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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v LUCAS, KENNEDY and PARK

Winneke CJ, Smith and Menhennitt JJ

14 February 1973

CRIMINAL LAW – ABDUCTION/ATTEMPTED RAPE – COMPLAINT MADE BY PROSECUTRIX – WHETHER A VOLUNTARY AND SPONTANEOUS EXPRESSION – COMPLAINT MADE IN ANSWER TO A QUESTION – WHETHER PROSECUTRIX'S ANSWERS WERE SPONTANEOUS STATEMENTS – COMPLAINT ADMITTED INTO EVIDENCE BY TRIAL JUDGE – WHETHER JUDGE IN ERROR.

HELD: Appeal dismissed.
1. The fact that a statement of a prosecutrix is made in answer to a question does not mean that it is not a voluntary or spontaneous statement or that it is to be excluded.

2. The two questions asked of the prosecutrix were quite natural questions and the trial judge was correct in concluding that in those circumstances it was the prosecutrix who was endeavouring to tell her sister what her complaint was.

3. The trial judge was justified in finding that the statements of the prosecutrix were voluntary and spontaneous statements and they were not extracted from her in such a way as to render them inadmissible as evidence of a complaint by her.

WINNEKE CJ: *[After setting out the facts of the trial and holding that in the circumstances it was not the Court's duty to interfere with the jury's findings of fact, His Honour continued]* … There is one further point that was raised by the appellant Kennedy and which would be applicable to the three appellants, and that was in relation to the evidence of the sister of the prosecutrix Mrs Gates. Kennedy submitted that that evidence should not have been admitted because it did not constitute a voluntary or spontaneous complaint on the part of the prosecutrix.

A similar objection was taken by counsel for Kennedy at the trial. The learned judge having examined the evidence on a *voir dire* concluded that the principles governing the admission of such evidence were satisfied and he admitted the evidence as a complaint in the exercise of his discretion. He gave the usual warning as to how that evidence would be used.

The appellant Kennedy, however, submits the learned Judge was wrong, and he has submitted before this Court that the evidence should have been excluded. The basis of the argument was that such evidence by way of complaint is not admissible if it appears that it has been extracted from the complainant by some form of leading question, so that it does not represent the voluntary and spontaneous expression of the person making the complaint.

The principles governing the matter have been dealt with by the English Court of Criminal Appeal in the cases of *R v Osborne* (1905) 1 KB 551; [1904-7] All ER 54 and *R v Norcott* (1917) 1 KB 347. We have examined the judgments in those cases, and in order to succeed on this point it would be necessary for the applicants to satisfy the Court that the judge was wrong in taking the view that the statements made by the prosecutrix to her sister were voluntary and spontaneous communications.

It is clear enough that when an issue of this kind arises, the statements actually said to have been made must be judged according to the precise circumstances of the particular case. The fact that a statement is made in answer to a question does not mean that it is not a voluntary or spontaneous statement or that it is to be excluded. If the questions which have been used to assist the making of the statement are questions of a kind which might naturally be asked under the circumstances prevailing, then the statement is not necessarily to be regarded as an involuntary or an extracted statement.

And so the problem in this case is whether the circumstances are such as to show that the Judge was wrong in admitting the evidence as a complaint. Now, as we have said the circumstances were these: the complainant had returned to her home after being dropped off by the applicants. As she approached her home her married sister, Mrs Gates, emerged. The evidence showed that the girl was in a somewhat hysterical condition, she was crying, breathless, and finding it difficult to express herself. The order of events then was, according to the evidence, that Mrs Gates, being her sister, not unnaturally asked the question, "What happened?" which evoked the answer about a car and four men. It was then that Mrs Gates asked what might be regarded as a leading question, and said, "Have you been assaulted?" and the girl said, "Yes."

We think it was perfectly open to the learned Judge in those circumstances to regard the two questions asked by the sister as quite natural questions, and we think it was perfectly open to him, and that he was right in concluding that in these circumstances it was the prosecutrix herself who was endeavouring to tell her sister what her complaint was. We think the Judge was perfectly justified in the way these questions came to be asked and in the circumstances in which the complainant's answers came out, in finding that these were voluntary statements of the prosecutrix, that they were spontaneous statements on her part and were not extracted from her in such a way as to render them inadmissible as evidence of a complaint by her.

In the result, therefore, we do not think that any of the grounds of appeal against conviction has been made out, and that the appeals against conviction must be dismissed. *[His Honour then dealt with the appeals against sentence and dismissed them.]*
