[HIGH COURT OF AUSTRALIA.]

EADE . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1924.

SYDNEY, *April* 17; *May* 2.

KNOX C.J., ISAACS, GAVAN DUFFY, RICH and STARKE JJ.

Criminal Law—Evidence—Child of tender years—Corroboration—Complaint made by child—False statements made by accused—Crimes Act 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 418.

On the hearing of a charge of indecently assaulting a girl of the age of five years evidence not on oath was given by the girl, pursuant to sec. 418 of the *Crimes Act* 1900 (N.S.W.), that the accused had indecently assaulted her and stating the circumstances of the assault.

Held, that evidence that immediately after the assault was alleged to have taken place the girl had voluntarily made a complaint to the same effect as her evidence at the trial was not corroborative of her testimony within the meaning of sub-sec. 2 of sec. 418.

Held, also, that, there being independent evidence establishing opportunity for the accused to have committed the offence charged, statements made by the accused which the jury might believe to be false, and to have been made in order to discredit the evidence given against him because he was unable to account for the facts to which the witnesses testified in any way consistent with his innocence, might be corroborative of the girl's testimony within the meaning of sub-sec. 2 of sec. 418.

Decision of the Supreme Court of New South Wales (Full Court): *R.* v. *Eade*, (1923) 24 S.R. (N.S.W.) 117, reversed.

APPLICATION for special leave to appeal, and appeal, from the Supreme Court of New South Wales.

At the Newcastle Circuit Court on 11th October 1923, before *Ralston* A.J. and a jury, Joseph Eade was tried on a charge of indecently assaulting a girl under the age of sixteen years, to wit, of the age of five years. The girl was not sworn as a witness but gave evidence not on oath pursuant to sec. 418 of the *Crimes Act* 1900 (N.S.W.). The accused, having been convicted and sentenced to five years' imprisonment, appealed to the Court of Criminal Appeal on the ground that the evidence given by the girl was not corroborated as required by sec. 418, and therefore that the learned Judge should have taken the case from the jury. The Court dismissed the appeal: *R.* v. *Eade* (1).

The accused now applied for special leave to appeal from that decision, and, special leave having been granted, the appeal was heard.

The other material facts are stated in the judgments hereunder.

Curtis (with him *Hunter*), for the appellant. There was no corroboration of the evidence of the child within the meaning of sec. 418 of the *Crimes Act* 1900 (N.S.W.). The only evidence to prove that an assault was committed was that of the child, and the evidence that she had made a complaint was not corroborative of that evidence, but only showed that her story was consistent. What is required by sec. 418 (2) is that there should be independent evidence that an assault had been committed and that the accused was the person who committed it. (See *Ridley* v. *Whipp* (2); *Eather* v. *The King* (3); *R.* v. *Lovell* [*No.* 2] (4); *R.* v. *Baskerville* (5); *R.* v. *Osborne* (6).)

[ISAACS J. referred to *Jones* v. *South-Eastern and Chatham Railway Co.'s Managing Committee* (7).]

Weigall S.-G. for N.S.W., for the respondent. The making of the complaint by the child is corroboration within the meaning of sec. 418. It is not necessary that there should be independent evidence that the offence was committed or that the accused

(1) (1923) 24 S.R. (N.S.W.) 117.
(2) (1916) 22 C.L.R. 381, at p. 389.
(3) (1914) 19 C.L.R. 409, at p. 414.
(4) (1923) 17 Cr. App. R. 163, at p. 166.
(5) (1916) 2 K.B. 658.
(6) (1905) 1 K.B. 551.
(7) (1918) 87 L.J. K.B. 775, at p. 778.

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committed it. It is sufficient if there is some independent evidence which corroborates the story told by the child, and evidence that a complaint was made is such evidence. In *R.* v. *Lovell* [*No.* 2] (1), although the trial Judge had directed that the making of a complaint was corroboration, the Court of Criminal Appeal dismissed the appeal, and in delivering judgment said that a complaint made by a girl was matter which might be taken into account by the jury in considering the credibility of the story which she told. That is the sort of corroboration which sec. 418 requires. In *R.* v. *Baskerville* (2) there was no evidence, except that of the witnesses whose evidence required corroboration, of the offence having been committed, and yet the Court dismissed the appeal. [Counsel referred to *R.* v. *Murray* (3); *R.* v. *Birkett* (4); *R.* v. *Tate* (5); *R.* v. *Goulding* (6); *R.* v. *Goad* (7); *R.* v. *Hedges* (8); *R.* v. *Carroll* (9).]

[STARKE J. referred to *R.* v. *Christie* (10).]

Apart from the complaint of the child, there was corroborative evidence, and special leave should be refused or, if it is granted and the appeal is allowed, there should be a new trial.

Curtis, in reply. The denials by the accused that he had got the child to buy the pies and that she had been at his house are not corroborative evidence. Those denials cannot be considered as admissions that he assaulted her. (See *Thomas* v. *Jones* (11).)

Cur. adv. vult.

May 2.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. The prisoner was charged, under the *Crimes Act* 1900 (N.S.W.), sec. 77, with indecently assaulting a girl under the age of sixteen years, and he was convicted and sentenced to five years' penal servitude. He appealed to the Court of Criminal Appeal in New South Wales, which dismissed his

(1) (1923) 17 Cr. App. R. 163.
(2) (1916) 2 K.B. 658.
(3) (1913) 9 Cr. App. R. 248.
(4) (1839) 8 C. & P. 732.
(5) (1908) 1 Cr. App. R. 39.
(6) (1908) 1 Cr. App. R. 121.
(7) (1909) 2 Cr. App. R. 278.
(8) (1909) 3 Cr. App. R. 262.
(9) (1906) 6 S.R. (N.S.W.) 258.
(10) (1914) A.C. 545, at p. 557.
(11) (1921) 1 K.B. 22, at p. 32.

appeal and confirmed his conviction, and he now by special leave appeals to this Court.

At the trial the girl, who was of tender years, was not sworn as a witness, but gave evidence, pursuant to the provisions of sec. 418 of the Act. Sub-sec. 2 of that section provides that "no person shall be convicted of the offence charged, unless the testimony admitted by virtue of this section and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused." At the trial, evidence was given that the girl "voluntarily and immediately after the commission of the alleged offence made a complaint to the same effect as her statement" before the Court, and the learned Judge who tried the case told the jury "that they were entitled to take that complaint into consideration as corroboration within sec. 418 of the *Crimes Act* of the truth of the account" given by the girl at the trial. The Court of Criminal Appeal agreed with this view. The admissibility of the child's complaint was not challenged in the Court of Criminal Appeal, nor in this Court. But it was contended that it was not and could not be corroborative of her testimony within the meaning of sec. 418. We agree with this view. And, indeed, *R.* v. *Christie* (1) is a conclusive authority upon the very point. We adapt to the facts of this case the words of Lord *Atkinson* at p. 557. If the child herself had been examined either in chief or on cross-examination and had detailed what took place, at the time of the complaint, this portion of her evidence could not be treated as corroboration of the other portion proving the charge. She could not be her own corroborator. It can make no possible difference when others tell us what she did and said on that occasion. Their evidence is no more material corroborative evidence in support of her evidence at the trial implicating the accused than hers would be. At best, the complaint could only be received as confirmatory of the credibility of the child because of the consistency of her conduct in making it with the story told by her in the witness-box (*R.* v. *Lovell* [*No.* 2] (2)).

The learned counsel for the prisoner then argued that the testimony of the child was uncorroborated by any material evidence in support

(1) (1914) A.C. 545.

(2) (1923) 17 Cr. App. R. 163.

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thereof implicating the accused, if her complaint did not amount to such corroboration. But we think there was some other such material evidence. The weight of that evidence is for the consideration of a jury. The story of the child was that the prisoner stopped her, whilst in company with another child, and asked her to go and buy him two pies; that she did so, and took the pies to the prisoner's house; that he put out his hand and pulled her into the house, where he pushed her on to a couch and indecently assaulted her. This story was corroborated by independent evidence, which proved the purchase of the pies by the child, her visit to the prisoner's dwelling-house and her admission into it by the prisoner, and the finding of the pies in the prisoner's house in the room and near the couch described by the child. This independent evidence established opportunity on the part of the prisoner to commit the crime charged, but did not in itself corroborate or confirm the commission of any crime or that the prisoner committed it (*R.* v. *Baskerville* (1); *Thomas* v. *Jones* (2)). The prisoner, when he was confronted with the child, and later, denied all knowledge of her, denied that he had asked her to buy pies for him, or that he had admitted her to his dwelling-house, and asserted that he knew nothing of the pies found in his house. Now, if a jury be of opinion that the prisoner's statements are false, then they may properly come to the conclusion that his falsehood indicates that the child's story is true, and that he is telling lies in order to discredit the evidence of the other witnesses because he is unable to account for what they say they saw, in any way consistent with his own innocence. Corroboration may be found in independent evidence or in admissions of the prisoner, or in inferences properly drawn from his conduct and statements. And it is, in our opinion, for the jury in the present case to say what complexion the conduct and statements of the prisoner bear.

ISAACS AND RICH JJ. Two questions have arisen in this case. The first is, can the conviction stand? The second is, should the Court direct a new trial? As to the first, the conviction cannot stand in view of the decision in *Lovell's Case* (3). The appellant

(1) (1916) 2 K.B. 658. (2) (1921) 1 K.B. 22.
(3) (1923) 17 Cr. App. R. 163.

was tried in December 1923, but at that time there was, in the report here available, not the same unmistakable distinctness as to the legal effect of complaints when various cases were looked at as there is now since *Lovell's Case* (1). It is quite understandable how the summing-up of the learned trial Judge and the Full Court decision in the present case might at the time have been thought to be in accordance with the law. *Lovell's Case* however, makes the matter quite clear, and the conviction must be set aside.

This gives rise to the next question whether there should be a new trial on the ground that there was sufficient evidence to go to the jury, apart from the complaint, or whether the evidence on the whole was such that the Judge should in view of the statute have withdrawn the case from the jury. The problem always is how to give proper effect to both branches of sec. 418, that is, to carry out the intention of the Legislature as to sub-sec. 1, but without going beyond that intention with regard to sub-sec. 2. It would, in the present circumstances, be quite improper to do more than state almost academically the reasons for holding that there should be a new trial. Merely to direct a new trial without giving any reasons would not be helpful, and might be very confusing and embarrassing to all engaged in it. On the other hand, to condescend to particulars of the evidence would more than likely prejudice the result one way or the other. We endeavour to avoid both consequences. No exhaustive formulation of what constitutes corroborative evidence which satisfies the statute would be either possible or proper. But, in addition to the central proposition laid down in *Baskerville's Case* (2), the decisions make clear the following propositions:— (1) Opportunity of itself affords no corroboration in such a case. (2) Opportunity may directly or inferentially be prima facie shown to be of such a character as to become corroborative evidence. (3) Whether denial by the accused of any incident deposed to is such evidence of the character of opportunity as to be corroborative is a question of law dependent on the circumstances of the case. (4) If in any given case a denial be legally corroborative, its weight as evidence varies with the circumstances, and that must be determined by the jury.

(1) (1923) 17 Cr. App. R. 163.

(2) (1916) 2 K.B., at p. 667.

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We think the case was not one to be withdrawn from the jury, and therefore a new trial should be ordered.

Special leave to appeal granted. Appeal allowed. New trial ordered. Prisoner remanded in custody to await his trial subject to any bail which the Supreme Court may in its discretion think fit to allow.

Solicitors for the appellant, *Reid & Reid*, Newcastle, by *Lobban, Lobban & Harney.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

BROWN . . . . . APPELLANT;
DEFENDANT,

AND

SMITT . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1924.

MELBOURNE. *Feb.* 25, 26; *May* 14.

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

Vendor and Purchaser — Sale of land — Purchaser in possession — Fraudulent misrepresentation by vendor — Rescission of contract — Compensation — Improvements by purchaser — Repairs — Losses in business.

In an action by a purchaser against a vendor for rescission of a contract for the sale of land where the purchaser had entered into possession of the land,

Held, by *Knox* C.J., *Gavan Duffy* and *Starke* JJ. (*Isaacs* and *Rich* JJ. dissenting), that the case being one in which rescission should be ordered, the purchaser was entitled to recover as compensation the value added to the land