EVIDENCE LAW REFORM COMMITTEE

REPORT ON

CORROBORATION

OCTOBER 1984
WELLINGTON
NEW ZEALAND

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EVIDENCE LAW REFORM COMMITTEE
REPORT ON CORROBORATION

The Minister of Justice

SCHEDULE OF RECOMMENDATIONS

(1) 20. The Baskerville definition of corroboration as independent evidence which implicates the accused in a material particular should be restricted to cases of treason and perjury.

(2) 21. In all other cases where some form of warning or direction on credibility is appropriate the Judge should avoid the use of the word "corroboration". He should refer instead to evidence independent of the accused which supports or confirms or makes more probable the truth of other evidence.

(3) 35. The requirement in s.112 of the Crimes Act 1961 should be retained. The requirement is that no-one shall be convicted of perjury, or of any offence against s.110 (False oaths) or s.111 (False statements, or declarations) on the evidence on one witness only, unless it is corroborated in some material particular by evidence implicating the accused.

(4) 53. The requirement in s.75(1) of the Crimes Act 1961 should be retained. The requirement is that no-one shall be convicted of treason on the evidence of one witness only unless the evidence of that witness is corroborated in some material particular by evidence implicating the accused.

(5) 61. No change should be made to the law relating to sedition.

(6) 86. A majority of the committee recommends that the mandatory requirement in s.52(2) of the Family Proceedings Act 1980 be repealed. The requirement is that no paternity order shall be made upon the evidence of the mother of the child alone unless her evidence is corroborated in some material particular to the satisfaction of the Court. The majority recommends that this be replaced by a new provision which states that no corroboration of evidence shall be required before a paternity order can be made.

(7) 117. In the case of an accomplice (as defined in the draft provision contained in Appendix 1) giving evidence for the prosecution it should be mandatory for the Judge to instruct the jury on the special need for caution when considering the evidence given by the accomplice.

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(8) 118. A witness may appear to the Judge to have some purpose of his own to serve, so that there is a risk that the witness may give false evidence to the prejudice of the accused. In such a case it should be mandatory for the Judge to consider the desirability of giving an instruction to the jury on the special need for caution when considering the evidence given by the witness.

(9) 119. In all cases to which the previous recommendation applies a concurrent Practice Note should be issued, directing Judges to adopt the practice of consulting counsel in the absence of the jury on the question of whether an instruction on the need for caution should be given to the jury. In all cases the judge should make a written note of his decision and the reasons for that decision so that they then become part of the record of the case and are available to an appellate court.

(10) 120. The draft provisions contained in Appendix 1 should be enacted.

(11) 143. The mandatory common law requirement for a warning to be given to the jury of the danger of convicting on the uncorroborated evidence of the complainant in a sexual case should be abrogated by statute.

(12) 148. No change should be made to the law in respect of the evidence of children.

(13) 151. No change should be made to the law in respect of claims against the estates of deceased persons.

Preface

1. In 1982 the Minister of Justice established the Evidence Law Reform Committee to examine the desirability of a gradual codification of the law of evidence and also to review specific areas of the law of evidence which are in need of reform.

2. This is the first report prepared by the Committee. In it we consider the law and practice relating to corroboration in both criminal and civil proceedings and, where we have considered it appropriate, make recommendations for legislation.

General Introduction

3. The definition of corroboration favoured by New Zealand courts is based on the statement of Lord Reading CJ in R v. Baskerville[1]:

> 'We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.'

4. In this report we consider first the legal definition of corroboration. We then examine the specific areas outlined below in which corroboration is required as a matter of law, where a warning to the trier of fact is required as a matter of practice and other cases where it is desirable as a matter of discretion to give a warning in some form.

5. Sometimes a conviction cannot be obtained without corroboration. In such cases it is often stated, perhaps misleadingly, that corroboration is required as a matter of law. These cases will be considered under this heading.

6. There are other cases in which the judge must warn the jury (or himself, if he is sitting alone) of the "dangers" of reaching a conclusion without corroboration. The necessity arises where the evidence of accomplices, or the victims of sexual offences, is concerned. Provided the warning is given, then the present law is that there is no objection to the trier of fact reaching a conclusion on the issues presented to him without corroboration. However, a failure to give the warning in sufficiently strong terms will be a ground of successful appeal, except in those very rare instances where the proviso to section 385(1) of the Crimes Act 1961 can be applied.

7. These cases are traditionally described as being those in which corroboration is required as a matter of practice. It is in this area that appellate courts have frequently encountered extreme difficulties, especially in the case of indictments with multiple counts. We shall examine these cases under the separate headings of "Accomplices" and "Sexual Offences".

8. There are also cases where the appellate court may consider that the trial judge ought, as a matter of discretion, to have given the jury a warning as to the danger of reaching a conclusion without corroboration. The circumstances when such a discretionary warning should be given are not entirely clear. This uncertainty contributes to the complexity and technicality of this branch of the law of evidence, which, we believe, should be much simpler to expound and easier to understand than it is at present. We will consider these cases in our discussion of "Accomplices".

9. The dangers of coming to a conclusion on uncorroborated evidence have also been stressed in cases where the evidence of children is involved and in claims against estates. We will consider these cases under the heading of "Related Matters" at the end of this Report.

Definition of Corroboration

10. As noted in our general introduction, the definition of corroboration favoured by New Zealand courts is based on the statement of Lord Reading CJ in R v. Baskerville.[2]

11. In D.P.P. v. Hester[3] Lord Diplock discussed the Baskerville definition:

> 'An examination of the basic 19th century cases makes it plain that in the judgments corroboration was not used in any other sense than "confirmation". This is the expression actually used in six out of the seven cases approved in R. v. Baskerville. Even in R. v. Baskerville itself the terms "corroboration" and "confirmation" are used interchangeably ...
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> 'Accomplices form the commonest category of witness whose evidence in criminal cases became subject to the common law requirement of a warning to the jury as to the danger of convicting on it unless it was confirmed by evidence from some other source, and most of the reported cases are about the evidence of accomplices. But a similar rule of practice at common law grew up as to the evidence of two other categories of witnesses whose reliability either generally or as to particular matters was liable to be suspect for other reasons. These were: children who, although old enough to understand the nature of an oath and so competent to give sworn evidence, are yet so young that their comprehension of events and of questions put to them or their own powers of expression may be imperfect; and persons, regardless of their age, who claim to have been victims of a sexual offence.
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> 'The danger sought to be obviated by the common law rule in each of these three categories of witnesses is that the story told by the witness to the jury may be inaccurate for reasons not applicable to other competent witnesses whether the risk be of deliberate inaccuracy, as in the case of accomplices, or unintentional inaccuracy, as in the case of children and some complainants in cases of sexual offences. What is looked for under the common law rule is confirmation from some other source that the suspect witness is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged.' (Emphasis added).

12. In D.P.P. v. Kilbourne[4] Lord Simon stated:

> '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. 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 Diplock) is confirmed by other evidence. Corroboration is therefore nothing other than evidence which "confirms" or "supports" or "strengthens" other evidence ... 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 ...
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> 'As for R. v. Lillyman and R. v. Whitehead, 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). The evidence was therefore admissible for and relevant to the limited purposes which I have stated: (see also R. v. Christie - 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.' (Emphasis added).

13. Mathieson[5] explains the significance of Baskerville as follows:

> 'In the leading case of R. v. Baskerville Lord Reading CJ said that what is required is some additional evidence rendering it probable that the story of the accomplice is true, and that it is reasonably safe to act upon his statement. Lord Reading's judgment settled a conflict between two views concerning the

> nature and extent of corroboration. According to the first view, independent evidence tending to verify any part of the testimony of the accomplice would suffice, while the second required that the evidence should not only show that part of the accomplice's testimony is true, but it should also implicate the accused ...
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> 'The second view was favoured by the Court of Criminal Appeal in R. v. Baskerville...
>
> 'It is submitted that the decision in favour of the second view is sound in principle because "false evidence given by an accomplice is commonly regarded as more likely to take the form of incriminating the wrong person than of imagining the crime charged".'

14. For reasons which we set out later in this report, we consider that the common-law definition of corroboration stated by Reading C.J. in Baskerville should be limited to the offences of treason and perjury. In both of these cases it is crucial to have independent evidence which does more than render the evidence of the crown witness more probable or, to put it in another way, is "confirmatory" in a general way of some part or parts of that evidence.

15. We believe that the independent evidence should continue to implicate the accused in some material particular. It must, if believed, be capable of linking the accused with the crime charged.

16. In cases other than treason and perjury, we consider that the explanation of the term "corroboration" given by Lord Simon in Kilbourne[6] should be sufficient, i.e. independent confirmatory evidence, without the strict necessity for that evidence to implicate the accused in a material particular. In essence this accords with the first view of corroboration referred to by Mathieson[7] above, namely independent evidence tending to verify any part of the "suspect" witness's evidence.

17. This view is also substantially in accord with the view expressed by Dickson J. in R v Vetrovec:[8]

> 'There are at least three difficulties associated with the Baskerville definition. The first is that it tends to obscure and, indeed, confuse the reason behind the "accomplice warning". As noted, the reason for the warning is that the accomplice is potentially untrustworthy, and we therefore desire other evidence which will accredit his testimony. After Baskerville courts began to frame the issue in terms of whether the corroborative evidence conformed to Lord Reading's definition, and ignored the real issue, whether there was evidence that bolstered the credibility of the accomplice. Evidence which strengthened credibility

was at the same time characterised as not corroborative "in law". Corroboration became a legal term of art, wholly unconnected with the original reason for the accomplice warning.

'The second difficulty associated with Baskerville is related to the first. Once it is decided that corroboration is a legal term of art, the law in the area becomes increasingly complex and technical. It immediately becomes necessary for the trial judge to define for the jury the legal meaning of corroboration. Moreover, one issue of whether there is any evidence which may be corroborative, according to that definition, becomes a matter of law. The trial judge must therefore examine the evidence to determine that question. The next step is to require the trial judge to specify for the jury those terms of evidence which, in his opinion may be corroborative...

'Since the judge's instructions on this issue involve questions of law, numerous technical appeals are taken on the issue of whether a particular item of evidence is "capable" of constituting corroboration. The body of case-law is so complex that it has in turn produced a massive periodical literature .... Moreover, the cases are difficult to reconcile. The Law Reform Commission of Canada has described the case-law in the area as full of "subtleties, variations, inconsistencies and great complexities" ... The result is that what was originally a simple, common-sense proposition - an accomplice's testimony should be viewed with caution - becomes transformed into a difficult and highly technical area of law. Whether this "enormous superstructure" (to use the description of the Law Reform Commisson) has any meaningful relationship with the task performed by the jury is unknown.

'The third, and perhaps most, serious difficulty associated with the Baskerville definition is that the definition itself seems unsound in principle. Prior to the judgment of Lord Reading there had been controversy over whether corroborative evidence must implicate the accused, or whether it was sufficient if it simply strengthened the credibility of the accomplice. Lord Reading settled the controversy in favour of the former view.

'With great respect, on principle Lord Reading's approach seems perhaps over-cautious. The reason for requiring corroboration is that we believe the witness has good reason to lie. We therefore want some other piece of evidence which tends to convince us that he is telling the truth. Evidence which implicates the accused does indeed serve to accomplish that purpose

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but it cannot be said that this is the only sort of evidence which will accredit the accomplice. This is because, as Wigmore said, the matter of credibility is an entire thing, not a separable one (7 Wigmore on Evidence, 1978 at p.424).

> ... whatever restores our trust in him personally restores it as a whole; if we find that he is desiring and intending to tell a true story, we shall believe one part of his story as well as another; whenever then, by any means, that trust is restored, our object is accomplished, and it cannot matter whether the efficient circumstance related to the accused's identity or to any other matter. The important thing is, not how our trust is restored, but whether it is restored at all ...

'It is I think unfortunate that the word "corroboration" ever became part of the legal lexicon. It is not a word of common parlance. When explained to juries it is given a technical definition, the exact content of which is still a matter giving rise to difference of opinion among jurists. As Lord Diplock observed in D.P.P. v. Hester, at p.1071, the ordinary sense in which the verb "corroborate" is used in the English language is the equivalent of "confirmed" and (at p.1073):

> What is looked for under the common law rule is confirmation from some other source that the suspect witness is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged.

'With respect, I would adopt also this further language of Lord Diplock (at p.1075):

> My Lords, to incorporate in the summing-up a general disquisition on the law of corroboration in the sort of language used by lawyers, may make the summing-up immune to appeal on a point of law, but it is calculated to confuse a jury of laymen and, if it does not pass so far over their heads that when they reach the jury room they simply rely on their native common sense, may, I believe, as respects the weight to be attached to evidence requiring corroboration, have the contrary effect to a sensible warning couched in ordinary language directed to the facts of the particular case.

'I agree with Lord Diplock that the nature of the summing-up upon the concept of corroboration and the respective functions of judge and jury is likely to be unintelligible to the ordinary layman.

'In Director of Public Prosecutions v. Kilbourne, supra, Lord Hailsham of St Marylebone L.C. spoke in like vein (at p.447):

> I agree with the opinions expressed in this House in Director of Public Prosecutions v. Hester 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 tailormade 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.

'As did Lord Reid (at p.456):

> 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 statment is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in.'

18. In the cases of treason and perjury, however, we feel that the full Baskerville requirements should continue to apply. The reasons for the retention of a full corroboration requirement are set out in the next two succeeding sections of this Report.

19. We believe that as a matter of practice the term "corroboration" should be restricted to charges of perjury and treason. In all other appropriate cases reference is made, in the course of a general summing up on credibility, to evidence which tends to confirm or support other evidence or which tends to show that a witness is telling the truth because other evidence independently confirms it as the truth. Or, as Dickson J. stated in Vetrovec:[9]

> 'I would only like to add one or two observations concerning the proper practice to be followed in the trial court where as a matter of common sense something in the nature of confirmatory evidence should be found before the finder of fact relies upon the evidence of a witness whose testimony occupies a central position in the purported demonstration of guilt and yet may be suspect by reason of the witness being an accomplice or complainant or of disreputable character. There are great advantages to be gained by simplifying the instruction to juries on the question as to when a

prudent juror will seek some confirmation of the story of such a witness, before concluding that the story is true and adopting it in the process of finding guilt in the accused as charged. It does not, however, always follow that the presiding justice may always simply turn the jury loose upon the evidence without any assisting analysis as to whether or not a prudent finder of fact can find confirmation somewhere in the mass of evidence of the evidence of a witness. Because of the infinite range of circumstances which will arise in the criminal trial process it is not sensible to attempt to compress into a rule, a formula or a direction the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness. There is no magic in the word corroboration, or indeed in any other comparable expression such as confirmation and support. The idea implied in those words may, however, in an appropriate case, be effectively and efficiently transmitted to the mind of the trier of fact. This may entail some illustration from the evidence of the particular case of the type of evidence, documentary or testimonial, which might be drawn upon by the juror in confirmation of the witness's testimony or some important part thereof. I do not wish to be taken as saying that such illustration must be carried to exhaustion. However, there is, in some circumstances, particularly in lengthy trials, the need for helpful direction on the question sifting the evidence of one or more witnesses. All of this applies equally in the case of an accomplice, or a disreputable witness of demonstrated moral lack, as, for example, a witness with a record of perjury. All this takes one back to the beginning and that is the search for the impossible: a rule which embodies and codifies common sense in the realm of the process of determining guilt or innocence of an accused on the basis of a record which includes evidence from potentially unreliable sources such as an accomplice.'

Recommendations

20. The Baskerville definition of corroboration as independent evidence which implicates the accused in a material particular should be restricted to cases of treason and perjury.

21. In all other cases where some form of warning or direction on credibility is appropriate the Judge should avoid the use of the word "corroboration". He should refer instead to evidence independent of the accused which supports or confirms or makes more probable the truth of other evidence.

CORROBORATION REQUIRED AS A MATTER OF LAW

(i) Perjury

Background

22. Section 112 of the Crimes Act 1961 provides that no one may be convicted of perjury, or of the related offences in ss.110 and 111 of the Act, on the evidence of one witness only unless the evidence of that witness is corroborated in some material particular by evidence implicating the accused. The common law rule with respect to perjury[10] has been followed in the Act.

23. Section 112 does not require a second witness to the falsity of the impugned statement. Instead corroboration might be provided (to take two examples) by an admission by the accused of the falsity of the impugned statement or by a letter (duly proved) which could be construed as persuading someone else to commit perjury in relation to the same matter.[11]

24. The historical basis for the rule can be found in the fact that perjury was originally punished in the Star Chamber, a court whose procedure had been influenced by civil law which usually applied the principle that the testimony of one witness is insufficient.[12] Two justifications have been given for the rule. The first is the reason given in R v. Muscot[13] that "else there is only oath against oath". This reason has been criticised as doubtfully based since it would equally justify a requirement of corroboration in many other situations where it is not now necessary as a matter of law or practice. The second, more reasonable, justification is that nothing must be allowed to discourage witnesses from testifying and the fact that a conviction for perjury might be secured on the oath of one uncorroborated witness could have this effect.[14]

Overseas Proposals for Reform

Canada:
Task Force on Evidence

25. In its Report on Evidence the Canadian Federal/Provincial Task Force on Uniform Rules of Evidence stated[15] :

> 'The minority of the Task Force feels that there is a parallel between treason and perjury prosecutions as in each case the offence is directly against the state or its institutions. The fear was also expressed that threatening a perjury charge could be used as a weapon by unscrupulous police officers or prosecutors to encourage witnesses to testify in a particular way. The majority of the Task Force thinks these distinctions are theoretical rather than real: a

prosecutor has no greater interest in obtaining a conviction in a perjury case than in any other serious case, and the danger of blackmailing a witness into giving a certain story in evidence exists today as most witnesses do not realise corroboration is required for a perjury conviction. The way to control improper conduct by the police or prosecutors is by effective action against them rather than through the rules of evidence. The majority therefore recommends that perjury not be one of the offences requiring a special provision.'

26. The Task Force also referred to Professor Wakeling's view[16] that the abolition of the corroboration requirement in perjury proceedings would improve the level of testimonial veracity by making successful prosecution of perjurers easier.

Canada Law Reform Commission

The Canadian Law Reform Commission[17] was of the view that:

27. 'The historical reason for requiring corroboration in cases of perjury has disappeared. However, the requirement is now defended for a different reason. It is contended that if the requirement is abolished it would have the effect of discouraging persons from giving evidence in court. A potential witness might fear that he would be unduly harassed by a charge of perjury brought by an unsuccessful party, and that in a subsequent prosecution for perjury it would be simply his testimony against his prosecutor's. However, eliminating the corroboration requirement does not make the prosecution's task any easier than a prosecution for any other serious crime such as murder or robbery; the trier of fact must still be satisfied of guilt beyond a reasonable doubt. Moreover, if the removal of the corroboration requirement better enables the prosecution of false witnesses and thus "discourages persons from giving (false) evidence" then the purpose of having a crime called perjury is fulfilled.'

England

28. In its Eleventh Report on Evidence (Cmnd 4991) the Criminal Law Revision Committee, in considering an English provision under which a conviction for perjury could not be obtained solely upon the evidence of one witness, stated at paragraph 190:

'No doubt anything which would make it easier to secure the punishment of the many bad cases of perjury which are known to occur would be advantageous for the administration of justice; but we doubt whether the abolition ... of the requirement would have this effect. In any case the majority think that the

> requirement is still desirable, because to make a prosecution for perjury too easy might discourage persons from giving evidence.'

29. The Criminal Law Revision Committee concluded in paragraph 192 by recommending a provision in practically identical terms to our s.112:

> 'The provision in s.13 of the Perjury Act that a person is not liable to conviction "solely upon the evidence of one witness as to the falsity of any statement alleged to be false" differs from ordinary statutory provisions requiring corroboration and refers expressly to the evidence of one witness. The section is treated, rightly or wrongly, as requiring that a second witness should give evidence, from his own knowledge, of the falsity of the statement in question. It follows that it is not enough (as it would be if the section merely required the evidence to be corroborated) that a second witness should prove that the accused admitted the falsity of the statement. This seems to us unnecessarily restrictive; and we recommend that the difficulty should be got over by replacing the rule in s.13 by a provision to the effect that the accused shall not be liable to be convicted on the evidence of one witness only as to the falsity of the statement in question unless the evidence is corroborated in some material particular by other evidence. This would bring the section into line with the ordinary provisions requiring corroboration.'

Committee's Reasoning

30. As a preliminary point, we reject the analogy drawn by the minority of the Canadian Task Force that in both treason and perjury the offence is directly against the state or its institutions. While this is undoubtedly true in the case of treason, perjury is more accurately described as an attempted abuse of one of the institutions of the state; viz the court system. There is a fundamental difference between behaviour which attempts to undermine or destroy the state and its institutions and behaviour which amounts to an abuse of one of those institutions for a purpose of one's own falling short of treason.

31. In our view the major justification for retaining the corroboration requirement in cases of perjury is the possibility of false accusations rather than the possible conviction of the innocent. The necessity for independent evidence which is corroborative of the evidence of a prospective complainant is a valuable device to reduce the chances of a false accusation of perjury being pursued.

32. We are not persuaded by Professor Wakeling's view that the removal of the corroboration requirement would make it easier to obtain a conviction in proceedings for perjury. While this may theoretically be so, in practice the trier of fact must still be satisfied of guilt beyond a reasonable doubt. Rather, as a consequence of the removal of the requirement for corroboration, it is likely that false complaints will be prosecuted which would not otherwise have been.

33. We also tend to agree with the view of the English Criminal Law Revision Committee that the requirement for corroboration is still desirable because if there was a general perception that the removal of the requirement could have the effect of making a conviction for perjury more easy to obtain this might occasionally tend to discourage people from giving evidence.

34. Submissions were received on this point from the Crown Law Office, the Law Society and the Police. Both the Law Society and the Police agreed with the view expressed above that the corroboration requirement should be retained. The view of the Crown Counsel who replied was that the requirement for corroboration should be removed and replaced by a general direction involving a caution in respect of credibility. They did not agree that removal of the requirement might occasionally discourage people from giving evidence.

Recommendation

35. The requirement in s.112 of the Crimes Act 1961 should be retained. The requirement is that no-one shall be convicted of perjury, or of any offence against s.110 (False oaths) or s.111 (False statements, or declarations) on the evidence on one witness only, unless it is corroborated in some material particular by evidence implicating the accused.

(ii) (a) Treason

36. Treason is defined in s.73 of the Crimes Act 1961:

> 'Every one owing allegiance to Her Majesty the Queen in right of New Zealand commits treason who, within or outside New Zealand, -
>
> (a) Kills or wounds or does grievous bodily harm to Her Majesty the Queen, or imprisons or restrains her; or
>
> (b) Levies war against New Zealand; or
>
> (c) Assists an enemy at war with New Zealand, or any armed forces against which New Zealand forces are engaged in hostilities, whether or not a state of war exists between New Zealand and any other country; or

(d) Incites or assists any person with force to invade New Zealand; or

(e) Uses force for the purpose of overthrowing the Government of New Zealand; or

(f) Conspires with any person to do anything mentioned in this section.'

37. Section 75(1) of the Crimes Act 1961 provides that no person shall be convicted of treason on the evidence of one witness only, unless the evidence of that witness is corroborated in some material particular by evidence implicating the accused.

38. Mathieson[18] suggests that a corroboration requirement is easy to justify in respect of those types of treason which (by their nature) are committed in secret (e.g. the incitement of any person to invade New Zealand: s.73(d)) while such a requirement is somewhat more arbitrary in cases where there is less opportunity for error or fabrication (e.g. assisting any enemy at war with New Zealand: s.73(c)).

39. He also points out that the death penalty has been retained for treason and that this may be one of the justifications for the corroboration requirement in s.75(1) in all cases of treason.

Overseas Proposals for Reform

Canada:
Task Force on Evidence

40. The Canadian Task Force quote Professor Wakeling's view[19] that:

> 'The treason rule was born of political intrigue and self-serving action on the part of monarchs and government officials in the fifteenth and sixteenth centuries.'

41. The Task Force also refers to Professor Wakeling's assertion that if a government really is bent on convicting a person of treason the corroboration rule will not save him.

42. A majority of the Task Force concluded, however, that treason was sui generis. The government is not merely the prosecutor but also a party with a direct interest of its own to serve in cases of treason. For this reason, although the Task Force favoured the abolition of the requirement that there must be corroboration before a conviction can be obtained, it felt that some additional protection for the accused is necessary in terms of a special warning to the jury as to the need for caution.

Canada Law Reform Commission

43. In its study paper[20] the Commission quoted Wigmore's view that:

> 'The true solution seems to depend on the relative proportion, in experience, of two elements, namely, the likelihood of false accusations, as compared with the harm of a guilty person's escape. When the former is large, and the latter is small, then the two-witness rule may be justified as being often effective, and seldom harmful when not effective. Now for treason this relation does seem to exist. In times of bitter political division, the dominant political party has the strongest motive and the amplest means of securing false testimony, to rid itself of its opponents; while the harm of a real traitor escaping judicial punishment is relatively small, because treason, when it is confined to a few individuals, can never really endanger the state, and, when it represents a wide-spread opinion in the community, there will be an ample array of witnesses to prove its acts. The rule of two witnesses, then, seems to rest on justifiable grounds of policy.
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> 7 Wigmore, Evidence sec. 2037 (3d ed. 1940).'

and then continued:

> 'It is anomalous that while corroboration is required for treason it is not required for any other offences against national security. We tend to agree with the English Criminal Law Revision Committee (11th Report, supra, para. 195) who said that they could determine no possible reason to continue the requirement of corroboration in the English Treason Act. If the Governement is ever as bent on convicting a person of treason as Wigmore hypothesized, the corroboration requirement will be of no protection to the accused.'

England

44. The Treason Act 1795 (U.K.) requires a second witness for a conviction for treason. The Criminal Law Revision Committee stated, without further elaboration, that it could see no possible reason to preserve the provision requiring the evidence of two witnesses.

45. It is notable that, unlike its view on perjury, it did not consider that there was any need for the evidence of a single witness to be corroborated in a material particular for a conviction.

Committee's reasoning

46. Unlike the Federal Task Force on Evidence we are of the view that something more than a warning on the need for caution is required.

47. Treason is an offence against the constitution of the state and in our view a safeguard is needed due to possible jury prejudice from indignation.

48. The Canada Law Reform Commission quotes a passage of highly persuasive reasoning from Wigmore in favour of retaining the corroboration requirement and then rejects this view by tending to agree with the conclusion of the English Criminal Law Revision Committee, (which is unsupported by any reasoning) that no safeguard is needed.

49. We prefer the reasoning of Wigmore.

50. In our view the requirement for corroboration also provides a valuable "screening device" to ensure that only those cases in which there is strong evidence of guilt proceed to trial.

51. We also believe that the retention of the death penalty for treason is an additional justification for the retention of the requirement that the evidence of a single witness must be corroborated in some material particular by evidence implicating the accused.

52. Treason is an offence against the state. The government is not only the prosecutor but a party with a direct interest in the proceedings. In these circumstances it is not only highly desirable that evidence in corroboration is truly independent and of such a nature that it links the accused to the offence but also that it is seen to be so. In this sort of case justice must be seen to be done if the public is to retain faith in the complete independence and impartiality of its legal institutions.

Recommendation

53. The requirement in s.75(1) of the Crimes Act 1961 should be retained. The requirement is that no-one shall be convicted of treason on the evidence of one witness only unless the evidence of that witness is corroborated in some material particular by evidence implicating the accused.

(ii)(b) Sedition

54. The rule which requires corroboration in all cases of treason does not apply to sedition. The same justifications for the rule may be thought to apply with equal force to both treason and sedition.

55. Sedition is any act performed with a seditious intention. Section 81(1) and (2) of the Crimes Act 1961 define seditious intention:

> '(1) A seditious intention is an intention -
>
> (a) To bring into hatred or contempt, or to excite disaffection against, Her Majesty, or the Government of New Zealand, or the administration of justice; or
>
> (b) To incite the public or any persons or any class of persons to attempt to procure otherwise than by lawful means the alteration of any matter affecting the Constitution, laws, or Government of New Zealand; or
>
> (c) To incite, procure, or encourage violence, lawlessness, or disorder; or
>
> (d) To incite, procure, or encourage the commission of any offence that is prejudicial to the public safety or to the maintenance of public order; or
>
> (e) To excite such hostility or ill will between different classes of persons as may endanger the public safety.
>
> (2) Without limiting any other legal justification, excuse, or defence available to any person charged with any offence, it is hereby declared that no one shall be deemed to have a seditious intention only because he intends in good faith -
>
> (a) To show that Her Majesty has been misled or mistaken in her measures; or
>
> (b) To point out errors or defects in the Government or Constitution of New Zealand, or in the administration of justice; or to incite the public or any persons or any class of persons to attempt to procure by lawful means the alteration of any matter affecting the Constitution, laws, or Government of New Zealand; or
>
> (c) To point out, with a view to their removal, matters producing or having a tendency to produce feelings of hostility or ill will between different classes of persons.'

56. We are of the view that there is not the same need in sedition as there is in treason for the additional requirement of corroboration. There does not appear to be the same need for a "screening" function as there is in cases of perjury and treason.

57. The penalties for sedition (2 years imprisonment) are also much less severe than for treason.

58. Also, there is not the same risk of jury prejudice from indignation as there is in a case of treason.

59. None of the four submissions received on this point advocated change. The submissions were received from the Crown Law Office, the New Zealand Law Society, the Police and a private practitioner. The generally held view was that very few sedition cases are ever brought and that there has been no need for change demonstrated.

60. Though some of the same factors which relate to treason could equally be applied to sedition to justify a corroboration requirement, it is our view that the above-noted factors are more persuasive and that there is thus no need for change.

Recommendation

61. No change should be made to the law relating to sedition.

(iii) Paternity

Background

62. Under s.52 of the Family Proceedings Act 1980 the evidence of the child's mother is unnecessary for the making of a paternity order. However, no such order may be made upon the evidence of the mother alone unless her evidence is corroborated in some material particular to the satisfaction of the Court. The corroborative evidence must implicate the alleged putative father in a material particular. The Act does not require corroboration of every material particular.

63. A paternity order made under the Family Proceedings Act 1980 may have the following consequences:

(i) an obligation to pay continuing maintenance for both the mother and child under the provisions of the Family Proceedings Act 1980;

(ii) an obligation to contribute to the maintenance of the child by paying a contribution under the liable parent contribution scheme provided for by the Social Security Amendment Act 1980 where the mother of the child is in receipt of a domestic purposes benefit;

(iii) Under s.7 of the Status of Children Act 1969 if paternity is established the relationship of father and child will be recognised for any purpose related to succession to property or the construction of any will or other testamentary deposition or any instrument creating a trust or for the purpose of any claim under the Family Protection Act 1955;

(Section 8(3) of the Status of Children Act 1969 provides that a paternity order will be prima facie proof of paternity in any subsequent proceedings other than maintenance proceedings, where the paternity order provides conclusive proof).

(iv) An obligation to pay funeral expenses if the child is dead; s.78(1)(b) Family Proceedings Act 1980;

(v) An obligation to pay expenses incurred by reason of the pregnancy and birth, and towards the support of the mother during pregnancy, s.78(2); - and perhaps most importantly

(vi) The right of guardianship, custody and access.

64. Only a declaration of paternity made by the High Court pursuant to s.10 of the Status of Children Act 1969 is conclusive of this status for all purposes. As noted above, a paternity order is conclusive evidence of paternity only in maintenance proceedings.

Submissions received

65. A large number of submissions were received on this topic with a wide range of opinion expressed. The Working Paper was circulated to all of the Family Court Judges, a majority of whom were in favour of the abolition of the mandatory requirement for corroboration.

66. One submission suggested that the automatic bar arising from the lack of corroboration in a paternity proceeding should be removed and replaced by the following safeguards:

(a) A statutory caution to the Judge to consider the effect of a lack of corroboration; and

(b) In view of the significant civil consequences, the standard of proof should be raised to the criminal standard.

67. A majority of the Committee are of the view that requirement (a) would add nothing to the existing position where a Judge will always be involved in a process of evaluating the weight to be attached to evidence. Requirement (b) we consider to be wrong in principle. In view of the fact that a paternity order does not declare status conclusively, except in respect of maintenance proceedings, the application of the criminal standard of proof to a non-criminal matter cannot be justified.

68. One justification advanced for the application of the criminal standard was the serious consequences which follow the making of a paternity order. In our view this argument is not persuasive. One might equally argue that because

defendants in defamation suits may be liable to pay large damages awards defamation proceedings should be governed by the criminal standard of proof.

69. Also, it is clear that the standard of proof is something more than that required in ordinary civil cases. In Blyth v. Blyth[21] Lord Denning stated (in relation to a divorce case):

> 'The case, like any civil case, may be proved by a preponderance of probability, but the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear.'

70. The fact that section 167 of the Family Proceedings Act 1980 refers only to proof on the balance of probabilities does not mean that a Judge can ignore the need to ensure that proof must be in proportion to the gravity of the allegation.

71. In Hall v. Vail[22] Wild CJ (after considering Blyth) stated:

> 'Before making a paternity order a Magistrate must be satisfied from the evidence upon a balance of probabilities that the defendant is the father of the child giving due weight to the gravity of the applicant's allegation of paternity against the defendant.'

72. In our view this elevates the standard of proof considerably and dilutes the comparison with the standard of proof in a criminal matter.

73. There was some support in the submissions received for an abrogation of the requirement for corroboration in the technical sense as stated in Baskerville[23] and its replacement by a mandatory requirement for some "confirmatory" evidence which, while rendering other evidence more probable, may not meet the full technical requirements of the Baskerville test. This accords with the view of corroborative evidence expressed by Lord Simon in D.P.P. v. Kilbourne[24].

74. It is clear that evidence is already received which would not be acceptable under a strict interpretation of the Baskerville test.

75. Bromley and Webb, in their standard text Family Law, comment that it "cannot be denied that extremely tenuous and speculative evidence is capable of satisfying [what is now s.52 of the Family Proceedings Act 1980], while what seems to be very cogent evidence does not"[25].

76. A case in point is H. v. K.[26] The mother's statement to a friend that intercourse had taken place on the previous day was not corroboration as it was not evidence independent of the mother. On the other hand, the friend's evidence of the couple being alone in the defendant's flat (i.e. evidence of mere opportunity), coupled with the circumstances of the association, was capable of being corroborative.

77. We view this as an acknowledgement by the Courts that a strict adherence to the technical sense of "corroboration" can create injustices. The Courts are already ameliorating this perceived injustice by receiving evidence as corroborative which, while not technically so, is merely confirmatory, in the Kilbourne sense.

78. We are not persuaded that even this "lesser degree" of confirmatory evidence should be a mandatory requirement before an order can be made. As a matter of practice Judges will continue to be cautious when considering evidence in this type of proceeding and will usually look for some independent "confirmatory" evidence, but in our view it would be inappropriate to retain any form of mandatory requirement that in the absence of some independent confirmatory evidence a judge must refuse to make a paternity order, even in circumstances where the judge is totally convinced of the complainant's truthfulness.

79. Section 52 of the Family Proceedings Act 1980 is in practically identical terms to its predecessors s.49 of the Domestic Proceedings Act 1968 and s.10 of the Destitute Persons Act 1910. There is no evidence in the Parliamentary Debates on the Domestic Proceedings Bill and the Status of Children Bill to suggest that the retention of the corroboration requirement was considered in any great depth.

80. In a submission received by us from the Justice Department the history of the matter before the Statutes Revision Committee was referred to:

> 'The Family Proceedings Act 1980 repeats the corroboration requirement formerly found in the Domestic Proceedings Act 1968. However, the provision was the subject of considerable criticism in submissions on the bill, although there were also submissions which supported the corroboration requirement. Without a great deal of discussion, the Statutes Revision Committee opted to maintain the status quo. That decision must be seen in context. The Committee had before it a very lengthy bill containing matters of much wider impact than this technical, evidentiary point. I do not consider that the decision in 1980 precludes a re-examination of the very real objections to the corroboration requirement. Indeed, it reinforces the need for closer scrutiny.'

81. In her Review of Matrimonial Law[27] Patricia M. Webb stated:

> 'PATERNITY PROCEEDINGS
>
> Section 49(2) imposes a requirement that any evidence given by the mother be corroborated in some material particular before a paternity order may be made. I see no reason to retain this provision. It may be that in practice the court will always be - and it probably should be - reluctant to make an order solely on the mother's evidence, but it is one thing to say that: another another to make corroboration a legal requirement. It is the difference between the requirement of a warning to a jury of the danger of convicting a person of any offence on the uncorroborated evidence of an accomplice or, in the case of a sexual offence, the complainant, and the outright prohibition on a conviction for treason or perjury on the evidence of only one witness, unless his evidence is corroborated. Do we really regard a paternity order as on a par with a conviction for treason or perjury?
>
> There are other arguments against retention, in particular the uncertainty surrounding the nature of corroboration (see X v. Y [1975] 2 NZLR 524 (C.A.)), but to me the one I have given is conclusive.
>
> I suggest therefore that s.49(2) be repealed.'

82. An additional argument in favour of the abolition of the requirement is that s.164 of the Family Proceedings Act 1980 permits the court to receive any evidence it thinks fit, whether or not such evidence is legally admissible. The purpose of the section is to avoid technicality in family proceedings and to assist the court to arrive at the truth of the matter. Removal of the necessity for corroboration is consistent with this aim. It would enable a Judge to make a paternity order if he is satisfied on all the evidence that the respondent is the father of the child.

83. Finally, we would like to express our agreement with the statement made by the authors of Family Law Practice[28] with reference to proceedings in the High Court under the Status of Children Act 1969:

> 'Unlike paternity proceedings in the District Court there is no requirement that the evidence of a person seeking a declaration of paternity be corroborated. This seems anomalous particularly when it is remembered that a paternity order is only prima facie evidence of paternity whereas a declaration of paternity is conclusive proof.'

Against this however it is clear from the reported decisions that "the High Court will be cautious in accepting uncorroborated evidence and will act on such evidence only when it finds the evidence sufficiently convincing to justify such a course"[29].

84. For all of the foregoing reasons, and in particular because in practice the sliding standard of proof as explained in Hall v. Vail[30] and Blyth v. Blyth[31] applies, a majority of the committee is of the view that the mandatory requirement for corroboration in paternity proceedings should be repealed.

Minority View

85. In the view of the minority (Dr. D.L. Mathieson and Mr J. Haigh) the requirement that there be corroboration in some material particular of the mother's evidence should be retained. We think that the arguments advanced by the majority of the Committee to justify a change are insufficiently strong to support their conclusion that this mandatory requirement should be repealed. We rely on the following considerations in combination : of necessity, since we are expressing a minority view, we state them very briefly.

1. Paternity cases are sui generis: a paternity order establishes the existence of a fundamental human relationship, that of father and child. There is accordingly no inconsistency between our view on such cases and the approach, which we share with the majority, to the corroboration warning which the common law presently requires in sexual cases.

2. Although a paternity order made in the Family Court is technically conclusive evidence of paternity only in subsequent maintenance proceedings, in practice very few applications for a declaration of paternity under s.10 of the Statutes of Children Act 1969 are made, and a paternity order is often treated in practice as conclusive by those immediately affected and those who learn of it.

3. We agree with Hardie Boys J.'s comment in Rells v Keen (Dunedin, 7 November 1983) that "the legal and social consequences of such a case are of great importance, not only to all directly concerned in it, but also to the public interest at large". The consequences in some cases will spin out far into the future from the making of the order. While we agree that the standard of proof adopted must be that stated by the late Chief Justice in Hall v Vail (quoted in para.71 above), we do not think this to be an adequate safeguard in itself against the making of an incorrect finding. The only additional safeguard which the law can provide, consistently with the proceedings being civil, is that there be some independent confirmation of a mother's evidence in a material particular. The right of appeal is not an adequate safeguard.

4. We hold to the traditional view that an allegation of paternity is easy to make but difficult to refute. This is because the conception of a child normally takes place in the absence of onlookers. Further, it is only too easy to fall into the trap of translating evidence of opportunity for sexual intercourse into evidence that it probably occurred. If a mother tells a clear and coherent story, this will almost always lead, in the absence of serological tests and a corroboration requirement, to the making of a paternity order, even although the Judge conscientiously guides himself by the standard of proof enuciated in Hall v Vail, supra. Yet there have been several cases, according to some of the Family Court judges whom the Committee consulted, in which further tests or evidence (on an application for a rehearing) show that the mother's evidence must have been false.

5. A significant minority of the Family Court judges is convinced of the wisdom of retaining the present law.

6. Drawing an analogy with other legal proceedings, e.g. defamation cases, in which serious consequences ensue but no corroboration is legally required (see para.68 supra) is inappropriate, because none of these other proceedings concern the fundamental status of a person, or have potentially long term effects on a child's future sense of security built on belief about his status.

7. We disagree that removing the necessity for corroboration would be more consistent with s.164 of the Family Proceedings Act 1980. We respectfully think that the majority confuse

(i) what kind of evidence is legally required;

with (ii) whether the evidence proferred to meet the law's requirements need be strictly legally admissible.

These are entirely different issues.

8. We emphatically disclaim the view that because of emotional considerations or family or other pressures a mother's evidence is intrinsically likely to be false or innocently inaccurate. Our view depends on an evaluation of whether preserving the corroboration requirement will lead to a more confident result in the vast majority of cases, while causing injustice in only a small minority of cases. We think it will, especially as the Court of Appeal is prepared to accept what used to be described as "mere opportunity" evidence as corroborative, where the circumstances and the history of the association are suggestive that intercourse almost certainly took place on a particular occasion. Whereas, if the rule is abrogated, the small number of injustices presently occasioned will be eliminated, but much less confident results as to the

identity of a child's father will be reached in the majority of cases. That is an unacceptably high price to pay, in our view, given the social importance of reaching correct results in paternity cases in the interests of the public and in the interests of not saddling someone who is not in truth the father with far-reaching monetary obligations.

Recommendation

86. A majority of the committee recommend that the mandatory requirement in section 52(2) of the Family Proceedings Act 1980 be repealed. The requirement is that no paternity order shall be made upon the evidence of the mother of the child alone unless her evidence is corroborated in some material particular to the satisfaction of the Court. The majority recommends that this be replaced by a new provision which states that no corroboration of evidence shall be required before a paternity order can be made.

CORROBORATION REQUIRED AS A MATTER OF PRACTICE

(i) Accomplices

Background

87. During the greater part of the nineteenth century it was regarded as a matter for the discretion of the trial judge whether he administered the accomplice warning to the jury or not. An early statement of the judge's discretion in the matter was made in 1788,[32] when it was held that a conviction on the uncorroborated evidence of an accomplice was strictly legal, but that the presiding judge might make such observations to the jury as the circumstances of the case might require, to help them in saying whether they thought the evidence sufficiently credible to guide their decision on the case. This state of affairs continued into the next century; but it seems that, while nominally regarding it as a matter of discretion, judges came to give the accomplice warning as a matter of routine.[33]

88. In Davies v. D.P.P.[34] the House of Lords made it clear that:

> 'In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated. This rule, although a rule of practice, now has the force of a rule of law. Where the Judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if, in fact, there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso ...'

89. The use of the proviso is exceptional when a corroboration warning which should have been given has been omitted. In New Zealand the equivalent provision is the proviso to section 385(1) of the Crimes Act 1961. Some jurisdictions (such as Queensland and some American states) go further than the rule in Davies and require (usually by statute) that actual corroboration must be found for the evidence of an accomplice to form the basis of a conviction.[35]

90. The passage from Davies which has been quoted above refers specifically to an accomplice giving evidence on behalf of the prosecution, but one of two co-accused may incriminate the other when giving evidence on his own behalf. In principle there is no reason for distinguishing between the two cases, and the Court of Appeal has held that an accomplice warning should be given in both cases. The test of incrimination is whether the co-accused's evidence, or any part of it, undermines the defence being advanced, or tends to establish or support the prosecution's case: R v. Te Whiu.[36]

91. The Court of Appeal in R v. Hartley[37] considered the position when a co-accused gives evidence on his own behalf which also incriminates the accused :

> 'When an accomplice has given evidence for the prosecution it is well settled that the Judge has a duty to warn the jury that although they may convict upon his evidence, it is dangerous to do so without corroboration. Since Davies v. Director of Public Prosecutions [1954] AC 378; [1954] 1 All ER 507 that requirement has been treated as a rule of law. But there Lord Simonds LC said that the rule applied only to witnesses for the prosecution and that their Lordships were not concerned with the proper procedure as to warning and the like where one defendant gives evidence implicating another. The latter class of case was considered by this Court in R v. Te Whiu [1965] NZLR 420, and at p.424 it was said:
>
> 'For ourselves we cannot see why, if a warning is necessary when a co-accused is called for the Crown, the same warning should not be required when a co-accused gives evidence on his own account and the effect of that evidence is to incriminate the accused. We think that the giving of such a warning is a practice which should be followed in this country.
>
> 'In R v. Terry [1973] 2 NZLR 620, 623, this Court returned to the subject, saying as to a warning in the case of evidence given by a co-accused, 'Since Davies v. Director of Public Prosecutions there has been some movement in England towards this extended requirement'.

'We do not regard those two New Zealand decisions as going as far as to lay down that an accomplice warning is required as a matter of law when one accused gives evidence implicating another. Nor do we think it desirable to lay down such a rigid rule.'

Further:

'As to what is desirable, the trend in both England and Australia is against formulating any new rule of law in this field. And in R v. O'Connor (CA 161/76, decided on 4 May 1977), a case about evidence from the wife of an accomplice, we have said that we would be reluctant to add another hard-and-fast requirement to the task of a Judge summing up to a jury. Nor did we think that the interests of justice required such an addition in that kind of case. The same applies, we think, to the question of a warning when one defendant has given evidence inculpating another. Probably it is regrettable that the requirement of a warning when an accomplice has been called for the Crown hardened into a rule of law. We see no need to take the rigidity further. Certainly a co-defendant may have no less strong a motive for giving false evidence, if it helps to pass the blame from himself; but that danger tends to be more obvious to the jury than with a Crown witness.

'Among the consequences of treating the rule as one of practice are these. When one accused has given evidence having an adverse effect on the defence of another, failure to give an accomplice warning must be recognised to be unusual and to be likely in many cases to give rise to a significant risk of a miscarriage of justice. But in exceptional cases the Judge may justifiably in his discretion omit any warning altogether or give one in terms that might not satisfy the fairly strict requirements that have to be observed when an accomplice is called by the Crown. For example, much of the accused's evidence may have been favourable to his co-accused; and as to any unfavourable part there may be no substantial reason for suspecting that he has distorted the facts either intentionally or otherwise, against the co-accused. In a borderline case of evidence partly favourable and partly unfavourable, the practice of consulting counsel before finally deciding whether or not to give a warning may be found helpful: see R v. Royce-Bentley [1974] 2 All ER 347; [1974] 1 WLR 535. When the Judge has omitted a warning and on that ground his summing up is challenged on appeal, the question will be whether in terms of s.385(1)(c) of the Crimes Act 1961 there was a miscarriage of justice. In considering whether that is made out this Court will be able to take into account all the circumstances of the particular case - including, but not limited to, the strength of the other evidence against the appellant...'

92. If the rule was one of law rather than practice the appropriate test for applying the proviso would be the stricter one - whether a reasonable jury, properly directed, would, on the evidence properly admissible, without doubt convict.

A. Rationale of the Accomplice Rule

93. Several dangers of accomplice testimony have been suggested.[38] These include:-

1. Even if a person is certain to be found guilty he may seek the avoidance or reduction of his punishment as a reward, not on the ground that his role in the crime was a minor one (it may not be) but for enabling the crime to be brought home against the other criminals; and he may be tempted to curry favour with the prosecution by painting their guilt more blackly than it deserves;

2. A person may wish to suggest his innocence or minor participation by transferring the blame to others;

3. "It often happens that an accomplice is a friend of those who committed the crime with him, and he would much rather get them out of the scrape and fix an innocent man than his real associates";[39]

4. If a person is informed against by an innocent witness he might (out of spite and revenge) accuse the informer of in fact taking part in the crime;

5. An accomplice's evidence should be suspect because he is a confessed or proved criminal. Such ideas of the "moral guilt of a witness" are found mainly in older cases.

94. The dangers inherent in all of these suggestions will be increased by the fact that though the accomplice's evidence may be false in implicating the accused it will normally have a seeming plausibility because the accomplice will have familiarity with at least some details of the crime. It is for this reason that the courts require that corroborative evidence should implicate the accused in some material particular.

B. Who is an Accomplice?

95. As corroboration of an accomplice's evidence is required the question of who is an accomplice becomes important. In New Zealand anyone is an accomplice who is a party to the commission of the offence charged within the meaning of s.66 or 67 of the Crimes Act 1961, R v. Terry,[40] or who is an accessory after the fact to an offence within the meaning of s.71 of that Act.

96. There appear to be three main definitions of accomplices in other common law jurisdictions:

(i) Narrow : An accomplice witness is one who could have been convicted of the actual crime charged against the accused as principal only (i.e. excluding those guilty of aiding and abetting or counselling and procuring).[41]

(ii) Wider : An accomplice is one who could have been convicted of the actual crime charged against the accused as a principal or as an aider and abettor, or counsellor. This test is common in America and in some other jurisdictions (including New Zealand).[42] It was extended by Lord Simmonds L.C. in Davies v. D.P.P. to include accessories after the fact, receivers of stolen goods on the trial of the thief, and parties to other offences committed by the accused which are admitted as similar fact evidence "proving system and intent and negativing accident."

(iii) Widest : This definition abandons any requirement that the witness be guilty of the same offence as the accused; it is enough if his liability to prosecution arises from the same facts as that of the principal offender.[43]

In Re Moke Ta'ala[44] a Full Court refused to support any extension of the categories laid down in Davies v. D.P.P.

98. One response to the perceived inadequacy of Lord Simonds' definition in Davies v. D.P.P. has been the growth of what are called "Prater Warnings"[45]. In that case it was held that where a witness in a criminal case may be regarded as having some purpose of his own to serve, whether he be a fellow-prisoner or a witness for the prosecution, it is desirable that the judge should warn the jury of the danger of convicting on that witness's evidence unless it is corroborated; but, if there is clear and convincing evidence which satisfies the Court that no miscarriage of justice has occurred by reason of the omission of the warning, the Court will not interfere. Every case must be looked at in the light of its own facts.

99. Immunity from Prosecution

Where it is proposed to call an accomplice as a witness for the Crown the common law practice is to: (a) omit him from the indictment; or (b) to take his plea of guilty on arraignment or, if he withdraws his plea of not guilty, during the trial; or before calling him either (c) to offer no evidence against him and permit his acquittal or (d) to enter a nolle prosequi.[46]

100. In New Zealand, however, the Law Officers of the Crown have the power to grant immunity from prosecution to witnesses in return for their testimony against a principal offender. The decision to grant immunity is not reviewable at the trial of the principal offender and it excludes the rule of practice that an accomplice, against whom proceedings have not been taken or completed, should not be called as witness for the Crown. Although the discretion to grant immunity is not reviewable, the trial Judge retains a discretion to exclude the evidence if it appears that the inducement offered to the witness might operate to create a real danger of injustice to the accused. The witness remains an accomplice and, in addition to the usual warning, it would seem that the jury should be told that he is escaping prosecution altogether because of his giving evidence.[47]

Overseas Proposals for Reform:
England

101. The English Criminal Law Revision Committee considered the evidence of accomplices in its 11th Report on Evidence (Cmnd 4991) and we quote paragraphs 183-185 of that Report in their entirety:

> '183. We are strongly of the opinion that there should be no special rule about corroboration of the evidence of accomplices. Therefore little need be said by way of summary of the present law in addition to what was said above about corroboration generally. The classes of persons who are accomplices for the purpose of the rule were laid down by the House of Lords in Davies v. Director of Public Prosecutions. These are (i) parties to the offence in question, (ii) handlers of stolen goods, in the case of thieves, and (iii) parties to another offence committed by the accused in respect of which evidence is admitted. The rule applies only to these persons when called by the prosecution and does not apply between two co-accused. But there is an increasing tendency in favour of a practice that the judge should give a warning to the jury of the need for special care before convicting on the uncorroborated evidence of a witness, whether a co-accused or a witness for the prosecution, who may have some purpose of his own to serve in giving evidence against the accused, although the witness may not be an accomplice in the strict sense; but it has been stressed that every case must be looked at in the light of its own facts. It is for the judge to rule whether there is evidence that a witness is an accomplice for the purpose of the rule and, if there is, for the jury to find whether he is one. The limited extent to which the rule applies seems to us in itself an objection to the rule, in particular in that it applies only to witnesses called by the prosecution. Also, as mentioned above, it is often

difficult to decide whether a person is an accomplice of the accused in respect of the offence charged, and the difficulty is aggravated when there are several accused and several charges. But a more serious objection in our view is the fact that the rule applies in all cases merely because the witness is an accomplice and irrespective of the circumstances of the particular case. The reason for the rule is supposed to be the danger that the accomplice may be giving false evidence against the accused in order to minimise his own part in the offence or out of spite against the accused. But although it is clearly right that the attention of the jury should be drawn to these possibilities, if they exist, there are many cases where there is no such possibility. For example, it may be obvious that the accomplice has no ill-feeling against the accused, and he may be repentant and clearly trying to tell the truth about his own part. There may also be many other cases where, in the circumstances, there can be no doubt but that the accomplice's evidence may be wholly reliable, yet the judge must still warn the jury that it is dangerous to rely on it.

'184. In truth the idea that there is something about the evidence of accomplices so special as invariably to require a direction that it is dangerous to rely on the evidence is in our view very much in need of reconsideration. As long ago as 1836, when it was still only a rule of practice, and not one of law, that a special direction should be given as to the evidence of accomplices, Henry Joy, Lord Chief Baron of the Court of Exchequer in Ireland, published a book, "On the Evidence of Accomplices", in the course of which he wrote:

> How the practice which at present prevails, could ever have grown into a general regulation, must be a matter of surprise to every person who considers its nature. Why the case of an accomplice should require a particular rule for itself; why it should not, like that of every other witness of whose credit there is an impeachment, be left to the unfettered discretion of the judge, to deal with it as the circumstances of each particular case may require, it seems difficult to explain. Why a fixed unvarying rule should be applied to a subject which admits of such endless variety as the credit of witnesses, seems hardly reconcilable to the principles of reason. But that a judge should come prepared to reject altogether the testimony of a competent witness as unworthy of credit, before he had even seen that witness; before he had had an opportunity of considering the consistency and probability of his story; before he had known the nature of the crime of

> which he was to accuse himself, or the temptation which led to it, or the contrition with which it was followed; that a judge, I say, should come prepared beforehand to advise the jury to reject without consideration such evidence, even though judge and jury should be perfectly convinced of its truth, seems to be a violation of the principles of common sense, the dictates of morality, and the sanctity of a juror's oath.

'The view that the present requirement is wholly wrong is also in accordance with the views of the great majority of those who replied to our request for observations in 1968. One judge wrote:

> Some accomplices clearly have the strongest motives for casting all or most of the blame on the accused, others have no possible motive for lying. It has always seemed to me that to give the required warning as regards the accomplice in the second class is wholly unnecessary and unfair to the accomplice ... In such cases I have given the warning required, but have gone on to point out that what weight the jury attach to such a warning is for them and that they will probably want to consider on the facts of the case they are trying whether the accomplice has any motive at all for lying.

'185. In our opinion it should be a matter for the judge's discretion whether to give the jury a warning about convicting on the uncorroborated evidence of an accomplice ... This result will be secured by the provision in clause 20(1) that (subject to any statutory requirements in the Bill or elsewhere about corroboration):

> at a trial on indictment it shall be for the court to decide in its discretion, having regard to the evidence given whether the jury should be given a warning about convicting the accused on uncorroborated evidence.

'The subsection goes on to provide that:

> any rule of law or practice whereby at such a trial it is in certain circumstances obligatory for the court to give the jury such a warning is hereby abrogated.

The effect of the subsection, so far as accomplices are concerned, will be that it will be for the judge to consider whether the circumstances are such that a special warning should be given. For example, if it appears that the accomplice has a purpose of his own to serve in giving the evidence, it will be right to give an appropriate warning, but a warning will not be necessary if it is clear that there is no special reason to think that the accomplice may be lying. There will be no need to consider whether the

witness is or is not an accomplice, but only what may be his motives in giving the evidence that he does; and it will be as if the principle stated in Prater, referred to above, was extended so as to swallow up the rule about accomplices. The provision in subsection (1) that the giving of a warning shall not be "obligatory" takes account of the possibility that in an appropriate case it may be right to give a direction in substance similar to that given at present in the case of accomplices. Although the judge will have a discretion, the exercise of the discretion will, as in ordinary cases of judicial discretion, be open to review on appeal, so that the Court of Appeal might quash a conviction on the ground that in the circumstances the evidence of an accomplice called for a particular direction. We see no reason to think that an innocent person will be any less protected against the danger of a wrong conviction on the evidence of an accomplice than he is under the present rule; and we hope that the inclusion of the provision will serve as a reminder of the need to consider the giving of a warning even in cases where a warning is not required under the present law'.

Canada

102. In a similar vein, the recent judgment of the Supreme Court of Canada in R v. Vetrovec[48] has severely criticised the existing law of corroboration and called for a return to "common sense".

103. On the issue of when corroboration is required in regard to accomplices' evidence Mr Justice Dickson, delivering the judgment of the Court, took the view that the detailed rules, developed in cases like Davies v. D.P.P., which require the judge to warn the jury of the danger of convicting without corroboration of an accomplices' evidence, should be abandoned. The judge ought not be bound by "a blind and empty formalism", but ought to consider the issue of untrustworthiness generally.

104. Dickson J. stated:

> 'Two circumstances in particular make it appropriate, as it seems to me, to pause and reassess the law as it affects corroboration, with particular reference to accomplice evidence. The first such circumstance is the increasing length and complexity of criminal trials, particularly in cases of so-called "white collar" crime ...
>
> 'The second circumstance is the apparent trend in the English courts to cast aside the technical impedimenta with which the idea of corroboration has increasingly been loaded and return to the conceptual basics.

I refer in particular to Director of Public Prosecutions v. Hester, supra (H.L.) and Director of Public Prosecutions v. Kilbourne [1973] 1 All E.R. 440 (H.L.). The House of Lords has never specifically approved the definition of corroboration set out in Baskerville'.

Further:

'There appeared to be something unsavoury about a self-confessed knave, often for reward, accusing his companions in crime. Thus the practice arose in the 18th century of warning the jury that, while they might legally convict on the basis of the testimony of an accomplice, it would be dangerous to do so unless the testimony were supported or "corroborated" by other unimpeachable evidence. This warning was for many years a matter for the discretion of the trial judge but in 1916, the English Court of Criminal Appeal declared that the practice had become "virtually equivalent to a rule of law": R. v. Baskerville, supra, at p.663. The court also took the opportunity to state that "corroboration" had a precise legal meaning ...

'Since Baskerville, a failure to instruct the jury in accordance with Lord Reading's exegesis will usually result in a conviction being overturned: see Davies v. Director of Public Prosecutions [1954] 1 All E.R. 507 (H.L.).

'In evaluating the adequacy of the law in this area, the first question which must be answered is a basic one: why have a special rule for accomplices at all? Credibility of witnesses and the weight of the evidence is, in general, a matter for the trier of fact. Identification evidence, for example, is notoriously weak, and yet the trial judge is not automatically required, as a matter of law, to instruct the jury on this point. Similarly, the trial judge is not required in all cases to warn the jury with respect to testimony of other witnesses with disreputable and untrustworthy backgrounds. Why, then, should we automatically require a warning when an accomplice takes the stand?'

105. Dickson J. then set out the traditional justifications for the rule: - viz

(1) Wigmore's view that an accomplice may try to save himself from punishment by procuring the conviction of others.

(2) An accomplice may falsely accuse others to protect his friends.

(3) An accomplice is not to be believed since he is a self-confessed criminal and is 'morally guilty'.

and concluded that:

> 'None of these arguments can justify a fixed and invariable rule regarding all accomplices. All that can be established is that the testimony of some accomplices may be untrustworthy. But this can be said of many other categories of witness. There is nothing inherent in the evidence of an accomplice which automatically renders him untrustworthy. To construct a universal rule singling out accomplices, then, is to fasten upon this branch of the law of evidence a blind and empty formalism. Rather than attempting to pigeon-hole a witness into a category and then recite a ritualistic incantation, the trial judge might better direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness.
>
> 'If, in his judgment, the credit of the witness is such that the jury should be cautioned, then he may instruct accordingly. If, on the other hand, he believes the witness to be trustworthy, then, regardless of whether the witness is technically an "accomplice" no warning is necessary ...
>
> 'This common sense approach to the matter was eventually discarded, however, in favour of the more technical view of Lord Reading in Baskerville. Corroboration became a certain sort of evidence, namely, evidence "which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it."
>
> > On this point little can be said save that it forms part of a conflict running through so much of the law of evidence between discretionary rules sensibly applied and rigid rules which though they may cause difficulties because of inflexibility at least constitute a bulwark against incompetence or prosecution-mindedness. [(Heydon [1973] Crim L.R. 264 at p.281)].'

106. In our Working Paper at paragraphs 31-34 we expressed the following tentative views:

> '31. ... to insist on a warning in every case where an accomplice gives evidence for the prosecution or a co-accused gives evidence that tends to incriminate another co-accused, would be too rigid. It has led to verdicts being quashed for failure to apply the rule

correctly, where there was, in fact, ample corroborative evidence before the jury. One difficulty is that the trial judge may determine that a witness is not an accomplice and therefore not give a warning. If the Court of Appeal subsequently holds that the witness was an accomplice, the absence of the warning will be fatal.

'32. On the other hand, the Committee accepts that in many cases there will be very good reason why an accomplice's evidence should be looked at with considerable caution. Accordingly, we are not attracted to the view that a simple abrogation of the rule is all that is required. Rather, we tend to favour the middle ground ... The effect [will be] to require the trial Judge to give a warning if he considers it proper to do so in the particular case. Such a provision, we believe, will be sufficient to draw the matter to the Judge's attention, without unduly fettering his discretion to address the jury in the manner that he considers appropriate in the circumstances of the case.

'33. The Committee is also inclined to the view that some revision of the definition of the term "accomplice" (as laid down in Davies would be helpful. We have considered the "broad brush" approach adopted, for example, in South Africa. There "a person is an accomplice if he is liable to prosecution in connection with the commission of the same offence as the principal offender". However, while this has an attractive simplicity, the cost of its adoption in New Zealand may be a loss of certainty.

'34. The Committee considers that an amalgamation of Davies and Prater may provide the means of retaining the certainty of the one and the desirable flexibility of the other. Accordingly, we put forward for discussion the following draft definition:

A witness called by the prosecutor is an accomplice of the accused in each of the following cases:

(a) Where the witness is a party to the offence with which the accused is charged;

(b) Where -

(i) The accused is charged with the theft of any goods; and

(ii) The witness has received those goods in circumstances constituting an offence;

(c) Where -

(i) The accused is charged with receiving any goods in circumstances constituting an offence; and

(ii) The witness stole those goods;

(d) Where -

(i) Evidence of any other offence alleged to have been committed by the accused is admitted against him as similar fact evidence; and

(ii) The witness is a party to that other offence;

(e) Where, because of the witness's possible criminal involvement in any of the circumstances of the offence with which the accused is charged, there is a danger that the witness may give false evidence against the accused.'

107. In essence our tentative view was that in all of the categories set out above the Judge should be required to consider the desirability of giving a warning about the danger of accepting the uncorroborated evidence of the witness. Whether he ultimately decided to give the warning, and the form of that warning, would be a matter for his discretion.

108. We also considered that due to a possible increase in appeals where no warning is given and it is argued either that the question was not considered by the Judge or, more probably, that there was an incorrect exercise of the discretion and a warning in some form should have been given, a Practice Note should be issued which would recommend the adoption of the approach to this matter set out in R. v. Royce - Bentley[49] i.e. The Judge should consult with counsel in the absence of the jury and, after hearing counsel, and reaching a decision, should make a written note of the reasons for his decision. Such a course would greatly aid an appellate Court in which the failure to warn the jury or the terms of any warning given are challenged.

Committee's reasoning

109. A number of submissions received endorsed the tentative view expressed above and stated that what is required is simply a caution as part of a general direction on credibility.

110. The definition of "accomplice" which we put forward in our Working Paper was criticised as being "too complicated". The view was also expressed that only category (e) was

required i.e. that because of the witness's possible criminal involvement in any of the circumstances of the offence there is a danger that the witness may give false evidence against the accused.

111. While we acknowledge that there may be a substantial degree of overlap between categories (a)-(d) and category (e), in our view the better approach is to retain categories (a)-(d) in the interests of certainty and to remove category (e) from our draft definition of accomplice.

112. Our final view is that the mandatory requirement for a warning in all cases where the witness is an accomplice who is giving evidence for the prosecution should be retained in a modified form. Accordingly, in categories (a) to (d) of our proposed definition of accomplice an instruction on the special need for caution should be mandatory. (See Appendix 1)

113. Category (e), which has been redrafted in broader terms, should be removed from the definition of accomplice. It should be retained in a separate provision as a separate category of case where a Judge has a duty to consider whether an instruction on the special need for caution is necessary but may decide that in the circumstances no instruction is required. (See Appendix 1)

114. We believe that the enactment of this provision would remove much of the current uncertainty, adverted to in our general introduction, as to when it may be appropriate as a matter of practice to give some kind of instruction to the jury about a witness's credibility. The provision sets out a mandatory requirement to consider the desirability of an instruction in any case where the witness may have some purpose of his own to serve and there is an attendant risk that he may thus be motivated to give false evidence prejudicial to the accused.

115. The new provision, incorporating the redrafted category (e), will cover the case of an accomplice giving evidence on his own behalf (i.e. a co-accused) which is prejudicial to the accused. Under the new provision it would be mandatory for the Judge to consider the desirability of an instruction but he may decide that in all the circumstances of the case no instruction is necessary.

116. In our view these draft provisions will strike the best balance between the certainty of the Davies approach and the flexibility of the Prater approach.

Recommendations

117. In the case of an accomplice (as defined in the draft provision contained in Appendix 1) giving evidence for the prosecution it should be mandatory for the Judge to instruct the jury on the special need for caution when considering the evidence given by the accomplice.

118. A witness may appear to the Judge to have some purpose of his own to serve so that there is a risk that the witness may give false evidence to the prejudice of the accused. In such a case it should be mandatory for the Judge to consider the desirability of giving an instruction to the jury on the special need for caution when considering the evidence given by the witness.

119. In all cases to which our second recommendation applies a concurrent Practice Note should be issued, directing Judges to adopt the practice of consulting counsel in the absence of the jury on the question of whether an instruction on the need for caution should be given to the jury. In all cases the judge should make a written note of his decision and the reasons for that decision so that they then become part of the record of the case and are available to an appellate court.

120. The draft provisions contained in Appendix 1 should be enacted.

(ii) Sexual Offences

Introduction

121. At the time of writing this report a snap election was called for 14 July 1984.

122. The Rape Law Reform Bill, which was before the Statutes Revision Committee, lapsed. The future of the Bill is presently uncertain.

123. In view of this uncertainty, and in addition to our discussion of this topic, we will:

(a) Reproduce in Appendix 2 a letter sent to the Minister of Justice on 16 May 1983 setting out the Committee's preliminary views on the matter;

(b) Reproduce in Appendix 3 the provisions of the Rape Law Reform Bill which dealt with corroboration in sexual cases;

(c) Reproduce in Appendix 4 a submission made by us on the Bill. The submission was subsequently passed on by the Minister of Justice to the Statutes Revision Committee for consideration.

Background

124. Corroboration warnings are required as a matter of practice in cases involving sexual offences. This involves a direction to the jury that it is not safe to convict on the uncorroborated evidence of the complainant, but that they may do so if satisfied of its truth.[50] Several justifications have been advanced for this rule.[51] These are:-

1. False accusations of sex crimes (especially rape) are believed by many to be much more common than untrue charges of other crimes. The suggested motives for false accusations include shame, blackmail, revenge, notoriety, fantasy, jealousy, neurosis.

2. There is a suspicion that in sexual cases the presumption of innocence to which the defendant is entitled is likely to give way to "the respect and sympathy naturally felt by any tribunal for a wronged female ..."[52] This alleged danger of unfair prejudice against the accused has two elements. First, the heinousness of the offence may arouse such indignation in the judge and jury that they will be hasty to convict. Secondly, juries are thought to be "preinclined to believe a man guilty of an illicit sexual offence he may be charged with, and it seems to matter little what his previous reputation has been".[53]

3. The commission of a sexual offence "is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent".[54]

125. All these justifications have been criticised.[55] The criticisms can be summarised as follows:

1. Whatever the motives for false allegations, it is argued that to whatever degree they do exist, they are outweighed by the disincentives to report rape [and other sexual crimes] and by the ease with which modern criminal investigation and traditional legal rules can uncover them.[56]

2. Where there is an absence of supporting evidence of duress, juries may tend to approach the evidence of a complainant critically. Also the risk that the jury will feel sorry for the complainant is always present in criminal trials.[57]

126. Early this year the Department of Justice and the Institute of Criminology published a discussion of the law and practice relating to rape entitled Rape Study. At pages 139-144 of Volume 1 of the study the corroboration warning in the context of rape complaints is discussed and proposals for reform put forward. At pages 139-140 of the study Dr Warren Young states:

> 'The empirical evidence in our study, however, tends to demonstrate ... that rape is not a charge easily to be made, and that a complaint to the police is usually made at considerable personal cost to the complainant. Further, the interviews

with victims indicate that there are many compelling reasons why some victims either do not make a complaint or later wish to withdraw it. Equally, our study of police files did not disclose any evidence to justify the conclusion that there are significant numbers of false complaints motivated by jealousy, spite, or fantasy. The complaints which did appear to be false were often made by third persons and were usually perceived very quickly by the police to be unfounded.

'There is therefore little or no firm basis for the existing corroboration rule. Moreover, there are several positive arguments in favour of amending it, which in our opinion are formidable and convincing.'

127. Five arguments in favour of reform are put forward in the study as follows:

1. The rule encourages the false assumption, which is insulting and derogatory to women, that women "are by nature peculiarly prone to malice and mendacity and particularly adept at concealing it".

2. The need to give the warning in every case, regardless of the strength of the evidence or the extent to which corroboration is in fact available, will inevitably suggest to the jury that <u>every</u> complainant should be viewed with suspicion. There may be many cases where such suspicion is unfounded. For example, there are some prosecution cases which are strong in several respects, but contain nothing which amounts in law to corroborative evidence. In such cases, almost the last thing the jury hear before they retire to consider their verdict is the warning that it would be dangerous for them to convict.

3. The form of the warning - to the effect that it is dangerous for the jury to convict on the complainant's uncorroborated evidence, but that they may do so if they are satisfied beyond reasonable doubt of the defendant's guilt - is almost a contradiction in terms, and therefore is likely to confuse the jury.

4. The corroboration warning adds little or nothing to the existing rules on the burden and standard of proof, and is therefore an unnecessary and anachronistic extension of them.

5. The technical distinction between evidence which does and evidence which does not amount to corroboration is subtle and difficult for a judge to apply, and may be

even more difficult for a jury to understand. Errors in judge's summings up on corroboration therefore result in a disturbing number of mistrials in rape cases.

128. At page 143, in the context of possible reforms of the rule, it is said that:

> 'A further and more fundamental reform would involve the abolition of the corroboration rule altogether, so that sexual offences would be treated in the same way as almost all other offences. This would leave judges with a discretion to warn the jury of the special need for care in deciding whether to rely on any particular piece of evidence if the circumstances of the witness or the nature of the evidence required this. This is essentially the approach in New South Wales, where s.405C(2) Crimes (Sexual Assault) Amendment Act 1981 provides:
>
> 'On the trial of a person for a prescribed sexual offence, the Judge is not required by any rule of law or practice to give, in relation to any offence of which the person is liable to be convicted on the charge for the prescribed sexual offence, a warning to the jury to the effect that it is unsafe to convict the person on the uncorroborated evidence of the person upon whom the offence is alleged to have been committed.
>
> 'It will be evident that the effect of this provision is to remove the requirement of the corroboration warning, although leaving the judge with the discretion to comment where he thinks it appropriate. If the corroborating evidence is in fact flimsy, then judges will presumably be inclined to give some type of warning; but if there is substantial corroborating evidence, or there is other evidence which strengthens the prosecution case, then he may merely give the required direction on the standard of proof.'

The Complainant's Distressed Condition

129. A complainant's distressed condition is capable of amounting to corroboration only in very special circumstances. In R v. Cain[58] the Court of Appeal said that the jury must be made to understand that evidence could be regarded as corroboration only if it were completely satisfied that there was no possibility of it being due to a cause not supporting the complainant's allegation. The time interval is therefore very important.

130. Similarly in R v. Poa[59] the Court of Appeal stated:

> 'A complainant cannot corroborate herself, whether the evidence she provides is in the form of words or in the form of conduct. When the issue is related to conduct in the form of distress, the crucial question as we said in Moana is whether the condition as observed by some independent witness was involuntary and uncontrived in the sense that it truly may be regarded in itself as independent of the allegation.'

131. Cato suggests that the true basis for admission of such evidence as corroboration is not its independence but its intrinsic and obvious value as evidence supporting the complainant.[60]

132. Evidence which is not strictly corroborative can still be taken into account when assessing credibility generally.[62]

Evidence of Recent Complaint

133. Mathieson[62] summarises the present law in respect of recent complaint evidence as follows:

> (a) Complaints may be proved as evidence-in-chief only in criminal prosecutions for a sexual offence;
>
> (b) the complaint must have been made voluntarily, and as speedily as could reasonably be expected;
>
> (c) it makes no difference whether the offence was committed against a male or a female, and whether consent is or is not an issue;
>
> (d) the particulars (as distinct from the mere fact of) the complaint may be proved'

134. Although such a complaint is admissible because it enhances the reliability of the complainant's testimony, it does not constitute corroboration of that testimony. Corroboration must come from a source independent of the witness to be corroborated.

135. It is noted that in New South Wales, the Crimes (Sexual Assault) Amendment Act 1981 abolished the corroboration requirement in cases of sexual assaults. Under the new provision the judge is given a discretion to comment where appropriate on the weight to be given to the evidence of the individual witness. There is also a statutory requirement that the judge warn the jury that a late complaint is not necessarily a false one and that there may be good reasons why a victim of a sexual assault may hesitate or refrain from making a complaint.

Committee's Reasoning

136. At present it is a requirement of practice that the jury should be directed that it is not safe (or is "dangerous") to convict on the uncorroborated evidence of the complainant, but they may do so if satisfied of the truth of that evidence.

137. This requirement seems to us to be unsatisfactory. It requres a direction which may appear to the jury to be self-contradictory. The words "dangerous to convict" are unduly inhibiting to juries, and also at an earlier stage to the Police in deciding whether or not they have a case to bring.

138. Further, as our comments on the law relating to distress and recent complaint suggest, juries may have difficulty appreciating the difference between credibility and corroboration.

139. We favour abolition of the mandatory requirement for a warning to be given of the danger of convicting on the uncorroborated evidence of the complainant.

140. We would be concerned, however, if the law went to the other extreme, and prohibited the judge in all cases from making any comment to the jury on the absence of confirmatory evidence. This appears to be the position, for example, in Canada following the enactment of the Criminal Code Amendment Act 1982. Such an inflexible restriction could lead to wrongful conviction in some cases. It is important, in all cases, if justice is to be done, that the judge should be free to comment on the evidence and draw to the attention of the jury particular points which merit their careful consideration. These points will vary according to the nature of the evidence and the real issues in the particular case. There will be circumstances where comment on aspects of a complainant's evidence is appropriate, just as there may be with respect to any other evidence. The extent to which particular evidence is or is not supported by other evidence may also require to be drawn to the jury's attention.

141. We also favour a mandatory provision similar to that enacted in the New South Wales Crimes (Sexual Assaults) Amendment Act 1981 in relation to evidence of recent complaint.

142. In short, we agree with the third alternative earlier quoted from p.143 of the Rape Study, Volume 1, that the complaint's evidence in sexual cases should be on the same footing as any other evidence. The requirement of a warning in all sexual cases, regardless of the circumstances, should therefore be abrogated.

Recommendation

143. The mandatory common law requirement for a warning to be given to the jury of the danger of convicting on the uncorroborated evidence of the complainant in a sexual case should be abrogated by statute.

Related Matters
Evidence of Children

144. A full corroboration warning is not required in cases involving child witnesses. However a jury is almost invariably warned of the need to scrutinise the evidence of young children with special care, and that young children are prone to invention or distortion.[63] The English courts have held that the warning must be given, whether the child's evidence is adduced to corroborate that of another child, or of an adult; and when the only issue is that of the identity of the perpetrator of a sexual crime against the child.

145. Children may give sworn evidence in civil and criminal cases provided the judge is satisfied that they understand the nature of the oath. Children under the age of 12 years may be examined without an oath. Therefore a child's evidence, whether sworn or unsworn, may corroborate the evidence, sworn or unsworn, of another child.

146. We are not presently persuaded of the need for a special rule of law requiring a mandatory warning against acting on the uncorroborated evidence of a child witness.

147. The current practice whereby a judge has a discretion to comment on a witness's age, in circumstances where it is appropriate to do so, is in our view a sufficient safeguard to an accused.

Recommendation

148. No change should be made to the law in respect of the evidence of children.

Claims Against the Estates of Deceased Persons

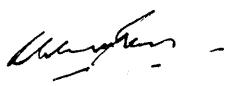
149. A claim against the estate of a deceased person will not generally be allowed on the uncorroborated evidence of the claimant, but there is no rule of law against allowing it.[64] This is also the case where a claim is made brought under the Law Reform (Testamentary Promises) Act 1949.[65]

The absence through death of one of the parties to the transaction calls for caution in such cases, but claims have been allowed when there was no corroboration but the uncorroborated testimony "carried clear and unhesitating conviction to the mind of the Court"[66]

Recommendation

151. No change should be made to the law in respect of claims against the estates of deceased persons.

For the Committee



I. L. McKay
October 1984

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Sir Graham Speight
Mr M. C. Carruthers (Secretary)
Ms K. F. McDonald (Typist)

FOOTNOTES

1. [1916] 2KB 658, at 667.

2. Ibid.

3. [1972] 3 All ER 1056 at 1073.

4. [1973] 1 All ER 440, at 462-63.

5. R. Cross, Evidence, 3rd N.Z. Edition, Editor D.L. Mathieson, Butterworths, Wellington, 1979, p.186.

6. Supra. n.4.

7. Supra n.5.

8. (1982) 67 C.C.C (2d) 1, at p.12.

9. Ibid, at page 16.

10. R v Muscot (1713) 10 Mod Rep 192.

11. Op. cit. Mathieson, supra n.5, at p.177.

12. Ibid, p.178.

13. Supra, n.10.

14. Op. cit. Mathieson, supra n.5. See also the recommendations of the English Criminal Law Revision Committee, 11th Report, cmnd 4991, paras 191-192.

15. Report of the Federal/Provincial Task Force on Uniform Rules of Evidence, 1982, at page 366.

16. Wakeling, Corroboration in Canadian Law (1977), at pp 12-13 and 128-29.

17. Canada Law Reform Commission, Evidence : 11 Corroboration Study Paper, 1975, at page 15.

18. Op. cit. Mathieson, n.5, at p. 179.

19. Op. cit. n.15, at p.365: Wakeling op cit, n.16, at pp 129-31.

20. Supra n.17, at page 17.

21. [1966] 1 All ER 524, at 536.

22. [1972] NZLR 95, at 96. See also Campbell v. Pickles [1982] 1 NZLR, 477 (C.A.); T v. M (Unreported, C.A. 175/83).

23. Supra, n.1.

24. Supra, n.4.

25. Bromley and Webb, Family Law NZ ed, Butterworths, 1974.

26. Recent Law, April 1972, at p.73.

27. Patricia M. Webb, Review of Matrimonial Law, August 1977, at pages 80-81.

28. Ludbrook, Tapp, O'Reilly, Family Law Practice, Brooker and Friend, 1981, at para 11C.07 (1/6/82) 11-9.

29. Idem

30. Supra, n.22.

31. Supra, n.21.

32. Atwood 1 Leach 464; 1658 E.R. 334.

33. See Glanville Williams, "Corroboration - Accomplices", [1962] Crim L.R. S88.

34. [1954] 1 All ER 507, at 513.

35. See : J.D. Heydon, "The Corroboration of Accomplices", [1973] Crim L.R. 264.

36. [1965] NZLR 420, at 424.

37. [1978] 2 NZLR 199, at 206.

38. Heydon, op cit, n.35.

39. Mullins (1848) 3 Cox C.C. 526 at 531 per Maule J.

40. [1973] 2 NZLR 620.

41. Hargrave (1831) 5 C&P 170; Young (1866) 10 Cox CC 371, at 372-373.

42. Moke Ta 'ala [1956] NZLR 474 (NZSCFC on appeal from Samoa).

43. See Heydon, op. cit. n.35 at page 265.

44. Supra, n.42, at page 481.

45. R v Prater [1960], 1 All ER 298, at 300 per Edmund-Davies J. See also R v Beck [1982] 1 All ER 807, (C.A.); R v Whitaker (1976) 63 Cr App R 193, (C.A.); 1982 Crim L.R. 586 - 8 (Casenote and comment on R v Beck).

46. Archbold 40th ed, para 401.

47. R v Weightman [1978] 1 NZLR 79; R v MacDonald [1980] 2 NZLR 102(CA); [1983] 1 NZLR 252 (PC).

48. Supra n.8.

49. [1974] 2 All ER 347, at 350.

50. See Cross, op. cit., supra n.5 at page 189.

51. See "The Rape Corroboration Requirement : Repeal Not Reform" 81, Yale L.J. 1345.

52. J.H. Wigmore, Evidence in Trials at Common Law revised by James H. Chadbourne, Little Brown and Co, Boston, 1978, para 2032 et seq, p.331 et seq.

53. Roberts v. State 106 Neb. 362, 367.

54. I.M. Hale, Pleas of the Crown, p.635.

55. See C.B. Cato, "The Need for Reform of the Corroboration Rule in Sexual Offences", [1981] NZLJ 339.

56. Op. cit., n.51 at 1374-5.

57. See Cato, op. cit., n.55, p.341.

58. Court of Appeal (unreported), 1 December 1977.

59. [1979] 2 NZLR 379, at 382-383.

60. See Cato, op. cit., n.55, p.343.

61. R v Arnold [1980] 2 NZLR 117, at 119.

62. See Cross, op. cit., n.5, p.224.

63. R v Parker [1968] NZLR 325.

64. Harper v Whittaker [1921] NZLR 783.

65. Smith v Malley [1950] NZLR 145.

66. Supra, n.64, at page 785, per Salmond J.

A P P E N D I C E S

APPENDIX 1

00. Accomplices - (1) This section applies to all criminal proceedings in which an accomplice of the accused gives evidence for the prosecution.

(2) No corroboration of the evidence given by the accomplice shall be required for the accused to be convicted, and it shall not be necessary for the Judge to give any warning to the jury relating to the absence of corroboration.

(3) In any proceedings to which this section applies that are conducted before a Judge and jury, the Judge shall instruct the jury on the special need for caution in considering the evidence given by the accomplice.

(4) The instruction need not be given in any particular form.

(5) For the purposes of this section, a witness is an accomplice of the accused in each of the following cases:

(a) Where the witness is a party to the offence with which the accused is charged:

(b) Where -

(i) The accused is charged with the theft of any goods; and

(ii) The witness has received those goods in circumstances constituting an offence:

(c) Where -

(i) The accused is charged with receiving any goods in circumstances constituting an offence; and

(ii) The witness stole those goods:

(d) Where -

(i) Evidence of any other offence alleged to have been committed by the accused is admitted against him as similar fact evidence; and

(ii) The witness is a party to that other offence.

(6) In any proceedings to which this section applies, the question whether a witness called by the prosecution is or is not an accomplice is one of fact.

(7) Nothing in this section shall derogate from the provisions of secton 75 (1) (evidence of treason) or section 112 (evidence of perjury, false oath, or false statement) of the Crimes Act 1961.

00. Witnesses having some purpose of their own to serve - Where in any criminal proceedings it appears to the Judge that a witness may have some purpose of his own to serve in giving evidence and that for that reason there is a risk that the witness may give false evidence that is prejudicial to the accused, the Judge shall consider whether or not he should instruct the jury on the need for special caution in considering the evidence given by the witness.

APPENDIX 2

Letter to the Minister of Justice dated 16 May 1983

RE: EVIDENCE LAW REFORM COMMITTEE

SEXUAL OFFENCES - REQUIREMENT FOR CORROBORATION

The Evidence Law Reform Committee has been considering possible changes in the present law relating to the need for corroboration in certain cases. One such case is the evidence of the complainant in sexual cases.

This is an area in which there has been considerable recent public discussion. It is understood that legislation is likely this year in regard to such offences, and the question of the need for corroboration will no doubt be considered.

My Committee has asked me to write to you so that you may be aware of our present views on this issue, and can take these into consideration if any changes are considered desirable before we are able to complete our final report on corroboration generally.

At present it is a requirement of practice that the jury should be directed that it is not safe (or is "dangerous") to convict on the uncorroborated evidence of the complainant, but they may do so if satisfied of its truth.

The present requirement is considered to be unsatisfactory. It requires a direction which to the jury may seem to be self-contradictory. The words "dangerous to convict" are unduly inhibiting both to juries and to the Police in deciding whether they have a case to bring. The Committee would therefore support some change to the present rule.

The Committee would be concerned, however, if the law were to go to the other extreme, and prohibit the judge in all cases from making any comment to the jury on the lack of corroboration. It is important, in all cases, if justice is to be done, that the judge should be free to comment on the evidence and draw to the attention of the jury particular points which merit their careful consideration. These points will vary according to the nature of the evidence and the real issues in the particular case. There will be circumstances from time to time where comment on aspects of a complainant's evidence is appropriate, just as there may be with respect to any other evidence. The extent to which particular evidence is or is not supported by other evidence may also require to be drawn to the jury's attention.

The Committee would favour abolition of the mandatory requirement for a warning to be given of the danger of convicting on the uncorroborated evidence of the complainant. It is of the view that such evidence should be on the same footing as any other evidence. The judge should be free to comment where he considers it appropriate to the particular case, but not required as at present to do so whether appropriate or not. The Committee would be concerned if there were any prohibition on such comment, such as is contained in the Canadian Criminal Code Admendment Act 1982 (see the Rape Study p.144) as this could in some cases lead to wrongful conviction and injustice.

The Committee favours in this respect the approach in section 125 of the Uniform law Conference of Canada Uniform Evidence Act. This proposal applies to all cases and not merely sexual offences. A copy is attached. The Committee suggests that if there is to be legislation at this stage it should be limited to sexual offences, as the Committee has still to give further evidence to the other cases where corroboration is required. Legislation limited to sexual offences, and along the lines of s.125(1) and (2) but stopping at the word "necessary" and omitting the subparagraphs, would accord with the present thinking of the Committee.

> '125. No corroboration or warning. (1) Subject to subsection (2), no corroboration of evidence is required and no warning concerning the danger of acting on uncorroborated evidence shall be given in any proceeding.
>
> (2) The court shall instruct the trier of fact on the special need for caution in any case in which it considers that an instruction is necessary ...'

The Committee will be following the usual practice of preparing and circulating a working paper for discussion and comment before reaching any final conclusions. In view of the possibility of early legislation affecting the particular case, however, it was felt desirable that I should acquaint you of our present views.

Yours sincerely

I.L. McKay
Chairman, Evidence
Law Reform Committee

APPENDIX 3

Extract from Introduction copy of the Rape Law Reform Bill (1984)

23AA Corroboration in sexual cases - (1) where any person is tried for an offence against any of sections 128 to 144 of the Crimes Act 1961 or for any other offence against the person of a sexual nature, no corroboration of the complainant's evidence shall be required for that person to be convicted and it shall not be necessary in any such case for the Judge to give any warning to the jury relating to the absence of corroboration.

(2) Nothing in subsection (1) of this section shall limit the judge's discretion to give such directions to the jury, and to make such comments on the evidence, as he thinks appropriate in the particular case; but if he decided to comment on the absence of corroboration he shall not use words to the effect that it is unsafe or dangerous to convict on the uncorroborated evidence of the complainant.

23AB Delay in making complaint in sexual cases - Where, during the trial of any person for an offence against any of sectiosn 128 to 144 of the Crimes Act 1961 or for any other offence against the person of a sexual nature, evidence is given or a question is asked of a witness tthat tends to suggest an absence of complaint in respect of the alleged offence by the person upon whom the offence is alleged to have been committed, or to suggest delay by that person in making any such complaint, the Judge may tell the jury that there may be good reasons why the victim of such an offence may refrain from or delay in making such a comment.

APPENDIX 4

Submission of the Evidence Law Reform Committee on the Rape Law Reform Bill provisions dealing with corroboration in sexual cases:

RE :EVIDENCE LAW REFORM COMMITTEE - RAPE LAW REFORM BILL

At the recent meeting of the Evidence Law Reform Committee I was asked to convey to you our views on the provisions in the above Bill relating to corroboration in sexual cases. You may consider it appropriate to pass these views on to the Select Committee.

Clause 23AA of the Bill is very much in line with our views as conveyed to you in my letter of 13 May last. The clause makes it clear that corroboration is not required as a prerequisite to conviction and it abolishes the rule of practice requiring that the jury be warned tht it is unsafe or dangerous to convict on uncorroborated evidence. The clause also recognises the point made in my letter that the jduge must be free in such cases, as in all cases, to make such comments on the evidence as he considers appropriate in the particular circumstances.

We do urge, however, that the clause should stop at this point. This would involve the deletion of the further words:

> "but if he decides to comment on the absence of corroboration he shall not use the words to the effect that it is unsafe or dangerous to convict on the uncorroborated evidence of the complainant."

We recognise the intention of these words, which we assume is to bury for all time the unsatisfactory formulae to which they refer. With this object we are in complete sympathy.

In our view, however, the additional words are both unnecessary and themselves dangerous.

We believe they are unnecessary because all our information suggests that judges have been dissatisfied with the formulae "unsafe to convict" or "dangerous to convict" and will readily drop them if subclause (1) is enacted. There is no need to add the specific prohibition of these words.

We believe the concluding words of subclause (2) are dangerous for two reasons.

The first is that they are an attempt to control by legislation the precise choice of language which a judge may use in his summing up. This is surely a matter which should be left to the discretion of the judge in the particular case. It is impossible for legislation to deal adequately with the multiplicity of

situations which can arise. There may well be cases in which the only evidence is so vague or unimpressive or so shaken by cross-examination that it would be quite wrong not to draw the jury's attention to the fact that that evidence stands alone, i.e. is uncorroborated, and to comment in very strong terms on the danger of relying on it.

Secondly, the concluding words prohibit not only the use of the words "unsafe to convict" or "dangerous to convict", but words "to the effect" of those phrases. It would be idle to prohibit specific words and leave the judge free to say the same thing in other words. In the form proposed, however, the prohibition is so wide as to make it almost impossible for the judge to make any appropriate comment, even in the extreme cases where some comment should be made in the interests of justice. While the existing rule of practice results in confusion in the minds of jurors and acquittals in some cases where convictions would be appropriate, it is important not to go to the other extreme and convict the innocent.

We feel that subclause (1) will adequately achieve the first objective and overcome the present shortcomings in the law, and that the first part of subclause (2) will provide an adequate safeguard for a person who is wrongly accused. The concluding portion of subclause (2) is unnecessary for the first of these objectives, and runs counter to the second.

The Committee also considered clause 23AB of the Bill which deals with delay in the making of a complaint in sexual cases. The Committee fully supports clause 23AB in the form in which it has been drafted.

This letter has been drafted subsequent to the Committee's meeting, but has been circulated to all members of the Committee for their approval before being sent to you.

Yours faithfully

I.L. McKay
Chairman
Evidence Law Reform Committee