CRIMINAL LAW — EVIDENCE — RAPE — CORROBATION — WHETHER COMPLAINANT MAY BE CORROBATED BY ACCOMPLICE—ADMISSIONS—ADMISSABILITY—EXCLUSION OF EXCULPATORY STATEMENTS—*REGINA* v. *SIGMUND, HOWE, DEFEND, CURRY.*

The recent case of *Regina* v. *Sigmund, Howe, Defend and Curry*[1] is an unfortunate decision on the novel point of whether the evidence of the complainant in a sexual case may be corroborated by the evidence of an accomplice. The British Columbia Court of Appeal held that the evidence of an accomplice may corroborate the testimony of the complainant and although the result reached in the particular case seems fair, the evidentiary rule established could lead to injustice if it were followed in all cases. In order to properly appreciate the rule established in *R.* v. *Sigmund* a general review of the relevant rules and reasons governing the law of corroboration will be useful.

Corroboration

Corroborating evidence is evidence supplementary to, and tending to strengthen or confirm, that already given.[2] A judicial definition which includes the requirements of corroboration was enunciated by Lord Reading in *R.* v. *Baskerville:*[3]

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

Historically, canon or civil law usually applied the maxim *testis unus testis nullus* which required a plurality of witnesses. English law started with something like the requirements of a number of witnesses such as were demanded by the canon law under the influence of Roman law but as the jury assumed pre-eminence as the tryer of fact the requirement of plurality of witnesses was limited to a number of specific cases.[4]

The Canadian rules with reference to corroboration in criminal law give rise to a distinction based upon whether the rule requiring it applies because of the nature, type or character of the offense itself, or because of the character or nature of the witness. The need for corroboration arises in two separate fields: the first, embracing cases in which corroboration is required by special statutory provision; the second, covering cases in which, by reason of a well established rule of practice at common law, it is deemed to be dangerous to convict in the absence of corroboration. The quality of the corroborative evidence in a case in which it is required by statute such as that required by section 134 [rape] of the Criminal Code[5] is exactly the same as the character of the corroboration required in a case involving the testimony of an accomplice which falls within the rule of practice at the common law.[6]

1 (1967), 60 W.W.R. 257 (B.C.C.A.; Davey, Ford and McFarlane, J.J.A.) The court also discussed the accused's silence as an admission of conduct, the range of questioning on re-examination and evidence that may cause substantial prejudice to the prisoner.
2 22A Corpus Juris Secundum, Criminal Law. 530(1), at 232.
3 [1916] 2 K.B. 658, 667 (C.C.A.).
4 Cross, *Evidence* 166 (2d ed. 1963). Specific cases requiring corroboration are: perjury, procuration, affiliation, unsworn evidence of children, breach of promise of marriage, accomplices, and complainants in sexual cases.
5 S.C. 1953-54, c. 51.
6 *Thomas* v. *The Queen* (1952), 103 C.C.C. 193, 203, per Cartwright, J., overruling *R.* v. *Auger* (1929), 52 C.C.C. 2; also for English authority see *R* v. *Baskerville, supra,* n. 3.

Corroboration of the Complainant's Testimony in a Sexual Offence

The Court in *R.* v. *Sigmund* had to consider the field requiring corroboration by special statutory provision in connection with the testimony given by the complainant in a rape case. The Criminal Code[7] section 134 provides:

> Notwithstanding anything in this Act or any other Act of the Parliament of Canada, where the accused is charged with an offence . . . [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.

The policy behind the rule was enunciated by Lord Chief Justice Hale:[8]

> It is true rape is a most detestable crime, and thereforce ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, though ever so innocent.

Psychiatrists have studied the behavior of young girls and women coming before the courts in sexual cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangement or abnormal instincts, partly by bad social environment and partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences.

Wigmore expresses the operation of this psychic phenomenon as follows:[9]

> The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex-incidents of which the narrator is the heroine or the victim. On the surface the narration is straight-forward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.

The rationale behind the rules governing corroboration of the complainant's testimony is valid and the fear that the complainant may distort the facts have forced the courts to approach her evidence with caution. For example the complaint (and the particulars of it) should not be regarded as corroboration of the complainant's testimony;[10] nor is independent evidence as to the condition of the area where the alleged offence took place corroborative if the complainant had not testified upon the same matter;[11] nor is evidence showing the condition of the complainant's clothing and her physical condition corroborative for it is not necessarily inconsistent with the defence of consent.[12] On the other hand, corroboration may be found in the conduct of the accused;[13] in the fact that the girl was found to be suffering from a venereal disease soon after the date of the alleged offence;[14] and in evidence of emotional upset on the part of the complainant where the complainant was elderly.[15]

7 *Supra*, n. 5.
8 *Pleas of the Crown*, 633, 635 (1618).
9 3 Wigmore, *Evidence* 459 (3d ed. 1940). The author gives case illustrations from modern psychiatry.
10 *R.* v. *Reeves* (1941), 77 C.C.C. 89, 92.
11 *McIntyre* v. *The King*, [1945] S.C.R. 134.
12 *R.* v. *Mudge* (1929), 52 C.C.C. 402, *R.* v. *Salman* (1924), 18 C.A.R. 50.
13 *Hubin* v. *The King*, [1927] S.C.R. 442; *R.* v. *Burr* (1907), 13 O.L.R. 485.
14 *R.* v. *Drew* (No. 2), [1933] 4 D.L.R. 592.
15 *R.* v. *Zielinski* (1950), 34 C.A.R. 193.

Thus, what may amount to corroboration of the complainant's testimony depends to a great extent on the facts and circumstances of the particular case, but the validity of the general rule requiring a warning to be given where the complainant's evidence is uncorroborated is not questioned by the courts.

Corroboration of the Testimony of an Accomplice

The question of whether a jury may lawfully convict on the sole testimony of an accomplice or whether the evidence of an accomplice must be corroborated has not been an easy one.

The question originally arose during the political trials in the time of Henry VIII, where an accomplice would turn informer and become the chief witness of the Crown in its prosecution. But the controversy was over the admissibility of the evidence and not as to its sufficiency because in theory one oath was as good as another and thus no question as to the qualitative sufficiency of the testimony arose.[16] By the end of the eighteenth century a general practice of discouraging a conviction founded solely upon the testimony of an accomplice had grown up.[17]

The rationale of the rule is simply that there is danger that the accomplice will minimize his role in the crime and exaggerate that of the accused.[18] The accomplice may elect to save himself from punishment by procuring the conviction of others. It is true that by doing this the accomplice will be convicting himself, but his expectation of clemency as a reward for helping in the prosecution is the balancing factor. Lord Abinger, C.B., recognized this rationale in *R.* v. *Farler*[19] when he stated:

> It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. . . . The danger is, that when a man is fixed, and knows that his own guilt is detected, he purchases immunity by falsely accusing others.

In Canada the Criminal Code provides that an accused must not be convicted on the uncorroborated evidence of one witness for certain crimes,[20] and a situation could arise where the accomplice was the only witness, but generally the rule that a trial judge *must* warn the jury of the danger of convicting the accused on the uncorroborated evidence of an accomplice was a rule of practice that has become a rule of law.

Some American jurisdictions have enacted legislation forbidding conviction on the uncorroborated evidence of an accomplice.[21] The effect of the legislation was to provide a substantive protection for the accused.[22] Fortunately we have not adopted such a position.

16 7 Wigmore, *op. cit. supra*, n. 9, at 312.
17 *Id.*, at 313. See *R.* v. *Smith* (1784), 1 Leach 479; 168 E.R. 341. The Court, though it was admitted as an established rule of law that the uncorroborated testimony of an accomplice is legal evidence, thought it too dangerous to suffer a conviction to take place under such unsupported testimony.
18 *Op. cit. supra*, n. 4, at 172.
19 (1837), 8 Car. & P. 106; 173 E.R. 418.
20 The Criminal Code, s. 131(1) provides that no person shall be convicted of the following offences unless there is corroboration: sexual intercourse with feeble-minded persons; incest; seduction of female between 16 and 18 years; seduction under promise of marriage; sexual intercourse with stepdaughter, foster daughter, female employee, etc.; and parent or guardian procuring defilement.
21 New York Commission on the Administration of Justice, Third Supplemental Report, 16 (1937) recommended the deletion of this section (C. Crim. Proc., s.399); also see 7 Wigmore, *op. cit. supra*, n. 9, at 325.
22 The existence of this legislation in the State of New York during the period of organized racketeering in the 1930's made it very difficult to convict the leaders of the crime rings and led to a recommendation that the statutory rule be abolished and that the courts return to the common law. See Wigmore, *Ibid.*

The authorities were divided on whether the trial judge "should" or "must"[23] warn the jury of the danger of convicting on the uncorroborated testimony of an accomplice, but the question was settled in *Davis* v. *D.P.P.*[24] by Lord Simonds:

> In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated. This rule, although a rule of practice, now has the force of a rule of law.

The Canadian position seems to be the same and the failure of a trial judge to give the warning would result in the conviction being quashed in the Court of Appeal.[25]

It is clearly established that one accomplice cannot corroborate another accomplice.[26] In other words, in looking for corroboration of the testimony of accomplice A, it cannot be found in evidence given by accomplice B.

Having examined the reasons relating to corroboration both in the case of an accomplice and of a complainant the necessity of the rules is evident. It was the forming of a new rule in *R.* v. *Sigmund* without proper regard for the existing rules and their rationale that lead the Court to an unfortunate conclusion.

The Rule in R. v. *Sigmund*

The facts of *R.* v. *Sigmund* were: Six young men (Barichello, Curry, Rowe, Sigmund, Defend and Longpre) went from Vancouver to Third Beach on the night in question; one of them (Curry) went off with the complainant; later upon returning to the car the others came upon the girl and Curry; one of them said, "Let's take her clothes off"; some of the boys had and some attempted to have intercourse with the complainant; one of them, Barichello, testified that he, Defend, and Curry had had, or attempted to have, intercourse with the complainant.

The trial judge warned the jury in appropriate terms that it would not be safe to convict upon the evidence of an accomplice unless it was corroborated in some material degree implicating the other prisoners. He also directed the jury in appropriate language under the Criminal Code, s. 134, that it would not be safe to convict the prisoners on the uncorroborated evidence of the complainant. He also told the jury that the complainant and the accomplice could not corroborate each other. As a result three of the prisoners were acquitted. The Crown appealed.

In the British Columbia Court of Appeal Mr. Justice Davey pointed out that there was no authority for the proposition laid down by the learned trial judge[27] and went on to state:[28]

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23 Edwards, *Accomplices in Crime*, [1954] Crim. L. Rev. 324, for a complete review of the case authority on both sides.

24 [1954] A.C. 378, 513.

25 *R.* v. *Burns* (1937), 70 C.C.C. 401; *R.* v. *Tate*, [1908] 2 K.B. 680; *R. v. Baskerville*, *supra*, n 3, at 670: "If the judge failed to give the warning, this court would be bound to set aside the conviction." For whether a judge trying a case alone must state that he appreciates the danger of convicting on the uncorroborated evidence of an accomplice see *R.* v. *Ambler* (1938), 70 C.C.C. 306 and *R.* v. *Bush* (1938), 71 C.C.C. 269.

26 *R.* v. *Gay* (1909), 2 C.A.R. 327; *R.* v. *Baskerville*, *supra*, n. 3; *R.* v. *Noakes* (1832), 5 Car. & P 326; 172 E.R. 996; *R.* v. *Howard* (1921), 15 C.A.R. 177. An accomplice is *participes criminis* in respect of the actual crime, one who could be indicted for the offence for which the accused is being tried: *Davies* v. *D.P.P.*, *supra*, n. 24. Thus, the complainant is not an accomplice. See also *R.* v. *Ratz* (1913), 12 D.L.R. 678; *R.* v. *Pitts* (1912), 8 C.A.R. 126.

27 Davey, J.A., stated *supra*, n. 1, at 258: "but no authority was cited, and I have found none, for the proposition laid down by the learned trial judge."—that the complainant and the accomplice could not as a matter of law corroborate each other.

28 *Supra*, n. 1, at 259.

> In the case of the evidence of a complainant to a sexual offence and an accomplice to it, there may be the danger that each is lying, but if so it will in most cases be for different reasons. It cannot be said, as it can in the case of accomplices, that the same motive will induce both to lie. In my respectful opinion the evidence of the accomplice could in law corroborate the evidence of the complainant.

It is the respectful opinion of the writer that the decision of Mr. Justice Davey is wrong. The fact that an accomplice and complainant will have different motives for lying does not give the court a substantial guarantee of the truth of the fact in issue—was the complainant raped by the accused—just because an accomplice and complainant corroborate each other's evidence. The reason Mr. Justice Davey gives for forming the rule as he does is totally unrelated to the real question the court is called upon to answer—did the accused commit the alleged crime? The complainant and accomplice do have different motives for lying but, and this I suggest is the important point, the results of their respective lying is that they both point to the guilt of the accused. They both attempt to implicate the accused in the crime; the accomplice in the hope he may purchase immunity for himself, and the complainant because of the psychic complexes that are peculiar to this type of witness in sexual cases.

By stating, "In my respectful opinion the evidence of the accomplice could *in law* corroborate the evidence of the complainant . . .",[29] Mr. Justice Davey went much further than seems necessary. In the case of both an accomplice and complainant the jury has an unfettered right to convict upon uncorroborated evidence provided the trial judge has warned of the danger of doing so. It seems logical that the British Columbia Court of Appeal should have established a similar type of practice rule in *R.* v. *Sigmund*. The rule simply stated could be that a trial judge must warn the jury of the danger of convicting on the evidence of the complainant where it is corroborated by the evidence of an accomplice, but that if they thought the witnesses were telling the truth they might convict.

The rules of evidence should not be used to shield the accused from conviction nor should they enable a desperate accomplice and a confused or unbalanced complainant to convict him by corroborating each other's evidence.

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29 *Ibid.* The logical result of Mr. Justice Davey's rule would be that no warning under s. 134 of the Criminal Code or concerning accomplices would be necessary.