1960
Mar. 15, 16
Apr. 11

THOMAS KRIBS, GERALD GRIFFITH, BERNARD GRIFFITH AND ROBERT QUIRIE ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Rape—Evidence of complaint—Whether admissible—Person to whom complaint made not called as witness—Whether only bare fact of complaint admissible and not particulars of it.

The accused were convicted by a jury on a charge of rape. The only evidence at the trial of any complaint having been made was given by the victim. The person to whom she allegedly complained could not be traced and consequently was not called as a witness in corroboration. The verdict was affirmed by a majority in the Court of Appeal. The accused appealed to this Court on two grounds of law: (1) that the victim's evidence of the details of the complaint allegedly made by her should not have been admitted at trial, and (2) that the jury should not have been charged that they might conclude from her evidence that her conduct had been consistent throughout. It was conceded by counsel for the accused that the validity of the second ground depended upon the validity of the first.

Held: The appeal should be dismissed.

The submission that in the absence of any evidence from the person to whom the complaint was allegedly made, the evidence of the victim as to the fact of the complaint was inadmissible, was ill-founded. The principle upon which such a complaint, not made on oath, nor in the presence of the accused, nor, as in this case, forming part of the *res gestae,* is admissible in a case of this nature, is one of necessity. It is presumed that the victim will complain at the first reasonable opportunity and, consequently, that her silence might naturally be taken as a virtual self-contradiction of her story. The victim should therefore be entitled to rebut, by her own evidence of complaint, the presumption which would attach to her silence, and that right should not be denied for the sole reason that the person to whom the alleged complaint was made was untraceable. There was no rule, either statutory or of other kind, that such evidence must itself be confirmed or corroborated.

The submission that the evidence of complaint should be limited to the fact that a complaint was made without giving any of the particulars of it, could not be entertained. Furthermore, the victim did not give particulars in this case.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming, by a majority decision, a jury's verdict on a charge of rape. Appeal dismissed.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Judson JJ.

[1] (1960), 32 C.R. 226.

C. Dubin, Q.C., for the appellants.

E. Pepper, for the respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—The appellants were convicted by a jury, in the Supreme Court of Ontario, on a charge of rape. The verdict was appealed to the Court of Appeal[1] for the province, and affirmed by a majority decision, Morden J.A. dissenting on two questions of law which now and pursuant to s. 597(1)(*a*) of the *Criminal Code* form the basis of this appeal. As stated in appellants' factum, these two grounds are:

1. The learned trial Judge erred in admitting the prosecutrix' evidence of the details of the complaint allegedly made by her.

2. The learned trial Judge erred in charging the jury that they might conclude from her evidence that her conduct had been consistent throughout.

For the appreciation and the consideration of the first ground, it is only necessary, but sufficient, to advert to that phase of the evidence of the prosecutrix, which is related to the complaint itself and to the circumstances immediately contemporaneous with it. Having testified how she had been forcibly conveyed in an automobile to a secluded place and there become the victim of the appellants, she said that she then crossed certain fields to reach the highway where she hailed an approaching truck. She boarded the truck, started to cry and upon the driver's inquiry as to the cause of her grief, she then made a complaint. Her evidence, the admissibility of which is challenged, proceeds as follows:

Q. Now, we will go back to the truck again. You were in the truck, you said, going towards Toronto?

A. Yes.

Q. Yes. And, having got into the truck, the truck driver asked you a question?

A. Yes.

Q. What was the question?

A. I was crying, and he asked me what was wrong.

Q. Yes, and did you tell him?

A. Yes.

Q. What did you say, please?

[1] (1960), 32 C.R. 226.

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A. I told him I was attacked by four boys and that my girl friend had got away, and that I didn't know where she was.

Q. Yes. Anything else?

A. He asked me where they were, and I pointed over to the car. You could see it from the truck.

Q. Yes. You could still see the car?

A. Yes.

Q. Now, was there any more conversation?

A. Yes.

Q. Go ahead.

A. He said that he would drive me back to London, but first of all I had to give him a kiss before he would.

Q. And did you?

A. No, I never. I got out of the truck.

Q. You got out of the truck?

A. Yes.

While she did give a certain description of the truck and of its driver, she did not take the license number of the vehicle nor did she know the driver thereof. In the result, the latter being untraceable, could not be called as a witness and there was consequently no evidence to confirm the fact of her complaint to him.

As presented, in the course of the hearing in this Court, the submission made on behalf of the appellants in support of the first ground of appeal is twofold. First, it is said that in the absence of any evidence from the truck driver, the evidence of the prosecutrix as to the fact of the complaint is inadmissible. It is then submitted that even if such evidence is admissible, the particulars of the fact complained of cannot be given in evidence by the prosecutrix as, it is contended, it was in this case.

These two points are really the only ones to be considered in this appeal; for, as conceded by counsel for the appellants, the validity of the second ground of appeal, which is related to the address of the trial Judge to the jury on the effect of the evidence of complaint, is conditioned upon the validity of the first for either one of the two points submitted in support of the latter ground.

No case in point could be found by counsel for the appellants to support the proposition that evidence of fresh complaint by the prosecutrix is inadmissible in the absence of any evidence from the recipient of such com-

plaint. From the following authorities, we were asked to draw, as did the learned dissenting Judge, inferences in affirmance of the validity of this submission.

The first is the *Lillyman* case[1] where both the prosecutrix and the recipient of her complaint testified as to the fact of the complaint. Our attention was called particularly to the following excerpt, at page 170 of the judgment of the Court, delivered by Hawkins J.:

> It is necessary, in the first place, to have a clear understanding as to the principles upon which evidence of such a complaint, not on oath, nor made in the presence of the prisoner, nor forming part of the res gestae, can be admitted. It clearly is not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains.

It was suggested that when speaking of the evidence of complaint, Hawkins J. was referring, not to the prosecutrix' evidence, but to the evidence of the person to whom she complained. With deference to the dissenting Judge, I am unable to agree with this interpretation. In the consideration of this and the other cases referred to, one is reminded of the two observations made by the Earl of Halsbury L.C. in *Quinn v. Leathem*[2]:

> . . . one is . . .that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.

We were then referred to a group of decisions: *Rex v. Walker*[3]; *R. v. Megson*[4]; *R. v. Guttridge et al.*[5]; *R. v. Nicholas*[6] and *R. v. Wallwork*[7]. In all of these cases, the prosecutrix did not give evidence, and because of this fact, evidence of the recipient of the complaint as to the fact

[1] (1869), 2 Q.B. 167.
[2] [1901] A.C. 495 at 506.
[3] (1839), 2 Mood. & R. 212.
[4] (1840), 9 C. & P. 420.
[5] (1840), 9 C. & P. 471.
[6] (1846), 2 Car. & Kir. 246.
[7] (1958), 42 C.A.R. 153.

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or the particulars of the outrage complained of was rejected. Reference was also made to *Rex v. Osborne*[1]; *Rex. v. Lovell*[2]; *Thomas v. The Queen*[3]; *Rex v. Washington*[4] and *Rex v. Lebrun*[5], where comments are made with respect to the confirmatory or corroborative nature of the evidence of the recipient of the complaint. While the testimony of the recipient of a complaint may be confirmatory or corroborative of the testimony of the prosecutrix as to the fact and the particulars of the complaint made by her, it does not follow that the admissibility of the evidence of the prosecutrix, as to these matters, is conditioned upon the corroboration or confirmation by the recipient. The comments made in these cases are of no assistance and, in my view, beyond the point here to be decided.

Finally, we were referred to Phipson On Evidence, 9th ed., at page 133, where it is said that:

> The complaint should be proved by calling both the prosecutrix herself and the person to whom it was made.

The authorities relied on by Phipson for this statement do not, as it was ultimately conceded at the hearing, on behalf of the appellants, support the same.

Counsel for the appellants properly called our attention to two cases where the validity of his first submission is negatived. One is *R. v. Eyre*[6]. The other is *R. v. Ball*[7], where Coady J. A. delivering the judgment of the Court of Appeal for British Columbia, said:

> The evidence of the complainant as to the complaint made by her would be admissible in evidence, it seems to me, even if the party to whom the complaint was made was not called as a witness. The failure to call the party as a witness, or if called, to confirm what was said by the complainant, goes to the weight to be attached to the complainant's evidence.

With this statement of the law and for the reasons hereafter given, I am in complete agreement.

The argument underlying appellants' proposition is that by adding to her recital of the outrage, the fact that she complained about it, the prosecutrix confirms her own

[1] [1905] 1 K.B. 551.
[2] (1923), 17 C.A.R. 163.
[3] [1952] 2 S.C.R. 344, 15 C.R.I., 103 C.C.C. 193, 4 D.L.R. 306.
[4] [1951] O.W.N. 129.
[5] [1951] O.R. 387, 12 C.R. 31, 100 C.C.C. 16.
[6] (1860), 2 F. & F. 579.
[7] (1957), 117 C.C.C. 366 at 369, 25 C.R. 250, 21 W.W.R. 113.

story and enhances her credibility. This, it is said, can only properly be done, not by her own, but by independent evidence. The true question, in my view, is not what is the effect of evidence of fresh complaint, but what is the principle upon which such complaint, not made on oath, nor in the presence of the accused, nor, as in this case, forming part of the *res gestae,* is admissible in a case of the nature of the one here considered.

The principle is one of necessity. It is founded on factual presumptions which, in the normal course of events, naturally attach to the subsequent conduct of the prosecutrix shortly after the occurrence of the alleged acts of violence. One of these presumptions is that she is expected to complain upon the first reasonable opportunity, and the other, consequential thereto, is that if she fails to do so, her silence may naturally be taken as a virtual self-contradiction of her story. In Hawkins' Pleas of the Crown, quoted by Hawkins J. in the *Lillyman* case, *supra,* at page 170, it is said:

> It is a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact.

In Wigmore On Evidence, vol. 4, 3rd ed., p. 218, reference is made to the history of the evidence of complaint in the case of rape and, at page 220, it is said:

> (*b*) So, where nothing appears on the trial as to the making of such a complaint, the jury might naturally assume that none was made, and counsel for the accused might be entitled to argue upon that assumption. As a peculiarity, therefore, of this kind of evidence, it is only just that the prosecution should be allowed to forestall this natural assumption by showing that the woman was *not silent,* i.e. that a *complaint was in fact made.*
>
> This apparently irregular process of negativing evidence not yet formally introduced by the opponent is regular enough in reality, because the impression upon the tribunal would otherwise be there as if the opponent had really offered evidence of the woman's silence. Thus the essence of the process consists in the showing that the woman did *not* in fact behave with a silence inconsistent with her present story. The Courts have fully sanctioned this analysis of the situation.

Thus it appears that by giving evidence of her conduct shortly after the alleged occurrence, the prosecutrix does not, in a sense, enhance or confirm her story any more than she does in reciting all that she did in resistance to the assault, but she rebuts a presumption and, in doing so,

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adds, for all practical purposes, a virtually essential complement to her story. In the *Lovell* case, *supra,* Lord Chief Justice Hewart, in reference to that type of evidence, said this, at page 169:

> There is a clear distinction between matters which affect the intrinsic credibility of the witness's own story when that story is considered by itself, and, on the other hand, corroborative evidence in the sense of independent testimony proceeding from a source other than the prosecutrix and implicating the accused; and it may be that sometimes the distinction between those two things has not been kept clearly in view. Historically, as Sir Richard Muir has pointed out in the cases he has cited and in the passages he has read from Hale's Pleas of the Crown, in sexual cases the fact of complaint by the prosecutrix was admitted, not so much as new matter tending to support a story sufficient in itself, but rather as an indispensable ingredient in the story of the prosecutrix, without which the story of the prosecutrix would be open to grave suspicion. Historically, that appears to be the origin of the admissibility of evidence of this kind, and in the opinion of the Court the right direction is that which is given in the case of *Lillyman* in the passage already referred to.

Where an accused is charged with rape, the Judge shall, if the only evidence that implicates the accused is the evidence, given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, instruct the jury that it is not safe to find the accused guilty in the absence of such corroboration, but that they are entitled to find the accused guilty if they are satisfied, beyond a reasonable doubt, that her evidence is true. (*Criminal Code,* s. 134). Furthermore and if evidence of fresh complaint has been adduced, it is also the duty of the Judge to impress upon the jury that they are not entitled to make use of the complaint as any evidence whatever of the facts complained of but that evidence can only be legitimately used by them for the purpose of enabling them to judge for themselves whether the conduct of the woman was consistent with her testimony on oath, given in the witness box, negativing her consent and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman, under the circumstances detailed by her. (*The Queen v. Lillyman, supra,* pp. 177 and 178).

But there is no rule, either statutory or of other kind, suggesting that the prosecutrix' evidence as to fresh complaint must itself be confirmed or corroborated. And there seems to be no valid reason why, in cases such as the present, where the recipient of an alleged complaint is untraceable, the prosecutrix should be denied the right to rebut, by her own evidence of complaint, the factual presumption which would otherwise attach to her silence as to the matter. If appellants' contention were accepted, a prosecutrix, complaining at the first opportunity to an untraceable witness, might possibly be denied the right to testify that, immediately after this first complaint, she complained to another person available as a witness, on the basis that the former but not the latter complaint was really the one made at the first opportunity.

For all these reasons, I agree with the majority of the Court of Appeal that appellants' first submission is ill-founded.

The second objection to the evidence, which is that evidence of complaint should be limited to the fact that a complaint was made without giving any of the particulars of it, was also considered in *The Queen v. Lillyman, supra,* at page 171 *et seq.,* and at page 177, Hawkins J. said:

> After very careful consideration we have arrived at the conclusion that we are bound by no authority to support the existing usage of limiting evidence of the complaint to the bare fact that a complaint was made, and that reason and good sense are against our doing so.

It is true that in the *Lillyman* case, *supra,* both the prosecutrix and the person to whom she complained were heard as witnesses. However, the reasons given against limiting the evidence of the complaint to the bare fact of that complaint are equally present in cases where the evidence of complaint by the prosecutrix is the only evidence as to fresh complaint.

I am also in respectful agreement with the Chief Justice for Ontario that, in the present instance, the prosecutrix did not give particulars.

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I would, therefore, dismiss the appeal. There should be an order that the time spent in custody under the sentences, pending the disposition of this appeal, be allowed as time served under the said sentences.

Appeal dismissed.

Solicitors for the appellants: Young & Hutchinson, Woodstock.

Solicitor for the respondent: W. C. Bowman, Toronto.

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*PRESENT: Kerwin, C.J., and Locke, Cartwright, Martland and Judson JJ.