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## Evidence—Corroboration of Complaining Witness in Sex Crimes

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mate tendency to throw light on the accuracy, truthfulness and sincerity of a witness."<sup>38</sup>

However, several cases relied upon in support of this proposition do not deal with the specific point involved in the instant case. *People v. Webster*<sup>39</sup> dealt with the admissibility of evidence of addiction *at the time* of the events to which the witness testified—therefore, competency rather than credibility was in issue. *Wilson v. United States*<sup>40</sup> also dealt with competency, and whether the witness at the time of testifying was so under the influence of drugs as to be incompetent. The fact that the dissent seeks support for its position by relying on scientific authority contrary to the majority position is merely indicative of the danger of unwarranted inferences being greater where scientific authority is in disagreement.

It would appear that the majority position propounded here has strong bases in policy and logic, both because of the factors mentioned above, and the fact that the traditional modes of impeachment would appear to provide adequate weapons for counsel to attack the veracity of a witness, *e.g.* past addiction, moral character, strenuous cross-examination. The fact that the jury is the final arbiter of credibility and demeanor is an additional safeguard of the defendant's rights.

#### CORROBORATION OF COMPLAINING WITNESS IN SEX CRIMES

A child under twelve years of age is presumed incompetent to be sworn as a witness in a criminal proceeding, which presumption can be overcome in a proper preliminary examination.<sup>41</sup> If the child is the complainant and is not sworn, but testifies, there is a statutory requirement that every material fact essential to constitute the crime must be corroborated.<sup>42</sup> Where the child is the complainant, but is sworn, there is no statutory requirement of corroboration.<sup>43</sup>

In *People v. Oyola*,<sup>44</sup> defendant's ten year old daughter was sworn, and testified to all the particulars of a completed act of intercourse upon her by her father soon after she retired for the night. Although defendant's wife returned home only two hours after the alleged act, and the police arrived only two hours after that, no medical evidence concerning complainant's condition was submitted at the trial. The jury convicted defendant of impairing the morals of a minor and of third degree assault.

In *People v. Porcaro*,<sup>45</sup> a companion case, the ten year old complainant was sworn and testified to having regular and frequent intercourse with her

38. *Supra* note 33, at 30, 187 N.Y.S.2d 760 (1959).

39. 139 N.Y. 73, 34 N.E. 730 (1893).

40. 232 U.S. 563 (1914).

41. *People v. Klein*, 266 N.Y. 188, 194 N.E. 402 (1935).

42. N.Y. CODE CRIM. PROC. § 392; *People v. Dutton*, 305 N.Y. 632, 11 N.E.2d 889 (1953).

43. *Supra* note 41.

44. 6 N.Y.2d 259, 189 N.Y.S.2d 203 (1959).

45. 6 N.Y.2d 248, 189 N.Y.S.2d 194 (1959).

father over a four year period. Here, as in the *Oyola* case, a matrimonial dispute was in the background. The testimony was definite and clear both as to the date and the acts of the defendant on that date and other occasions. Two days after the complainant told her mother, the day on which appellant was arrested, complainant was examined by a doctor. Timely and repeated demands by defendant for a physical examination of complainant were refused, and no medical evidence as to complainant's physical condition was introduced at the trial. Defendant was subsequently convicted of impairing the morals of a minor.<sup>46</sup>

In both cases the Court reversed the convictions, 4-3, because the prosecution failed to introduce any evidence supporting complainant's testimony. The Court did not hold that corroborating evidence is always required, but rather that the fortuitous fact that the child is sworn does not compel it "to dispense with all objective verification" of her testimony, especially if the supporting evidence is readily available and possibly dispositive.<sup>47</sup> The majority recognized that acts of this nature are easily charged, and difficult to disprove, in view of the instinctive horror with which mankind regards them.<sup>48</sup>

Judge Fuld concurred in both cases, contending that no morals conviction has ever been obtained in the Court of Appeals upon the testimony of a complainant unsupported by other evidence, and that the Court should explicitly declare this result the rule.<sup>49</sup>

Judge Burke argued in a dissenting opinion that the rule requiring other evidence to support complainant's testimony is of statutory origin, and since there is no corroboration statute expressly related to the statute making criminal impairing the morals of a minor, as there is for certain other sex crimes, the Court should not supply the requirement.

However, the rule requiring other evidence to sustain a conviction for defiling a female is *not* of statutory but is of common law origin.<sup>50</sup> The New York statute codifying this evidentiary rule *in terms* applies to any act of defilement.<sup>51</sup> Therefore, whatever the name of the crime, if the charge proceeds

46. In each case complainant's testimony appeared clear and convincing. However, independent collateral facts were considered as impairing the force of that testimony. Not only was there a failure to introduce the medical evidence, and a total lack of other supporting evidence, but the instigator of each prosecution was the complainant's mother, who intended to use her child's testimony as ammunition in a subsequent matrimonial action.

47. The medical evidence would have been dispositive if, upon examination, complainant's hymen had been intact, because it could not have remained intact if defendant had acted in the manner testified to by her.

48. The rule requiring other corroborating evidence to sustain a sex offense conviction is based on this rationale.

49. *People v. Meyers*, 309 N.Y. 837, 130 N.E.2d 622 (1955); *People v. Rosen*, 293 N.Y. 683, 56 N.E.2d 297 (1944); *People v. Derner*, 288 N.Y. 599, 42 N.E.2d 605 (1942); *People v. Slaughter*, 278 N.Y. 479, 15 N.E.2d 70 (1938); *People v. Churgin*, 261 N.Y. 661, 185 N.E. 782 (1933).

50. *People v. Friedman*, 139 App. Div. 795, 124 N.Y. Supp. 521 (2d Dep't 1910).

51. N.Y. Sess. Laws 1888, c. 676.

upon an act of defilement, Judge Fuld's position that corroborating evidence should be required appears correct.<sup>52</sup>

"OTHER EVIDENCE" REQUIRED TO CORROBORATE COMPLAINANT'S TESTIMONY IN RAPE CASE

A defendant charged with rape cannot be convicted upon the testimony of the person defiled without "other evidence,"<sup>53</sup> which tends to establish that the crime was committed by this defendant.<sup>54</sup>

Where the commission of rape is proved, the Court of Appeals has rejected the contention that the "other evidence" required must independently establish that defendant committed the crime.<sup>55</sup> *People v. Masse*,<sup>56</sup> declares the present rule to be, given the establishment of the crime, that *almost any other evidence* is sufficient to corroborate complainant's testimony and sustain a conviction.

In the *Masse* case complainant voluntarily told her parents that she had been raped, only hours before, by the defendant and two others. Medical evidence obtained shortly thereafter established the commission of the act.<sup>57</sup> At the trial complainant testified that in resisting she threw a jewelry box through a bedroom window. The Court held that the medical evidence, coupled with evidence that the bedroom window screen was broken, and an eyewitness' testimony that defendant came out of the house and retrieved a jewelry box, constituted sufficient "other evidence" to corroborate complainant's testimony and sustain a conviction.

The cases generally divide into two situations: (1) defendant had an opportunity to commit the crime, but there is no independent proof that the crime was committed, and (2) defendant had an opportunity to commit the crime, and there is independent proof that the crime was committed.

In the absence of proof that the crime has been committed by someone, a conviction is indeed difficult to obtain.<sup>58</sup>

Where the commission of the crime is established, defendant's false denial that he was with complainant at about the alleged time of the act not only

52. *People v. Masse*, 5 N.Y.2d 217, 182 N.Y.S.2d 821 (1959), noted elsewhere in this issue, also deals with the rule requiring corroborating evidence to sustain a sex offense conviction.

53. N.Y. PEN. LAW § 2013. The statute embodies the common law rule of evidence. *People v. Friedman*, 139 App. Div. 795, 124 N.Y. Supp. 521 (2d Dep't 1910).

54. *People v. Terwilliger*, 142 N.Y. 629, 37 N.E. 565 (1893).

55. *People v. Masse*, 5 N.Y.2d 217, 182 N.Y.S.2d 821 (1959).

56. *Ibid.*

57. Although defendant argued on appeal that the medical evidence was insufficient to prove the commission of the act by someone, the Court assumed the contrary position in its decision.

58. *People v. Murray*, 183 App. Div. 468, 170 N.Y. Supp. 873 (2d Dep't 1918); *People v. Croes*, 285 N.Y. 279, 34 N.E.2d 320 (1941); *People v. Anthony*, 293 N.Y. 649, 59 N.E.2d 637 (1944); *People v. Brehm*, 218 App. Div. 266, 218 N.Y. Supp. 469 (2d Dep't 1926); *People v. Kingsley*, 166 App. Div. 320, 151 N.Y. Supp. 980 (3d Dep't 1915); *People v. Downs*, 236 N.Y. 306, 140 N.E. 706 (1923); *People v. Page*, 162 N.Y. 272, 56 N.E. 750 (1900); *People v. Seaman*, 152 App. Div. 495, 137 N.Y. Supp. 294 (2d Dep't 1912); *People v. Kline*, 152 App. Div. 438, 137 N.Y. Supp. 296 (2d Dep't 1912).