R. v. MWILA.

A CRIMINAL REVIEW CASE OF 1935.

Rape—Penal Code section 113*—evidence of carnal knowledge—unsatisfactory evidence of complainant regarding absence of consent or consent obtained by force or intimidation—absence of corroboration on a charge of rape not essential in law but usually required—alternative charge of procuring defilement of woman by threats or intimidation—Penal Code section* 122 (1)*—latter section makes corroboration in some material particular necessary to support conviction on such alternative charge.*

While on a charge of rape under section 113 of the Penal Code corroboration in some material particular by evidence implicating the accused is not essential it is usually required and without such corroboration it is unwise to convict. Where the evidence in support of the charge does not justify a conviction for rape under section 113 of the Penal Code the Court may (by virtue of section 172 (1) of the Criminal Procedure Code) in a proper case convict of procuring the defilement of the woman by threats or intimidation under section 122 (1) of the Penal Code, but this last section specifically provides that no person shall be convicted of such offence upon the evidence of one witness only unless such witness be corroborated in some material particular by evidence implicating the accused; it follows that, if the evidence in support of the charge of rape under section 113 of the Penal Code is confined to the evidence of one witness only and such witness is not corroborated in some material particular by evidence implicating the accused, the latter cannot be convicted under section 122 (1) of the Penal Code of procuring the defilement of the woman by threats or intimidation. It may, however, happen that, although there is evidence of one witness together with corroboration sufficient (if believed) to justify conviction on the charge of rape, the Court is unable to find that rape (as defined in section 113 of the Penal Code) has in fact been committed; in such circumstances the Court might convict the accused of procuring defilement of the woman by threats or intimidation under section 122 (1) of the Penal Code.

Francis, J.: I am not satisfied with the propriety of this conviction and intervene in pursuance of my power under the Criminal Procedure Code.

The aggregate of the evidence upon which the conviction is based is—so far as it appears to me—as follows:

On a date uncertain, but about two weeks before the date of hearing (16th February), the prosecutrix, a married woman four months' pregnant to her husband, when going to meet her mother was accosted by the accused. He seized her and carried her away on his shoulders. She was frightened, cried out and fainted. The accused subsequently tied her hands and forcibly effected sexual intercourse.

The couple were away in the bush for some days. The girl states she was acting under constant compulsion and threats of the accused, and adds that the accused slept with her on several occasions during this period.

On one occasion they appeared at Lusongo's village where people gave them " fire ". And so the two " lived among the ' Hills ' for several days ", stealing food and utensils from various villages visited by them for this purpose.

After some period of absence (not stated) the search party from the girl's village found them. Her first exclamation was, " I have been very frightened because we two have been all alone in the forest I am glad to see you ". This evidence is not sufficiently convincing upon which to found a charge of rape.

Corroboration is not essential in such a charge, nevertheless it is unusual to act upon the uncorroborated testimony of a prosecutrix; and it is in my view peculiarly dangerous to do so in native cases. The only assistance given by the mother of the prosecutrix is that next day some way from the village she found a place where the grass had been beaten down and her daughter's comb and ring. This is no corroboration of rape.

To me it is curious that no complaint was made to her husband or mother immediately after the prosecutrix was enabled to rejoin them. The husband was not called as a witness.

The evidence of the accused (erroneously referred to as a statement on oath) admits he took the girl away and slept with her, but it is no admission of rape.

The evidence appears to suggest more appropriately an offence under section 122 (1)—a kindred offence. But here again the proviso to that section sets up a difficulty—because the only evidence of defilement by threats is that of the girl herself.

The Solicitor-General has been given the opportunity of arguing in support of the conviction and the Court is informed that he does not wish to be heard.

The conviction and sentence must be and are hereby quashed.