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[IN THE COURT OF APPEAL.]

1914

MASH v. DARLEY.

June 10.

Bastardy—Evidence—Corroboration—Conviction for having had Unlawful Carnal Knowledge—Proof of Conviction—Evidence of Conduct of Accused—Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4.

Upon the hearing of a complaint under s. 4 of the Bastardy Laws Amendment Act, 1872, the evidence adduced in corroboration of that of the complainant was the evidence of a person who deposed that he had been present at the trial and conviction of the alleged father of the complainant's child upon an indictment charging him with having had unlawful carnal knowledge of the complainant, and who also deposed to the fact that when before the committing justices the alleged father gave evidence that the complainant was a fast girl and that that was the cause of her then condition, and that on his trial at the assizes no suggestion was made that the complainant was a fast girl, nor was the evidence of the alleged father to that effect repeated:—

Held by Buckley L.J. and Kennedy L.J. (Phillimore L.J. doubting), that the conviction was not sufficiently proved, and that the evidence as to it was not corroboration of the complainant's evidence in a material particular as required by the statute.

Held, further, that the evidence as to the conduct of the alleged father in giving evidence before the justices that the complainant was a fast girl and in not giving evidence to that effect at the assizes was corroboration of the complainant's evidence in a material particular.

Decision of the Divisional Court [1914] 1 K. B. 1 affirmed on different grounds.

APPEAL from the decision of a Divisional Court (Ridley, Scrutton, and Bailhache JJ.) upon a case stated by justices; reported [1914] 1 K. B. 1.

On February 27, 1913, the respondent preferred a complaint at petty sessions against the appellant, under the Bastardy Laws Amendment Act, 1872, alleging that the appellant was the father of her bastard child and applying for an order under the statute. The justices, having adjudged the appellant to be the putative father and made an order for the payment of 4s. a week, stated a case for the opinion of the Court to the following effect.

Upon the hearing of the complaint the respondent gave evidence that the appellant had had connection with her in December, 1911, and in January, February, and March, 1912 ;

that no other man had interfered with her during that period ; and that she had been delivered of a bastard child in November, 1912.

The only evidence by way of corroboration as required by the statute (35 & 36 Vict. c. 65, s. 4) tendered by the respondent was that of Henry Tebbey, a superintendent of police, to the effect

(a) That he was present at the hearing before the justices at Oundle Police Court when the appellant was committed for trial on the charge that on divers dates between December 1, 1911, and March 31, 1912, he unlawfully and carnally knew a certain girl named Gertrude Dexter Darley, being above the age of thirteen years and under the age of sixteen years, to wit, of the age of fourteen years ; that at the hearing before the justices the appellant gave evidence which suggested that the respondent was a fast girl and that that was the reason of her then condition ; that he (Tebbey) was in Court during the trial of the appellant at the assizes at Northampton, but no suggestion was then made by the defence that the respondent was a fast girl, nor did the appellant repeat the evidence on this point which he gave before the justices.

(b) That he (Tebbey) was present at the conviction of the appellant at the assizes at Northampton upon an indictment charging that the appellant on or about March 22, 1912, and on divers other occasions within six months then last past did unlawfully and carnally know the respondent, she then being above the age of thirteen and under the age of sixteen years, when the appellant was sentenced to eighteen months' imprisonment.

The respondent contended that the evidence of the superintendent was admissible and amounted to corroboration of her evidence in some material particular as required by the statute. The appellant contended that the said evidence was inadmissible in point of law ; that it was not proof of the fact of the said conviction ; that, if admissible, it did not amount to corroboration as required by the statute ; that the fact of the said conviction, if held to be proved, was not corroboration of the respondent's evidence in any material particular as required by the statute, and that, therefore, there was no corroboration of the respondent's

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The justices admitted the evidence of the superintendent and held that the conviction of the appellant was sufficiently proved, and came to the conclusion upon the whole of the facts which had been proved before them that the evidence of the respondent was corroborated in some material particular as required by the statute.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law, and if not what should be done in the premises.

The Divisional Court held (1) that evidence of the conviction was admissible, that the conviction was properly proved, and that this evidence was corroboration of the complainant's evidence in a material particular as required by the statute.

The appellant appealed.

B. Campion, for the appellant. The conviction was not properly proved. At common law it was necessary to produce the record of the conviction in order to prove it. But s. 13 of the Evidence Act, 1851 (14 & 15 Vict. c. 99), substitutes a certified copy of the record. There is no authority that a criminal conviction can be proved in any way but at common law except under the statute. The respondent, not having availed herself of the means of proof provided by the statute, is thrown back on the common law mode of proof. As regards the suggested corroboration by the appellant's conduct, a defendant does not corroborate a charge made against him by remaining silent. There is no corroboration in the fact that he said before the justices that the respondent was a fast girl but did not say so at his trial.

Barrington-Ward, for the respondent. It is admitted that it is not possible to contend that the conviction was properly proved. But in the case as it stands there is corroboration. Corroboration may be provided by anybody, and you may rely on the conduct of the appellant when the paternity of the child is under

(1) [1914] 1 K. B. 1.

consideration. His excuse before justices in cross-examination and in his own evidence was that the respondent was a fast girl, and this defence was dropped at the trial at the assizes; the justices on the hearing of the bastardy summons were justified in treating these facts as corroboration. It is admitted that the case is on the line, but on the whole there is sufficient corroboration. [He cited *In re Crippen* (1) ; *Bessela v. Stern*. (2)]

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Campion in reply. The real question is whether the conviction was properly proved. and whether, if so, it amounted to corroboration.

BUCKLEY L.J. This case comes to us upon appeal from an order of the Divisional Court made upon a case stated by justices. The question for decision is whether there was evidence corroborating the evidence of the mother in some material particular by other evidence to the satisfaction of the justices. I have only to examine whether there is upon this case stated evidence in some material particular which could satisfy the justices, for they, and not we, are the people to be satisfied.

The facts of the case, as appearing on the case stated, are as follows: On or about February 27, 1913, a complaint was preferred at the petty sessions against the appellant under the Bastardy Laws Amendment Act, 1872, alleging that the appellant was the father of the applicant's bastard child. Before the justices the girl gave evidence to the effect that she had been a domestic servant in the appellant's house from September, 1911, to March, 1912, and that the appellant first had connection with her just before Christmas, 1911, after which he used to visit her bedroom two or three times a week and had connection with her in her bedroom two or three times a week during January, February, and March till March 1912. There are some further facts which I need not go on to read. On August 9 and 10, 1912, there was a hearing before the justices at the Oundle Police Court when the appellant was committed for trial on a charge that he "at divers dates between December 1, 1911, and March 31, 1912, unlawfully and carnally did know a certain girl named Gertrude Dexter Darley, being above the age of thirteen years

(1) [1911] P. 108.

(2) (1877) 2 C. P. D. 265.

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and under the age of sixteen years, to wit, of the age of fourteen years, contrary to the form of the statute," &c. The evidence of the superintendent of police states that he was convicted of that offence. The girl was delivered of a child on November 26, 1912, so that at the date of the proceedings which I have been mentioning she was pregnant, and the bastardy summons was issued, as I have said, in February, 1913. The case stands in this position—that upon the evidence of the girl the paternity of the child is established, the offence is proved, if the evidence can be listened to; but, having regard to the statute, the case cannot be taken to be proved unless within s. 4 of the Act of 1872 the evidence of the mother is corroborated in some material particular by other evidence to the satisfaction of the justices.

The first point upon which the justices proceeded was that the superintendent of police who was giving evidence spoke to the fact of the conviction, that he was present when the man was convicted, and the justices say, "We admitted the evidence of the superintendent of police and held that the conviction of the appellant was sufficiently proved." The conviction was not proved either by the production of the record or by the proper proceedings under s. 13 of Lord Brougham's Act of 1851, and on that point—I do not see that it is necessary to decide it, because I am going to decide this case upon other grounds—I do not myself see that it could be said that the conviction was proved, and in fact Mr. Barrington-Ward before us has not raised that contention. He does not say that the evidence of the police superintendent that the conviction was arrived at in his presence is a proof of the conviction. I therefore pass from that. I do not rely upon that. What I do rely upon is this. There are two matters, it seems to me, which are plainly admissible evidence. The first is that the superintendent of police said that he was present at the inquiry before the justices when the appellant gave evidence which suggested that the respondent was a fast girl and that that was the reason of her then condition. That is admissible. The second is that the superintendent of police was in Court during the trial at the assizes and he says that no suggestion was then made by the appellant that the

respondent was a fast girl, nor did the appellant repeat the evidence on this point which he gave at the hearing of the charge before the justices in August, 1912. That is admissible. Corroborative evidence, I conceive, may be found either in admissions by the man or inferences properly drawn from the conduct of the man. Admission here, there is none. Conduct there is. Were or were not the justices entitled to take into account as a matter of evidence upon which they might come to some conclusion the fact that the man before the justices told a story, namely, that she was fast and that her condition was due to that state of things, and the fact that when at the assizes he stood in peril and when, if the defence was true, it was to his interest to set it forward, he did not set it forward at all? It has been argued before us as if he could not have set up that defence without going into the box and exposing himself to cross-examination. It appears to me that that is a mistake. The defence could have been set up in cross-examination of the girl when she was in the box. Nothing of the kind was done. So, upon matters which are admissible in evidence, it is established that the conduct of the man was this—that before the justices he took a particular course and at a subsequent date he did not take a particular course, and that that was a course which you would have expected him to take under circumstances of his innocence. It is not for us to say what weight ought to be given to that evidence. All that we have to look at is to see whether there was evidence. If there was evidence, it is not for us but for the justices to determine whether or not that was evidence which satisfied them. It appears to me that that was corroborative evidence and that the justices were entitled to take into account that the man so conducted himself as that there was reason from his conduct to infer that the girl's story was presumably true. It appears to me that that disposes of this case. Therefore I do not say anything about the question of the proof of the conviction.

The eighth paragraph of the case runs thus: "We admitted the evidence of the said Henry Tebbey and held that the said conviction of the appellant was sufficiently proved." I do not proceed upon that. Then it goes on, "and we came to the

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C. A. 1914 <hr/> MASH v. DARLEY. <hr/> Buckley L.J.	conclusion upon the whole of the facts which had been proved before us that the evidence of the respondent was corroborated in some material particular as required by the statute 35 & 36 Vict. c. 65, s. 4. The question for the opinion of the Court is whether upon the above statement of facts we came to a correct determination in point of law." I say that they did, in that they were entitled to say that the matters to which I have pointed were evidence upon which they might proceed and they were matters on which it was for them to form an opinion. For that reason I think that this appeal fails and should be dismissed with costs.
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KENNEDY L.J. In my view this is an exceedingly unsatisfactory case. To begin with—as Buckley L.J. has just read the words I need not repeat them—prominence unquestionably is given in the case stated (and no doubt quite in accordance with the fact) to the admission by the justices of the conviction as a thing which they say they found was sufficiently proved. I agree that in the latter part of the sentence the wording is open to the conclusion that they took into consideration what they call the whole of the facts, and that in those facts there was evidence of the corroboration required by the statute. But one cannot help feeling that the admission of the conviction as a piece of evidence which I think clearly ought not to have been admitted was a fact which may have led to the conclusion to which they came, and which may perhaps unconsciously have influenced their minds, although there be sufficient in the rest of the evidence for the conclusion at which Buckley L.J. has himself arrived. Worse still, when the matter came before the Divisional Court, when the counsel for the respondent, Mr. Barrington-Ward, was not called upon to argue in support of the proof of the conviction, the case proceeded in the judgment of my brother Ridley upon grounds which, with all due respect, I think are grounds which I could not possibly have supported. Indeed, Mr. Barrington-Ward says that they could not be supported. The judgment could not be supported on the grounds given. I say “the grounds given” because the beginning of the judgment in the Court below is “The justices held that the evidence of

Tebbey as to the conviction of the appellant was corroboration," &c. Therefore the question stated, and very clearly stated, by Ridley J. is, Was evidence of the conviction admissible? That is the question, as he calls it, in the case. When I come to the conclusion of the judgment I find a statement of the law which, with all respect, I cannot as at present advised think is a right statement. "In my opinion," says the learned judge, "in a case like this where it is not necessary to prove a conviction but evidence of a conviction is offered by the complainant simply as part of the evidence in support of her case, the evidence of a person who is present is sufficient." It seems to me that if a conviction is offered by a party as part of the evidence in support of her case, one has simply got to go to those rules of law which state whether such evidence is admissible, and we find that the evidence of a conviction is only admissible for any purpose as evidence in a Court of law under certain conditions which were not fulfilled in the present case. "I think, therefore, that there was sufficient evidence before the justices of the conviction of the appellant of having had carnal knowledge of the respondent, this not being a case in which it was necessary to prove the conviction. There is another ground upon which I think that the evidence is admissible, that is, as evidence of the opinion of the jury expressed in the presence of the appellant." I confess that this is the first time I have heard—there may be authority of which I am unfortunately ignorant—that oral evidence of a conviction can be given by somebody who heard the jury give a verdict which is to let in indirectly evidence of the conviction as to the proof of which we have express statutory provision. "I do not see how it can be said that that was not corroborative evidence against him." That is the evidence of the opinion of the jury. "There is no authority to that effect; but as a matter of principle I do not see why this evidence of the verdict of a jury was not some corroboration of the evidence of the respondent. Upon both grounds, therefore, either as a conviction, or as a piece of evidence, I think this evidence was admissible." I am quite unable to follow that: "either as a conviction"; the conviction is put in as a part of the evidence. Therefore, really it seems to me there was only one question which was considered, as the

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learned judge had said at the commencement, Were the justices or were they not entitled to treat the evidence before them as properly bringing before them the conviction of the appellant as a matter of corroboration?

But it is, as has been said, no doubt open to the respondent to support this judgment upon facts appearing in the case stated, although not the facts upon which the Court below had relied in affirming the conviction, and with considerable hesitation I think I ought not to differ from the opinion of the other members of the Court. It is, as Mr. Barrington-Ward said, to use his own words, "only just over the line." I confess that I feel some doubt as to whether it is over the line at all. In many cases I think a change of defence could not be treated as in any way corroborative of the guilt of the prisoner, as to which of course there should be direct evidence on the part of the prosecution where corroboration was required. I should greatly have preferred to find that I was dealing with a case in which I knew that this wrongly admitted evidence of the conviction had had no weight with the justices; but I also agree that there may be cases in which language, whether used in a Court of justice or outside a Court of justice, may be considered as having the effect of corroboration, although there is nothing like an express admission. There may be such cases. I am not prepared to differ from my brethren in thinking that this was one of them. The girl had been living in the man's house as a domestic servant; the fact of her being with child was not in dispute. The man had given evidence himself on the first occasion suggestive of improper conduct of other persons, and on the later occasion, when it was very important for him, if he could, to have shewn similar conduct on her part, he withdrew that suggestion altogether. Whether, if I had had to deal with the case in the first instance, knowing the seriousness of the charge and the difficulty in many cases of disproving it, I should have thought this fact sufficient evidence of corroboration is another matter. All we have to consider is, might the justices acting judicially consider that conduct and act upon it? I will not differ from the conclusion to which my brethren have come. The statute says that it must be corroboration "in some material particular," and we must

consider the particular in regard to the charge which is made, which is, here, one of paternity. As I say, I am not sure that I should myself have acted upon it. What we have to say is whether, in point of law, the justices must be held to be wrong because they acted upon it. Upon the whole I will not differ from the conclusion to which the Court has come, though, as I say, I refrain from doing so with some reluctance, and with the feeling that I could not concur in the reasoning in the Court below. I regret that the fact of the conviction, as evidence which could have influenced the justices, should appear so prominently on the face of the case stated.

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PHILLIMORE L.J. I agree that this appeal should be dismissed, and I put it upon the ground—it is quite sufficient to put it upon the ground—given by Buckley L.J. As the matter strikes me, here is a young woman with a child, and she deposes with detail to acts of sexual connection by her master in his house in her bedroom. He, before the magistrates, being charged, the girl being under sixteen and therefore it being a criminal offence, deposes on oath to facts which conceivably would lead the magistrates to suppose that somebody else was the parent of the child, though it would be still possible that he might have had sexual connection with her. His defence is not sufficient to prevent the magistrates committing him for trial. When the trial comes it gets as far as his having to give evidence. That I am quite prepared to take from the evidence of the police constable. I also take the finding “nor did the appellant repeat the evidence on the point” as a finding of the magistrates that he did go into the witness-box. It does not very much matter whether he did so or not. He then, being in increased peril, does not repeat, either through his advocate, by cross-examination, or when he comes to give evidence, if he did give evidence, the suggestion which would explain the matter in a way favourable to himself. I do not say that by itself it would be nearly enough; but when corroboration only is required, when, as the books put it, the corroboration is required to prevent men being at the mercy of profligate women, such evidence by conduct might be treated by

C. A. the tribunal which had to determine not a criminal but a purely
1914 civil question as sufficient corroboration. That is all I think it
is necessary to say to support the decision.

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But I am bound to say that other matters in this case may require on some future occasion further consideration. Mr. Campion, in his very able and concise argument, to my mind inverted the points. I think that the first and really important point is whether, if the conviction had been properly proved, it would have been admissible. I can see the difficulty. As you can convict without corroboration, ought a conviction which may have been obtained without corroboration to go any further than the girl's evidence? I think that that is a matter which will require some very careful consideration. But if it is admissible to prove that on another occasion the person has been convicted and you once get into the history of the trial, it seems to me very difficult to say that you must not go to the end of the history of the trial; and although I entirely agree that for any purposes for which a conviction is to be relied on as a conviction of crime (if it is to be relied on under the Habitual Criminals Act or for the purposes of the Common Law Procedure Act, and so on) you must have strict documentary evidence, I am not certain that as part of the history of the case (if the conviction was admissible, as to which I desire to express no opinion,) it was not for this purpose sufficiently proved for the particular case. All, however, that it is necessary for me to say is that I agree, on the ground put by Buckley L.J.

Appeal dismissed.

Solicitors for appellant: *Samuel Price & Sons, for Darnell & Price, Northampton.*

Solicitors for respondent: *Kingsford, Dorman & Co., for Simpson & Mason, Higham Ferrers.*

W. J. B.