1944

*Nov. 29, 30
*Dec. 20

RODERICK McINTYRE.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Charge of rape—Evidence—Corroboration—Charge to jury —Misdirection—New trial.

The appeal was from the judgment of the Court of Appeal for Ontario (81 C.C.C. 319) dismissing (Laidlaw J.A. dissenting) appellant's appeal from his conviction on a charge of rape. The issue at the trial was whether or not the complainant voluntarily consented to the intercourse. A witness, R., who had arrived at the scene of the alleged offence shortly after what took place, testified to there being a "matted down" area of about 20 x 6 feet. The complainant in her evidence had said nothing about such condition. Appellant testified that such condition existed before what took place. In charging the jury the trial Judge said that the evidence of R. and two other men corroborated the complainant's story in regard to some of the material aspects thereof and he followed by detailing certain matters of their evidence, including the condition of the area as described by R.

Held (Taschereau and Kellock JJ. dissenting): The conviction should be quashed and a new trial directed.

Per the Chief Justice and Kerwin J.: It was not necessary that the complainant should have given some particular bit of evidence before an independent witness upon that point could corroborate her general story on the issue of consent. As part of the Crown's case, it was quite proper to show the condition of the particular area when R arrived, and the jury would not be bound to believe appellant's evidence as to its condition before the occurrence. But it was misdirection to say that evidence of the matted down condition of the area after the occurrence could constitute corroboration of a material aspect of the complainant's story as to which she had not testified. And it could not be said that the misdirection had caused no miscarriage of justice.

Per Rand J.: It was beyond controversy on the evidence that the state of the surface of the area could not have furnished the slightest corroboration to the complainant's story or to the case of the Crown. The charge to the jury was, therefore, in that respect, a misdirection in law and of such a nature that it could not be said that it might not have influenced the jury in reaching their verdict.

Per Taschereau and Kellock JJ. (dissenting): The reference in question in the charge to the condition of the area, having regard to its context, related, not to any supposed statement of the complainant as to the condition of the area which was corroborated by R., but to a reference earlier in the charge to the complainant's evidence as to the nature of the alleged assault, and would be so understood by the jury; and R.'s evidence as to the condition of the area was consistent with, and could properly be regarded as corrobora-

*PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Rand and Kellock JJ.

tive of, the complainant's evidence with respect to the struggle alleged by her to have taken place, unless it were clearly established as a matter of fact that the struggle described by her was of such a limited character that it could not have been the cause of an area of the extent described by R., and on that question the jury, if accepting complainant's evidence that she did not consent and was attacked, and giving due weight to the circumstances, might well have considered that no difficulty arose, and that was a question of fact, expressly left as such to, and entirely one for, the jury. There was really no question of law involved in the dissent in the Court of Appeal, but merely matters of fact, and therefore the appeal should be quashed.

APPEAL from the judgment of the Court of Appeal for Ontario (1) dismissing (Laidlaw J.A. dissenting) the appellant's appeal from his conviction, at trial before Greene J. and a jury, on a charge of rape.

H. Freshman for the appellant.

W. B. Common K.C. for the respondent.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—The conviction of the appellant McIntyre on a charge of rape was upheld by the Court of Appeal for Ontario with Mr. Justice Laidlaw dissenting. As I consider there should be a new trial, I refrain from discussing the evidence except as it may be necessary to explain my reasons for so doing.

If the offence occurred, there is no doubt that the appellant committed it. He admits that he had intercourse with the complainant, Eva Pettigrew, at the time and place mentioned by her but his defence is that she consented voluntarily. The intercourse took place about noon on a bright Sunday, May 23rd, 1943, not far from a travelled highway in the Township of Ancaster. The exact spot is part of the abandoned right-of-way of an electric railway company and is described in the evidence as being about twenty feet by six feet in area. The ground surrounding it is filled with weeds and tall grass.

After the occurrence, Eva Pettigrew complained to one or more of the occupants of a neighbouring farm house, one of whom described the condition of the particular

(1) 81 Can. Crim. Cas. 319.

1944

McINTYRE v. THE KING

Kerwin J.

area immediately thereafter as "matted down". There would appear to be no denial of this fact but, in view of the defence, the important question in this connection was as to the condition of that area before the complainant and accused had reached it. The only one who gave any evidence on this question was the accused, who said it was "well flattened" and "the only matted down spot in the whole territory."

The vital point in the whole case was as to whether the complainant consented or, if she had consented, whether such consent had been extorted by threats or fear of bodily harm (*Criminal Code*, s. 298). The trial judge told the jury that they "should be reluctant to convict in a case of this kind upon the uncorroborated evidence of the complainant" but that "it is within your power to do so." He then dealt with the question "whether the story of the complainant had been corroborated in a material aspect." He stated that the evidence of three people in the farm house "amply corroborates the story as told by Eva Pettigrew in regard to some of the material aspects of that story." He then detailed some of these aspects and stated, as one of them:— "They described the condition of the area twenty feet by six where the grass was pressed down", and concluded:— "So in several matters they corroborated the evidence of Eva Pettigrew as she gave it in the witness box here to-day." Later in his charge he said:— "She says that she did not consent, and that she was overpowered by fear when he threatened her with bodily harm. Indicating that there was perhaps some struggle or evasion—it is for you gentlemen to say—there was a beaten down area in the grass and weeds there of some twenty feet by six."

It was pointed out in argument before us that the trial judge was in error in stating that three occupants of the farm house had described the condition of this lot where the grass was pressed down. As a matter of fact only one had referred to it but, as we may deal only with the dissent in the Court below, I disregard this discrepancy. All that was required was that the corroboration should be of the evidence of the complainant that the accused had carnal knowledge of her without her consent or with consent that had been extorted by threats or fear of bodily harm

It was not necessary that the complainant should have testified to some particular bit of evidence before an independent witness upon that point could corroborate her general story on the issue of consent. As part of the Crown's case, it was quite proper to show the condition of the particular area when the independent witnesses arrived, and the jury would not be bound to believe the evidence of the accused as to its condition before the occurrence.

However, that is not what the trial judge told the jury. He instructed them that the evidence could be taken by them as corroborating her story in regard to some of the material aspects thereof and then gave as one aspect the condition of the area. As a matter of fact she had said nothing about it. It was misdirection to say that evidence of the matted down condition of the area after the occurrence could constitute corroboration of a material aspect of the complainant's story as to which she had not testified. It is in this sense that I understand Mr. Justice Laidlaw's statement:—"There could not, of course, be corroboration, ample or otherwise, of evidence not given by the complainant, Eva Pettigrew, and in my opinion there was a misdirection to the jury in this matter." In any event, later in his judgment he states:—"There was again [referring to the same point] misdirection of such a character and magnitude as to make the trial unfair to the appellant."

In other parts of his charge, the trial judge had told the jury that they were the sole judges as to what facts had been proved by the evidence; that while it was his duty to review some of the highlights of the evidence and to comment on them, if he saw fit, he could not pretend to review everything and, if he expressed an opinion of the facts, they were not bound to follow it unless their own opinion happened to be the same; and, towards the conclusion of his charge, he stated that he did not pretend to have covered all the evidence,—that there might be parts of it that were important that they recalled which he had not gone over but that he was satisfied that among their twelve joint memories they would have before them everything that was of any real importance.

1944

McINTYRE v. THE KING

Kerwin J.

These general observations, however, cannot weigh in this case where the question of consent was of prime importance, nor does it matter that the judge was right in pointing out other evidence which, if the jury believed it, would warrant them in treating it as corroboration. There being misdirection, I am unable to say that there has been no miscarriage of justice. The fact that counsel for the accused did not object at the trial should not be taken, in the circumstances, to indicate that the point was negligible. There had already been one trial where the jury disagreed, and, considering the evidence as a whole in the record before us and the importance attached to the matted down area by the trial judge, the Crown has failed to convince me that but for the misdirection the verdict would necessarily have been the same. *Gouin* v. *The King* (1).

The appeal should be allowed, the conviction quashed and a new trial directed.

The judgment of Taschereau and Kellock JJ., dissenting, was delivered by

KELLOCK J.—This is an appeal from an order of the Court of Appeal for Ontario dismissing an appeal from the conviction of the appellant on a charge of rape. Appellant relies upon the dissenting judgment of Laidlaw J. A. as establishing jurisdiction in this Court pursuant to the provisions of section 1023 of the *Criminal Code*.

The difference of opinion in the Court below was with regard to certain portions of the charge of the learned trial judge. Laidlaw J.A. was of opinion that there was material misdirection and that the Crown had not met the onus thereby cast upon it of showing that there had been no miscarriage. The Chief Justice of Ontario and Gillanders J.A. were of opinion that there was no misdirection, the Chief Justice being further of the view that even if it could be said that misdirection existed, it was quite improbable that it had had any effect upon the result. The question in issue at the trial was as to whether or not there had been consent on the part of the complainant, the defence being that there had been such consent.

(1) [1926] S.C.R. 539, at 544.

In his charge, the learned trial judge said:

> The evidence of the three gentlemen near by, the farmer Mr. Robson, his father-in-law and his brother-in-law Scott, amply corroborates the story as told by Eva Pettigrew in regard to some of the material aspects of that story. In other words, they painted the scene as she has told it to you. They found the man naked. They told you how she arrived at the house with nothing but her skirt and jacket on, and they described the condition of the area twenty feet by six where the grass was pressed down. So in several matters they corroborated the evidence of Eva Pettigrew as she gave it in the witness box here to-day.

The complainant did not give any evidence with regard to the condition of the area at any time. In the course of his judgment, Laidlaw J.A., after pointing this out, refers to the description given by complainant as to her struggle with the appellant, and the evidence of the appellant that the place in question was matted down at the time he and the complainant came there. The ground of dissent was that Robson's evidence could not amount to corroboration of any evidence given by complainant either as to the condition of the area or as to her struggle with the appellant, for the reason that she had given no evidence as to the condition of the area and the extent of the beaten down area described by Robson could not have been caused by the struggle described by the complainant.

In considering whether or not there was misdirection in the charge, the language of the learned trial judge is to be scrutinized to see what the jury might reasonably be considered to have understood from it. It is, of course, misdirection if a jury is directed to treat something as corroboration which is not in law corroboration. In the present case, the question is whether there is to be taken from what the learned trial judge told the jury that the complainant had made some statement in evidence with regard to the condition of the area which was corroborated by Robson, or whether his charge is to be taken as referring only to her evidence as to her struggle, and if the latter, then was the evidence of Robson in any way corroborative of it?

To my mind, the context in which the above portion of the charge appears affords an answer to the first branch of the question.

The learned trial judge had first warned the jury that they should be reluctant to convict upon the uncorroborated

1944

McINTYRE v. THE KING

Kellock J.

evidence of the complainant and pointed out that if they did so, it was a very serious responsibility to assume unless her story had "been corroborated in some material aspect". He then proceeded to say:

> It is proper that we should take just a moment to consider as to whether the story of the complainant has been corroborated in a material aspect. I think I need only recall to you her story as to what took place in that gully or depression in the land that has been referred to, about her clothes being removed, and *the nature of the assault* which she alleges this man made upon her.

Then followed the portion of the charge which is objected to as already set out above. In my opinion, the reference to the condition of the area in the part objected to relates to the reference in the earlier part to the complainant's evidence as to the nature of the assault which she alleged had been made upon her and, in my opinion, would be so understood by the jury. The learned trial judge in a subsequent passage of his charge, returns to the relation of the complainant's evidence as to the assault and the existence of the beaten down area and the bearing of the one upon the other when he said:

> Indicating that there was perhaps some struggle or evasion—it is for you gentlemen to say—there was a beaten down area in the grass and weeds there of some twenty feet by six.

I am of opinion, therefore, that in the portion of the charge objected to as first set out above, there is no implication that the learned trial judge was telling the jury that the complainant had made any statement with regard to the condition of the beaten down area.

There remains to be considered the second branch of the question, namely, as to whether or not the evidence of Robson could be properly regarded as corroborative of the evidence of the complainant with respect to the struggle which she alleged had taken place between herself and the appellant. To put the matter another way, while the complainant had not said that the grass was pressed down as the result of the struggle, she had given evidence of a struggle and Robson's evidence as to the condition he found would be consistent with a struggle having taken place at that point and therefore corroborative of the evidence of the complainant unless it were clearly established as a matter of fact that the struggle described in evidence by the

complainant was of such a limited character that it could not have been the cause of an area of the extent described by Robson. In considering this matter, it is to be remembered that if the complainant's evidence that she did not consent and that she was attacked was accepted by the jury, the latter may well have considered that the complainant was not to be held literally to her account of the struggle as she was not, in her agitated condition in the circumstances of the attack, likely to have noted it in detail or to have remembered it fully afterwards. Giving due weight to the circumstances, the jury may well have considered that no difficulty arose in this matter. In my view, this was a matter of fact entirely for the jury and no ground is presented for interference by the court. This question of fact was expressly left to the jury as such in the second passage of the charge to which I have referred, namely: "Indicating that there was perhaps some struggle or evasion—it is for you gentlemen to say—there was a beaten down area in the grass and weeds there of some twenty feet by six". The learned dissenting judge refers to this part of the charge but takes the view that the complainant's description of the struggle and the extent of the beaten down area were quite inconsistent the one with the other. This is a finding of fact. With respect, this was, in my opinion, a matter purely within the province of the jury.

The fact that appellant had given evidence that the area was beaten down when he and the complainant first arrived at the place has no relevancy to the point under discussion. The learned trial judge in the passage of his charge referred to, was not dealing with any evidence given by the appellant, but was dealing with the evidence of the complainant and some aspects in which her evidence was corroborated by that of Robson. He had already charged the jury—

There are two things that I wish to stress in regard to the facts of the case as apart from the law: in my review I cannot pretend to review everything; I try to assist you with a review of some of the more important parts of the evidence, but that does not relieve you from your duty, with your twelve joint memories, of recollecting and considering anything that may be of importance in deciding the real issue

1944

McINTYRE v. THE KING

Kellock J.

in this case; and if I express an opinion on the facts, or seem to express an opinion, you are not bound to follow my opinion unless your own happens to be the same.

Viewing the evidence as I do, there is no question of law involved in the dissent below, but merely matters of fact. I would, therefore, quash the appeal.

RAND J.—This is an appeal by the accused from a conviction for rape and comes here through the dissent in the Court of Appeal for Ontario of Laidlaw, J.A., on a point of law.

The only issue at the trial was consent or no consent, and the point on which the dissent arose was in relation to a portion of the judge's charge which dealt with corroboration.

The woman was twenty years of age and the young man eighteen. Her story was of struggle until exhaustion, although terrified by threats of bodily injury. The occurrence took place a short distance in the country from the city of Hamilton in a low-lying area about twenty feet by six, over which the grass had been beaten down until it was almost flat. Pictures of the surrounding land indicated the grass to be fairly high and somewhat coarse and heavy.

A witness, who had reached the spot while the accused was still there and naked, gave evidence of that state of the grass. The complainant had not in her evidence referred to it. The accused gave a similar description of it but added that it was in that condition when he and the complainant had come to it. This latter feature was not challenged either in cross-examination or in rebuttal.

In his charge to the jury, the trial judge used the following language:

They told you how she arrived at the house with nothing but her skirt and jacket on, and they described the condition of the area twenty feet by six where the grass was pressed down. So in several matters they corroborated the evidence of Eva Pettigrew as she gave it in the witness box here to-day.

And later in the charge:

Indicating that there was perhaps some struggle or evasion—it is for you gentlemen to say—there was a beaten down area in the grass and weeds there of some twenty feet by six.

In the peculiar circumstances of the case presented, extraordinary even as told by the complainant, and in view of the sole issue before the jury, I doubt that any single suggestion could have carried more weight to incline the balance of their judgment than that the grass in this spot might have shown the condition it did as a result of her struggles. So far, however, from that being the fact, it is beyond controversy, on the evidence, that the state of the surface of the area could not have furnished the slightest corroboration to the story of the complainant or to the case of the Crown. It was, therefore, a misdirection in law and of such a nature that we are quite unable to say that it might not have influenced the jury in reaching their verdict.

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

Appeal allowed, conviction quashed, and new trial directed.

Solicitor for the appellant: *Herbert Freshman*