

THE JERSEY LAW COMMISSION



CONSULTATION PAPER

CORROBORATION OF EVIDENCE IN CRIMINAL TRIALS

The Jersey Law Commission was set up by a Proposition laid before the States of Jersey and approved by the States Assembly on 30 July 1996.

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CONTENTS

1	The present state of the law in Jersey	4
2	The standard corroboration direction.....	4
3	The rationale for the practice	6
4	The nature of corroboration	7
5	Procedure	7
6	Criticism of the present corroboration rules	9
7	Justification for retention of the rules	10
8	Practice in other jurisdictions.....	11
9	Our provisional conclusion.....	12

CORROBORATION OF EVIDENCE IN CRIMINAL TRIALS

The Jersey Law Commission have been asked to consider whether or not the current practice of requiring the trial judge to warn the jury, in cases involving sexual offences, of the need to look for corroboration of the evidence of the complainant should be abolished or altered. The request followed the resignation as Minister for Home Affairs of Senator Wendy Kinnard, who stated as her reason for resignation the fact that the Council of Ministers were unwilling to accept a recommendation from the Department for Home Affairs that the requirement for a corroboration warning should be abolished. The Chief Minister referred the recommendation to the Jersey Law Commission with a request that the Commission report back at the earliest opportunity. Given the request that we treat this paper as an urgent matter we have not had the opportunity to carry out any significant prior consultation, in particular in relation to practitioners' experience of the operation of the corroboration warning but, in accordance with our usual practice, there will be the opportunity for interested parties to express views on this paper prior to the preparation of our final report.

1 The present state of the law in Jersey

It is a long standing policy and practice of the Jersey Courts that in cases involving alleged sexual offences a corroboration direction must be given¹. The direction is given by the trial judge to the jury, where the offence charged arises from the common law, or to the jurors, where it is a statutory offence. Offences such as indecent assault and rape are common law offences and thus trials in respect of such offences are ordinarily conducted with a jury.

2 The standard corroboration direction

In *Ferreira V Attorney General*² the Jersey Court of Appeal approved, for use by the judges of the Jersey Courts, the standard direction on corroboration recommended by the Judicial Studies Board of England and Wales in June 1991, which reads as follows:-

¹ See *Vibert v Attorney General* [1991] JLR 247 CA ; *Halley v Attorney General* 1996 unreported [CA]

² [2003] JLR note 3; [2003 JCA 011]

“Experience has shown that people who say that sexual offences have been committed against them sometimes, and for a variety of reasons, tell lies. Such false allegations are easy to make and frequently very difficult to challenge, even by an entirely innocent person. So it is dangerous to convict on the evidence of the complainant alone unless it is corroborated, that is independently confirmed by other evidence.

Corroboration is independent evidence, that is evidence which does not come from [X] [the complainant] which confirms in some important respect not only the evidence that the crime has been committed but also that the defendant committed it.

I say “confirms in some important respect” because it is not necessary that there should be independent evidence of everything [X] has told you.

[It is for me to point out to you the evidence which, if you accept it, is capable of independently confirming [X’s] evidence. I shall do that later in this summing up. But it is for you to decide whether it does, in fact, provide independent confirmation of [X’s] evidence].

[It would be for me to point out to you the evidence which, if you accepted it, would be capable of independently confirming [X’s] evidence but there is none].

Nevertheless, [even if your view is that ‘s evidence is not independently confirmed] [despite the absence of independent confirmation], and providing you bear in mind the danger of convicting without it, you may rely upon’s evidence if you are sure [he] [she] is telling the truth”.

It should be noted that the standard warning does not direct the jury that they cannot convict in the absence of corroboration, merely that they should be aware of the danger of convicting solely on the evidence of the complainant. Furthermore it should also be remembered that the burden of proof in a criminal case remains with the prosecution, who must prove the case against the accused beyond reasonable doubt.

3 The rationale for the practice

Whilst no doubt many people will appreciate the sentiment expressed in the first two lines of the standard direction we believe that many would be surprised to learn that as late as 1968 the standard direction under English Law was apparently based upon the alleged characteristics of women and girls in general, the English direction then stating that “human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is easy to fabricate, and extremely difficult to refute”.³

A requirement for corroboration is not confined to cases involving sexual offences. For example, where a young witness is giving evidence it is within the discretion of the trial judge to give the jury a direction warning them of the danger of convicting on the evidence of such a child without corroborative evidence. However the age above which it becomes unnecessary for a judge to give a corroboration warning is a matter within the discretion of the trial judge⁴.

Similarly, a corroboration warning is required in relation to the evidence of an accomplice⁵. Accomplices who are parties to the offence charged are incapable of corroborating one another⁶.

Pursuant to Article 21 (5) of the Road Traffic (Jersey) Law 1956 a person prosecuted for speeding in a motor vehicle is not liable to be convicted solely on the evidence of one witness to the effect that in the opinion of the witness the person prosecuted was driving the vehicle at a speed exceeding the speed limit.

We are however confining ourselves in this paper to the need for corroboration in cases of a sexual nature.

³ Henry [1968] 53 CR.APP.R.150, 153.

⁴ See *Vibert v Attorney General* [1991] JLR 257

⁵ *Attorney General v Evans* [CA] 1965 JJ527

⁶ *Kilbourne* [1973] AC 729

4 The nature of corroboration

In *Attorney General v. Evans*⁷ the Jersey Court of Appeal cited with approval the judgment of the English Court of Appeal in *R. v. Clynes*⁸ where the court stated that “it is quite true that in this court it has been laid down that a Judge is not obliged to draw the jury’s attention to specific items of evidence which may or may not be corroboration, but it is, in our view, at least necessary, in order to make the warning intelligible, to tell the jury what is meant by corroboration. No particular language is necessary to describe it, but it is at least necessary to explain to the jury that what is required is some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence”.

Accordingly corroboration must be a) independent and b) implicate the accused.

It has been held in Jersey that although if the accused lies on oath this may be corroboration this is not always the case given that there could many explanations for a lie and that a careful direction to the jury is required.⁹ English cases have held that the lie in question must relate to the offence in question and that evidence proving the accused to be generally untruthful cannot constitute corroboration¹⁰.

In the case of sexual offences the distressed condition of the complainant after an alleged rape is regarded by the Jersey courts as being capable of amounting to corroboration of her evidence, although much will depend on the precise circumstances and it may be of little weight if it is effectively part of the complaint itself.¹¹ It will be necessary in such a case for the trial judge adequately to direct the Jury that it must be certain that the complainant’s distress was genuine.

5 Procedure

In a criminal trial the question whether particular evidence is capable of amounting to corroboration is a matter of law to be decided by the judge and he must explain to the

⁷ *Supra*

⁸ [1960] 44CR.APP. R.158 at page 161

⁹ *Attorney General V Smith* [CA] 1968 JJ937

¹⁰ West (1983) 79 Cr.App. R 45

¹¹ *Halley v. Attorney General* [CA] 1996 JLR note 11b

jury what corroboration is. However the question as to whether an item of evidence is actually corroborative is one that must be left to the jury. Indeed, it has been held by the English Court of Appeal that it is improper for the judge to direct the jury that as a matter of law corroboration exists¹².

In a simple trial involving one defendant the corroboration requirement may not present much difficulty. However in a trial involving multiple defendants, some of whom may be accomplices, matters may become more complicated, the judge having to explain to the jury firstly what is meant by accomplice so that they can decide whether a particular witness is an accomplice (which would mean that his evidence cannot corroborate that of another accomplice) and the jury would then have to consider whether particular evidence is or is not corroborative. Not only may this present the trial judge with difficulties of formulation but it may also provide the jury with a complex decision making process. These difficulties were well expressed by Lord Ackner in the English case of *Spencer*¹³:

" where there is no corroboration the rule of practice merely requires that the jury should be warned of the danger of relying upon the sole evidence of an accomplice or of the complainant in the sexual case....The warning to be sufficient must explain why it is dangerous so to act, since otherwise the warning will lack significance. The jury are, of course, told that while as a general rule it is dangerous so to act, they are at liberty to do so if they feel sure that the uncorroborated witness is telling the truth. Where, however, there is evidence before the jury which they can properly consider corroborative evidence the position becomes less simple. The trial judge has the added obligation of identifying such material, and explaining to the jury that it is for them to decide whether to treat such evidence as corroboration. He should further warn them against treating as potential corroborative evidence, that which may appear to them to be such, but which is not so in law, e.g. evidence of a recent complaint in a sexual offence. Moreover where the prosecution are relying, as potential corroborative material, on lies alleged to have been told by the accused, a particularly careful direction is needed. A special direction is also often needed where evidence of complainant's distress is relied upon by the prosecution in sexual cases as potentially

¹² *Tragen* [1956] Crim LR 332

¹³ [1987] AC 128

corroborative material. The trial judge has further the additional obligation of directing the jury that accomplices, who are parties to the same charge, cannot corroborate each other".

If the trial judge fails to direct the jury properly in relation to corroboration it is likely that any subsequent conviction will be set aside on appeal.

6 Criticism of the present corroboration rules

The English Law Commission, in a Working Paper¹⁴ and subsequent Report¹⁵ (and to which we are indebted for having assisted us with our analysis of the issues) considered the then English rules which, to a large extent mirror the current rules in Jersey. They noted that there were two main criticisms of the rules. Firstly that the rules, and the practice that had followed, impose on the courts an excessively complicated and over-elaborate duty, and are inappropriate for the task that they are supposed to perform of protecting the accused from the danger of the juries being misled by unreliable evidence. Secondly, that it was questionable whether the evidence of complainants in sexual cases has such particular characteristics that the trial judge should be obliged to apply the rules to every case falling within that category, without regard to his judgment of the actual needs of the case or of the reliability of the particular witness or evidence.

The English Law Commission concluded that the rules were unduly inflexible and complex, to the extent of making it extremely difficult for the judge to give the jury proper help in his summing up, that they produced a substantial number of anomalies and that in some cases, far from achieving their object of providing additional protection for the accused, they might operate to his detriment. They also concluded that there was no good reason for treating the evidence of all complainants in sexual cases in exactly the same way, as the rules required.

It has also been suggested that the use of the words "dangerous to convict" in the standard wording may be likely to be interpreted by juries as a direction to acquit¹⁶.

¹⁴ No.115

¹⁵ No.202

¹⁶ Victorian Law Commission Interim Report on Sexual Offences, Recommendation 42

Whilst criticism of the rules often focuses on the difficulties that they may present in securing a conviction it is also fair to point out that they may operate to the disadvantage of the accused. This was explained by Lord Diplock in *Hester*¹⁷ as follows :

"...to incorporate in the summing up a general disquisition upon the law of corroboration in the sort of language used by lawyers may make the summing up immune to appeal upon 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."

7 Justification for retention of the rules

The common justification for retention of the rule is that expressed in the opening words of the corroboration warning itself, to the effect that there is a danger that the complainant in a case of a sexual nature may have made the accusation up, whether because of jealousy, fantasy, spite or her (or, of course, his) refusal to admit that she consented to an act of which she is now ashamed. However there appears to be no empirical evidence to support the assertion that such a danger is more present in sexual cases than in others. Similarly whilst there may be circumstances in which an accusation of a sexual assault is easy to make but difficult to refute that is not the case with all offences of a sexual nature and it may equally be the case with other offences which have no sexual content.

There are very few reported Jersey cases concerning corroboration and we have no empirical evidence as to whether or not the rules have caused difficulties either for the prosecution or defence in this jurisdiction. However we note that in the appeal in *Ferreira v. Attorney General*¹⁸, where the trial judge had failed to give the jury the standard corroboration warning, counsel for the Crown suggested that the Court of Appeal should take the opportunity to hold that a corroboration direction was no

¹⁷ [1973] AC 296

¹⁸ *Supra*

longer a requirement of Jersey common law. The Court of Appeal refused, stating that "This Court should hesitate long before undertaking the abolition of the requirement. It is for the States of Jersey to move to abolition by enactment if the States were to consider that step desirable in the public interest, after a full investigation of the rival arguments for retention and for abolition. It is our judgment that (i) the arguments deployed by the (English) Law Commission are not strongly persuasive; (ii) there is a not inconsiderable argument for the position in Scots law which requires corroboration of the commission of all criminal offences (save for some statutory exceptions); and (iii) we have not been provided with sufficient information to form any view in favour of abolition." In the circumstances of that particular case the Court of Appeal found that there had been a miscarriage of justice and set aside the conviction.

8 Practice in other jurisdictions

Following the recommendations of the English Law Commission the requirement for a corroboration warning in cases involving sexual offences was abolished in England and Wales by the Criminal Justice and Public Order Act 1994. They have also been abolished in Hong Kong, Canada, New Zealand and Australia. As noted above, Scotland retains its corroboration requirement.

A study published by the Australian Centre for the Study of Sexual Assault in June 2005 suggested that the abolition of the requirement to give a corroboration warning has not been universally effective in Australia. Notwithstanding that the Australian High Court had stated definitively that sexual assault complainants were not to be seen as especially untrustworthy, judicial statements casting doubt on the reliability of victim-complainant witnesses continued. When the corroboration warning remained discretionary in the State of Victoria studies suggested that such warnings were being given in circumstances where they were unnecessary. Similarly in New South Wales corroboration warnings were given in 40% of cases despite the Australian High Court having overruled warnings suggesting that sexual offence complainants should be regarded as a suspect class of witnesses. Proposals for reform in Australia have suggested that legislative guidance should be given as to when corroboration warnings will be required and propose mandatory instructions to the jury. The

solution proposed by the State of Victoria Law Commission is to prohibit the judge from warning, or suggesting in any way to, the jury that the law regards complainants in sexual offence cases as an unreliable class of witness and further prohibiting the judge from warning, or suggesting in any way to, the jury that it is dangerous or unsafe to convict the accused unless satisfied that : (i) there is evidence that the accused has in fact suffered some specific forensic disadvantage due to a substantial delay in reporting; or (ii) there is evidence that the accused has in fact been prejudiced as a result of other circumstances in the particular case¹⁹.

9 Our provisional conclusion

In the light of the above we have provisionally concluded that the mandatory requirement for the corroboration warning in relation to offences of a sexual nature and the rules of practice that have been adopted in conjunction with it should be abolished. We have considered whether or not to recommend that the judge is instead given discretion to issue a corroboration warning in cases where he feels it appropriate to do so. However experience in Australia suggests that if such a recommendation were to be implemented the existing practice in terms of the form of direction to the jury would in all probability be maintained, with the consequent detrimental consequences to which we refer in this paper. This could however be remedied by appropriate legislation and we feel that the recommendation of the State of Victoria Law Commission, referred to in the preceding paragraph, has much to commend it.

¹⁹ see Victorian Law Commission , Final Report on Sexual Offences (2004), Chapter 7

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