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no express words to such an effect; and I can find no necessary implication. But as the considerations which influence my mind have not been fully discussed, and as the withholding of my definitive opinion will not cause any inconvenience, I prefer to say merely that I doubt as to the decision which is now being given by the Court.

Rule absolute for prohibition.

Solicitors for the prosecutor, *F. C. Petrie & Son*, for *Atthow & McGregor*, Brisbane.

Solicitor for the defendants, *J. V. Tillett*, Crown Solicitor for New South Wales, for *W. F. Webb*, Crown Solicitor for Queensland.

B. L.

Appl *R v Gardner* [1988] 2 QdR 682

Cons *R v Do* (1990) 54 SASR 543

Foll *Kelleher v R* (1974) 131 CLR 534

[HIGH COURT OF AUSTRALIA.]

HICKS . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 19, 20, 27.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Criminal Law—Evidence—Corroboration—Sexual offence on young girl—Direction to jury—Reasonable doubt, direction as to—Miscarriage of justice—Practice—Appeal to High Court—Criminal matter—Point taken for first time in High Court—Jurisdiction—Criminal Appeal Act 1912 (*N.S.W.*) (*No.* 16 *of* 1912), *sec.* 6.

On the hearing of a charge of carnally knowing a child under the age of ten years there was evidence, apart from that of the child, that at some time during a period of half an hour at night the child had been carnally known, that the accused during that period had led the child to a churchyard, and that he gave a false account of his own movements during that period.

Held, that this was corroborative evidence connecting the accused with the sexual act, and therefore that it was unnecessary for the trial Judge to caution the jury against convicting the accused on the uncorroborated evidence on oath of the child.

Hargan v. *The King*, 27 C.L.R., 13, distinguished.

In directing the jury the trial Judge said:—"You are supposed to be reasonable men, and Judges have laid it down that a reasonable doubt is a reasonable doubt such as reasonable men, men of affairs going about the ordinary life of the world, would have. Such a question is for reasonable men. Whether you are satisfied on the evidence or whether there is a reasonable doubt is a question for you, and the responsibility of deciding on the facts rests with you."

Held, by *Knox* C.J., *Gavan Duffy* and *Starke* JJ. (*Isaacs* and *Rich* JJ. dissenting), that, having regard to the rest of the charge, the direction could not mislead the jury in the performance of their duty or occasion any miscarriage of justice.

Brown v. *The King*, 17 C.L.R., 570, discussed.

Quære, whether on an appeal from a judgment of the Supreme Court of New South Wales dismissing an appeal under the *Criminal Appeal Act* 1912 (N.S.W.) the High Court has jurisdiction to entertain an objection to the direction of the trial Judge which is taken for the first time before the High Court.

Decision of the Supreme Court of New South Wales affirmed.

APPEAL from the Supreme Court of New South Wales.

At the Central Criminal Court at Sydney, before *Ralston* A.-J., Richard John Hicks was tried on a charge that on 27th September 1919, at Stockton, he did carnally know a girl then under the age of ten years, to wit, of the age of eight years and eight months. The accused, having been convicted, appealed to the Full Court on the grounds (among others): (6) that the presiding Judge should have specially warned the jury of the danger of convicting on the uncorroborated evidence of the girl herself; (8) that the presiding Judge should have directed the jury that, if they came to the conclusion that it was indecent assault only, they should acquit, and (9) that the presiding Judge should have more particularly directed the attention of the jury to the case being possibly one of indecent assault only, and to the mother's evidence on this point. The Full Court dismissed the appeal.

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From that decision the accused now, by special leave, appealed to the High Court.

The other material facts appear in the judgments hereunder.

Watt and *Perry*, for the appellant. Grounds 8 and 9 amount to this : that the trial Judge did not sufficiently refer in his summing-up to the facts indicating that the offence which had been committed was an indecent assault only, and did not tell the jury that that was the offence which they might find the accused had committed. The trial Judge treated the case as one of carnal knowledge or nothing. The Judge is not to be restricted in his summing-up by counsel's conduct of the case (*R.* v. *Hopper* (1)). As to ground 6, the trial Judge pointed out to the jury that they should scrutinize the evidence of the child very carefully, but he did not tell them that there was danger in their acting on her uncorroborated evidence, and he should have done so (*Hargan* v. *The King* (2) ; *R.* v. *Severo Dossi* (3)).

[ISAACS J. referred to *R.* v. *Baskerville* (4).]

The trial Judge wrongly directed the jury as to the meaning of "reasonable doubt": *Brown* v. *The King* (5). The direction in that case was substantially the same as in the present case, and a majority of the Court were of opinion that the direction was wrong. This point is open now, although taken for the first time in this Court. The right of appeal granted by sec. 6 of the *Criminal Appeal Act of* 1912 (N.S.W.) is unlimited. Once the appeal is before the Supreme Court, the matter is at large, and, if so, it is at large on an appeal to this Court. An appeal to this Court is a rehearing, and this Court has to make the order which the Supreme Court should have made. The Supreme Court should have allowed the appeal on this ground although its attention was not drawn to the point (*Nolan* v. *Clifford* (6) ; *Attorney-General of New South Wales* v. *Jackson* (7)).

[STARKE J. referred to *Banbury* v. *Bank of Montreal* (8) ; *Enders* v. *Rouse* (9).]

(1) (1915) 2 K.B., 431, at p. 435.
(2) 27 C.L.R., 13.
(3) 13 Cr. App. R., 158, at p. 160.
(4) (1916) 2 K.B., 658.
(5) 17 C.L.R., 570.
(6) 1 C.L.R., 429.
(7) 3 C.L.R., 730.
(8) (1918) A.C., 626.
(9) 11 V.L.R., 827.

Coyle, for the respondent. [As to grounds 8 and 9 counsel was not heard.] If the Court is satisfied that what was said amounted to a caution as to accepting the uncorroborated evidence of the child, that is sufficient, and no particular words are required (*R.* v. *Cratchley* (1); *R.* v. *Graham* (2); *R.* v. *Brown* (3); *R.* v. *Pitts* (4); *R.* v. *Severo Dossi* (5)).

[STARKE J. referred to *R.* v. *Warren* (6).

[KNOX C.J. referred to *Abrath* v. *North-Eastern Railway Co.* (7) and *R.* v. *Stoddart* (8).]

There was in this case ample corroboration which connected the accused with the commission of the offence. The summing-up contains a sufficient direction as to reasonable doubt, and, taking the whole of the summing-up, it cannot be said that there has been any miscarriage of justice.

Watt, in reply. There was corroborative evidence as to opportunity, but none connecting the accused with the commission of the sexual offence (*Ridley* v. *Whipp* (9); *Peacock* v. *The King* (10)).

Cur. adv. vult.

April 27.

The following judgments were read :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. (read by KNOX C.J.). Special leave to appeal was granted in this case so that the Court might hear further argument. Now that we have had that advantage we are of opinion that the appeal must be dismissed.

Several points were suggested by the learned counsel for the prisoner. One was that the learned trial Judge did not sufficiently discriminate in his charge between the offence known as indecent assault and that of carnally knowing a child under the age of ten years, with which the prisoner was charged. The learned Judge, however, gave the jury a satisfactory direction as to the ingredients essential to establish the charge laid against the prisoner. In view of the direction given, we cannot assume that the jury failed to

(1) 9 Cr. App. R., 232, at p. 235.
(2) 4 Cr. App. R., 218.
(3) 6 Cr. App. R., 24.
(4) 8 Cr. App. R., 126.
(5) 13 Cr. App. R., at p. 160.
(6) 14 Cr. App. R., 4.
(7) 11 App. Cas., 247.
(8) 25 T.L.R., 612.
(9) 22 C.L.R., 381.
(10) 13 C.L.R., 619.

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appreciate the true nature of the offence with which the prisoner was charged.

Another point was that the learned Judge had not sufficiently cautioned the jury against convicting the prisoner on the uncorroborated evidence of the child given upon oath. The decision of this Court in *Hargan* v. *The King* (1) was relied upon. The argument proceeded upon the basis that there was no corroboration of the child's story as to the sexual act. We are of opinion, however, that there was ample independent evidence before the jury connecting the prisoner with the sexual act. Shortly stated, it was as follows :—On 27th September 1919 the child and her elder sister were sent by their mother, about a quarter to eight in the evening, to a chemist's shop about five minutes' walk from their home. The prisoner met the children as they were returning home, stopped and spoke to them. The elder sister said :—" After that the man, my sister and I walked up the road, turned round Grealey's corner and went down to the church. We went round the corner, and I said ' I had better go home, Mumma will want us.' The man said ' Can your sister come ? ' and I said ' I don't think so.' I walked up the road towards home, and Jessie " (the child) " went along with the man. They went round in front of the English Church." The elder child went home and made a statement to her mother, who immediately went in search of the younger child. The mother reached the churchyard in seven or eight minutes, but could not find the child, and rushed home again. The sister and her brother immediately left in search of the child, and found her " coming round the corner and took her home." The mother thereupon examined the child, and it is clear that at that time the offence had been committed. Apart from the children, there was ample evidence that the prisoner was in the vicinity of the chemist's shop about eight o'clock. The prisoner made a statement asserting that he went to a bakehouse at ten minutes to eight to attend to the ovens, and was engaged there for some time, but there was evidence before the jury that the prisoner did not reach the bakehouse until twenty or thirty minutes past eight o'clock. The medical evidence afforded ample corroboration of the fact that the child had been ravished.

(1) 27 C.L.R., 13.

So it appears that there was independent evidence before the jury from which they might conclude that the child was ravished at some time between eight and eight twenty to eight thirty o'clock; that the prisoner had, without warrant, during that period led the child away towards a churchyard, and had given a false account of his own movements during this critical period. It seems to us idle, in the face of this evidence, to contend that there was no corroboration of the child's story of the carnal knowledge of her by the prisoner. *Hargan's Case* (1) has no application to cases in which the sworn evidence of the child is corroborated, and therefore the argument wholly fails, and renders any discussion of that decision unnecessary.

Finally, it was said that the following words of the learned Judge in his charge to the jury amounted to a misdirection :—" You are supposed to be reasonable men, and Judges have laid it down that a reasonable doubt is a reasonable doubt such as reasonable men, men of affairs going about the ordinary life of the world, would have. Such a question is for reasonable men. Whether you are satisfied on the evidence or whether there is a reasonable doubt is a question for you, and the responsibility of deciding on the facts rests with you." No objection was taken to this direction at the trial, or before the Court of Criminal Appeal either in the notice of appeal or in the argument. The objection was first mooted in this Court. During the argument it was suggested from the Bench that the jurisdiction of the Court to entertain the point was open to doubt. This question of jurisdiction is one of great importance and difficulty, and we do not feel called upon, in this case, to determine it. In order to succeed on the point raised, it is necessary for the prisoner to establish, first, that this Court has jurisdiction to decide the question, and, secondly, that the direction complained of was a misdirection. If he fails to establish either proposition, his appeal must fail. In *Brown* v. *The King* (2) *Barton* J. and our learned brothers *Isaacs* and *Powers* expressed an opinion, but did not decide judicially, that it was a misdirection in a criminal case to charge the jury: " If you have a reasonable doubt in that matter, and you do not know where the truth lies, then you will find a verdict for the accused.

(1) 27 C.L.R., 13. (2) 17 C.L.R., 570.

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A reasonable doubt, as I have already remarked, means a doubt such as would influence you in the ordinary affairs of life." It is unnecessary for us to consider whether the opinion expressed in *Brown's Case* is correct, and we reserve the right to consider the question when it comes before us for decision. The language of the charge in the present case is substantially different from that in *Brown's Case*, and we are satisfied, in the present case, that the charge given to the jury could not mislead them in the performance of their duty or occasion any miscarriage of justice. Substantially, it conveyed to the jury the meaning that, if as reasonable men they had any doubt as to the guilt of the prisoner, their verdict should be "Not guilty," and that in considering the question they as men of affairs were judges of what amounted to a reasonable doubt. Indeed, at another part of his charge, the learned Judge observed: —"Now I come to the most important thing, and that is, was the accused the person who committed the offence. If you have any reasonable doubt, sitting there as reasonable men, having listened to the whole case, having listened to the case put forward by the advocate appearing for the accused, and having heard the case as presented to you by the Crown—if you have a reasonable doubt as reasonable men it is your duty to give the accused the benefit of that doubt and acquit him." We do not say that the words chosen by the learned Judge, in that portion of his charge which is challenged, were the happiest that could have been chosen, but we have no doubt that they contain no misdirection in point of law, and certainly could not lead to any miscarriage of justice. We must add that if this point had been the only ground suggested as a reason for granting special leave to appeal, we should have refused the application.

The appeal is dismissed.

ISAACS AND RICH JJ. (read by ISAACS J.). This case concerns a highly important branch of the criminal law, namely, the proper precautions to which an accused person, and particularly one on trial for his life, is entitled, in order to guard against his being unjustly convicted. The appellant, Richard John Hicks, was convicted of the offence of carnally knowing a little girl of eight years and eight

months, and sentenced to death. He appealed against his conviction to the Supreme Court of New South Wales, which refused his appeal. He applied to this Court for special leave to appeal from that refusal, and leave was granted.

One of the grounds urged on his behalf to this Court on that occasion was that the learned Judge before whom the case was tried misdirected the jury on a fundamental point. It is at the root of our law that every man accused of crime is presumed to be innocent until proved to be guilty, and that no one shall be found guilty unless the jury are convinced of his guilt beyond reasonable doubt. And it was urged that the summing-up to the jury failed in this essential matter. That point had not been taken before the Supreme Court of New South Wales, and no decision was given upon it. After consideration, this Court granted leave to appeal, in general terms, for argument without excluding that ground. On the appeal itself, the appellant's counsel were permitted to argue the question, subject to the prior question whether, in view of the point not having been raised in the Supreme Court, this Court had jurisdiction to determine it, one way or the other. Both branches—merits and jurisdiction—were fully argued. No conclusion is arrived at by this Court upon the question of our jurisdiction, and therefore no authoritative decision can be given on the main question, but, for the purposes of this case only, opinions are stated as if we had jurisdiction. The difficulty as to the misdirection complained of occurred in this way:—Several times during the summing-up the learned Judge told the jury they must not convict the prisoner unless they were persuaded of his guilt beyond all reasonable doubt. So far, no fault could legally be found. The subject of reasonable doubt is dealt with in *Brown's Case* in the judgment of *Barton* J. (1) and in the judgments of *Isaacs* and *Powers* JJ. (2). We think the opinions there expressed correctly state the law, and we find it necessary to form our opinion on that point in order to consider the further point as to miscarriage. Of course, neither *Brown's Case* nor this case can be legally regarded as a formal decision on the question of reasonable doubt, or miscarriage by reason of a faulty charge on that point. But if the fate of the accused is to be

(1) 17 C.L.R., at pp. 584-586. (2) 17 C.L.R., at pp. 594-596.

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determined by extra-judicial opinion, our own is clear that, though the language of the charge in *Brown's Case* was different from that in this case, the principle there stated, which now represents the opinion of four Judges of this Court, applies to the present case, and that is the real test. We summarize the law as there laid down, so far as relevant to the circumstances of this case. Reasonable doubt as to a prisoner's guilt means reasonable doubt entertained by the jury as actually constituted, after considering the circumstances of the particular case. Eminent Judges have explained that to mean that the jury must have what is termed " moral certainty " of the prisoner's guilt. Of course, physical or demonstrable certainty is impossible. But our law draws a great distinction between civil and criminal cases. In civil cases, you decide merely on the balance of probabilities ; in criminal cases, you must be " morally certain " that the prisoner is guilty. This is elementary. In the ordinary affairs of life a man acts on what seems to him, on the whole balance of probabilities, the reasonable thing to do. But in the most serious affairs of life he hesitates longer : and the more serious the affair, the longer he hesitates, and the less doubt must he have before he acts. And this truth is at the root of the point raised for the appellant. If that point be sustained, we cannot understand how it can fail to amount to a substantial miscarriage of justice. It may, for all we know, have been the turning point in the jury's mind. But this much is clear, we are neither the tribunal to decide on the prisoner's guilt—that would be usurping the jury's function; nor are we able to say the jury would certainly have come to the same verdict if the misdirection had not occurred. And this is the test. A miscarriage of justice takes place in a criminal case whenever there is some departure from strict law or from an established practice designed to protect a man possibly innocent, unless the Court can say positively that the verdict would have been the same. As Lord *Alverstone* said in *R.* v. *Dyson* (1), " it is one thing to say that the jury on a proper direction would *probably* have so convicted ; it is another to say positively that there has been no substantial miscarriage of justice." This was the principle

(1) (1908) 2 K.B., 454, at p. 457.

laid down and acted upon by the House of Lords in *Bray* v. *Ford* (1) even in a civil action for damages. Therefore, according to the highest authority, if there has been a substantial miscarriage of justice, supposing there was the misdirection complained of, we have to inquire as to that. The learned Judge, although several times he referred merely to reasonable doubt, which, if left alone, is supposed to carry its own meaning, proceeded on one occasion, unfortunately for the prisoner, to define what he meant all along when he used the term "reasonable doubt." He said this: "A reasonable doubt is a reasonable doubt such as reasonable men, *men of affairs going about the ordinary life of the world*, would have." That is the interpretation of the phrase "reasonable doubt" which the jury were told to accept whenever that term was used. And it carries the more weight because it was the final direction given as to that term. What, then, is the effect of putting in the expression "men of affairs going about the ordinary life of the world"? Would not—or might not, for that is sufficient—might not a jury naturally think that means such a doubt as a business man would have when transacting his ordinary affairs? We go so far as this in defence of human life: if that definition be open merely to fair doubt as to whether it means what we think it clearly means, if the jury might reasonably take that to be its meaning, that is sufficient, in our opinion, to entitle the accused to a new trial. Courts of Criminal Appeal were instituted to enable the corporate conscience of the community to be satisfied that by no mischance an innocent person is condemned. The guiding principle of English criminal law is a humane one: it is that, while guilt once established should be punished, yet it is safer to err in acquitting than in condemning, and that it is better that many guilty persons should escape than one innocent person suffer. But we think the interpretation given to the jury is clearly wrong. And the reason we think it wrong is this: "a man of affairs going about the ordinary business of life" does not look for "moral certainty." Men of affairs going about the ordinary business of life could not afford to wait for "moral certainty," which, as stated by high authority, is the affirmative form of stating the absence of reasonable doubt in

(1) (1896) A.C., 44.

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criminal cases. A merchant transacting an affair of ordinary life comes to a conclusion without reasonable doubt, on much more slender consideration than if, for instance, he were weighing the matter of undergoing a severe operation either by himself or by some one dear to him. In other words, " reasonable doubt " in the circumstances which would deter him from acting in the ordinary life of the world would have to be much more pronounced than if the matter had more serious consequences. Some Judges have impressed juries with their duty to be convinced as they would require to be convinced in their *graver and more important affairs.* That is nearer the mark, because the results of a criminal conviction certainly belong to the graver and more important matters of life. But how can a jury, having to determine the guilt of the accused in such a case as the present, where not merely character and liberty but life itself are at stake, be properly told to place themselves for that purpose in the same position as " men of affairs going about the ordinary life of the world," and told that a doubt that would be reasonable in the one case is a reasonable doubt in the other, and therefore that a doubt that would not deter them from acting in ordinary life—(say) the purchase of wheat or butter—would not deter them from sending a fellow creature to death? An error, a serious and fundamental error, in our opinion, has been made. A false analogy, a wrong standard, was supplied to the jury; one which lessened their sense of responsibility. Test it by a simple and very practical process, and one that brings the matter home better than any amount of theoretical argument. Which of us, if we were standing in peril as the appellant was, would not feel the vast and vital difference between the two standards—the chances that a business man thinks reasonable in the ordinary life of the world, and the moral certainty that the law requires in conviction for crime? In our opinion, an unfortunate but unmistakable miscarriage of justice has occurred, that can only justly be remedied by a new trial.

Other points were argued on behalf of the accused, which we agree with our learned brothers in holding must fail. One is this: learned counsel for the defence said that in the circumstances of this case the learned Judge at the trial did not tell but should have told the

jury they might come to the conclusion that the accused had committed only the minor crime of indecently assaulting the girl (sec. 77 of the *Crimes Act* 1900). There is no substance in the point, for this reason:—The jury were very clearly directed that unless there was penetration, there should be no conviction. What did it matter that the criminal code also prescribed a punishment for a lesser offence? The duty of the jury would have been exactly the same if sec. 77 did not exist. That, therefore, fails.

Next, it was urged that the direction was defective because it did not sufficiently warn the jury against the danger of convicting a person accused of a sexual offence upon the uncorroborated testimony of the female herself. Since on a careful examination of the evidence it appears there was sufficient corroboration according to the authorities that now prevail, and as it was left to the jury to consider as such, that point becomes unnecessary to determine.

Another point was whether there was, in fact, corroboration of the girl Jessie's evidence sufficient to make any cautionary direction unnecessary apart from a caution respecting her youthfulness. This point is closely connected with the point just dealt with. In *R.* v. *Murray* (1) the present Lord Chief Justice of England, for the whole Court, held that though there was a wrong direction as to acting on the uncorroborated testimony of the girl, yet, as there was corroborative evidence which was left as such to the jury, it could not be assumed that the jury acted on the girl's evidence alone, and so the defect in the charge became immaterial. In that case corroboration was necessary by law, but for the present purposes that creates no distinction. A similar position arose in *R.* v. *Bovy* (2), which was the case of an accomplice. It must be remembered that what the Court looks to in such a case is not simply whether there was corroborative evidence on which the jury might have acted if it were left to them as such, but whether, having regard to the Judge's charge, there being such evidence, it can be assumed by the Court that they acted on the uncorroborated evidence of the girl or accomplice alone, or whether the Court should assume, having regard to the whole circumstances, that they did their duty in considering how far they should give credence to the principal evidence in

(1) 9 Cr. App. R., 248. (2) 12 Cr. App. R., 15.

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view of the corroborative evidence also. In this case the learned Judge did expressly invite the jury to consider all the evidence to see whether the girl's testimony was supported. What we have to see, therefore, is whether testimony existed which can, if believed, be regarded as sufficient corroboration. The learned Chief Justice has stated the facts that the Crown relies on, and that were, in substance, summarized to the jury by the learned trial Judge. Learned counsel for the appellant contended that these facts fell short, in law, of the necessary corroboration. His argument was that though they might be sufficient to sustain a charge of indecent assault, yet they could not, and did not, go to the necessary length of corroborating Jessie as to the necessary fact of penetration. It is true that the law as to what constitutes corroboration has varied. At one time it was thought sufficient if it went to some material circumstance so as to confirm the girl's credibility. That may or may not be still the criterion in civil matters. It is so in some civil matters (*Minister of Stamps* v. *Townend* (1)). But in criminal matters, relating to accomplices at all events, a change took place more in accordance with the general attitude of our law towards an accused person. Courts administering the criminal law are not impervious to the general sentiment of the community they represent, as to fair treatment of the accused in public prosecutions for offences against the community itself. About the year 1826 it began to be the prevalent view that, in justice to an accused person, the corroboration of an accomplice must also go to the identity of the accused so as to implicate him in the crime alleged. A distinct line of cleavage took place in that year in *R.* v. *Sheahan* (2), a case of accomplice, where eleven Irish Judges sat to consider the question. Five adhered to the older view; and six held that juries should be told that "a mere confirmation of the transaction, not being brought down in any respect either to the prisoner on trial, or to any other person charged by the accomplice, generally speaking, scarcely, if at all, distinguishes the case from no confirmation." The view of the majority has firmly gained acceptance. See such cases as *R.* v. *Farler* (3) in 1837, before Lord *Abinger* C.B., whose views were those of *Parke* B. and

(1) (1909) A.C., 633.

(2) Jebb C.C., 54.

(3) 8 C. & P., 106.

two other Judges in *R.* v. *Stubbs* (1) in 1855. Lord *Abinger's* very expressions have been made the basis of a recent and authoritative decision on the question of accomplices (*Baskerville's Case* (2)), and the observations of the Lord Chief Justice (3) extend the rule to such cases as the present. Therefore, so far, learned counsel is supported by present cases in insisting on the requirement that there must, in this case, be corroboration as to identity. Recently, however, a question has been raised in the English Court of Criminal Appeal in *R.* v. *Myro Smith* (4), a case of carnal knowledge, whether in sexual cases the corroboration must be in a material particular implicating the accused—that is, whether the doctrine of *Baskerville's Case* applies. The Court there ordered the question to be determined by a full Court. The matter came on in October 1919 and was argued (5), but it was found unnecessary to determine it because the conviction was quashed on another ground. We, therefore, withhold any definite pronouncement one way or the other as to this requirement in such a case as the present, but we assume, for the purposes of this case, that the corroboration must go to the extent claimed. Nevertheless, it does not follow that corroboration as to identity must be as direct as the argument contends for. It has been truly said (*inter alia*), in *Baskerville's Case* (6), that if it were necessary that every circumstance detailed by the principal witness had to be directly confirmed by independent testimony, the evidence of the principal witness might be dispensed with altogether. And therefore, as laid down in that case (7), the rule is, where corroboration implicating the accused is necessary, 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 learned Lord Chief Justice added: "The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged"; and "the

(1) Dears. C.C., 555.
(2) (1916) 2 K.B., 658.
(3) (1916) 2 K.B., at p. 667.
(4) 14 Cr. App. R., 74.
(5) 14 Cr. App. R., 81.
(6) (1916) 2 K.B., at p. 664.
(7) (1916) 2 K.B., at p. 667.

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corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime." Having regard to the identification of the accused up to the church, the space of time that elapsed during which the crime must have been committed, the time of the accused's reappearance elsewhere, and the absence of any evidence even suggesting the presence of another man who could have been the offender, we are of opinion that there was independent evidence which a jury, believing it, might lawfully, if properly directed, regard as confirming the evidence of Jessie, and implicating the accused. But we repeat that, notwithstanding the failure of these points, the fundamental error we firstly dealt with vitiates the whole trial, and entitles the condemned man to a retrial of his case.

Appeal dismissed.

Solicitor for the appellant, *E. R. Abigail.*

Solicitor for the respondent, *J. V. Tillett*, Crown Solicitor for New South Wales.

B. L.