



Director of Public Prosecutions v Kilbourne

Evidence (University of Botswana)



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HEARING-DATES: 13 14, 15 NOVEMBER 1972, 31 JANUARY 1973

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CATCHWORDS:

Criminal Law - Evidence - Corroboration - Indecent assault - Child victim - Boy - Evidence of system - Mutual corroboration - Evidence of other boys alleging similar offences against themselves - Evidence of other boys admissible as proving system and negating innocent association - Whether evidence of other boys capable of constituting corroboration of victim's evidence.

HEADNOTE:

The accused was charged on an indictment containing seven counts, and convicted of one offence of buggery, one of attempted buggery and five of indecent assault. The counts fell into two groups. Counts 1 to 4 referred to offences alleged to have been committed in 1970 and involved four boys; counts 5 to 7 alleged offences committed a year later and involved two other boys. The boys were all between the ages of nine and 12 at the time of the alleged offences. All the boys were called for the prosecution and were allowed to give sworn evidence. The prosecution alleged that the accused encouraged the boys to come to his house by providing them with various inducements and having got them into his house he committed the acts charged in the indictment. The accused admitted that the boys had come to his house but claimed that his association with them had been entirely innocent. The judge directed the jury that, whereas the boys in each of the two groups knew each other well and could have collaborated in putting forward their stories, it was unlikely, if not impossible, for the two groups to have collaborated in that way and accordingly they were entitled to take the evidence of the boys in one group as corroborating the evidence of the boys in the other group. The Court of Appeal quashed the convictions holding that, although the evidence of the boys of one group was admissible in relation to charges concerning boys of the other group as tending to show that the accused was a homosexual whose proclivities took a particular form and as tending to rebut the defence of innocent association, that evidence could not in law constitute corroboration of the evidence of boys of the other group. The prosecution appealed.

a [1972] 3 All ER 545, [1972] 1 WLR 1365

Held - The appeal would be allowed. The word 'corroboration' had no special technical meaning; by itself it meant no more than evidence tending to confirm other evidence. No distinction could, therefore, be drawn between evidence which could be used as corroboration and evidence which might help the jury to determine the truth of the matter. Since the evidence of one group of boys was admissible in relation to the charges concerning the other group as being relevant to matters in dispute and implicating the accused in the criminal conduct alleged, that evidence, if believed, constituted corroboration. It was immaterial that the evidence of boys of both groups was mutually corroborative, or that each boy was, technically, an accomplice in

relation to the offence committed against him (see p 446 e and f, p 448 b d and e, p 453 a, p 454 h, p 455 c, p 456 b and g, p 457 d h and j and p 463 a and g to p 464 b e f and h, post).

Director of Public Prosecutions v Hester [1972] 3 All ER 1056 applied.

R v Sims [1946] 1 All ER 697 and dictum of Lord Goddard CJ in R v Campbell [1956] 2 All ER at 276 explained and disapproved in part.

Per Lord Hailsham of St Marylebone LC, Lord Morris of Borth-y-Gest and Lord Simon of Glaisdale. There is no general rule that no persons who come within the definition of 'accomplice' may be mutually corroborative. The rule does not necessarily apply to all witnesses in the same case who may deserve to be categorised as 'accomplice'. In particular it does not necessarily apply to accomplices who give independent evidence of separate incidents as proving system and negating accident, and where the circumstances are such as to exclude the danger of a jointly fabricated story (see p 454 e and f, p 457 j and p 463 e, post).

Decision of the Court of Appeal sub nom R v **Kilbourne** [1972] 3 All ER 545 reversed.

NOTES:

For corroboration, see 10 Halsbury's Laws (3rd Edn) 458-462, paras 843-850, and for cases on directions as to corroboration, see 14 Digest (Repl) 542-545, 5258-5304.

CASES-REF-TO:

Arthurs v A-G for Northern Ireland (1970) 55 Cr App Rep 161, HL (NI).
Davies v Director of Public Prosecutions [1954] 1 All ER 507, [1954] AC 378, 118 JP 222, 38 Cr App Rep 11, HL, 14 Digest (Repl) 527, 5108.
Director of Public Prosecutions v Hester [1972] 3 All ER 1056, [1972] 3 WLR 910, HL.
Harris v Director of Public Prosecutions [1952] 1 All ER 1044, [1952] AC 694, 116 JP 248, 36 Cr App Rep 39, HL, 14 Digest (Repl) 423, 4118.
HM Advocate v AE 1937 JC 96, 15 Digest (Repl) 1025, * 6338.
HM Advocate v H'Donald 1928 JC 42.
Markin v A-G for New South Wales [1894] AC 57, 63 LJPC 41, 69 LT 778, 58 JP 148, 17 Cox CC 704, PC, 14 Digest (Repl) 420, 4094.
Moorov v HM Advocate 1930 JC 68.
Ogg v HM Advocate 1938 JC 152.
People, The (at the suit of the Attorney-Genera) v Dominic Casey (No 2) [1963] IR 33.
R v Bailey [1924] 2 KB 300, [1924] All ER Rep 466, 93 LJKB 989, 132 LT 349, 88 JP 72, 27 Cox CC 692, 18 Cr App Rep 42, CCA, 14 Digest (Repl) 335, 3249.
R v Ball [1911] AC 47, 75 JP 180; sub nom Public Prosecutions Director v Ball (No 2) 80 LJKB 691, 103 LT 738, 22 Cox CC 366, 6 Cr App Rep 31, HL, 14 Digest (Repl) 426, 4138.
R v Baskerville [1916] 2 KB 658, [1916-17] All ER Rep 38, 86 LJKB 28, 115 LT 453, 80 JP 446, 25 Cox CC 524, 12 Cr App Rep 81, CCA, 14 Digest (Repl) 536, 5214.
R v Campbell [1956] 2 All ER 272, [1956] 2 QB 432, [1956] 3 WLR 219, 120 JP 359, 40 Cr App Rep 95, CCA, Digest (Cont Vol A) 377, 5106a.
R v Chandor [1959] 1 All ER 702, [1959] 1 QB 545, [1959] 2 WLR 522, 123 JP 131, 194, 43 Cr App Rep 74, CCA, Digest (Cont Vol A), 367, 4204a.
R v Christie [1914] AC 545, [1914-15] All ER Rep 63; sub nom Public Prosecutions Director v Christie 83 LJKB 1097, 111 LT 220, 78 JP 321, 24 Cox CC 249, 10 Cr App

Rep 141, HL, 14 Digest (Repl) 405, 3962.
R v Cratchley (1913) 9 Cr App Rep 232, CCA, 14 Digest (Repl) 59, 228.
R v Flack [1969] 2 All ER 784, [1969] 1 WLR 937, 133 JP 445, 53 Cr App Rep 116, CA, Digest (Cont Vol C) 195, 2238a.
R v Gay (1909) 2 Cr App Rep 327, CCA, 14 Digest (Repl) 536, 5209.
R v Smith (1915) 84 LJKB 2153, [1914-15] All ER Rep 262, 114 LT 239, 80 JP 31, 25 Cox CC 271, 11 Cr App Rep 229, CCA, 14 Digest (Repl) 341, 3312.
R v Lillyman [1896] 2 QB 167, [1895-99] All ER Rep 586, 65 LJMC 195, 74 LT 730, 60 JP 536, 18 Cox CC 346, CCR, 14 Digest (Repl) 453, 4390.
R v Manser (1934) 25 Cr App Rep 18, CCA, 14 Digest (Repl) 525, 5102.
R v Noakes (1832) 5 C & P 326, 172 ER 996, 14 Digest (Repl) 536, 5199.
R v Prater [1960] 1 All ER 298, [1960] 2 QB 464, [1960] 2 WLR 343, 124 JP 176, 44 Cr App Rep 83, CCA, Digest (Cont Vol A) 379, 5303a.
R v Price [1968] 2 All ER 282, [1969] 1 QB 541, [1968] 2 WLR 1397, 132 JP 335, 52 Cr App Rep 295, CA, Digest (Cont Vol C) 258, 9881b.
R v Robinson [1953] 2 All ER 334, 37 Cr App Rep 95; sub nom Practice Note [1953] 1 WLR 872, CCA, 14 Digest (Repl) 600, 5969.
R v Russell (1968) 52 Cr App Rep 147, CA, Digest (Cont Vol C) 219, 5217a.
R v Sims [1946] 1 All ER 697, [1946] KB 531, [1947] LJR 160, 175 LT 72, 31 Cr App Rep 158, CCA, 14 Digest (Repl) 260, 2279.
Thompson v R [1918] AC 221; sub nom Thompson v Public Prosecutions Director 87 LJKB 478, 118 LT 418, 82 JP 145, 26 Cox CC 189, 13 Cr App Rep 61, HL; affg sub nom R v Thompson [1917] 2 KB 630, CCA, 14 Digest (Repl) 682, 6966.
R v Williams (1956) Crim LR 833, CCA.
R v Whitehead [1929] 1 KB 99, [1928] All ER Ep 186, 98 LJKB 67, 139 LT 640, 92 JP 197, 27 LGR 1, 28 Cox CC 547, 21 Cr App Rep 23, CCA, 15 Digest (Repl) 1018, 10,016.

INTRODUCTION:

Appeal. The respondent, John **Kilbourne**, was charged on an indictment containing seven counts. On 19th April 1972 he was convicted in the Crown Court at Leeds before Lawson J and a jury of buggery, attempted buggery and five offences of indecent assault on boys aged between nine and 12 years. He was sentenced to ten years' imprisonment for buggery, seven years for attempted buggery and five years for each of the offences of indecent assault. Sentences on counts 1 to 4 and on counts 5 to 7 were to run concurrently. The sentences totalled 15 years, all being certified as extended sentences. The respondent appealed against the convictions and sentences. The Court of Appeal (Lawton LJ, MacKenna and Swanwick JJ) by their judgment delivered on 31st July 1972 and reported at [1972] 3 All ER 545 quashed the convictions. The Crown appealed. The facts are set out in the opinion of Lord Hailsham of St Marylebone LC.

COUNSEL:

R A R Stroyan QC and C J Holland for the Crown. G Baker QC and E A Greenwood for the respondent.

JUDGMENT-READ:

Their Lordships took time for consideration. 31st January. The following opinions were delivered.

PANEL: LORD HAILSHAM OF ST MARYLEBONE LC, LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD SIMON OF GLAISDALE AND LORD CROSS OF CHELSEA

JUDGMENTBY-1: LORD HAILSHAM OF ST MARYLEBONE LC.

JUDGMENT-1:

LORD HAILSHAM OF ST MARYLEBONE LC. My Lords, this is an appeal by the Director of Public Prosecutions from a decision of the Court of Appeal, Criminal Division n1 (Lawton LJ, MacKenna and Swanwick JJ) quashing convictions on seven counts of an indictment on which the respondent was convicted at the Leeds Crown Court (Lawson J and a jury) on 19th April 1972. One of these convictions (count 3 of the original indictment) no longer falls to be considered. It was quashed by the Court of Appeal on grounds extraneous to any important question of law, and the Crown does not now seek to sustain it.

n1 [1972] 3 All ER 545, [1972] 1 WLR 1365

The remaining six convictions consisted, as to one count of buggery, as to the remainder of indecent assault, one of which had originally been presented as a charge of buggery. The charges all related to offences alleged to have been committed against young boys. All the boys gave evidence and were sworn. The first three convictions still in question related to dates between October and November 1970, and the boys concerned were John, Paul and Simon (the brother of Paul). These convictions are referred to in the judgment of the Court of Appeal n1, and hereafter, as 'the first group'. The third count relating to a boy, Mark, no longer falling to be considered, also belonged to this group. The fourth, fifth and sixth convictions still outstanding (counts 5, 6 and 7 of the original indictment) related to two boys, Gary and Kevin, and to offences alleged to have been committed against them in October and November 1971, approximately one year after the first group. These three counts are referred to hereafter as 'the second group'. Count 5 related to an offence alleged to have been committed on 3rd October 1971. The remaining two convictions in the second group related to offences alleged to have been committed on 7th November 1971, one against each of the two boys, and led directly to the police investigations which appear to have begun at least as early as the following day. On conviction, the respondent was sentenced to periods of imprisonment amounting to 15 years in all. These were described by the trial judge (Lawson J) as having been extended by virtue of s 37 of the Criminal Justice Act 1967 in view of a formidable list of previous convictions for similar offences and one of attempted murder, committed against the victim of a sexual offence. Pending his appeal to this House, the respondent was ordered by the Court of Appeal to be detained under s 37 of the Criminal Appeal Act 1968. If this appeal is allowed, the respondent's appeals against these sentences still fall to be adjudicated on by the Court of Appeal (Criminal Division).

n1 [1972] 3 All ER 545, [1972] 1 WLR 1365

The appeal relates to corroboration, and is the second of two appeals dealing with this subject which have reached this House in a matter of weeks. The other appeal was Director of Public Prosecutions v Hester n1. The decision of this House in Hester n1 had not been given at the time when the present appeal was argued, but I have had the advantage of reading the opinions delivered in that case when they were in draft. There are two manifest distinctions to be drawn between the facts in Hester n1 and the present case. Hester's case n1 was concerned with the alleged mutual corroboration of two witnesses, one of whom (the victim of the alleged offence) was sworn, and one of whom was an unsworn child who gave her evidence pursuant to s 38 of the Children and Young Persons Act 1933. In the present case all the witnesses were sworn. Secondly, in Hester's case n1 both the witnesses whose evidence was in question gave evidence purporting to deal with the same incident, which each claimed

to have witnessed. In the present case, of the five boys in question, only two pairs claimed actually to have seen the same incident, and in the way in which the trial judge's summing-up was framed, the corroboration in fact placed before the jury related to incidents similar in character to one another, but in respect of each of which the evidence alleged to be mutually corroborative was supported by witnesses from the other group.

n1 [1972] 3 All ER 1056, [192] 3 WLR 910

Both the offences of the first and the second group were alleged to have been committed by the respondent at his home, where the respondent resided with a young man called 'Vic' who gave evidence on his behalf. It was conceded that all the boys concerned with the charges visited the respondent there, and partook there of various refreshments or amusements, comics, cards, a puppy to take on a walk and so forth. The reason why they visited the respondent's home was in dispute. The Crown alleged that what was set up was a 'baited trap'. The respondent's case, to which he testified in the box, was that the association was innocent. The boys' presence in his house served, he claimed, to help him in his business as a painter and decorator as they helped to make him known in the neighbourhood. Although a certain amount of physical contact was admitted, it was only 'skylarking', and the detailed and unequivocal acts of misconduct which were specifically alleged the respondent denied in the witness box. What he admitted, he alleged to have been innocent in intention and entirely devoid of any sexual character. In short, the respondent's defence was innocent association coupled with a denial of those features of the evidence which were wholly incapable of such a construction.

It has been common ground throughout the case that the evidence of the boys was of the class demanding the customary warning to the jury about corroboration. In the event the judge gave such a warning. There was indeed evidence which, if believed, was corroboration of the strongest possible kind. The police officers concerned in the case testified that, in relation to each group, the respondent had admitted to 'playing with the private parts' or 'playing with the penises' (sic) of all the boys of each group, and the Court of Appeal n2 said that, if they could have satisfied them selves that this evidence had been believed, they would have had no hesitation in applying the proviso to s 2 (1) of the Criminal Appeal Act 1968.

n2 [1972] 3 All ER 545 at 551, [1972] 1 WLR 1365 at 1372, 1373

Happily, or unhappily, counsel for the Crown felt unable to rest on the evidence of the police officers as corroboration of the boys, and --

'by way of safeguarding his case against the possibility that the jury might reject the police evidence, he submitted to the trial judge... that there was other evidence which was capable of corroborating some of the evidence of the boys.' n1

n1 [1972] 3 All ER at 547, [1972] 1 WLR at 1367, 1368

If he had not taken this course the case would certainly never have reached the House of Lords, and, possibly, never have been the subject of a reported judgment in the Court of Appeal. On such small chances, legal history depends. Counsel's submission as to corroboration was in substance accepted by the trial judge, who, as the Court of Appeal held, although the construction of the summing-up is not quite clear, directed the jury that they could regard the evidence of either of the two boys of the second group, Gary and Kevin, as corroboration of the evidence of any of the boys of the first group, John, Paul, Simon and Mark (whose evidence related to the

quashed count three) and conversely the evidence of any of the boys of the first group as corroboration of Gary or Kevin. On the other hand, the trial judge directed the jury that they must not use the evidence of any of the boys of either group to reinforce the evidence of any boy of the same group as that to which the witness belonged. He evidently had in mind that the boys of each group were respectively well known to one another and wished thereby to exclude the possibility that they might have put up within each group, but not between groups, a concocted tale.

The Court of Appeal whose judgment was given given by Lawton LJ approached the matter in three stages. Lawton LJ said n2:

n2 [1972] 3 All ER at 548, [1972] 1 WLR at 1369

'... we have had to decide whether the evidence of one group of boys was admissible at all on the counts in which the other group of boys were named. If it was not, there was a misdirection as to the admissibility of evidence; but if it was admissible, the second and third stages have to be considered. The question at the second stage is whether such evidence if it had involved neither victims nor children could have been capable of being corroboration; and the third stage is whether in the circumstances of this case in which child victims were involved, it was capable of being corroboration.' The Court of Appeal then held on the authority of R v Sims n3, R v Chandor n4 and R v Flack n5 that the evidence was admissible and admissible because it was relevant to the matters in dispute and implicated the respondent in the criminal conduct alleged in the indictment. The nerve of their argument is contained in the following short passage in the judgment of the court n6:

n3 [1946] 1 All ER 697, [1946] KB 531

n4 [1959] 1 All ER 702, [1959] 1 QB 545

n5 [1969] 2 All ER 784, [1969] 1 WLR 937

n6 [1972] 3 All ER at 548, 549, [1972] 1 WLR at 1369, 1370

'In the present case, with the exception of the penis touching incident involving the boy Kevin, each accusation bears a resemblance to the other and shows not merely that the [respondent] was a homosexual (which would not have been enough to make the evidence admissible), but that he was one whose proclivities in that regard took a particular form. Further, the evidence of each boy went to rebut the defence of innocent association which the [respondent] put forward: this by itself made the similar fact evidence admissible (see R v Chandor n7 per Lord Parker CJ). We have no doubt that the evidence of one group of boys could properly be taken into account by the jury when considering the counts relating to the other group. But for what purpose since only relevant evidence is admissible? What, for example, did Gary's evidence prove in relation to John's on count 1? The answer must be that his evidence, having the striking features of the resemblance between the acts committed on him and those alleged to have been committed on John, makes it more likely that John was telling the truth when he said that the [respondent] had behaved in the same way to him.'

n7 [1959] 1 All ER at 703, [1959] 1 QB at 548, 549

The court went on to quote the passage of the judgment of the Court of Criminal Appeal in R v Sims n1 when they say:

n1 [1946] 1 All ER at 701, [1946] KB at 539, 540

'The evidence of each man was that the accused invited him into the house and there committed the acts charged. The acts they describe bear a striking similarity. That is a special feature sufficient in itself to justify the admissibility of the evidence... The probative force of all the acts together is much greater than one alone; for, whereas the jury might think that one man might be telling an untruth, three or four are hardly likely to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy their evidence would seem to be overwhelming.'

In spite of this reasoning, the Court of Appeal n2 went on to say that nonetheless there was nothing mutually corroborative in testimony of this kind. They felt themselves constrained to come to this conclusion because of the later passage in *R v Sims* n3 which says:

n2 [1972] 3 All ER at 550, [1972] 1 WLR at 1371

n3 [1946] 1 All ER at 703, [1946] KB at 544

'We do not think that the evidence of the men can be considered as corroborating one another, because each may be said to be an accomplice in the act to which he speaks and his evidence is to be viewed with caution.'

On this the Court of Appeal quoted with some relish, the comments of Professor Cross n4:

n4 Evidence (3rd Edn, 1967), p 182

'... it is difficult to see how admissible evidence of misconduct of the defendant or accused on other occasions could ever fail to corroborate the evidence relating to the question with which the court is concerned. If it is admissible at all on account of its relevance for some reason other than its tendency to show a propensity towards wrongdoing in general or wrongdoing of the kind into which the court is inquiring, the conduct must, it would seem, implicate the defendant or accused in a material particular in relation to the occasion into which the court is inquiring.'

In quashing all the convictions on this ground the Court of Appeal went on to rely on the authority of *R v Campbell* n5, where it is said:

n5 [1956] 2 All ER 272 at 276, [1956] 2 QB 432 at 438, 439

'... we may perhaps endeavour to give some guidance to courts who have from time to time to deal with cases of sexual assaults on children where the evidence of each child deals only with the assault on him or her self. In such cases it is right to tell a jury that because A says that the accused assaulted him, it is no corroboration of his evidence that B says that he also was the victim of a similar assault though both say it on oath. At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story. And if the defence is one of innocent association by the accused with the children, the case of *R v Sims* n6, subsequently approved on this point by the House of Lords in *Harris v. Public Prosecutions Director* n1, shows that such evidence can be given to rebut the defence.'

n6 [1946] 1 All ER 697, [1946] KB 531

n1 [1952] 1 All ER 1044, [1952] AC 694

On this particular passage the Court of Appeal comment n2:

n2 [1972] 3 All ER at 550, [1972] 1 WLR at 1371, 1372

'Here Lord Goddard CJ is apparently distinguishing between evidence which can be used as corroboration and evidence which may help the jury in some way to determine the truth. A's evidence that the accused indecently assaulted him may not be used to corroborate B's evidence that B was indecently assaulted, but it may be used in some other way to help the jury to determine the truth, of B's evidence: see Cross on Evidence n3, where he cites Sims' case n4 as an authority for this difficult distinction.'

n3 3rd Edn (1967), pp 320, 321, footnote 7

n4 [1946] 1 All ER 697, [1946] KB 531

Basing themselves on this state of the authorities, the Court of Appeal decided that n5 'Accordingly we must hold the direction to be defective, with whatever consequences may follow from this view.' The consequences, of course, involved the quashing of all the convictions.

n5 [1972] 3 All ER at 551, [1972] 1 WLR at 1372

We now have to determine at the invitation of the Court of Appeal how 'evidence which can be used as corroboration and evidence which may help the jury in some other way to determine the truth' can be validly distinguished, and the distinction explained to a jury. The question certified by the Court of Appeal in the present case as of general public importance is:

'Whether and in what circumstances the sworn evidence of a child victim as to an offence charged can be corroborated by the admissible but uncorroborated evidence of another child victim as to similar misconduct of the accused on a different occasion.'

I may say at once that I regard the passage in R v Campbell n6 which attempts to draw a distinction between evidence which helps the jury to arrive at a conclusion about evidence requiring corroboration and evidence which is confirmatory or corroborative of evidence requiring corroboration as a valiant, but wholly unsuccessful, attempt to reconcile the two quoted passages in R v Sims n7, the second of which I believe to be wholly inconsistent with the first. The second passage may be based on what I believe to be a false analogy with the use which can be made by the prosecution of complaints by the alleged victim of a rape as evidence of consistency, but not corroboration, since a witness requiring corroboration 'cannot corroborate herself'. It may also be based to some extent on the rule about joint accomplices stretching back to R v Noakes n8 per Littledale J. But this also, as I shall endeavour to show, is a false analogy.

n6 [1956] 2 All ER 272 at 276, [1956] 2 QB 432 at 438, 439

n7 [1946] 1 All ER at 701, 703, [1946] KB at 539, 540, 544

n8 (1832) 5 C & P 326 at 328

In my view, there is no magic or artificiality about the rule of practice concerning corroboration at all. In Scottish law, it seems, some corroboration is necessary in every criminal case. In contrast, by the English common law, the evidence of one competent witness is enough to support a verdict whether in civil or criminal proceedings except in cases of perjury (cf Hawkins n9 and Foster n10). This is still the

general rule, but there are now two main classes of exception to it. In the first place, there are a number of statutory exceptions. The main statutory exceptions are contained in (i) Treason Act 1795 n11, s 1 (compassing the death of the Sovereign etc); (ii) Perjury Act 1911, s 13 (re-enacting the common law exception); (iii) Children and Young Persons Act 1933, s 38(1), proviso (dealing with the unsworn evidence of young children and re-enacting a statute of 1908); (iv) Representation of the People Act 1949, s 146(5) (personation at elections); (v) Sexual Offences Act 1956, ss 2(2), 3(2), 4(2), 22(2) and 23(2) (procuration etc); (vi) Road Traffic Act 1960, s 4(2) (speeding); (vii) Affiliation Proceedings Act 1957, s 4 (2) (complainant's evidence against putative father). In each of these cases the different, but closely similar, provisions of the different statutes override the common law. The other main statutory exception in civil proceedings, the evidence of a plaintiff in breach of promise case is, of course, now obsolete.

n9 Pleas of the Crown (8th Edn, 1824), Bk 2, c 25, s 129, c 46, s 2, pp 351, 590

n10 Crown Cases (3rd Edn, 1809), c 3, 58, p 233

n11 36 Geo 3 c 7

But side by side with the statutory exceptions is the rule of practice now under discussion by which judges have in fact warned juries in certain classes of case that it is dangerous to found a conviction on the evidence of particular witnesses or classes of witness unless that evidence is corroborated in a material particular implicating the accused, or confirming the disputed items in the case. The earliest of these classes to be recognised was probably the evidence of accomplices 'approving' for the Crown, no doubt, partly because at that time the accused could not give evidence on his own behalf and was therefore peculiarly vulnerable to invented allegations by persons guilty of the same offence. By now the recognised categories also include children who give evidence under oath, the alleged victims, whether adults or children, in cases of sexual assault, and persons of admittedly bad character. It do not regard these categories as closed. A judge is almost certainly wise to give a similar warning about the evidence of any principal witness for the Crown where the witness can reasonably be suggested to have some purpose of his own to serve in giving false evidence (cf R v Prater n1 and R v Russell n2). The Supreme Court of the Republic of Ireland has apparently decided that at least in some cases of disputed identity a similar warning is necessary (People v Dominic Casey (No 2) n3). This question may still be open here (cf R v Williams n4 and Arthurs v A-G for Northern Ireland n5).

n1 [1960] 1 All ER 298, [1960] 2 QB 464

n2 (1968) 52 Cr App Rep 147

n3 [1963] IR 33 at 39, 40

n4 (1956) Crim LR 833

n5 (1970) 55 Cr App Rep 161 at 169

Since the institution of the Court of Criminal Appeal in 1907, the rule, which was originally discretionary in the trial judge, has acquired the force of a rule of law in the sense that a conviction after a direction to the jury which does not contain the warning will be quashed, unless the proviso is applied: see R v Baskerville n6 and Davies v Director of Public Prosecutions n7 per Lord Simonds LC.

n6 [1916] 2 KB 658, [1916-17] All ER Rep 38

n7 [1954] 1 All ER 507 at 512, [1945] AC 378 at 398

However, it is open to a judge to discuss with the jury the nature of the danger to be apprehended in convicting without corroboration and the degree of such danger (cf R v Price n8) and it is well established that a conviction after an appropriate warning may stand notwithstanding that the evidence is uncorroborated, unless, of course, the verdict is otherwise unsatisfactory (R v Baskerville n6). There is, moreover, no magic formula to be used (R v Price n8). I agree with the opinions expressed in this House in Director of Public Prosecutions v Hester n9 that it is wrong for a judge to confuse the jury with a general if learned disquisition on the law. His summing-up should be tailor-made to suit the circumstances of the particular case. The word 'corroboration' is not a technical term of art, but a dictionary word bearing its ordinary meaning; since it is slightly unusual in common speech the actual word need not be used, and in fact it may be better not to use it. Where it is used it needs to be explained.

n6 [1916] 2 KB 658, [1916-17] All ER Rep 38

n8 [1968] 2 All ER 282 at 285, [1969] 1 QB 541 at 546

n9 [1972] 3 All ER 1056, [1972] 3 WLR 910

The difficulty which has arisen in the present case was complicated by the fact that the witnesses requiring corroboration were said to be corroborated by witnesses not of the same incident, but of incidents of a similar character themselves all of the class requiring corroboration. A considerable part of the time taken up in argument was devoted to a consideration whether such evidence of similar incidents could be used against the respondent to establish his guilt at all, and we examined the authorities in some depth from Makin v A-G for New South Wales n1, through Lord Sumner's observations in Thompson v R n2 to Harris v Director of Public Prosecutions n3. I do not myself feel that the point really arises in the present case. Counsel for the respondent was in the end constrained to agree that all the evidence in this case was both admissible and relevant, and that the Court of Appeal n4 was right to draw attention to the 'striking features of the resemblance' between the acts alleged to have been committed in one count and those alleged to have been committed in the others, and to say that this made it 'more likely that John was telling the truth when he said that the [respondent] had behaved in the same way to him'. In my view, this was wholly correct. With the exception of one incident n5:

n1 [1894] AC 57

n2 [1918] AC 221

n3 [1952] 1 All ER 1044, [1952] AC 694

n4 [1972] 3 All ER 545 at 549, [1972] 1 WLR 1365 at 1370

n5 [1932] 3 All ER at 548, 549, [1972] 1 WLR at 1369

'... each accusation bears a resemblance to the other and shows not merely that [the respondent] was a homosexual (which would not have been enough to make the evidence admissible), but that he was one whose proclivities in that regard took a particular form.'

I also agree with the Court of Appeal in saying that the evidence of each child went to contradict any possibility of innocent association. As such it was admissible as part of the prosecution case, and since, by the time the judge came to sum up, innocent association was the foundation of the defence put forward by the respondent, the

admissibility, relevance, and, indeed cogency of the evidence was beyond question. The word 'corroboration' by itself means no more than evidence tending to confirm other evidence. In my opinion, evidence which is (a) admissible and (b) relevant to the evidence requiring corroboration, and, if believed, confirming it in the required particulars, is capable of being corroboration of that evidence and, when believed, is in fact such corroboration. As Professor Cross well says in his book on Evidence n6:

n6 3rd Edn (1967), p 316

'The ground of the admissibility of this type of evidence was succinctly stated by HALLETT, J., when delivering the judgment of the Court of Criminal Appeal [in R v Robinson n7]: "If the jury are precluded by some rule of law from taking the view that something is a coincidence which is against all the probabilities if the accused person is innocent, then it would seem to be a doctrine of law which prevents a jury from using what looks like ordinary common sense."

n7 (1953) 37 Cr App Rep 95 at 106

That this is so in the law of Scotland seems beyond dispute, and it would be astonishing if the law of England were different in this respect, since one would hope that the same rules of logic and common sense are common to both. We were referred to Moorov v HM Advocate n8 (an indecent assault case), HM Advocate v AE n9 (an incest case) and Ogg v HM Advocate n10 (a case of indecent conduct with male persons).

n8 1930 JC 68

n9 1937 JC 96

n10 1938 JC 152

I quote from these cases at length because they are not easily available in parts of England. My only criticism of them in principle is that they seem to suggest in places that cases of sexual misconduct are in some ways different from other cases. I do not because this is so. They are, I believe, particular applications of general principles which *mutatis mutandis*, can be applied elsewhere. In Moorov v HM Advocate n1 the Lord Justice-General (Lord Clyde) said n1:

n1 1930 JC at 73, 74

'In the present case there is direct evidence in support of the *factum probandum* as regards each charge which the jury found proved. But the evidence is that of a single credible witness only to each charge. Corroboration is sought from the circumstance that the charges thus supported are numerous and of the same kind, and the question is whether the case is one in which resort may legitimately be had to corroboration derived from this circumstance.

'It is beyond doubt, in the law of Scotland, that corroboration may be found in this way, provided that the similar charges are sufficiently connected with, or related to each other -- Hume on Crimes n2; Alison's Criminal Law n3. But what is the test of sufficiency? The test I think is whether the evidence of the single witnesses as a whole -- although each of them speaks to a different charge -- leads by necessary inference to the establishment of some circumstance or state of fact underlying and connecting the several charges, which, if it had been independently established, would have afforded corroboration of the evidence given by the single witnesses in support of the separate charges. If such a circumstance or state of fact was actually established by

independent evidence, it would not occur to anyone to doubt that it might be properly used to corroborate the evidence of each single witness. The case is the same, when such a circumstance is established by an inference necessarily arising on the evidence of the single witnesses, as a whole. The only difference is that the drawing of such an inference is apt to be a much more difficult and delicate affair than the consideration of independent evidence. No merely superficial connection in time, character, and circumstance between the repeated acts -- important as these factors are -- will satisfy the test I have endeavoured to formulate. Before the evidence of single credible witnesses to separate acts can provide material for mutual corroboration, the connexion between the separate acts (indicated by their external relation in time, character, or circumstance) must be such as to exhibit them as subordinates in some particular and ascertained unity of intent, project, campaign, or adventure, which lies beyond or behind -- but is related to -- the separate acts. The existence of such an underlying unity, comprehending and governing the separate acts, provides the necessary connecting link between them, and becomes a circumstance in which corroboration of the evidence of the single witnesses in support of the separate acts may be found -- whether the existence of such underlying unity is established by independent evidence, or by necessary inference from the evidence of the single witnesses themselves, regarded as a whole. It is just here, however, that the pinch comes, in such a case as the present. The Lord Advocate spoke as if it would be enough to show from the evidence of the single witnesses that the separate acts had occurred in what he called "a course of criminal conduct." Risk of confusion lurks behind a phrase of that kind; for it might correctly enough be applied to the everyday class of case in which a criminal recurs from time to time to the commission of the same kind of offence in similar circumstances. It might be justly said, in relation to the evidence in support of any indictment in which a number of such similar crimes committed over a period of (say) three years are charged together, that the accused had been following "a course of criminal conduct." If any of the crimes in the series had formed the subject of a former prosecution or prosecutions, and convictions had been obtained, neither the commission of such former crimes nor the previous convictions could afford any material for corroborating the evidence of a single witness in support of the last member of the series. And therefore -- especially in view of the growing practice of accumulating charges in one indictment -- it is of the utmost importance to the interests of justice that the "course of criminal conduct" must be shown to be one which not only consists of a series of offences, the same in kind, committed under similar circumstances, or in a common locus -- these are after all no more than external resemblances -- but which owes its source and development to some underlying circumstance or state of fact such as I have endeavoured, though necessarily in very general terms, to define.'

n2 Vol 2, p 384

n3 Vol 2, p 552

The Lord Justice-Clerk (Lord Alness) in a similar passage said n1:

n1 1930 JC at 80

'The principle to be extracted from these passages may, I think, be expressed both negatively and positively. Negatively it may be expressed thus: -- that where different acts of the same crime have no relation or connexion with each other, it is not competent to eke out and corroborate the evidence of one witness to one act by the evidence of another witness to another act. Positively that rule may be expressed thus: -- that where, on the other hand, the crimes are related or connected with one

another, where they form part of the same criminal conduct, the corroborative evidence tendered is competent. In that case, as Dickson n2 says: -- "The unity of character in such cases makes it highly probable that they were all parts of one thieving expedition." The statement of the distinction is easy but its application is manifestly difficult. In every case, as it seems to me, the Court must put itself the question -- Is there some sort of nexus which binds the alleged crimes together? Or, on the other hand, are they independent and unrelated?'

n2 Dickson on Evidence (Grierson's Edn), para 1810

Lord Sands spoke to the same effect n3:

n3 1930 JC at 88, 89

'In regard to the relevancy as corroboration of such evidence as is here in question, there is not, as in the case of previous convictions or of statements by a client to his agent, any clear-cut rule of law formulated in non-ambulatory terms. There are two extremes. On the one hand, it is not in dispute that, in the case of certain offences, such as indecent conduct towards young children, evidence of one offence is corroborative of the evidence of another alleged to have been committed at a near interval of time and under similar circumstances. On the other hand, it is not in dispute that, in the case of two thefts having no peculiar connexion the one with the other, evidence of the commission of the one is not corroboration of evidence of the commission of the other. Cases which fall clearly within the one class or the other present no difficulty. But between the two classes one seems to get into somewhat open country. This consideration leads me to fall back upon what I said at the outset about the function of evidence to ascertain the truth of the matter by fair and impartial inquiry. In that view it is admissible to take into account evidence in support of one charge as corroboration of the evidence in support of another, when the former, taken in connexion with the latter, is -- to use a familiar old expression -- relevant to infer that the panel committed the latter offence. It does not suffice merely that the evidence in support of the one charge makes it more comfortable to convict upon the other; it must be such evidence as helps to bring home the guilt of the accused to a reasonable and logical mind with sure conviction... The other landmark is what has been described as embarking on a course of conduct. Where the accused, about the time the alleged offence was committed, has embarked upon a certain peculiar course of conduct, the fact that he has done so is corroborative of evidence of a special act alleged to have been committed in pursuance of that course of conduct. I say "peculiar course," and I do so advisedly. Evidence of a general evil course will not suffice. There must be some peculiarity, or some special incidents, which stamp the offences charged as within the ambit of a course of conduct. This may be illustrated by the case I have already referred to of indecent offences against children. Evidence inferring a course of general immorality would not be admissible or corroborative of an indecent offence against an adult. But indecency against children is a rare and peculiar offence, and, accordingly evidence inferring a course of conduct is admitted as relevant.'

Finally Lord Blackburn said n1:

n1 1930 JC at 92, 93

'I agree with your Lordship in the chair that the greatest caution is necessary in applying the rule that the evidence of a single witness to a particular offence may be held to be corroborated by the evidence of another single witness to a similar offence. That such a rule may apply in certain cases admits of no doubt, but it is, I think,

difficult, if not hopeless, to attempt to define with precise limits the classes of cases, or the circumstances, in which it should be applied. I agree with your Lordship that there must be a close similarity between the nature of the two offences to each of which only one witness speaks, before the evidence of the one witness can be taken as corroborating the evidence of the other. I also agree that there must be some connexion between the two offences in the matter of time. I have already committed myself to the view that such corroboration is competent in the case of offences against young girls -- M'Donald n2. That appears to me to be a class of case isolated from all others in one respect at any rate, viz., that a child of tender age is not only liable to be easily influenced by an adult, but is herself in the eyes of the law incapable of giving any consent to, or encouragement of, the offence which is committed against her. If what the child says did happen, then a crime has been committed, and the fact that the child is telling a true story may be corroborated by the proved truthfulness of the child on other incidental matters, and by the fact that another child, also proved to be truthful, has had a similar experience at the hands of the same man.'

n2 1928 JC 42

In *HM Advocate v AE* n3, a case at first instance, the Lord Justice-Clerk (Lord Aitchison) summed up to the jury as follows n4:

n3 1937 JC 96

n4 1937 JC at 98-100

'Now, I want finally to put before you one or two circumstances that you may think point in the direction of corroboration. First, I must give you a direction on this question -- Can you take the evidence of the one girl as corroboration of the evidence of the other? Now, unless you believe both girls you need not consider whether you are going to take the evidence of the one as corroboration of the other. If you believe J. and do not believe E., then, of course, E.'s evidence would be no use in the case of J., because you do not believe what E. said. And J.'s evidence would be of no use in the case of E., for the same reason; but, if you believe both, I want you to consider anxiously whether you ought not to accept the evidence of the one as corroborating the evidence of the other. Now, it is a well-established rule in our criminal law that you do not prove one crime by proving another or by leading evidence tending to show that another crime has been committed. That is a good general rule. But then, when you are dealing with this class of crime there is some relaxation of the rule, otherwise you might never be able to bring the crime home at all. Let me give you an illustration that is not at all unfamiliar -- There are many cases of it, especially in our large cities -- you get a degraded man who finds some little girl in the street, and he gives her a penny, and gets her to go up a close, and there he does something immoral with her, and then he sends her away. Nobody sees what he has done; there is only the evidence of the child. And then the same thing happens with another child, and again nobody sees that; and then there is a third child, and the same thing happens again. Well, of course, if you had to have two witnesses to every one of these acts -- they are all separate crimes -- you would never prove anything at all. But that is not the law. The law is this, that, when you find a man doing the same kind of criminal thing in the same kind of way towards two or more people, you may be entitled to say that the man is pursuing a course of criminal conduct, and you may take the evidence on one charge as evidence on another. That is a very sound rule, because a great many scoundrels would get off altogether if we had not some such rule in our law. Now, I give you this direction in law. If the conduct which is the

subject of these charges is similar in character and circumstances, and substantially coincident in time, and you believe the evidence of both of these girls, then the evidence of the one may be taken as corroboration of the evidence of the other. This is in substance what was laid down in the High Court in the case of Moorov v. H. M. Advocate n1. That was a case where an employer in a Glasgow warehouse used to take one girl employee at a time up to his private office, and there commit an act of indecency, and then she was put out of the door. Nobody saw the act of indecency committed. There was only the girl's word for it. And then he would get another girl to go up, and the same thing would happen. Again nobody else was there, and there was just the girl's word for it. Now, no doubt there were in that case a number of these criminal assaults committed upon separate girls, whereas in this case we are only dealing with two, but I do not hesitate to tell you -- and I take the responsibility of telling you -- that if you believe the evidence of these two girls whom you have seen in the witness-box, and accept it as the evidence of reliable witnesses, you may take the one as corroborating the other, and, therefore, as against the accused on each charge.'

n1 1930 JC 68

In addition to the valuable direction to the jury, this summing-up appears to me to contain a proposition which is central to the nature of corroboration, but which does not appear to date to have been emphasised in any reported English decision until the opinion delivered in Director of Public Prosecutions v Hester n2 by Lord Morris of Borth-y-Gest although it is implicit in them all. Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanity the question of his needing, or being capable of giving, corroboration does not arise. It is for this reason that evidence of complaint is acceptable in rape cases to defeat any presumption of consent and to establish consistency of conduct, but not as corroboration. The jury is entitled to examine any evidence of complaint, in order to consider the question whether the witness is credible at all. It is not entitled to treat that evidence as corroboration because a witness, although otherwise credible 'cannot corroborate himself' -- i.e. the evidence is not 'independent testimony' to satisfy the requirements of corroboration in R v Baskerville n3. Of course, the moment at which the jury must make up its mind is at the end of the case. They must look at the evidence as a whole before asking themselves whether the evidence of a given witness is credible in itself and whether, if otherwise credible, it is corroborated. Nevertheless, corroboration is a doctrine applying to otherwise credible testimony and not to testimony incredible in itself. In the present case Mark's evidence (count 3) was corroborated. But it was not credible and the conviction founded on it was rightly quashed.

n2 [1972] 3 All ER 1056, [1972] 3 WLR 910

n3 [1916] 2 KB at 667, [1916-17] All ER Rep at 43

It seems to me that the only way in which the doctrine on which the decision of the Court of Appeal n1 was founded can be supported, would be if there were some general rule of law to the effect that witnesses of a class requiring corroboration could not corroborate one another. For this rule of law counsel for the respondent expressly contended. I do not believe that such a rule of law exists. It is probably true that the

testimony of one unsworn child cannot corroborate the testimony of another unsworn child (see Cross n2) but if so this is probably because this is expressly prohibited by statute (see Director of Public Prosecutions v Hester n3). It is not 'other' testimony within the meaning of the proviso to the Children and Young Persons Act 1933, s 38(1). This House has now decided in Director of Public Prosecutions v Hester n3 that the sworn testimony of a child can be corroborated by the unsworn testimony of another child and vice versa. In so doing the House disapproved the 'circular argument' doctrine first enunciated by Lord Hewart CJ in R v Manser n4 which was at one time generally accepted, and which is probably the only real support for the general proposition contended for on behalf of the respondent. There Lord Hewart CJ said n5:

n1 [1972] 3 All ER 545, [1972] 1 WLR 1365

n2 Evidence (3rd Edn, 1967), p 164

n3 [1972] 3 All ER 1056, [1972] 3 WLR 910

n4 (1934) 25 Cr App Rep 18

n5 (1934) 25 Cr App Rep at 20

'The argument for the prosecution is therefore an argument in a circle. Let it be granted that the evidence of Barbara [the elder child witness for the prosecution who may have been sworn or unsworn] has to be corroborated; it is corroborated by the evidence of Doris [the younger child witness who was unsworn]. She, however, also needs to be corroborated. The answer is that she is corroborated by the evidence of Barbara, and that is called "mutual corroboration." In truth and in fact the evidence of the girl Doris ought to have been obliterated altogether from the case, inasmuch as it was not corroborated.'

in Director of Public Prosecutions v Hester n3 this House has stigmatised this argument as fallacious. With respect, I wholly agree, and I hope no more will be heard of it.

n3 [1972] 3 All ER 1056, [1972] 3 WLR 910

The other ground on which the general proposition may be defended is the bald proposition that one accomplice cannot corroborate another. In support of this proposition were cited R v Noakes n6 per Littledale J, R v Gay n7, R v Prater n8 per Edmund Davies J, R v Baskerville n9 citing R v Noakes n6 and R v Cratchley n10. I believe these citations have been misunderstood. They all refer to fellow accomplices: see per Lord Diplock in Director of Public Prosecutions v Hester n11. Obviously where two or more fellow accomplices give evidence against an accused their evidence is equally tainted. The reason why accomplice evidence requires corroboration is the danger of a concocted story designed to throw the blame on the accused. The danger is not less, but may be greater, in the case of fellow accomplices. Their joint evidence is not 'independent' in the sense required by R v Baskerville n12, and a jury must be warned not to treat it as a corroboration. But this illustrates the danger of mistaking the shadow for the substance. I feel quite sure that, for instance, where an unpopular officer in the army or the unpopular headmaster of a school could have been the victim of a conspiracy to give false evidence of this kind as the suggestion was in R v Bailey n13 a similar warning should be given. As Lord Hewart CJ said in that case n14 (which turned, however, on a wholly different point):

n6 (1832) SC & P 326

n7 (1909) 2 Cr App Rep 327

n8 [1960] 1 All ER at 299, [1960] 2 QB at 465

n9 [1916] 2 KB at 664, [1916-17] All ER Rep at 41

n10 (1913) 9 Cr App Rep 232

n11 [1972] 3 All ER at 1073, 1074, [1972] 3 WLR at 929, 930

n12 [1916] 2 KB at 667, [1916-17] All ER Rep at 43

n13 [1924] 2 KB 300, [1924] All ER Rep 466

n14 [1924] 2 KB at 305, [1924] All ER Rep at 467

'The risk, the danger, the logical fallacy is indeed quite manifest to those who are in the habit of thinking about such matters. It is so easy to derive from a series of unsatisfactory accusations, if there are enough of them, an accusation which at least appears satisfactory. It is so easy to collect from a mass of ingredients, not one of which is sufficient, a totality which will appear to contain what is missing.'

On the other hand, where the so-called accomplices are of the third class listed by Lord Simonds LC in *Davies v Director of Public Prosecutions* n1 the danger is or may be nugatory. The real need is to warn the jury of the danger of a conspiracy to commit perjury in these cases, and, where there is the possibility of this, it is right to direct them not to treat as corroborative of one witness the evidence of another witness who may be part of the same conspiracy, but who cannot be an accomplice because if the evidence is untrue there has been no crime committed. This prompts me to point out that although the warning must be given in every appropriate case, the dangers to be guarded against may be quite different. Thus the evidence of accomplices is dangerous because it may be perjured. The evidence of Lady Wishfort complaining of rape may be dangerous because she may be indulging in undiluted sexual fantasy. A Mrs Frail making the same allegation may need corroboration because of the danger that she does not wish to admit the consensual intercourse of which she is ashamed. In another case the danger may be one of honestly mistaken identity as when the conviction of the accused depends on an identification by a single uncorroborated witness to whom he was previously unknown. These matters should, in suitable cases, be explored when the nature and degree of danger is being discussed, as suggested in *R v Price* n2. I do not, therefore, believe that there is a general rule that no persons who come within the definition of accomplice may be mutually corroborative. It applies to those in the first and second of Lord Simonds LC's categories and to many other cases where witnesses are not or may not be accomplices. It does not necessarily apply to all witnesses in the same case who may deserve to be categorised as 'accomplice'. In particular it does not necessarily apply to accomplices of Lord Simonds LC's third class, where they give independent evidence of separate incidents, and where the circumstances are such as to exclude the danger of a jointly fabricated story.

n1 [1954] 1 All ER at 513, [1954] AC at 400

n2 [1968] 2 All ER at 285, [1969] 1 QB at 546

Whatever else it is, the rule about fellow accomplices is not authority for the proposition that no witness who may himself require corroboration may afford corroboration for another to whom the same consideration applies, and this alone is

what would help the respondent. When a small boy relates a sexual incident implicating a given man he may be indulging in fantasy. If another small boy relates such an incident it may be a coincidence if the detail is insufficient. If a large number of small boys relate similar incidents in enough detail about the same person, if it is not conspiracy it may well be that the stories are true. Once there is a sufficient nexus it must be for the jury to say what weight is given to the combined testimony of a number of witnesses.

These considerations lead inescapably to the conclusion that the appeal must be allowed. There is no dispute that the witnesses required corroboration, nor that the judge gave an adequate warning of the danger of convicting in the absence of corroboration. The witnesses of the several children were *ex concessis* admissible, and there were sufficient points of similarity in their several pieces of testimony to provide the underlying unity to make their evidence mutually probative within the meaning of the first passage from *R v Sims* n3 and the Scottish authorities quoted above. There is no general rule that witnesses of a class requiring corroboration cannot corroborate one another if otherwise admissible and relevant as probative. The distinctions adumbrated in *R v Sims* n1 and *R v Campbell* n2 on which the Court of Appeal n3 founded their decision is logically untenable, as is the 'circular argument' doctrine enunciated in *R v Manser* n4 and disapproved in *Director of Public Prosecutions v Hester* n5. The rule regarding inability of fellow accomplices to corroborate one another does not apply in this case. A number of minor points criticising the summing-up were raised by counsel for the respondent. These were not raised on the grounds of appeal, nor before the Court of Appeal n3, and are not reflected in the question certified by the Court of Appeal. I do not believe they are now open to the respondent, and in any event, once the major question has been disposed of, I would not hesitate to apply the proviso.

n3 [1946] 1 All ER at 701, [1946] KB at 539, 540

n1 [1946] 1 All ER 697, [1946] KB 537

n2 [1956] 2 All ER 272, [1956] 2 QB 432

n3 [1972] 3 All ER 545, [1972] 1 WLR 1365

n4 (1934) 25 Cr App Rep 18

n5 [1972] 3 All ER 1056, [1972] 3 WLR 910

To the question certified by the Court of Appeal as of general public interest, I would reply that the sworn evidence of a child victim can be corroborated by the evidence of another child victim of alleged similar misconduct where such evidence is otherwise admissible and, under the general law regarding relevance, is probative of the facts in dispute and indicative of the guilt of the accused, and if and when believed by the jury. I would observe that the adjective 'uncorroborated' in the third line of the question is inappropriate. Such evidence is not uncorroborated if itself corroborated in the above set of circumstances of the original testimony requiring corroboration. In my judgment the whole appeal illustrates the danger well stated in *Cross on Evidence* n1 where it is said in the context of Lord Hewart CJ's 'circular argument' doctrine in *R v Manser* n4:

n1 [1946] 1 All ER 697, [1946] KB 537

n4 (1934) 25 Cr App Rep 18

'The foregoing discussion reveals what may be a defect in the law relating to corroboration generally. There is a danger that the law will become enmeshed in technicalities concerning what does and does not amount to corroboration, whereas all that is required is the recognition that there are certain situations, including all cases in which material evidence is that of children, in which it is necessary for the tribunal of fact to proceed with caution.'

The law may not go quite so far as the last sentence. But as I have sought to show, artificiality is to be avoided and if this unhappy case serves to minimise it, it will have served a useful purpose.

In my view, therefore, the appeal should be allowed, and the convictions restored, and the Court of Appeal should proceed to consider the appeals against sentence lodged in the case.

JUDGMENTBY-2: LORD REID.

JUDGMENT-2:

LORD REID. My Lords, the question in this case is whether the Court of Appeal n3 were right in quashing the conviction of the respondent on three counts alleging offences against s 12(1) and four counts alleging offences against s 15(1) of the Sexual Offences Act 1956. The Crown seeks restoration of the conviction on all counts except count 3.

n3 [1972] 3 All ER 545, [1972] 1 WLR 1365

The victims in all cases were boys between nine and 12 years of age. Each count charges an offence against a different boy. All the boys gave sworn evidence. On each count there was no direct evidence of the act charged under it beyond the evidence of the boy concerned. By what has now become a rule of law the trial judge was bound to warn the jury of the great danger of accepting the unsupported evidence of a boy of this age and to advise them that they should look for corroboration before convicting on any count. The learned judge did give a warning to the jury. But the Court of Appeal n3 held that he had misdirected them as to what they could regard as corroboration so they quashed the conviction.

n3 [1972] 3 All ER 545, [1972] 1 WLR 1365

Each count must of course be considered separately and in cases of this kind the first question must be whether evidence of acts charged under other counts can be taken into consideration. That is only permissible when the evidence as a whole discloses what has been loosely called a system. In the present case it has been admitted and I think that it is clearly established that that requirement is fulfilled. So as the question was not argued, I shall say no more than that this may often be a difficult question and that, in addition to the English authorities, valuable guidance may be obtained from the leading Scottish case of Moorov v HM Advocate n1.

n1 1930 JC 68

The main difficulty in the case is caused by observations in R v Manser n2 to the effect that the evidence of one witness which required corroboration cannot be used as corroboration of that of another witness which also requires corroboration. For some unexplained reason it was held that there can be no mutual corroboration in such a case. I do not see why that should be so. There is nothing technical in the idea of

corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in.

n2 (1934) 25 Cr App Rep 18

In ordinary life we should be and in law we are required to be careful in applying this idea. We must be astute to see that the apparently corroborative statement is truly independent of the doubted statement. If there is any real chance that there has been collusion between the makers of the two statements we should not accept them as corroborative. And the law says that a witness cannot corroborate himself. In ordinary affairs we are often influenced by the fact that the maker of the doubted statement has consistently said the same thing ever since the event described happened. But the justification for the legal view must I think be that generally it would be too dangerous to take this into account and therefore it is best to have a universal rule.

So when we are considering whether there can be mutual corroboration between witnesses each of whom require corroboration the question must or at least ought to be whether it would be too dangerous to allow this. It might often be dangerous if there were only two children. But here we are dealing with cases where there is a 'system', and I do not think that only two instances would be enough to establish a 'system'. Where several children, between whom there can have been no collaboration in concocting a story, all tell similar stories it appears to me that the conclusion that each is telling the truth is likely to be inescapable and the corroboration is very strong. So I can see no ground at all for the law refusing to recognise the obvious. Once there are enough children to shew a 'system' I can see no ground for refusing to recognise that they can corroborate each other.

Many of the authorities cited deal with accomplices where the rule as to the need of warning that there should be corroboration is similar to the rule with regard to children. I do not think it useful to regard children as accomplices; the rule with regard to children applies whether or not they are accomplices. In most of the authorities the accomplices were accomplices to a single crime so the danger that they collaborated in concocting their story is obvious, and it is therefore quite right that there should be a general rule that accomplices cannot corroborate each other. Whether that should be a universal rule I greatly doubt, but I need not pursue that matter in this case. Then there are indications of a special rule for homosexual crimes. If there ever was a time for that, that time is past, and on the view which I take of the law any such special rule is quite unnecessary.

I must now turn to the authorities subsequent to the Manser case n2. The most important are R v Sims n1 and R v Campbell n2. I am in general agreement with the greater part of the Sims n1 judgment but the last part appears to have been influenced by the Manser n3 doctrine and to that extent I think that it is erroneous. The present position of the law is set out in R v Campbell n4:

n2 (1934) 25 Cr App Rep 18

n1 [1946] 1 All ER 697, [1946] KB 531

n2 [1956] 2 All ER 272, [1956] 2 QB 432

n3 (1934) 15 Cr App Rep 18

n4 [1956] 2 All ER at 276, [1956] 2 QB at 438, 439

'As we are endeavouring in this judgment to deal comprehensively with the evidence of children we may perhaps endeavour to give some guidance to courts who have from time to time to deal with cases of sexual assaults on children where the evidence of each child deals only with the assault on him or her self. In such cases it is right to tell a jury that because A says that the accused assaulted him, it is no corroboration of his evidence that B says that he also was the victim of a similar assault though both say it on oath. At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story. And if the defence is one of innocent association by the accused with the children, the case of *R. v. Sims* n1, subsequently approved on this point by the House of Lords in *Harris v. Public Prosecutions Director* n5, shows that such evidence can be given to rebut the defence.'

n1 [1946] 1 All ER 697, [1946] KB 531

n5 [1952] 1 All ER 1044, [1952] AC 694

I find this very difficult to understand. I do not see how evidence with regard to count B can help the jury to determine whether evidence with regard to count A is true unless it amounts to corroboration of that evidence. I can see no difference between saying that evidence corroborates other evidence, and saying that evidence helps one to determine the truth of the other evidence.

Any attempt to apply this distinction in practice must I think lead to confusion. How is the jury to be directed? Counsel were unable to suggest and I cannot suggest any better way than this. The judge must tell the jury to consider each count separately. He must then warn them of the danger of accepting the evidence of the child to whom count I relates unless it is corroborated. Then he must tell them that the evidence of the other children is not corroboration. Then he must tell them that they can act on the uncorroborated evidence of the first child if they feel sure that it is true and that in considering that matter they can obtain help by taking into consideration the evidence of the other children. I should be surprised if any jury understood such a direction: it could only confuse them.

The law cannot be left in such a state. In the present case the learned trial judge was obviously trying to make the passage which I have quoted from *R v Campbell* n4 intelligible to the jury, but the Court of Appeal n6 have held that he failed. I cannot blame the trial judge nor can I blame the Court of Appeal. And I would not blame the court which decided *Campbell's* case n2.

n4 [1956] 2 All ER at 176, [1956] 2 QB at 438, 439

n6 [1972] 3 All ER 545, [1972] 1 WLR 1365

n2 [1956] 2 All ER 272, [1956] 2 QB 432

The trouble has arisen from the rule that the Court of Appeal is not permitted to reconsider an earlier judgment of that court. So in order to do justice they may have to invent a distinction without a difference. For a long time the court appear to have been reluctant to reach the logical result required by the *Manser* n3 doctrine. In my judgment this House should now set the matter at rest.

n3 (1934) 15 Cr App Rep 18

I would therefore hold that there was no misdirection by the learned trial judge in the present case and restore the conviction of the respondent except as to count 3.

JUDGMENTBY-3: LORD MORRIS OF BORTH-Y-GEST.

JUDGMENT-3:

LORD MORRIS OF BORTH-Y-GEST. My Lords, I have had the advantage of reading in advance the speech prepared by my noble and learned friend, Lord Hailsham of St Marylebone LC. I am in agreement with it and accordingly I would allow the appeal.

JUDGMENTBY-4: LORD SIMON OF GLAISDALE.

JUDGMENT-4:

LORD SIMON OF GLAISDALE. My Lords, the respondent, John **Kilbourne**, was convicted at Leeds Crown Court after a trial before Lawson J and a jury on the following counts of the indictment: 1. Buggery with John S, a male child of ten years. 2. Indecent assault on Paul G, a male child of ten years. 3. Attempted buggery of Mark G, a male child of nine years. 4. Indecent assault on Simon G, a male child of ten years. 5. Indecent assault on Gary W, a male child of ten years. 6. Indecent assault on Gary W, who had by the date of this assault attained the age of 11 years. 7. Indecent assault on Kevin E, a male child of s 12 years.

The offences fell into two groups -- counts 1 to 4 inclusive on the one hand (which I shall call 'the first group') and counts 5 to 7 inclusive (which I shall call 'the second group') on the other. The first group all took place in November 1970, the second all in October and November 1971. Moreover, to quote from the judgment of Lawton LJ in the Court of Appeal n1:

n1 [1972] 3 All ER 545 at 548, [1972] 1 WLR 1365 at 1369

'... the boys in each group knew each other well and could have collaborated in putting forward their stories whereas it was unlikely, if not impossible, that the two groups could have got together to tell false stories or to embellish true stories with accusations of indecencies.'

The boy concerned in each count gave evidence on oath as to the offence concerning himself. The respondent admitted association with the boys, but averred that it was innocent, on the lines described by my noble and learned friend on the Woolsack. Apart from the police evidence of statements by the respondent, to which my noble and learned friend has also referred, there was no evidence which implicated the respondent except that of the boys.

The summing-up of the learned judge contained the following passages which I have conflated and have designated respectively '(A)', '(B)' and '(C)' for ease of reference later:

(A) 'You are entitled to act on the sworn evidence of a boy... if you are thoroughly convinced that the boy is telling you the truth. On the other hand,... experience has indicated that it can be dangerous to convict solely upon the evidence of a child victim of a sexual offence, because children, as we all know, have fantasies, children as we all know do talk together about these sorts of things in certain circumstances, and it follows that children, being imaginative little creatures, can make up things and come into court, having made something up, and tell a story which is not true with a good

deal of conviction. You must be very, very careful not to act on the sole evidence of a boy victim as to what happened to him, and what you should do, as the law suggests, is to see whether that boy victim's evidence is corroborated by some other piece of evidence which you have had before you. Corroboration means some independent evidence, some evidence coming from outside the boy himself, which leads you to the conclusion that it is safe to rely upon his sworn evidence... The fact that boy two says the same sort of thing was done to him as was done to boy one does not corroborate boy one's evidence. In other words, you cannot use the evidence on one charge to corroborate the evidence on another charge relating to a different boy... Remember that although you can, if you think it is safe and if you are certain about it, act on the uncorroborated sworn evidence of any one of those boys it is better and my advice to you would be that this is a case where you should particularly look for some corroborative evidence of what each small boy says.'

(B) 'You would be entitled to take the evidence of [Kevin] and [Gary], or either of them, if you think their evidence is true as to what was done to them by the [respondent], and you would be entitled to take this view of it, "Well, we can use the evidence of [Kevin] and [Gary]", or either of them if you accept it as reliable, 'As supporting evidence given by the boys in the first group"; but what you must not do is to use the evidence of [John] as to what was done to him to reinforce the evidence of another boy in the first group, [Paul] for example, as to what was done to him. You can use the evidence of the first group, if you accept it, in weighing up the evidence of [Gary] and [Kevin]. You can use the evidence of [Gary] and [Kevin], or either of them, if you accept it, in weighing up the evidence of the boys in the first group.'

(C) His [the respondent's] case is, "Yes, they all came. They came a great deal but my association with these boys was an entirely innocent association, apart from a little bit of skylarking", and he gave you illustrations of one or two occasions of larking about with the boys in what he suggests, and you must consider it, was an entirely innocent way as far as sexual conduct was concerned... "I quite liked the small boys coming to my house; I thought it was good for my business"... the prosecution case is this, they submit to you that what was set up here by the [respondent] was, so to speak, a baited trap for small boys -- comics, cards, mild refreshment from time to time, the puppy to be taken out for his walk, the van to be cleaned.'

I would point out four matters with regard to those passages. First, the learned judge's direction as to the meaning of corroboration did not include the requisite that it must implicate the respondent (unless this is irrelevant -- e g when, on a charge of sexual assault, intercourse is admitted and the only issue is consent); but, in the context of this case, nothing turns on that, since the evidence of the other boys as to the offences committed against themselves, if corroborative at all, plainly implicated the accused. Secondly, the learned judge remained the jury of the respondent's defence of 'innocent association': he did not, however, tell the jury that, in addition to treating the evidence of the other boys in the way set out in (B), they were in any case entitled to take it into account in deciding whether the respondent's defence of 'innocent association' might reasonably be true; as will appear, this was favourable to the respondent. Thirdly, the learned judge's reasons for treating the two groups separately as he did was because, as appears from the passage I have cited from the judgment of Lawton LJ n1, he had in mind a danger of collaboration within groups which could be disregarded as between groups. Fourthly, I have no doubt that in directing the jury the learned judge was seeking to apply the law as laid down in R v Sims n2 and R v Campbell n3. I set out the relevant passages of these two judgments, dividing them by the signs '(a)', '(b)' and '© ' to correspond with the

passages from the summing-up which I have designated respectively '(A)', '(B)' and '(C)'.

n1 [1972] 3 All ER at 548, [1972] 2 WLR at 1369

n2 [1946] 1 All ER 697, [1946] KB 531

n3 [1956] 2 All ER 2728 [1956] 2 QB 432

R v Sims n4

n4 [1946] 1 All ER at 703, 701, [1946] KB at 544, 540

(a) 'We do not think that the evidence of the men can be considered as corroborating one another, because each may be said to be an accomplice in the act to which he speaks...'

(b) 'Applying these principles, we are of opinion that on the trial of one of the counts in this case, the evidence on the others would be admissible. The evidence of each man was that the accused invited him into the house and there committed the acts charged [sodomy and gross indecency]. The acts they describe bear a striking similarity. That is a special feature sufficient in itself to justify the admissibility of the evidence;...'

© '... the visits of the men to the prisoner's house were either for a guilty or innocent purpose; that they all speak to the commission of the same class of acts upon them tends to show that in each case the visits were for the former and not the latter purpose. The same considerations would apply to a case where a man is charged with a series of indecent offences against children, whether boys or girls; they all complain of the same sort of conduct shows that the interest the prisoner was taking in them was not of a paternal or friendly nature but for the purpose of satisfying lust.'

R v Campbell n1

n1 [1956] 2 All ER at 276, [1956] 2 QB at 438, 439

(a) 'As we are endeavouring in this judgment to deal comprehensively with the evidence of children we may perhaps endeavour to give some guidance to courts who have from time to time to deal with cases of sexual assaults on children where the evidence of each child deals only with the assault on him or her self. In such cases it is right to tell a jury that because A says that the accused assaulted him, it is no corroboration of his evidence that B says that he also was the victim of a similar assault though both say it on oath.'

(b) 'At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story.'

© 'And if the defence is one of innocent association by the accused with the children, the case of R v. Sims n2, subsequently approved on this point by the House of Lords in Harris v. Public Prosecutions Director n3 shows that such evidence can be given to rebut the defence.'

n2 [1946] 1 All ER 697, [1946] KB 531

n3 [1952] 1 All ER 1044, [1952] AC 694

The Court of Appeal n4 set aside the instant convictions on the grounds of misdirection. They held that (B) in summing-up might, notwithstanding (A), have been understood by the jury as a direction that evidence of a boy in the first group as to an offence against him might be taken as corroboration of the evidence of a boy in the second group as to an offence against himself, and vice versa; and that this would be contrary to (a) in R v Sims n2 and R v Campbell n5 which the Court of Appeal felt that they should follow. Before the Court of Appeal it was controverted on behalf of the Crown that (B) could have been understood as going to corroboration; but before your Lordships this contention was abandoned, and it was accepted that the Court of Appeal were right on this point. But the fact that the learned trial judge followed the authorities so closely in his summing-up, and yet was held to have fallen into error, hardly suggests that the authorities are in a very satisfactory state as a guidance to judge and jury. The Court of Appeal certified the following point of law of general public importance as being involved:

n4 [1972] 3 All ER 545, [1972] 1 WLR 1365

n2 [1946] 1 All ER 697, [1946] KB 531

n5 [1956] 2 All ER 272, [1956] 2 QB 432

'Whether and in what circumstances the sworn evidence of a child victim as to an offence charged can be corroborated by the admissible but uncorroborated sworn evidence of another child victim as to similar misconduct of the accused on a different occasion.'

As will appear, the words 'but uncorroborated' beg the question whether there can be 'mutual corroboration'. Also implicit in the point certified by the Court of Appeal and in the appeal before your Lordships is the question whether the distinction drawn in the authorities between, on the one hand, 'evidence which may help... to determine the truth of the matter' (paraphrased in the summing-up as 'supporting evidence' and as evidence which may be used in 'weighing up' other evidence) and, on the other hand, 'corroboration' is a valid one.

Your Lordships have been concerned with four concepts in the law of evidence: (i) relevance; (ii) admissibility; (iii) corroboration; (iv) weight. The first two terms are frequently, and in many circumstances legitimately, used interchangeably; but I think it makes for clarity if they are kept separate, since some relevant evidence is inadmissible and some admissible evidence is irrelevant (in the senses that I shall shortly submit). Evidence is relevant if it is logically probative or disprobative of some matter which requires proof. I do not pause to analyse what is involved in 'logical probativeness', except to note that the term does not of itself express the element of experience which is so significant of its operation in law, and possibly elsewhere. It is sufficient to say, even at the risk of etymological tautology, that relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable. To link logical probativeness with relevance rather than admissibility (as was done in R v Sims n1) not only is, I hope, more appropriate conceptually but also accords better with the explanation of R v Sims n1 given in Harris v Director of Public Prosecutions n2. Evidence is admissible if it may be lawfully adduced at a trial. 'Weight' of evidence is the degree of probability (both intrinsically and inferentially) which is attached to it by the tribunal of fact once it is established to be relevant and admissible in law (though its relevance may exceptionally, as will appear, be dependent on its evaluation by the tribunal of fact).

Exceptionally evidence which is irrelevant to a fact which is in issue is admitted to lay the foundation for other, relevant, evidence (e.g. evidence of an unsuccessful search for a missing relevant document, in order to lay the foundation for secondary evidence of the document). Apart from such exceptional cases no evidence which is irrelevant to a fact in issue is admissible. But some relevant evidence is nevertheless inadmissible. To cite a famous passage from the opinion of Lord Herschell LC in *Makin v A-G for New South Wales* n3:

n1 [1946] 1 All ER 697, [1946] KB 531

n2 [1952] 1 All ER 1044, [1952] AC 694

n3 [1894] AC 57 at 65

'It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered in the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accident, or to rebut a defence which would otherwise be open to the accused.'

That what was declared to be inadmissible in the first sentence of this passage is nevertheless relevant (i.e. logically probative) can be seen from numerous studies of offences in which recidivists are matched against first offenders, and by considering that it has never been doubted that evidence of motive (which can be viewed as propensity to commit the particular offence charged, in contradistinction to propensity to commit offences generally of the type charged) is relevant. All relevant evidence is prima facie admissible. The reason why the type of evidence referred to by Lord Herschell LC in the first sentence of the passage is inadmissible is, not because it is irrelevant, but because its logically probative significance is considered to be grossly outweighed by its prejudice to the accused, so that a fair trial is endangered if it is admitted; the law therefore exceptionally excludes this relevant evidence; whereas in the circumstances referred to in the second sentence the logically probative significance of the evidence is markedly greater: see also Lord Moulton in *R v Christie* n4.

n4 [1914] AC 545 at 559, 560, [1914-15] All ER Rep 63 at 69, 70

Not all admissible evidence is universally relevant. Admissible evidence may be relevant to one count of an indictment and not to another. It may be admissible against one accused (or party) but not another. It may be admissible to rebut a defence but inadmissible to reinforce the case for the prosecution. The summing-up of Scrutton J in *R v Smith* n1 ('The Brides in the Bath' case) was a striking example -- the jury was directed to consider the drowning of other newly-wedded and well-insured wives of the accused for the purpose only of rebutting a defence of accidental death by drowning -- but not otherwise for the purpose of positive proof of the murder charged: see also Lord Atkinson, Lord Parker concurring, in *R v Christie* n2.

n1 See the report in *The Trial of George Joseph Smith (Notable British Trials)*, pp 276-278; affd (1915) 84 LJKB 2153, [1914-15] All ER Rep 262

n2 [1914] AC at 553, [1914-15] All ER Rep at 66

In the instant case it is not disputed that the evidence of the other boys with regard to the offences committed against themselves was admissible on each count of the indictment. It was plainly admissible to rebut the defence of innocent association (R v Simsⁿ³, R v Campbellⁿ⁴, R v Ballⁿ⁵). But was it admissible for (i.e. relevant to, logically probative of) any other matter in particular to reinforce the case for the Crown? In view of R v Sims^{(b) n3} and R v Campbell^{(b) n4} counsel for the respondent did not contend to the contrary; but it is necessary to examine the question, if only as a step to considering the validity of R v Sims^{(a) n3} and R v Campbell^{(a) n4}. In *Moorov v HM Advocate*ⁿ⁶ the accused was convicted of a series of assaults and indecent assaults on various female employees. In respect of many of the charges the only direct evidence against the accused was that of the woman against whom the particular offence was alleged to have been committed. The evidence of each woman was, however, held to have been corroborative of that of the others, which involved that it was both admissible on and relevant to the other charges. The Lord Justice-General (Lord Clyde) started his judgmentⁿ⁷: 'the question in the present case belongs to the department of circumstantial evidence. This consideration is vital to the whole matter...' Circumstantial evidence is evidence of facts from which, taken with all the other evidence, a reasonable inference is a fact directly in issue. It works by cumulatively, in geometrical progression, eliminating other possibilities. Why should evidence of assault on the other women in *Moorov*ⁿ⁶ be evidence from which it was a reasonable inference that the accused had committed that particular assault? The answer was given in the passages cited by my noble and learned friend on the Woolsack; there was such a striking similarity between the various offences as to show an underlying unity, to provide a connecting link between them -- so that each confirmed another, rendered the other more probable. As it was put in R v Simsⁿ⁸:

n3 [1946] All ER 697, [1946] KB 531

n4 [1956] 2 All ER 272, [1956] 2 QB 432

n5 [1911] AC 47

n6 1930 JC 68

n7 1930 JC at 72

n8 [1946] 1 All ER at 701, [1946] KB at 540

'The probative force of all the acts together is much greater than one alone; for, whereas the jury might think one man might be telling an untruth, three or four are hardly likely to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy their evidence would seem to be overwhelming.' (See also R v Smithⁿ⁹.)

n9 *The Trial of George Joseph Smith* (Notable British Trials), pp 277, 279; affd (1915) 84 LJKB 2153, [1914-15] All ER Rep 262

How, then, does this match with corroboration? The reason why corroboration is required in some types of case, and the nature of corroboration, were recently considered by your Lordships' House in *Director of Public Prosecutions v Hester*ⁿ¹⁰. It is required because experience has shown that there is a real risk that an innocent person may be convicted unless certain evidence against an accused (neatly called 'suspect evidence' by my noble and learned friend, Lord Diplockⁿ¹) is confirmed by other evidence. Corroboration is therefore nothing other than evidence which 'confirms' or 'supports' or 'strengthens' other evidence (Lord Morris of Borth-y-Gestⁿ², Lord Pearsonⁿ³ and Lord Diplockⁿ⁴). It is, in short, evidence which renders

other evidence more probable. If so, there is no essential difference between, on the one hand, corroboration and, on the other, 'supporting evidence' or 'evidence which helps to determine the truth of the matter'. Each is evidence which makes other evidence more probable. Once it is accepted that the direct evidence on one count is relevant to another by way of circumstantial evidence, it follows that it is available as corroboration if corroboration is required. Whether it operates as such depends on what weight the jury attaches to it, and what inferences the jury draws as to whether the offences demonstrate an underlying unity. For that purpose the jury will be directed in appropriate terms to take into account the proximity in time of the offences, their multiplicity, their similarity in detail and circumstance, whether such similarity has any unusual feature, what, if any, risk there is of collaboration in presenting a false case, and any other matter which tends to suggest or rebut an underlying unity -- a system -- something which would cause common sense to revolt at a hypothesis of mere coincidence.

n10 [1972] 3 All ER 1056, [1972] 3 WLR 910

n1 [1972] 3 All ER at 1072, [1972] 3 WLR at 928

n2 [1972] 3 All ER at 1065, [1972] 3 WLR at 919, 920

n3 [1972] 3 All ER at 1070, [1972] 3 WLR at 925

n4 [1972] 3 All ER at 1071, 1073, [1972] 3 WLR at 927, 928

I think that the contradistinction that was drawn in *R v Sims* n5 and *R v Campbell* n6 between corroboration and 'evidence which helps to determine the truth of the matter' was partly due to *R v Manser* n7, partly to such cases as *R v Lillyman* n8 and *R v Whitehead* n9. So far as *R v Manser* n7 is concerned I agree with the criticisms made in *Director of Public Prosecutions v Hester* n10, particularly with the observation of my noble and learned friend, Lord Morris of Borty-y-Gest n11, that the concept of 'mutual corroboration' is not 'argument in a circle' -- that would be to confuse relevance with weight of evidence. I also agree with what my noble and learned friend on the Woolsack has just said about accomplices corroborating each other. As for *R v Lillyman* n8 and *R v Whitehead* n9, they show that evidence of complaint immediately after a sexual assault is admissible and relevant to show consistency of conduct and negative consent, but does not amount to corroboration. But the only reason why this admissible and relevant evidence could not amount to corroboration was because it was not from an independent source -- or, as it is sometimes put, 'a person cannot corroborate himself' or 'be his own corroborator' (Lord Atkinson in *R v Christie* n12). The evidence was therefore admissible for and relevant to the limited purposes which I have stated: (see also *R v Christie* n13 -- statement admissible as closely connected with an act of identification by the complainant, but not corroborative). But these types of case are no authority for the proposition that admissible and relevant evidence from an independent source (such as the other boys in the instant case) cannot amount to corroboration. In my view it can, if accepted by the jury, and if they discern such an underlying unity between the offences as to make coincidence an affront to common sense. I am reinforced in this view by the Scottish cases cited by my noble and learned friend on the Woolsack.

n5 [1946] 1 All ER 697, [1946] KB 531

n6 [1956] 2 All ER 272, [1956] 2 QB 432

n7 (1934) 25 Cr App Rep 18

n8 [1896] 2 QB 167, [1895-99] All ER Rep 586

n9 [1929] 1 KB 99, [1928] All ER Rep 186

n10 [1972] 3 All ER 1056, [1972] 3 WLR 910

n11 [1972] 3 All ER at 1065, [1972] 3 WLR at 919

n12 [1914] AC at 557, [1914-15] All ER Rep at 68

n13 [1914] AC 545, [1914-15] All ER Rep 63

In the instant case Lawson J in (B) directed the jury as to the way they could approach the evidence of the other offences. Even if they understood it as a direction on corroboration, they must either have taken the police officers' evidence as corroboration (which would have involved believing it) or the evidence as to the other offences. For the reasons which I have given they were entitled so to treat the latter class of evidence; and there was no misdirection in this respect. Although Lawson J did not expressly invite the jury to consider whether there was an underlying unity encompassing the various offences, the jury must have accepted the boys' evidence in order to convict on each count; and there was here the same striking similarity between the offences charged as the Court of Justiciary discerned in Moorov v HM Advocate n1, and an even closer proximity in time. Collaboration between the boys in the different groups being excluded, common sense would be affronted by a hypothesis of coincidence. I would therefore apply the proviso and allow the appeal. I concur with the order proposed by my noble and learned friend on the Woolsack.

n1 1930 JC 68

JUDGMENT BY-5: LORD CROSS OF CHELSEA.

JUDGMENT-5:

LORD CROSS OF CHELSEA. My Lords, the Court of Appeal n2 quashed these convictions because they thought that the summing-up might have led the jury to believe that when they were considering a count charging the respondent with an offence against a boy in the first group they could treat the evidence of boys in the second group as to what the respondent had done to them on other occasions as corroborating the evidence given by the boy in the first group. As I read his summing-up the judge was trying his best to direct the jury in accordance with the passage at the end of the judgment of the Court of Criminal Appeal in R v Campbell n3 which says that in a case of this sort the evidence of boys B, C and D as to similar incidents 'may help the jury to determine the truth of the matter' but cannot 'corroborate' the evidence of boy A who alleged the assault which is the subject of the count in question. I have no doubt that the judge failed completely to make this distinction clear to the jury for it is not, as the Court of Appeal calls it, a 'difficult' distinction; but a distinction which simply does not exist at all. Once the 'similar fact' evidence is admitted -- and it was common ground that it was properly admitted in this case -- then of necessity it 'corroborates' -- i.e. strengthens or supports -- the evidence given by the boy of an alleged offence against whom is the subject of the count under consideration. If one asks why it was that the court thought it necessary -- as it did in R v Sims n4 and in the passage from R v Campbell n3 cited above -- to try to draw this non-existent distinction the answer, I think, is that each of the boys was, if his evidence was believed, technically an 'accomplice' of the respondent and that ever since the decision of the Court of Criminal Appeal in R v Manser n5 it had become

generally accepted that 'mutual corroboration' was impossible -- that is to say that the evidence of witness A in respect of which a warning as to the desirability of 'corroboration' had to be given could not be corroborated by the evidence of witness B whose evidence was of a similar character. If that is the law then obviously you get into difficulties if you admit 'similar fact' evidence from other accomplices. But in the recent case of Director of Public Prosecutions v Hester n6 this House has decided that there is no warrant for the doctrine laid down in R v Manser n5 and the supposed need to draw this non-existent distinction has accordingly now disappeared. I would allow this appeal.

n1 1930 JC 68

n2 [1972] 3 All ER 545, [1972] 1 WLR 1365

n3 [1956] 2 All ER 272 at 276, [1956] 2 QB 432 at 438, 439

n4 [1946] 1 All ER 697, [1946] KB 531

n5 (1934) 25 Cr App Rep 18

n6 [1972] 3 All ER 1056, [1972] 3 WLR 910

DISPOSITION:

Appeal allowed.

SOLICITORS:

Director of Public Prosecutions; Word, Bowie & Co (for the respondent).