MILAN "MIKE" KOLNBERGER .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1968

*Nov. 15
Dec. 20

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Rape—Complainant's evidence uncorroborated—Identity of accused—Misdirection as to burden of proof—Criminal Code, 1953-54 (Can.), c. 51, s. 134.

The complainant, a married woman, accepted an offer of a ride home by a stranger, while waiting for a bus. Having refused to have sexual intercourse, she was physically and sexually assaulted and then forced from the stranger's automobile. When interviewed in the hospital, she described her attacker and the automobile. Some four months later, she identified the appellant as her attacker. The appellant's car was different from the one described as the car which the attacker drove. The appellant did not testify nor was any evidence called on his behalf. The evidence of the complainant was uncorroborated. It appears from the record that the trial judge was in some doubt that he had to apply s. 134 of the *Criminal Code* to the question of identity as well as to the assault. The appellant's conviction was affirmed by the Court of Appeal. Leave to appeal to this Court was granted on the question as to whether the trial judge, having regard to the terms of s. 134, misdirected himself as to the burden of proof.

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

Per Cartwright C.J. and Hall and Spence JJ.: The trial judge had to instruct himself in accordance with s. 134 of the Code not only as to the fact of the rape but also on the matter of identity. The record discloses that either the judge concluded that corroboration was not necessary on the question of identity, or he found that he could satisfy himself beyond a reasonable doubt that the complainant's story (her identification of the appellant) was true from the fact

*PRESENT: Cartwright C.J. and Fauteux, Martland, Hall and Spence J.J.

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that the appellant offered no explanation or contradiction. In either case, the judge was in error. The appellant's failure to deny the charge could not be corroboration under s. 134. A burden was placed on the appellant which the law says does not exist.

Per Cartwright C.J. and Fauteux and Martland JJ.: It was necessary for the trial judge, as a judge of the facts, to instruct himself in accordance with s. 134 of the *Criminal Code*. There is, in the judge's reasons for judgment, the implication that he was finding the appellant guilty not because he was satisfied beyond a reasonable doubt that the complainant's evidence was true, but partly because the appellant had not gone into the witness box to deny what she had said. It was not enough, in order to find guilt, to have evidence tending toward the appellant's guilt. It was necessary for the Court to be satisfied beyond a reasonable doubt that the complainant's evidence was true. There was not due compliance with the requirements of s. 134 of the Code.

Droit criminel—Viol—Témoignage de la plaignante non corroboré—Identité du prévenu—Directives erronées quant au fardeau de la preuve—Code criminel, 1953-54 (Can.), c. 51, art. 134.

La plaignante, une femme mariée, a accepté alors qu'elle attendait un autobus, l'offre faite par un étranger de la reconduire chez elle en automobile. Ayant refusé d'avoir des rapports sexuels, elle a été attaquée physiquement et sexuellement, et, après coup, elle a été forcée hors de l'automobile de l'étranger. A l'hopital, elle a décrit son assaillant ainsi que l'automobile. Quelque quatre mois plus tard, elle a identifié l'appelant comme étant celui qui l'avait attaquée. L'automobile de l'appelant était différente de celle qu'elle avait précédemment décrite. L'appelant n'a pas témoigné et aucune preuve n'a été offerte en sa faveur. La preuve de la plaignante n'était pas corroborée. Le dossier fait voir que le juge au procès n'était pas certain que l'art. 134 du *Code criminel* s'appliquait à la question d'identité aussi bien qu'à celle de l'assaut. La déclaration de culpabilité a été confirmée par la Cour d'appel. L'appelant a obtenu la permission d'appeler à cette Cour sur la question de savoir si le juge au procès, vu les termes de l'art. 134, s'était donné des directives erronées quant au fardeau de la preuve.

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

Le Juge en Chef Cartwright et les Juges Hall et Spence: Les directives que le juge au procès devait se donner devaient être conformes à l'art. 134 du Code non seulement sur le fait du viol mais aussi sur la question d'identité. Le dossier montre soit que le juge a conclu que la corroboration n'était pas nécessaire sur la question d'identité, ou qu'il pouvait se convaincre au delà d'un doute raisonnable que la version de la plaignante (sur l'identification de l'appelant) était véridique du fait que l'appelant n'a offert aucune explication ou contradiction. Dans l'un ou l'autre cas, le juge a erré. Le défaut de l'appelant de nier l'accusation ne peut pas être une corroboration sous l'art. 134. Un fardeau que la loi dit ne pas exister a été placé sur les épaules de l'appelant.

Le Juge en Chef Cartwright et les Juges Fauteux et Martland: Il était nécessaire que le juge au procès, comme juge des faits, se donne des

directives conformes à l'art. 134 du *Code criminel*. Il est implicite dans les notes de jugement du juge qu'il déclarait l'appelant coupable non pas parce qu'il était convaincu au delà d'un doute raisonnable que la preuve de la plaignante était véridique, mais en partie parce que l'appelant n'a pas témoigné pour réfuter ce qu'elle a dit. Pour conclure à la culpabilité, il n'était pas suffisant d'avoir une preuve tendant à la culpabilité de l'appelant. Il était nécessaire que la Cour soit convaincue au delà d'un doute raisonnable que le témoignage de la plaignante était véridique. Les conditions requises par l'art. 134 du Code n'ont pas été suivies.

APPEL d'un jugement de la Cour d'Appel de l'Alberta confirmant une déclaration de culpabilité pour viol. Appel accueilli.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, affirming the appellant's conviction for rape. Appeal allowed.

Ian G. Scott, for the appellant.

Brian Crane, for the respondent.

Cartwright C.J. and Spence J. concurred with the judgment delivered by

HALL J.:—The accused was charged with rape and tried by Manning J. in the Supreme Court of Alberta without a jury. He was convicted and sentenced to ten years in prison. An appeal to the Appellate Division of the Supreme Court of Alberta was dismissed. This appeal is by leave on the following question of law:

> Did the learned trial judge, having regard to the terms of Section 134 of the Criminal Code, misdirect himself as to the burden of proof?

On August 22, 1966, the complainant, a married woman, Dorothy Rose Smith, spent the late evening in a beverage room in the Royal Hotel at the City of Edmonton. After leaving the hotel at approximately 11:00 p.m. and while waiting for a bus, she was offered a ride homeward by a stranger who was alone in an automobile. After some hesitation, she accepted and got in the car. They had only driven a short distance when the driver proposed intercourse which she refused. The automobile was then driven into a laneway where the complainant was physically and sexually assaulted. The assault was a vicious one, and having had intercourse the driver shoved the complainant

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from the automobile and abandoned her in a semi-nude and hysterical condition. The complainant ran to the nearest house and was given assistance. The police were called and the complainant taken to Misericordia Hospital. The complainant's story of the attack was wholly credible and the place where she had been attacked was identified by parts of her clothing and effects which were found there. There is no question but that a rape took place. This appeal is concerned solely with the question of the identity of the appellant as the assailant.

As a new trial is being ordered, I will not refer to the evidence except in general terms.

Mrs. Smith was interviewed in the hospital by Detective Waite. She described her assailant as a man with blonde, bushy hair, 5 feet 8 inches in height, 160 pounds, wearing dark pants and a white shirt, who talked with an accent, German or Hungarian. She also described the automobile as one she believed to be an older model Chrysler product, cream or off-white in colour and very dirty.

On December 21, 1966 four months later, Mrs. Smith purported to identify the appellant as the man who had attacked her. Prior to the lineup, she was shown an automobile which she said she identified as the one in which she had been attacked. This automobile which belonged to the appellant was a 1957 Chevrolet, blue body with white top, very dirty both inside and out.

The appellant did not testify nor was any evidence called on his behalf. In his summation, counsel for the appellant drew Manning J.'s attention to s. 134 of the *Criminal Code* which reads:

> 134. Notwithstanding anything in this Act or any other Act of the Parliament of Canada, where an accused is charged with an offence under section 136, 137, subsection (1) or (2) of section 138 or subsection (1) of section 141, the judge shall, if the only evidence that implicates the accused is the evidence, given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, instruct the jury that it is not safe to find the accused guilty in the absence of such corroboration, but that they are entitled to find the accused guilty if they are satisfied beyond a reasonable doubt that her evidence is true.

Even though this was not a jury case, it is beyond question that the learned trial judge had to instruct himself in accordance with this section, not only as to the fact

of the rape but also on the matter of identity: *Regina v. Ethier*[1]. In *Regina v. McMillan*[2], which was a case of an appeal from a magistrate who had convicted on a complainant's uncorroborated testimony, Kirby J. quashed the conviction. The headnote in the case reads:

> It was *held* that, in the absence of any words by the magistrate indicating that he had directed himself as to the danger of convicting in the absence of any corroboration of complainant's story, the appeal must be allowed and the conviction quashed. Such a direction must be given, and must appear to have been given, no less in the case of a judge sitting alone, than in the case of a judge sitting with a jury, not only in cases of charges under the *Criminal Code*, 1953-54, ch. 51, but in all judicial inquiries involving sexual offences; ...

The same point was dealt with by the Privy Council in *Chiu Nang Hong v. Public Prosecutor*[3], where Lord Donovan said at p. 1285:

> Their Lordships would add that even had this been a case where the judge had in mind the risk of convicting without corroboration, but nevertheless decided to do so because he was convinced of the truth of the complainant's evidence, nevertheless they do not think that the conviction could have been left to stand. For in such a case a judge, sitting alone, should, in their Lordship's view, make it clear that he has the risk in question in his mind, but nevertheless is convinced by the evidence, even though uncorroborated, that the case against the accused is established beyond any reasonable doubt. No particular form of words is necessary for this purpose: What is necessary is that the judge's mind upon the matter should be clearly revealed.

It appears from the record that Manning J. was in some doubt that he had to apply the provisions of s. 134 of the *Criminal Code* to the question of identity as well as to the assault. This is made manifest in the record where the following appears:

> THE COURT: Mr. Buchanan, it is dangerous to convict on the uncorroborated evidence, dangerous to convict, does this apply also to the question of corroboration, not corroboration, but as to identity?
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> MR. BUCHANAN: Yes, it does My Lord, if I may refer Your Lordship to the case of—
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> THE COURT: Where identity is not denied.
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> MR. BUCHANAN: Each issue must be corroborated.
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> THE COURT: When the accused does not deny identity?

Having heard further submissions from counsel for the appellant which concluded with, "however I do base my

[1] [1959] O.R. 533 at 536, 31 C.R. 30, 124 C.C.C. 332.
[2] (1966), 57 W.W.R. 677.
[3] [1964] 1 W.L.R. 1279.

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final argument on the question of identity sir." the learned trial judge said: "I would like to think this over until two o'clock. We will adjourn until that time."

When Court reconvened at 2:00 o'clock, the record is as follows:

> THE COURT: Gentlemen, it seemed to me at the conclusion of the evidence this morning and at the conclusion of the arguments that I have heard from you two that I could not come to any other conclusion than that the charge had been established, and this was after taking into consideration the provisions of Section 134. However, as you know I wanted to consider this over the noon adjournment, and having given it more careful consideration I still feel that I should not come to any other conclusion than that the charge has been established.
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> I particularly refer to this statement of the law in Regina and Coffin, 1956 Supreme Court Reports at Page 228 in which Mr. Justice Kellock has referred with approval to a statement of Lord Tenterden in which Lord Tenterden said this:
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> > "No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends?"
>
> And accordingly I find the accused guilty of the offence with which he has been charged.

It seems clear that when Manning J. said in the extract just quoted:

> Gentlemen, it seemed to me at the conclusion of the evidence this morning and at the conclusion of the arguments that I have heard from you two that I could not come to any other conclusion than that the charge had been established, and this was after taking into consideration the provisions of Section 134.

he was referring to the assault aspect of the case and not to the question of identity. Were it otherwise, there was no need for him to give the matter further consideration and that becomes even clearer when he found it necessary to consider the effect of appellant's failure to deny the charge.

I cannot but hold that in applying the statement of Lord Tenterden as he did, and concluding with "And *accordingly* I find the accused guilty of the offence with which he has been charged." (Emphasis added) the learned trial judge erred in law and misdirected himself as to the bur-

den of proof. It is manifest either that he concluded that corroboration was not necessary on the question of identity or, alternatively, that he found he could satisfy himself beyond a reasonable doubt that the complainant's story (her identification of the appellant) was true from the fact that the appellant offered no explanation or contradiction. In either case, he was in error.

Appellant's failure to deny the charge could not be corroboration under s. 134, and in imposing an onus on the appellant to offer an explanation or contradiction he was placing a burden on him which the law says does not exist.

I would, accordingly, allow the appeal, quash the conviction and direct a new trial.

Cartwright C.J. and Fauteux J. concurred with the judgment delivered by

MARTLAND J.:—The essential facts in this case have been stated in the reasons of my brother Hall. I am in agreement with him that this appeal should be allowed and a new trial ordered.

My reasons for reaching this conclusion are these. The offence with which the appellant was charged was under s. 136 of the *Criminal Code*. Section 134 of the Code provides:

> 134. Notwithstanding anything in this Act or any other Act of the Parliament of Canada, where an accused is charged with an offence under section 136, 137, subsection (1) or (2) of section 138 or subsection (1) of section 141, the judge shall, if the only evidence that implicates the accused is the evidence, given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, instruct the jury that it is not safe to find the accused guilty in the absence of such corroboration, but that they are entitled to find the accused guilty if they are satisfied beyond a reasonable doubt that her evidence is true.

As has been pointed out by my brother Hall, although the trial in this case was by judge alone, it was necessary for the learned trial judge, as a judge of the facts, to instruct himself in accordance with this section.

The only evidence in this case which implicated the appellant was that of the complainant. Her evidence, in that respect, was not corroborated by any evidence which implicated the appellant.

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In these circumstances, while it was open to him to find the appellant guilty of the offence charged, it was only proper for him to do so if he was satisfied beyond a reasonable doubt that her evidence was true.

The learned trial judge, in stating his reasons at the conclusion of the trial, had this to say:

> Gentlemen, it seemed to me at the conclusion of the evidence this morning and at the conclusion of the arguments that I have heard from you two that I could not come to any other conclusion than that the charge had been established, and this was after taking into consideration the provisions of Section 134. However, as you know I wanted to consider this over the noon adjournment, and having given it more careful consideration I still feel that I should not come to any other conclusion than that the charge has been established.
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> I particularly refer to this statement of the law in Regina and Coffin, 1956 Supreme Court Reports at Page 228 in which Mr. Justice Kellock has referred with approval to a statement of Lord Tenterden in which Lord Tenterden said this:
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> > "No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends?"
>
> And accordingly I find the accused guilty of the offence with which he has been charged.

There is, to me, in this statement, the implication that he was finding the appellant guilty not because he was satisfied beyond a reasonable doubt that the complainant's evidence was true, but partly because the appellant had not gone into the witness box to deny what she had said. The passage quoted from Lord Tenterden's judgment in *R. v. Burdett*[4], as applied in the circumstances of this case, meant that the learned trial judge, in a situation where the appellant had offered no explanation or contradiction, felt that he could not "do otherwise than adopt the conclusion to which the proof *tends*" (the italics are my own).

In my view this reasoning is not satisfactory in a case to which s. 134 applies. It was not enough, in order to find guilt, to have evidence tending toward the appellant's guilt, coupled with the absence of any denial by him. It

[4] (1820), 4 B. & Ald. 95 at 161, 106 E.R. 873.

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was necessary for the Court to be satisfied beyond reasonable doubt that the complainant's evidence was true.

As I am not satisfied that there was due compliance with the requirements of s. 134, I feel the appeal should be allowed and a new trial ordered.

Appeal allowed and new trial ordered.

Solicitors for the appellant: Cameron, Brewin & Scott, Toronto.

Solicitor for the respondent: The Attorney General for Alberta.