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Evidence—"Other Evidence" Required to Corroborate Complainant's Testimony in Rape Case

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upon an act of defilement, Judge Fuld's position that corroborating evidence should be required appears correct.[52]

"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,"[53] which tends to establish that the crime was committed by this defendant.[54]

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.[55] *People v. Masse*,[56] 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.[57] 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 on 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.[58]

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).

justifies an inference of guilty presence but guilt of the particular crime.[59] In such a situation, it is also error to exclude evidence that someone else also had intercourse with complainant at about the same time, if that evidence might impair the probative force of the medical proof.[60]

People v. Terwilliger,[61] *People v. Shaw*,[62] and *People v. Marshall*[63] illustrate the relationship between the "other evidence" required and complainant's testimony where the commission of the crime is proved and defendant's opportunity is established. In the *Terwilliger* case complainant promptly and voluntarily disclosed the act. Her disheveled and distraught condition and her statement that she lost an undergarment button in an isolated area where defendant and she had traveled on the night of the alleged act were held sufficient "other evidence" to sustain a conviction upon the finding of the missing button. But complainant's disheveled and distraught condition and traces of gonococci common to both complainant and defendant were not sufficient to sustain the "other evidence" requirement in the *Shaw* case,[64] where complainant's disclosure was delayed and her testimony in part contradictory. In the *Marshall* case complainant testified that she was forcibly carried into defendant's automobile after she had attempted to escape from him, and in so doing, broke her leg. She testified further that defendant tied a rag around her bleeding leg and used a knife to coerce her. Defendant admitted that he drove an automobile that night matching the description given by complainant. An examination of the automobile disclosed a matching rag, a knife on the floor, and bloodstains on the back seat. This evidence was held sufficient to corroborate complainant's testimony and sustain the conviction.

Only in the *Marshall* case can it be contended that the "other evidence" independently proved that defendant was guilty. The other above cases establish that the corroborating evidence required need only support complainant's testimony once the commission of the crime is proved. Complainant's character,[65] the voluntary nature, promptness, and credibility of her testimony, as a comparison of the *Terwilliger* and *Shaw* cases illustrate, effectively dictate the reliance to be placed on this "other evidence." The problem, as counsels' briefs suggest, is that while the People cannot be required to furnish an eyewitness to the crime, neither should a defendant be convicted merely because he *might* have been guilty. This decision, however, in allowing almost any other evidence to suffice, so weakens the spirit of the evidentiary

59. People v. Deitsch, 237 N.Y. 300, 142 N.E. 670 (1923). *Cf.* People v. Croes, *supra* note 58.

60. People v. Brehm, *supra* note 58; People v. Oathout, 240 App. Div. 739, 265 N.Y. Supp. 535 (3d Dep't 1933).

61. *Supra* note 54.

62. 158 App. Div. 146, 142 N.Y.S.2d 782 (3d Dep't 1913).

63. 5 A.D.2d 352, 172 N.Y.S.2d 237 (3d Dep't 1958).

64. The female defiled in the Shaw case was 8 yrs. old. Note the following excerpt from Holt and McIntosh, DISEASES OF INFANCY AND CHILDHOOD (11th ed.,) at 821: "Gonococcus vaginitis is not to be regarded as a venereal disease (in young girls). An insignificantly small proportion of the cases are acquired by sex contact."

65. See dissent in People v. Kline, *supra* note 58.

rule that serious doubt remains whether the protection hitherto afforded by the rule still remains.

ADMISSION OF EVIDENCE OF CRIME NOT CHARGED IN INDICTMENT

Upon the trial of one crime evidence of the commission of another crime not charged in the indictment is generally inadmissible.[66] However, exceptions have been made to admit such evidence under certain circumstances.[67] In *People v. Cohen*[68] the defendant was convicted on several counts of insurance fraud and larceny by false representations with respect to two different fires,[69] the first of which occurred in Pennsylvania, the second in New York. The Court of Appeals reversed the Appellate Division,[70] and held that the trial court had not erred in admitting evidence showing that the cause of the first fire was the defendant's incendiarism, even though such evidence tended to prove the crime of arson, which was not charged in the indictment.

The Court held the evidence of arson admissible with respect to the crimes involving the first fire because it was introduced naturally and incidentally to the showing of facts and because it showed the falsity of defendant's statement in his insurance claim (that he did not know the cause of the fire), which showing evidenced his misrepresentations and his intent to defraud. The evidence of arson in the first fire would not have been admissible to prove the charges with respect to the second fire, but the Court held that since that evidence was properly admitted with respect to the first fire and counsel for the defendant had failed to object to its admission with respect to the second fire, the objection could not be raised for the first time on appeal.[71]

People v. Molineux[72] and *People v. Katz*[73] are the leading New York cases dealing with exceptions to the general rule on admission of evidence of an uncharged crime. Among the exceptions set forth in those cases is one concerned with the situation in which proof of the uncharged crime is relevant to the instant crime because it tends to show defendant's intent or a common scheme or plan.[74] This exception has been allowed in trials for uttering counter-

66. People v. Sharp, 107 N.Y. 427, 14 N.E. 319 (1887); Coleman v. People, 55 N.Y. 81 (1873); People v. Shea, 147 N.Y. 78, 41 N.E. 505 (1895).

67. The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial. (Wharton on Crim. Ev. [9th ed.] sec. 48) . . .

People v. Molineux, 168 N.Y. 264, 293, 61 N.E. 286, 294, 62 L.R.A. 193, 240 (1901).

68. 5 N.Y.2d 282, 184 N.Y.S.2d 340 (1959).

69. N.Y. PEN. LAW, §§ 1202, 1290, 1294.

70. People v. Cohen, 4 A.D.2d 557, 172 N.Y.S.2d 575 (4th Dep't 1957).

71. N.Y. CIV. PRAC. ACT § 446.

72. People v. Molineux, *supra* note 67.

73. People v. Katz, 209 N.Y. 311, 103 N.E. 305 (1913); see also People v. Thau, 219 N.Y. 39, 113 N.E. 556 (1916); People v. Buchar, 289 N.Y. 181, 45 N.E.2d 225 (1942).

74. People v. Molineux, *supra* note 67.