. 315