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*Jun. 4
*Jun. 30

GORDON E. THOMAS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Corroboration—Rape—Complaint—Evidence.

The appellant, charged with rape, admitted that he had had intercourse with the complainant, but swore that it had been with her consent, which she denied saying that she had only submitted to it in fear of bodily harm. His conviction was upheld by the Court of Appeal for Ontario.

Held: There should be a new trial; since the jury had not been properly instructed on the question of corroboration and as to the limited use that may be made of the evidence of complaint, it was impossible to say that if it had been properly instructed it would necessarily have convicted the appellant.

Held: The corroboration to be sought was of the complainant's testimony that she did not consent but only submitted in fear of bodily harm. In a case of this sort, when there is any evidence on which a jury could find corroboration, the jury should be directed as to what is necessary to constitute corroboration and it is then for the jury to say whether corroborative inferences should be drawn. It was not, in the present case, made plain to the jury (i) that corroboration could be found only in evidence independent of the testimony of the complainant and of such a character that it tended to show that her story on the vital question of consent was true, and (ii) that facts, though independently established, could not amount to corroboration if, in the view of the jury, they were equally consistent with the truth as with the falsity of her story on this point.

Held: It was not made clear to the jury that in a case where a sexual offence is charged, evidence of the making of a complaint is not corroborative of the testimony of the complainant. Where corroboration is required either by statute or under the rule of practice at common law, the corroborative evidence must be shown to possess the essential quality of independence. It must be made plain to the jury that the witness whose testimony requires corroboration can not corroborate herself. (*Rex* v. *Auger* 64 O.L.R. 181 and *Rex* v. *Calhoun* [1949] O.R. 180 ought not to be followed on that point).

Held: There was failure to instruct the jury of the limited use that may be made of the evidence of the complaint and to warn them against treating the complaint as evidence of the facts complained of.

The King v. *Baskerville* [1916] 2 K.B. 658; *The Queen* v. *Lillyman* (1896) 2 Q.B. 167; *Rex* v. *Evans* 18 C.A.R. 123; *Rex* v. *Coulthread* 24 C.A.R. and *Rex* v. *Whitehead* [1929] 1 K.B. 99 referred to.

APPEAL from the judgment of the Court of Appeal for Ontario (1) upholding the conviction of the appellant on a charge of rape.

*PRESENT: Kerwin, Taschereau, Kellock, Locke and Cartwright JJ.

(1) 100 Can. C.C. 112.

A. E. Maloney for the appellant. On the first question, it is a fatal error to fail to define corroboration to a jury in a case of this nature since there is a danger that the jury might well have regarded some item of evidence as being corroborative which is not capable of being such in law: *Rex* v. *Zielinski* (1), *Rex* v. *Yott* (2) and *Rex* v. *Hong Suey* (3).

In connection with some of the matters which the jury might have regarded as corroborative but which are not capable of being so in law, the following cases are referred to: *Rex* v. *Hubin* (4), *Rex* v. *Yates* (5), *Rex* v. *Gemmill* (6).

It is no answer to this contention to say that there is otherwise in the record ample evidence capable of corroborating the evidence of the complainant, because the jury might well have failed to regard it as such and might not have seen fit to act upon it: *Rex* v. *Ross* (7), *Rex* v. *Hubin* (*supra*).

On the second question, it is submitted that due to the failure to define corroboration, it might well be that the jury may have regarded the complaint to the husband as being corroboration of her testimony. A complaint made in a sexual case is not capable in law of being corroboration, which term is defined in *Rex* v. *Baskerville* (8). It is not corroboration because it lacks the essential quality of independence. It must serve to confirm not only that a crime has been committed but also the identity of the accused as the person who committed it. Independent means that it must emanate from some source other than the complainant or the witness whose testimony requires corroboration. Thus in a case of rape where the defence is consent, the offender's admission that he had carnal connection is sufficient corroboration of the complainant's testimony identifying the accused as the person with whom she had relations. However, it then becomes necessary to search the record for independent evidence to corroborate her testimony of non-consent. The following cases are

(1) 34 C.A.R. 193.
(2) 85 Can. C.C. 19.
(3) 96 Can. C.C. 346.
(4) 48 Can. C.C. 179.
(5) 85 Can. C.C. 334.
(6) 43 Can. C.C. 360.
(7) 18 C.A.R. 141.
(8) 12 C.A.R. 81.

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referred to: *Rex* v. *Evans* (1), *Rex* v. *Coulthread* (2), *Rex* v. *Whitehead* (3), *Rex* v. *Osborne* (4), *Reg.* v. *Lillyman* (5) and *Rex* v. *Lovell* (6).

Because of the completely inadequate directions on the third question, it may well be that the jury wrongly thought that they could regard the complaint as evidence of the truth of the facts it contained: *Reg.* v. *Lillyman* (*supra*), *Rex* v. *Osborne* (*supra*) and *Rex* v. *Hill* (7).

W. B. Common Q.C. for the respondent. The failure of the trial judge to define corroboration could have had no practical result. The term as understood by laymen is self-explanatory. Reference by the judge to all the circumstances in the evidence, which in law were corroboration of non-consent, had the same effect as if he had in fact defined the term. In the light of the evidence and the manner in which the evidence of non-consent was left to the jury, it cannot be said, that, had the term been exhaustively defined the jury could not have reached the same conclusion: *Rex* v. *Coulthread* (2) and *Rex* v. *Zielenski* (8).

It is a well established principle of law that in cases involving a charge of rape, the evidence of complaint is not evidence of the facts complained of, nor as being a part of the *res gestae,* but as evidence of the consistency of the conduct of the complainant with the story told by her in the witness box, and that what was done, was done without her consent. It has been said that evidence of a complaint is corroboration of the credibility of the complainant and where consent is an issue it is corroborative of her evidence that she did not consent: *Rex* v. *Osborne* (4). It must be noted that nowhere does the trial judge categorically instruct the jury that the evidence of complaint is to be treated by them as corroboration of her story, or even as to her non-consent; furthermore, no proper inference can be drawn from the charge that the complaint can be treated by the jury as corroboration of all the evidence of the complainant. If, however, it might

(1) 18 C.A.R. 123.
(2) 24 C.A.R. 44.
(3) [1929] 1 K.B. 99.
(4) [1905] 1 K.B. 551.
(5) (1896) 2 Q.B. 167.
(6) 17 C.A.R. 168.
(7) 49 Can. C.C. 161.
(8) 34 C.A.R. 193.

be inferred that the judge had left it to the jury that the complaint could be treated as corroboration of her evidence and as to her non-consent, it was only in a limited sense that the term was so used.

The term "corroboration" as defined in *Rex* v. *Baskerville* (1) has not necessarily the same implications when used in connection with the effect of the evidence of a complaint in cases of rape. In cases requiring corroboration by statute or common law, the term implies that not only was there evidence tending to prove that the crime was committed, but in addition, that it was committed by the accused or that the accused was a party to its commission. In the wide sense of the term, corroboration connotes an aspect or quality of independence, but where the term is used in relation that the complaint is in corroboration of the complainant's testimony, it simply means that the complaint not only shows a consistency of conduct, but it may confirm her evidence as to non-consent. The quality of independence, of course, cannot be established, and consequently it is in this limited sense that the evidence of complaint by its very nature confirms or corroborates the credibility of the complainant and her evidence as to non-consent.

When the term in this sense is used it means that the complaint adds an additional quality to the character of the complainant's evidence, and consequently her evidence is more worthy of credit than if her testimony stood alone. In this sense the complaint is corroboration.

In *The Queen* v. *Lillyman* (2), it was put that the test is whether according to the principles of the exception, her having made the complaint tends to corroborate testimony given by the child at the trial.

In our Courts it has been held that it is not misdirection to the jury in a rape case to tell them that the complaint may be taken as evidence negativing consent and in corroboration of its absence: *Rex* v. *Calhoun* (3) and *Rex* v. *Auger* (4).

(1) 12 C.A.R. 81.
(2) (1896) 2 Q.B. 167.
(3) 93 Can. C.C. 289.
(4) 64 O.L.R. 181.

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In *Rex* v. *Coulthread* (1), the term was used in its widest sense, and left the impression with the jury that the complaint was independent testimony that not only that the offence had been committed but that the accused had committed it. No such language is to be found in the case at bar.

It is conceded that the trial judge omitted to instruct the jury on the limited use that could be made of the complaint and that the complaint should not be regarded as proof of the facts it contained, but what he did say could not be interpreted that they were to take it as conclusive evidence that the offence had been commited by the accused or that there was non-consent. The language can only be interpreted as conveying that a complaint in proper circumstances gives "greater probability" to her evidence or corroborates or confirms her credibility as to non-consent. However, on this ground, had the jury been properly instructed, they could have reached no other conclusion. *Rex* v. *Coulthread* (*supra*).

Furthermore, on the facts as disclosed by the evidence, and on the charge taken as a whole, there has been no substantial wrong or miscarriage of justice.

The judgment of the Court was delivered by:—

CARTWRIGHT J.—This is an appeal from a judgment of the Court of Appeal for Ontario (2) dismissing an appeal from the conviction of the appellant before Treleaven J. and a jury on a charge of rape.

The appeal is brought pursuant to an order of my brother Kellock granting leave to appeal on the following questions of law:—

1. The Court of Appeal erred in failing to find that the learned trial judge had erred in failing to define corroboration to the jury.

2. The Court of Appeal erred in failing to find that the complaint made by the complainant in this case as in any sexual case is not capable as a matter of law of being corroborative of the complainant's testimony because it lacks the essential quality of independence.

3. The Court of Appeal erred in failing to find that the learned trial judge had erred in failing to instruct the jury of the limited use that could be made of the evidence of the complaint made by complainant to her husband and particularly he erred in failing to instruct the jury that the complaint must not under any circumstances be regarded by them as proof of the truth of the facts it contained.

(1) 24 C.A.R. 44. (2) 100 Can. C.C. 112.

The following summary of the evidence is taken with some modifications and additions from the reasons for judgment of Roach J.A. who delivered the unanimous judgment of the Court of Appeal (1).

The appellant is unmarried and twenty-one years of age. The complainant is a married woman, thirty-five years of age, living with her husband and three children in the city of Hamilton.

In the evening of Tuesday, October 24, 1950, the complainant, accompanied by a woman friend, attended a theatre in downtown Hamilton. After the show they went to a cocktail lounge, where they had something to eat and the complainant had two drinks of whiskey. After leaving the cocktail lounge about 12.45 o'clock, the friend boarded a bus to go home and the complainant waited on the street corner for a bus that would take her to her home. The appellant, driving his father's car, came to the corner and, seeing the complainant, stopped and beckoned to her and suggested he would drive her home. The complainant at first demurred but shortly accepted the invitation and entered the car. The appellant drove her to the front of her home, where he stopped. According to the complainant, she sought to leave the car promptly but the appellant suggested there was no hurry, grabbed her by the wrist and set the car in motion. As the car rounded the nearby corner, she screamed, leaned over and blew the horn with her free hand, and then grabbed the steering wheel. In the scuffle, the car went up over a neighbour's lawn. The appellant straightened it out onto the highway and drove at a considerable speed along a course that finally led to a lonesome section on the Hamilton Mountain. During the journey, according to the complainant, she protested that she wanted to go home and she started to cry. The appellant told her to stop crying and sit still. The car was travelling at such a speed that she was afraid to jump out.

The complainant testified that when the appellant finally stopped the car, she said that she was going to get out and attempted to open the door. Thereupon the appellant grabbed her and pulled her toward him. According to her, she pulled his hair and bit his face, and he then

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swore at her and said "I'll fix you", grabbed her by the throat with one hand and started to choke her. She pleaded with him, and finally he released his grasp upon her throat and made it plain that he intended to have sexual intercourse with her. By that time she was terrified and yielded in fear of further violence saying to him "I guess I have no choice".

When the act was completed the appellant drove her home, stopping the car at her request at a well-lighted intersection two and a half blocks from her house. The complainant stated that when he stopped the car, or shortly before he stopped it, he turned out the lights but this the appellant denied. As she left the car, she attempted to get the number of the license but succeeded in getting only some of the digits in it.

When the complainant entered her home her husband, although in bed, was still awake. The husband testified, that the complainant was sobbing, her hair was disarrayed, her dress was askew, there were two small scratches on her chest and her throat was very red from ear to ear. He asked her "What is the trouble?" to which she replied "I have just got myself in a jam". He then said "What has happened?" to which she replied "A young chap picked me up and brought me home and he then started up in his car quick and took me out in the outskirts of the city and I have been raped."

The appellant, in his evidence, admitted that the complainant had grabbed the steering wheel of the car as he was first leaving her home. He admitted that when they arrived at the lonely spot on the mountainside, he made it plain that he desired to have sexual intercourse with her. He testified that at first she faintly demurred and he possibly used some bad language toward her, but that she finally agreed and that the act took place with her full consent and co-operation. He denied using either threats or violence.

There was some conflict of evidence as to what conversation occurred between the time when the complainant said "I guess I have no choice" and the completion of the act of intercourse. She admits having said to the appellant "You seem to have a lot of experience". He deposed that he had asked her whether he should use a contraceptive

and that she said "No". The complainant was called in reply and asked whether any conversation such as that last mentioned took place. Her reply was "No, I don't recall any".

On Wednesday, October 25, according to the complainant's husband, instead of communicating with the police, he started out himself to try to locate the car, part of the license number and the description of which his wife had given him. He was unsuccessful.

On Thursday, October 26, the husband and wife were in downtown Hamilton together, shortly after the noon hour, and, by coincidence, the wife saw the appellant on the street and pointed him out to her husband. Together they approached the appellant. Some conversation took place between the husband and the appellant, during which the latter denied ever having seen the complainant. The appellant stated, among other things, that Police Constable Larson could account for his whereabouts on the Tuesday night, and the husband and wife and the appellant started for the police station. On the way, a police cruiser, in which were Police Constable Larson and another officer, drove along and stopped, and the husband entered into a discussion with them that resulted finally in the three of them getting into the cruiser with the police constables to go to a parking lot where the appellant said his father usually parked his car. In the parking lot, the complainant identified a car as being the one in which she had been driven and the appellant admitted it was the one he was driving on the night in question.

The appellant was then taken in custody to the police station. There, after a caution was administered to him, he made a statement in which he stated where he had been and what he had been doing from about 3.00 o'clock on the afternoon of Tuesday, October 24, until he went to bed at his home shortly after midnight. This statement contained no reference to his meeting with the complainant or being in her company. It was reduced to writing and signed by the appellant.

After about two hours further interrogation by the police, which further interrogation, according to the evidence of the police constables, was prompted by the fact that they did not believe what the appellant had said in his

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first statement, the appellant made another statement in which he did account for his meeting with the complainant on the street corner, their drive, first to the front of her home, and later to the lonely spot where he had sexual intercourse with her with her consent. Both these statements were admitted in evidence at the trial. I, of course, express no opinion as to whether or not they would be admissible at a new trial as that question is not before us.

In August 1949 the complainant had undergone a hysterectomy. She had recovered her normal health but testified that she could not become pregnant.

From the above recital it at once becomes obvious that the appellant had carnal knowledge of the complainant at the time and place alleged by the Crown and that the only substantial question before the jury was whether this was done either without her consent or with consent which had been extorted by threats or fear of bodily harm.

The only portion of the charge of the learned trial judge which is relevant to any of the three points before us is as follows:—

> There are two other principles of law applicable to a case of this kind which I must mention to you. One is that it is dangerous to convict in a case of this kind on the uncorroborated evidence of the complainant. Now, when I say it is dangerous, that is what I mean. If you are satisfied of the truth of the story of the complainant, and do not believe the story of the accused, you may, notwithstanding corroboration or lack of it, make your finding accordingly; but for a long time it has been considered dangerous to convict on uncorroborated evidence. Of course, I am not saying that in this case there is not corroboration, and I will mention what is brought forward here as corroboration in a moment when I come to deal with the evidence. There is corroboration as to the identity of the accused, because he admits the carnal knowledge; there is no difficulty there; but on the question of corroboration as to whether there was consent or not, there is evidence—it is for you to say what weight you give to it, and if you believe it—the redness of the neck, the scratches on the chest, the dishevelled condition of the clothes, the sobbing of the wife when she got home, the mark or marks on her wrist—depending, of course, gentlemen, on what you believe about it, but there is evidence which if you believe it to be true I would think you might accept as corroboration of her story.
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> One other thing: It is the duty of a woman who has been sexually attacked, raped or attempted rape, to complain of the offence at the first reasonable opportunity. Unless it is the first reasonable opportunity, probably the evidence would not be admitted at all as a matter of law, but here, if you accept the evidence, the complainant as soon as she got home told her husband that she had been raped, and he saw the marks on her neck and chest and I think at that time her wrist. But there is

the evidence which is before you for consideration as to whether she complained at the first reasonable opportunity or not. The weight to be attached to it, gentlemen, is for you.

It will be convenient to deal with the grounds of appeal in the order set out above.

As to the first point, it is a well settled rule of practice at common law that in cases of rape while the jury may convict on the uncorroborated evidence of the prosecutrix the judge must warn them that it is dangerous to do so and may in his discretion advise them not to do so. In the case at bar no exception is taken to the manner in which the learned trial judge warned the jury of this danger. What is complained of is his failure to explain to them what is meant by the term corroboration. In my opinion this ground is well taken. I do not think it necessary to refer to authorities other than the classic statement of the Court of Criminal Appeal in *The King* 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. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The language of the statute, "implicates the accused", compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.
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> The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

This decision has been repeatedly approved and acted upon by this Court. See, for example, *Hubin* v. *The King* (2), particularly at page 444 and *MacDonald* v. *The King* (3).

(1) (1916) 2 K.B. 658 at 667. (2) [1927] S.C.R. 442.
(3) [1947] S.C.R. 90 at 96, 97.

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not the correct view. When, for example, the words are used, as they are at page 561 of the report, "corroborative of the complainant's credibility", nothing more is really meant than what is spoken of in *Lillyman* in the words: "The consistency of the conduct of the prosecutrix with the story told by her in the witness box."

It is to be observed that in *Rex* v. *Osborne* (*supra*) the question whether the evidence of complaint was capable of being treated as corroboration of the complainant's testimony did not arise and was not decided. As appears at page 553 of the report the chairman had told the jury that the only corroboration of the girl's story was the statement of the prisoner at the police station.

If and in so far as the judgment of Middleton J.A. in *Rex* v. *Auger* (1), and particularly at page 184, decides that evidence of a complaint is corroborative of the complainant's testimony in the sense in which the word is used in *The King* v. *Baskerville* or that evidence which would not serve as corroboration in a case where corroboration is required by statute might do so in cases falling within the rule of practice at common law, it is at variance with the judgment in Baskerville and ought not to be followed.

I venture to think that the difficulty in reconciling the statements in some of the decisions arises from the fact that, in common parlance, the word "corroborate" has not a single or precise meaning. Since the decision in *Baskerville,* and its approval and adoption in this Court referred to above, it is no longer open to doubt that before evidence can be properly described as corroborative in cases where corroboration is required either by statute or under the rule of practice at common law it must be shewn to possess the essential quality of independence. It must be made plain to the jury that the witness whose testimony requires corroboration can not corroborate herself. I do not think it necessary to multiply authorities and will refer only to the following:—In *Rex* v. *Evans* (2), Hewart L.C.J. speaking for the Court of Criminal Appeal said:—

> It has been pointed out again and again in these cases that evidence of a complaint by the prosecutrix is not corroboration of her evidence against the prisoner. It entirely lacks the essential quality of coming from an independent quarter.

(1) 64 O.L.R. 181.

(2) (1924) 18 C.A.R. 123 at 124.

In *Rex* v. *Coulthread* (1), Avory J., with the concurrence of Lord Hewart C.J. and Branson J., said at page 48:—

. . . . Undoubtedly that statement that the things which were said in the morning might be treated as corroboration of the boy's story is in direct conflict with the view of this Court, expressed in more than one case, that a complaint of this sort, though it may be evidence of the consistency of the complainant's story is not corroboration in the proper sense in which that word is understood in cases of this kind.

In *Rex* v. *Whitehead* (2), Lord Hewart C.J., delivering the judgment of the Court, said at page 102:—

. . . . Any such inference as to what the girl had told her mother could not amount to corroboration of the girl's story, because it proceeded from the girl herself; it was merely the girl's story at second hand. In order that evidence may amount to corroboration it must be extraneous to the witness who is to be corroborated.

Rex v. *Whitehead* was accepted as correctly stating the law in this regard in the judgment of Bowlby J.A. in *Rex* v. *LeBrun* (3). The other members of the Court of Appeal, Roach and Hogg, JJ.A., agreed with Bowlby J.A. If and in so far as the judgment of the Court of Appeal for Ontario in *Rex* v. *Calhoun* (4) expresses the view that evidence of a complaint may be treated as corroboration of the testimony of the complainant within the meaning of the term corroboration as explained in *The King* v. *Baskerville* it must be regarded as over-ruled. I do not mean by this to suggest that the actual result reached in that case was wrong.

As to the third point I am of opinion that the learned trial judge erred in failing to charge the jury as to the limited use that could be made of the evidence of the complaint. The importance of so doing and of warning the jury against treating the complaint as evidence of the facts complained of has been stressed in many cases. I will refer only to the following passage in *Regina* v. *Lillyman* (*supra*) at page 178:—

It has been sometimes urged that to allow the particulars of the complaint would be calculated to prejudice the interests of the accused, and that the jury would be apt to treat the complaint as evidence of the facts complained of. Of course, if it were so left to the jury they would naturally so treat it. But it never could be legally so left; and we think it is the duty of the judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of those facts, or for any other purpose than that we have stated.

(1) (1933) 24 C.A.R. 44.
(2) [1929] 1 K.B. 99.
(3) [1951] O.R. 387 at 399.
(4) [1949] O.R. 180.

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In conclusion it is necessary to consider the submission of counsel for the respondent that even if we should find that there was error in law as to any or all of the grounds of appeal argued before us we should apply the provisions of section 1014(2) of the *Criminal Code* and dismiss the appeal. After a perusal of the complete record I find myself quite unable to say that a reasonable jury after being properly directed would necessarily have convicted the appellant.

I would allow the appeal, quash the conviction and direct a new trial.

Appeal allowed; new trial directed.

Solicitors for the appellant: *Edmonds & Maloney.*

Solicitor for the respondent: *W. B. Common.*