**17/79**

## SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

# *R v FREEMAN and ORS*

**Starke, McInerney and Murphy JJ**

**15 November 1978 — [1980] VicRp 1; [1980] VR 1**

**CRIMINAL LAW – RAPE – COMPLAINT EVIDENCE – VOLUNTARY STATEMENT OR INDUCED – CORROBORATION – WHAT CAN PROPERLY AMOUNT TO.**

**1. The evidence of a recent complaint is not admitted to prove or tend to prove any of the facts stated in it or the prosecutrix's lack of consent, but simply to buttress the prosecutrix's evidence given in the witness box. It provides no evidence at all and is inadmissible if it stands on its own and the prosecutrix is not called to give evidence. It is not corroborative of the evidence of the prosecutrix in the technical sense in which the word "corroborative" is now understood in the criminal law.**
***Sparks v R* (1964) AC 964; [1964] 1 All ER 727; [1964] 2 WLR 566, applied.**

**2. Accepting that the complaint, to be admissible, must have been made at the first reasonable opportunity, the words "reasonable opportunity" require consideration. In determining whether the opportunity is the "first reasonable" opportunity, the trial judge must have regard to all the circumstances. If the prosecutrix was injured physically, it might well be considered to be unreasonable to expect her to complain to those coming to her aid or at all, until she was out of pain.**

**3. In the present case where mental and emotional injury or shock was to the forefront, it was open to the learned trial Judge to conclude on the evidence that he had heard that the prosecutrix in such a distressed and agitated state after the several events that she remain so right up to the time when she spoke to Hadley, and that the mere fact that she was unable to or did not tell, her story by way of complaint to either of the Parfitts or to Miss Dennert, did not mean that the complaint when made was not made at the first reasonable opportunity.**

**4. In relation to the question of corroboration, what had to be corroborated in some material particular was non-consensual intercourse between each of the accused and the prosecutrix. The evidence of Dr Bush was corroborative of at least one act of sexual intercourse by at least one man with the prosecutrix. The admissions of each accused were corroborative of the evidence of the prosecutrix that the accused in question had had intercourse with her or (in the case of the applicant Johnson) that he had attempted to have sexual intercourse with her. The evidence of Mrs Parfitt, of Miss Dennert, and of the witnesses Hadley and Alway was corroborative of the prosecutrix's evidence that the acts of intercourse had been a distressing experience for her and, when taken in conjunction with the evidence as to the time and place of the acts of intercourse, the number of men involved, and of the fact that she knew nothing of them save that some of them lived in a nearby block of flats, tended to show that it was more probable that the acts of intercourse were non-consensual than that they were consensual. And this test was sufficient for admissibility of the evidence though not for conviction.**

**THE COURT:** Each defendant was presented on one charge of rape except Johnson who was presented on one charge of attempted rape. Each defendant made a record of interview and in the County Court hearing before His Honour Judge Ogden each made an unsworn statement. Each defendant was sentenced to terms of imprisonment, ranging from 7 years with minimum of 5½ years, to 3 years with minimum of 2½ years.

The facts briefly were that the prosecutrix was walking alone in Elwood at 10.40pm, when she was followed by 3 men, one putting arms around her, she pushing him away, he then pushing her into a lane onto the ground. She resisted the advances but when be inserted a finger into her vagina, this irritated an infection she was being medically treated for, caused her pain, so she laid still to ease the pain. (It was proved she had attended a doctor earlier that day and was prescribed tablets & cream). Freeman, out of sight of his companions completed the act of sexual intercourse, Bowland then came to her, she testified she just lay there scared and crying, that she did not call out as Freeman had scared her so much. Bowland and 4 other men had, (or attempted to have) intercourse with her. (One was never identified.)

A witness – Mrs Parfitt – walked up the lane shortly afterwards, and asked her what was wrong. She was crying, tried to talk, but couldn't get the words out. She eventually asked for a glass of water, Mrs. Parfitt was leaving to get it when she heard her say "I wish I hadn't." (Prior to this Mrs Parfitt had heard unfamiliar male voices in the lane, saw 3 figures or shadows standing in the area.) On returning with the glass of water, she saw the girl had got up and walked a little way. She drank the water, Mrs Parfitt continuing to ask if she could help. Her observations were the girl was crying so much she could not talk. She then walked to Sue Dennert's flat, as by the time she reached Miss Dennert's flat the prosecutrix had calmed down, but as soon as Sue Dennert opened the door the prosecutrix started crying again. Sue Dennert got hold of her brought her inside and sat her down. She asked the prosecutrix what was wrong but the prosecutrix could not say anything. She was so upset she could not tell her.

Eventually she asked Miss Dennert to go with her to a public telephone and to telephone one Gary Hadley. Hadley was a trainee linesman who shared a flat with Constable Alway in Elwood, in which block of flats the prosecutrix also resided. Miss Dennert got Hadley to the phone and then the prosecutrix spoke to him. She asked Hadley to get her some clothes, her ointment, a pill – a contraceptive pill – some makeup, and to bring them round to Sue Dennert's. Hadley thought this was a strange thing to ask a man to do. He asked the prosecutrix if anything was wrong and she burst out crying. He then asked her if somebody had hit her or had she been raped or something and the prosecutrix "just went pretty quiet". He asked her again and she said she had been raped. He asked her whether she wanted him to get Constable Alway, and she said yes. Accordingly Hadley went downstairs to her flat, got the things she had asked him to get and then, with Alway went to Miss Dennert's flat. When they arrived Hadley saw that the prosecutrix was pretty upset; she looked "roughed up a bit". Alway said she was in a very distressed condition and it was fairly obvious that she had been crying. According to him he said to her, "what has happened?" and she said, "I'm in trouble. I've just been pack-raped by six bikies." Her version was that Alway asked her what had happened and she said she had been raped, and Alway said, "How many?" and she said, "Six". Always asked her whether she would like the police called in and she said, "Yes". Accordingly he called the police in.

The submission was made that evidence of a complaint made by the prosecutrix in a rape trial is, as a matter of law, admissible only if –

> (a) it is made at the first opportunity and
> (b) it is made spontaneously and not in reply to questions of a leading or suggestive character.

Reliance was placed upon the well-known statement in *R v Osborne* (1905) 1 KB 551 at p556. where Ridley J said:

> "It appears to us that the mere fact that the statement is made in answer to a question in such cases is not of itself sufficient to make it inadmissible as a complaint. Questions of a suggestive or leading character will, indeed, have that effect and will render it inadmissible ... In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the complaint, must be left to the discretion of the presiding Judge. If the circumstances indicate that, but for the questioning, there probably would have been no voluntary complaint the answer is inadmissible. If the question merely anticipates a statement which the complainant was about to make, it is not rendered inadmissible by the fact that the questioner happens to speak first. It applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character and only when it is made at the first opportunity after the offence which reasonably offers itself."

In *Kilby v R* [1973] HCA 30; (1973) 129 CLR 460; 1 ALR 283; 47 ALJR 369 Barwick CJ said:

> "The admissibility of that evidence in modern times can only be placed, in my opinion, upon the consistency of statement or conduct which it tends to show, the evidence having itself no probative value as to any fact in contest but merely and exceptionally constituting a buttress to the credit of the woman who has given evidence of having been subject to the sexual offence."

We emphasise that the evidence of a recent complaint is not admitted to prove or tend to prove any of the facts stated in it or the prosecutrix's lack of consent, but simply to buttress the prosecutrix's evidence given in the witness box ...

It provides no evidence at all and is inadmissible if it stands on its own and the prosecutrix is not called to give evidence: *Sparks v R* (1964) AC 964; [1964] 1 All ER 727; [1964] 2 WLR 566. It is not corroborative of the evidence of the prosecutrix in the technical sense in which the word "corroborative" is now understood in the criminal law.

But the attempt, in *R v Osborne* to cover the field by enumerating the circumstances in which a complaint is properly admissible to prove consistency, is also, in our view, open to criticism, and indeed has not escaped criticism. Madden CJ said at pp268-9 in *Rex v William McNeill* [1907] VicLawRp 51; (1907) VLR 265,

> "Another matter has been debated here, based upon a dictum in *R v Osborne* that such a statement is not admissible if it appears that but for the question the child or woman would never have made the statement in question. Speaking for myself I would like to consider the matter very carefully before coming to the conclusion that the *dictum* in that case is correct. We decide this case on the other ground – namely, that there is nothing to show that this was a statement made at the first reasonable opportunity after the assault."

In *R v Norcott* (1917) 1 KB 347 at p350, the Court stated what we believe to be the basic requirement:

> "The Court in *R v Osborne* (*supra*) meant to guard against the admission in evidence of statements which have been put into the mouth of the prosecutrix by questions of a leading or suggestive character. The Court is concerned to see, that in the present case the statement made by the girl was spontaneous in the sense that it was her unassisted and unvarnished statement of what happened. That she may have been persuaded to tell her unassisted and unvarnished story is no reason why the evidence of her having made the statement should be rejected."

The decision in *R v Norcott* may, perhaps, be regarded as "a strong one, in that the evidence showed that the complaint was ultimately made only after a woman (old enough to be the prosecutrix's mother) who had observed the prosecutrix to have been crying, had asked her what was the matter (which the prosecutrix would not tell her), had urged the prosecutrix to tell and had finally taken hold of her bicycle and said to the Prosecutrix, "I won't let you go until you do tell me." The Court saw nothing in these circumstances which would cause the complaint to be inadmissible.

Almost inevitably, any attempt to formulate a rule which will cover all cases is bound to fail. What may prove to tend to prove consistency in one case may not do so in another, and the attempt which appears to have been made in *Osborne's Case* to provide guidance to a trial Judge of a rule of thumb nature when deciding whether evidence of a complaint should or should not be admitted, may in some cases prove misleading.

The ultimate question must always be does the "complaint", in the circumstances in which it was uttered, tend to buttress the prosecutrix's credit as a witness. The underlying basis for the admission of the evidence is that just as the absence of a complaint in the circumstances alleged may be considered by the jury so unusual as to throw doubt on the prosecutrix's credibility, the making of a complaint may be supportive of her credibility.

Ordinarily the form of question asked by Hadley would be regarded as leading and as suggesting the answer, "Yes", to some part. But the context in which the question was put was one where the prosecutrix had made what Hadley said he regarded (and which it was open to the learned trial judge and the jury to have regarded) as a rather strange request for a girl to make to a man. It was a request which might be regarded as one more likely to be made to her own female flatmates than to a male. It obviously suggested to Hadley that something was wrong and her reaction namely, that she burst out crying – would have confirmed that impression. That impression would have been strengthened when, in response to his next and much more direct question, she "just went pretty quiet". It was only after Hadley had repeated the question that she made the statement that she had been raped.

The learned trial Judge saw and heard the prosecutrix. He was in a position to determine whether she was a suggestible witness or in some way under Hadley's influence or domination. Hadley's questions did not, in these circumstances, rend the complaint inadmissible by taking from it the quality of spontaneity which is looked for in such complaints to buttress the prosecutrix's

evidence. His Honour's decision to admit evidence of the complaint to Hadley is therefore not shown to have been judicial error.

The complaint made to Constable Alway at Miss Dennert's flat was not, on the evidence, the result of any leading or suggestive question put to the prosecutrix by Alway. It was contended, that evidence of his complaint should be rejected because the complaint was not one made at the first reasonable opportunity. But the decision in *R v Wilbourne* (1917) 12 Cr App R 280 may be taken to be authority for the view that evidence of the second complaint made is not inadmissible merely because a prior complaint had been made to another person so long as each of the complaints can fairly be regarded as having been made at the first reasonable opportunity after the offence.

Accepting that the complaint, to be admissible, must have been made at the first reasonable opportunity, the words "reasonable opportunity" require consideration. In determining whether the opportunity is the "first reasonable" opportunity, the trial judge must have regard to all the circumstances. If the prosecutrix was injured physically, it might well be considered to be unreasonable to expect her to complain to those coming to her aid or at all, until she was out of pain.

In the present case where mental and emotional injury or shock was to the forefront, it was open to the learned trial Judge to conclude on the evidence that he had heard that the prosecutrix in such a distressed and agitated state after the several events that she remain so right up to the time when she spoke to Hadley, and that the mere fact that she was unable to or did not tell, her story by way of complaint to either of the Parfitts or to Miss Dennert, did not mean that the complaint when made was not made at the first reasonable opportunity.

"Reasonable" must, we think, take into account the subjective situation in which the prosecutrix was placed and have regard to such factors as were operating on her at the material time after the events.

It was in our opinion open to the learned trial judge to conclude that the complaints were made at the first reasonable opportunity. In our opinion the complaints when made did show consistency. They did buttress the prosecutrix's evidence. They were admissible, for this purpose also.

**(ii) Corroboration:**

It has been held that where the real issue in a rape trial is whether the absence of consent is proved against the accused, corroborative evidence directed to that issue may be required – *R v Salman* (1924) 18 Cr App R 50; *James v R* (1971) 55 Cr App R 299 at p302.

Although the admission of the accused that he had intercourse with the prosecutrix implicates him in the crime (if that intercourse was without consent) it hardly tends to support the evidence of the prosecutrix that the intercourse was in fact without her consent. It may be possible to argue that even though at a rape trial a single issue remains at the trial namely, that of consent, corroboration in a relevant sense of the evidence of the prosecutrix could be found by evidence which goes only to some aspect of the crime other than the single issue of consent which remains for the determination at the trial. However, several decisions appear to question either expressly or impliedly the general application of the wide statement in *James v R* (*supra*) see *Kelleher v R* [1974] HCA 48; (1974) 131 CLR 534 at p543; 4 ALR 450; (1974) 48 ALJR 502; *DPP v Hester* (1973) AC 296; [1972] 3 All ER 1056; (1973) 57 Cr App R 212; [1972] 3 WLR 910 and *DPP v Kilbourne* (1973) AC 729; [1973] 1 All ER 440; (1972) 57 Cr App R 381; [1973] 2 WLR 254. Nevertheless (without deciding the point) we think that in most cases where consent or non-consent is the issue it would be advisable in the present state of the law that the trial judge should direct the jury that it should look for corroboration in respect of the issue of non-consent.

Certainly that seems to be how the learned trial Judge in this case approached the matter. Moreover there is, in the present case, a body of evidence which is corroborative of the prosecutrix's evidence that she did not consent to intercourse with any of the applicants.

In *R v Colless* (1964-5) NSWR 1243 at p1245 the Full Court said:

> "For there to be corroboration there must be some evidence, independent of the complainant, which confirms in some material particular not only the evidence that the crime was committed but, also that the prisoner committed it. *R v Baskerville* (1916) 2 KB 658 at p667; [1916-17] All ER 38; 12 Cr App R 81; 86 LJKB 28. The medical evidence goes part of the way and is corroboration that carnal knowledge was committed of the girl by somebody and it has not been argued otherwise, the contest being whether there is evidence in some material particular to implicate the accused. To look separately at each element said to constitute corroboration may lead to error, particularly as corroboration need not be, and rarely is, direct evidence that the accused committed the crime, but may be merely circumstantial evidence of his connection with the crime. (*ibid* at p667). External evidence concerning the nature of the place and the circumstances under which sexual relations admittedly occurred, may provide corroborative evidence, of a circumstantial type, of lack of consent, although the only direct evidence be of the complainant (*R v Davy*; *R v Edwards* (1964-5) NSWR 40)."

It was submitted that there was no sufficient causal connection shown between any such distress and any individual one of the five applicants, save possibly Freeman. In our opinion this argument is unsustainable. Whether actual force was used is not the point. If intercourse without consent occurred five times and distress followed it was open to the jury to conclude that each one of the participants shared in the causal relationship between the repeated acts and the consequent distress.

It was also submitted that in accordance with the principle expressed in *R v Flannery* [1969] VicRp 72; (1969) VR 586 at p591 the jury should have been warned that the evidence of distress carried little weight.

The Full Court said:

> "We should add, that except in special circumstances such as existed in *Redpath's case*, *supra*, evidence of distressed condition will carry little weight and juries should be so warned by the trial judge in the course of his charge."

Note the words "except in special circumstances such as existed in *Redpath's case*." In *R v Redpath* (1962) 46 Cr App Rep 319; [1962] Crim LR 491 a bystander saw the prosecutrix within a matter of seconds after the accused had left her in a distressed condition. The Court of Criminal Appeal said that the bystander's evidence, if accepted by the jury, afforded "very strong evidence" (corroborative) of the little girl's story." The instant case appears to be on all fours with *Redpath's Case*.

The evidence of Mrs Parfitt and her son was clearly capable of being regarded by the jury as corroborative of the prosecutrix's evidence against each of the accused. The Parfitts' observation of the prosecutrix occurred within a matter of seconds of the event. Indeed some of the applicants had not yet fled out of sight, over fences into the night. The prosecutrix was not aware, so far as one can judge, that she was being observed by the Parfitts. She was heard to be moaning, before she was observed lying in the dark lane. When spoken to, she simply moaned and eventually sat up holding one arm across her chest. She was distressed. She seemed dazed and her eyes looked glassy. She was vague, her hair was tousled and her face swollen. There is other evidence of distress but these references will suffice.

In our opinion this evidence was capable of amounting to corroboration. Evidence as being strongly supportive of the prosecutrix's evidence.

In the present case, the trial Judge did tell the jury that it was open to them to treat as corroboration of the evidence of the prosecutrix the evidence of Dr Bush that there were, on his examination at about 3.30am the next morning, two scratch marks between the outer and inner lips of the vagina Dr Bush had, however, said that he could not say how the scratches had been obtained, that they might have been caused by scratches, by rubbing or tearing – that it was almost impossible to say exactly how they did occur, that all he could say was that intercourse had occurred, and that he had no means of determining whether consent was either given or withheld.

It was contended for the applicants that the evidence of the abrasion or scratch marks should have not been left to the jury as corroboration in that they indicated no more than that intercourse had occurred and that they were as consistent with consensual as with non-consensual intercourse.

The prosecutrix had been examined by Dr Butt on 24th January prior to the incidents giving rise to the offences the subject of this appeal. He examined her vagina, in part, and observed a condition of vulvovaginitis, but he made no mention of having observed any tears or abrasions such as those described by Dr Bush. It was open to the jury, in our opinion, to find, that those tears or abrasions had been sustained by the prosecutrix subsequently to Dr Butt's examination and to have inferred that she sustained them in the course of one or more of the acts of intercourse complained of by her. If Dr Bush's evidence stood alone and if it was necessary for his evidence to corroborate that intercourse was non-consensual, we do not think it could be regarded as tending to show that it was more probable. It might in those circumstances have been regarded as having minimal weight as to justify its being classified as insufficiently relevant and therefore inadmissible – see *R v Stephenson* [1976] VicRp 34; (1976) VR 376 at pp380-1. The prosecution was entitled to rely on that evidence in association with other evidence to show that the prosecutrix's evidence of non-consensual intercourse was more likely to be true than not.

What had to be corroborated in some material particular was non-consensual intercourse between each of the accused and the prosecutrix. The evidence of Dr Bush was corroborative of at least one act of sexual intercourse by at least one man with the prosecutrix. The admissions of each accused were corroborative of the evidence of the prosecutrix that the accused in question had had intercourse with her or (in the case of the applicant Johnson) that he had attempted to have sexual intercourse with her. The evidence of Mrs Parfitt, of Miss Dennert, and of the witnesses Hadley and Alway was corroborative of the prosecutrix's evidence that the acts of intercourse had been a distressing experience for her and, when taken in conjunction with the evidence as to the time and place of the acts of intercourse, the number of men involved, and of the fact that she knew nothing of them save that some of them lived in a nearby block of flats, tended to show that it was more probable that the acts of intercourse were non-consensual than that they were consensual. And this test is sufficient for admissibility of the evidence though not for conviction.

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