IN THE COURT OF APPEAL [1997] QCA 100

SUPREME COURT OF QUEENSLAND

C.A. No. 438 of 1996
C.A. No. 439 of 1996

Brisbane

[R. v. Major]
[R. v. Lawrence]

THE QUEEN

v.

SEAN GREG MAJOR
COLIN WILLIAM LAWRENCE

Appellants

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Fitzgerald P.
McPherson J.A.
Helman J.

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Judgment delivered 2 May 1997

Separate reasons for judgment of each member of the Court

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**APPEALS DISMISSED**

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**CATCHWORDS:CRIMINAL LAW – evidence – rape – concerted attack by accused – single continuous episode – whether complainant's distressed condition after attack capable of corroborating case against each accused**

Counsel: Mr S.J. Hamlyn-Harris for the appellants
Mr M. Byrne Q.C. for the respondent

Solicitors: Legal Aid Office for the appellants
Queensland Director of Public Prosecutions for the respondent

Hearing Date: 5 December 1996

**REASONS FOR JUDGMENT - FITZGERALD P.**

**Judgment delivered 2 May 1997**

The issue giving rise to these appeals concerns the adequacy of the trial judge's directions with respect to corroboration when each of the appellants was convicted of rape. The circumstances are set out in the reasons for judgment of the other members of the Court.

Differences of opinion with respect to the topic of corroborative evidence exist, as appears from the other judgments in this case and other recent decisions of this Court,[1] and there is "a strong opinion that the law of corroboration has become unduly and unnecessarily complex and technical".[2] I will state my opinion on the applicable principles as briefly and simply as possible.

(i) (a) Evidence is corroborative of evidence of a matter when the former evidence, if accepted, logically adds to the probability that the matter occurred.

(b) It is not the function of corroborating evidence to prove a matter of its own force, or, a fortiori, by itself to establish a matter beyond reasonable doubt.

(ii) If corroboration of the evidence of a prosecution witness that an accused committed an

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1 See, for example, R. v. Clark (C.A. 41 of 1995, unreported, 1 September 1995); R. v. Smith (C.A. 198 of 1995, unreported, 14 November 1995); R. v. Schultz (C.A. 413 of 1995, unreported, 14 December 1995); R. v. Knight (C.A. 370 of 1995, unreported, 19 December 1995); R. v. Snowdon (C.A. 271 of 1995, unreported, 4 June 1996); R. v. Massey (C.A. 72 of 1996, unreported, 12 July 1996); R. v. Cook & ors. (C.A. 219, 231, 242, 243 and 250 of 1996, unreported, 19 November 1996); and cases cited. See also R. v. Camp (Vic. CA 60172 of 1995, unreported, 3 September 1996); R. v. BRS (NSW CCA, BC9600450, unreported, 5 March 1996) and R. v. Pisano (Vic. CA, 58 of 1996, unreported, 15 August 1996). The leading modern High Court authority is Doney v. R. (1990) 171 C.L.R. 207.

2 Webb v. R. (1994) 181 C.L.R. 41, 94 per Toohey J.

offence is essential,[3] there must be evidence from a source other than that witness which adds to the probability both that the offence was committed and that it was committed by the accused.

(iii) Evidence is corroborative of evidence of an accused's guilt if the former evidence is evidence of a disputed matter or matters[4] which logically add to the probability, i.e., confirm or tend to confirm, that the accused is guilty.

(iv) A matter does not add to the probability that an accused is guilty merely because it is consistent with guilt; for example, if it is "neutral", i.e., equally consistent with guilt and innocence, or more consistent with innocence. Conversely, a matter which is consistent with an accused's innocence is capable of adding to the probability that he or she is guilty.[5]

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[3] When corroboration of the evidence of a witness is not essential, it is nonetheless sometimes appropriate that a jury be instructed either that it is dangerous to convict an accused person on the basis of the evidence of that witness, or that the evidence of the witness must be scrutinised with particular care, unless it is corroborated.

[4] Reference is often made to corroboration in a "material particular".

[5] For example, flight or lies by the accused.

(v) In order to be corroborative, evidence need not directly confirm or even relate to the circumstances of the offence described by the witness whose evidence requires corroboration or otherwise refer to a constituent element of the offence.

(vi) A body of evidence can be corroborative of evidence of a matter although individual parts of the body of evidence, considered in isolation, are not capable of being corroborative of the evidence of that matter.

(vii) Evidence can be corroborative of evidence of a matter although there is other evidence which contradicts or explains the evidence relied on as corroborative, including an explanation by the accused.

(viii) Other evidence may be considered in determining whether evidence corroborates a witness's evidence of a disputed matter. The other evidence which may be considered includes other evidence of the witness whose evidence is sought to be corroborated, except insofar as use of that evidence for that purpose would involve the witness corroborating himself or herself. For example, the significance of evidence relied on as corroborative might depend on, and only emerge by reference to, other evidence.[6] Conversely, if a lie by an accused person is relied on as corroborating a witness's evidence of a disputed matter, the evidence of that witness cannot be used to establish that the accused lied.[7]

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6 See the discussion of the decisions of the New South Wales Court of Criminal Appeal in R. v. Holland (No. 60602 of 1991, unreported, 5 August 1992), R. v. Williams (No. 60171 of 1993, unreported, 30 September 1994), and Kalajzich (1989) 39 A.Crim.R. 415 in Hunt (1994) 76 A.Crim.R. 363 at pp. 365-366. (An appeal on other grounds in Holland was dismissed: (1993) 67 A.L.J.R. 946.)

7 Edwards v. R. (1993) 178 C.L.R. 193, 211.

(ix) Evidence which adds to the probability that the evidence of a witness of a particular matter is correct might or might not add to the probability that the evidence of the witness of some or all other matters is correct.[8] I do not consider it a principle of law that evidence which confirms or tends to confirm one part of a witness's testimony corroborates the entire testimony by "increasing the probability that [the witness's] entire testimony was truthful".[9] It is for the judge to determine whether the former evidence is capable of corroborating the witness's evidence on the latter matter or matters - and, if so, which matters - and, if the evidence is so capable, for the jury to decide (i) whether it does or does not add to the probability that that matter, or those matters, occurred and (ii) whether that matter or those matters add to the

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8 R. v. M. [1995] 1 Qd.R. 213.

9 Massey, citing M. at p. 221. In my opinion, M. does not support the proposition for which it is cited in Massey.

probability that the accused is guilty.

(x) "Leaving aside the special problems associated with the unsworn evidence of children ... and the position with respect to the evidence of accomplices, there is no rule of law or practice that evidence which attracts a corroboration warning cannot corroborate or be corroborated by other evidence attracting the same warning."[10]

(xi) (a) It will commonly be desirable for a trial judge's charge to the jury to identify the relevant matter or matters the subject of the evidence sought to be corroborated in order to assist the jury to determine whether other evidence is corroborative of the evidence of that matter. Further, the judge should explain whether, and if so how, that matter could confirm or tend to confirm that the accused person is guilty of the offence charged in order to assist the jury to decide whether it does so. Such a direction should indicate the potential strength or weakness of the evidence relied on by the prosecution as corroboration; for example, whether the matter the subject of the evidence is also consistent with the accused's innocence.

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[10] Pollitt v. R. (1992) 174 C.L.R. 558, at p. 600, per Dawson and Gaudron JJ.

(b) The jury should also be warned that the circumstance that evidence which corroborates evidence of the accused's guilt, i.e., adds to the probability that the accused is guilty, does not necessarily mean that there is no reasonable doubt concerning the accused's guilt, or absolve the jury from its obligation to acquit unless it is satisfied of the accused's guilt beyond reasonable doubt.[11]

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[11] Pollitt, at pp. 587-588, 606, 616.

The trial judge warned the jury of the danger of convicting the appellants on the uncorroborated testimony of the complainant, who gave evidence of sexual intercourse with each of the appellants against her will. There was no issue concerning the identity of the appellants as persons who each had intercourse with the complainant at the material time. The disputed issue on which the guilt or innocence of each of the appellants depended was whether or not the complainant consented to have intercourse with him, and the matter relied on to corroborate the complainant's testimony that she did not consent was her distressed and dishevelled condition following the acts of intercourse after she dressed and went to another house where she spoke to a community police officer. The evidence of the community police officer describing the complainant's condition at that time was relied on as evidence corroborating the disputed testimony of the complainant that she did not consent to the intercourse with either appellant.

While evidence of the complainant's condition was not, and in the circumstances of this case at least could not be, evidence which identified either or both of the appellants as the person or persons who had had sexual intercourse with her, that is of no present significance. Most obviously, it was not disputed that each of the appellants had intercourse with the complainant. However, even were that not so, independent evidence directly confirming her testimony that each of the appellants had intercourse with her would not have been needed to corroborate her evidence identifying the appellants as the persons who had intercourse with her. Corroboration of the complainant's testimony with respect to that matter could have been provided by any evidence from a source other than the complainant which confirmed or tended to confirm the identity of the appellants as those who had intercourse with her; e.g., evidence from a witness who heard noises consistent with the complainant's testimony from the premises where, according to the complainant's evidence, intercourse had occurred and saw the appellants

follow her from those premises. Because it was not disputed that the appellants had intercourse with the complainant, it is unnecessary to pursue this point. However, had the identity of the appellants as the men who had intercourse with her (according to the complainant) been in dispute, corroborative evidence of her identification of the appellants would have been called for if her testimony was to be corroborated. R. v. Berrill [1982] Qd.R. 508 is not authority to the contrary. Like this, it was a case in which the identity of the persons who had intercourse with the complainant was not in dispute. Had there been a dispute with respect to identity, corroboration of the complainant's evidence would have required corroborative evidence in respect of identity, as the unanimous judgment of the High Court in Doney establishes.[12]

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[12] See p. 211.

It was not disputed that the complainant's evidence that she did not consent to the sexual intercourse which occurred with the appellants could be corroborated by evidence which did not directly confirm or even relate to the circumstances of the offence alleged by the complainant or otherwise refer to the existence or absence of the complainant's consent, and it was accepted that evidence of the complainant's condition following the intercourse which admittedly occurred could confirm or tend to confirm that she did not consent to at least one act of intercourse by one of the appellants. However it was argued for the appellants that the complainant's condition following the intercourse could not corroborate her evidence that she did not consent to intercourse with either of the appellants, or add to the probability that either appellant's intercourse with her was non-consensual. In one sense, at least, this does involve a dispute concerning corroboration with respect to the complainant's evidence of identity; namely, the identity of the person or persons whose intercourse with the complainant was non-

consensual. As McPherson J.A. points out in his reasons for judgment in another context, the community police officer's evidence of the complainant's condition could not provide a basis for corroborating the complainant's evidence identifying each appellant as a person who had sexual intercourse with her against her will if the community police officer's evidence did not add to the probability that the intercourse of the complainant with both of the appellants was non-consensual.

The application of a strictly logical approach can present theoretical difficulties when two or more persons are charged with an offence, and evidence which demonstrates that one or some or all were guilty leaves open the hypothetical possibility that one or more accused might have been innocent. The law's response has been pragmatic,[13] as is also exemplified by the decision of the Court of Criminal Appeal in Berrill. The theoretical difficulty loses force when the whole body of evidence is considered and the evidence relied on as corroborative is placed in context.

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[13] See, for example, R. v. Cai and Wang (CA444 and 457 of 1994, unreported, 3 March 1995); and Powell v. Smith and Blacker (CA 251 and 264 of 1995, unreported, 14 November 1995).

The appellant Lawrence gave evidence that the complainant consented to intercourse with him. The appellant Major did not give evidence, but there was evidence of his statement to investigating police that the complainant consented to intercourse with him. The jury must have rejected those claims. Further, there was no evidence which the jury might have considered offered a plausible explanation for the complainant's condition if intercourse with both appellants had been consensual, as each claimed with reference to his own activity. As Helman J. has pointed out, on any version the acts of intercourse were closely connected in time and place and constituted a single continuing episode or incident. In the circumstances described, the evidence of the complainant's condition as observed by the community police officer was capable of corroborating the complainant's evidence that the entire episode involving intercourse with both appellants was against her will. Berrill supports that conclusion and, insofar as that is its effect, it was, in my opinion, correctly decided.

Further, although the material portion of the summing-up could have been better expressed, it indicated to the jury that limited significance could legitimately be attached to the complainant's distressed condition. I am satisfied that there was no deficiency in the summing-up which might have caused a miscarriage of justice.

I agree that the appeals should be dismissed.

**REASONS FOR JUDGMENT - McPHERSON JA**

**Judgment delivered 2 May 1997**

I agree with Helman J. in his conclusion that these appeals should be dismissed. The only qualification I would attach to my otherwise complete concurrence in his Honour's reasons is that I do not consider that, for evidence to be capable of corroborating the testimony of a complainant that she was raped, it must necessarily confirm not only that the crime has been committed but also that the accused committed it.

Whether an accused person committed a particular sexual offence involves proof of identity of the perpetrator; given that an offence is proved to have been committed, an issue remains whether the accused is the person or one of the persons who committed it. Few of the circumstances commonly relied on as corroborative at trials for rape are capable of confirming the complainant's evidence on that issue. Neither torn clothing, bodily injuries, dishevelment, distress, or any of the other frequent concomitants of rape is ever likely to point unequivocally or at all to a particular perpetrator. Even less is it capable of identifying or confirming the identity of a particular individual among two or more perpetrators of such an outrage. Yet evidence of that kind is commonly admitted at trials for rape, where it is relied on as capable of confirming in a material particular the complainant's sworn account or, as it is described in *R. v. Baskerville* [1916] 2 K.B. 658, 665, her "story".

The truth is that evidence of the kind referred to is ordinarily relevant only to the issue of consent, or the absence of consent, on the part of the complainant, and never (or almost never) to the issue of identity. To the extent that it confirms the complainant's evidence that what happened took place without her consent, it is or may be capable of being considered corroborative or confirmatory "in a material

respect". It is not the function of evidence of that character to identify any particular offender, and no amount of legal reasoning or artifice can ever force it into such a shape. Assuming, however, that it is capable of performing the task of confirming the complainant's testimony in a particular respect, it may also increase the likelihood that other parts of her otherwise uncorroborated evidence are reliable; and in that way it may go to support the whole or part of the complainant's testimony with respect to other matters that are in issue at the trial : see *R. v. M.* [1995] 1 Qd.R. 213.

So in this case, the complainant testified that each of the appellants had sexual intercourse with her without her consent. They each admitted to having had sexual intercourse with her. Having regard to that admission, it is difficult to see how any question of identity could have arisen at the trial. Each of the appellants, she said, used force on her either before or during sexual intercourse, by holding her down or doing other acts designed to diminish her resistance. Her physical and emotional condition after the event provided some independent evidentiary confirmation of her account or "story" of what had happened; and so suggested that sexual intercourse had occurred without her consent. It would be virtually impossible to ascribe her condition specifically to the acts of any particular individual in the series; but her subsequent state, which was seen by others who gave evidence about it, supplied some confirmation, going beyond her own otherwise unsupported word, that she had indeed been set upon and forced to have sexual intercourse without her consent.

The particular problem, mentioned by Helman J. in his reasons, which is encountered when signs of physical injury to the complainant are observed after more than one episode or incident of violence, seems to me, with respect, to be simply an example of an evidentiary circumstance that is to a greater or lesser degree equivocal. It is, however, a characteristic of circumstantial evidence that it seldom if ever points in only one direction or is susceptible of only a single interpretation or explanation. Distressed condition is perhaps the foremost example of this kind because it may proceed from any one or more of a wide range of emotional states: see *R. v. Berrill* [1982] Qd.R. 508, 526-527. It is however not, for that reason alone, necessarily incapable of affording corroboration of a complainant's account of violent treatment on either or both of two distinct but proximate episodes or instances. The fact that an item of circumstantial evidence may give rise to competing inferences is not ordinarily sufficient to justify its exclusion from consideration. See *R. v. Stratford* [1985] 1 Qd.R. 361, 366; and *R. v. McK.* [1986] 1 Qd.R. 476, 480, both of which were referred to with approval in *Kalajzich* (1989) 39 A.Crim.R. 415, 429-433.

The present case is, however, not one in which there was a succession of separate or distinct episodes of violence in any one of which the complainant might have received injuries producing the state of distress observed after the event. As Helman J. points out, the incident here was a concerted attack on the complainant in which all of the accused joined. In these circumstances, it is not strictly necessary to consider whether, if each of the accused had attacked the complainant in succession but quite independently of each other, evidence of her subsequent condition would

have tended to confirm her sworn account of what had been done to her by each of the accused. For my part, however, I cannot see why it should not be considered capable of serving that purpose, even if incapable of being specifically related to a particular assailant. Having some evidence that supports a complainant's account that force was used on her by someone is an improvement, even if only a slight one, on having no such evidence at all. At least that must be so while it continues to be thought desirable to search for evidence that corroborates a complainant's testimony in cases of this character.

I continue to hold to the view that difficulties of the kind supposed to be raised in these appeals can in most instances be avoided by refraining altogether from using in summing up the expression "corroboration", or derivatives of that word. Because of the close historical association of that word with the requirement that the independent evidence relied on must also "implicate" (meaning "involve") the accused, directions to juries that speak of "corroborating" evidence almost invariably attract the baleful scrutiny of appellate counsel. It is a much safer course for trial judges to adopt the expression "confirm", rather than "corroborate", when speaking of independent evidence that bears out the complainant's testimony in a material particular, which is something it is quite capable of doing without the need for simultaneously identifying any particular individual as the perpetrator. Such a direction has the added virtue of concentrating the attention of the jury on the precise extent to which, if at all, that testimony is confirmed, instead of leaving them with what, I suspect, sometimes is the false impression that, once some corroborative

evidence has been identified, their function is at an end and they are, without more, justified in finding the accused guilty of the offence.

It is now fifteen years since the High Court refused special leave to appeal in *R. v. Berrill* [1982] Qd.R. 508. The decision has been followed on many occasion in Queensland. The reasoning in that and other Queensland decisions in which it has been applied was adopted by the Court of Criminal Appeal in New South Wales in *Kalajzich* (1989) 39 A.Crim.R. 415. During that period of time, the unusually stringent attitude to proof of guilt on charges of sexual offences that once prevailed has undergone a degree of relaxation. It is now far too late to resurrect the sophistry of some of the former rulings on the topic. The subject, however, is one that has by now exhausted its utility, and certainly any intellectual fascination, it might once have possessed.

Subject to these possible qualifications, I respectfully agree with what in his reasons Helman J. has written in these two appeals, which, as I have said, should be dismissed.

**REASONS FOR JUDGMENT - HELMAN J.**

**Judgment delivered 2 May 1997**

On 16 September 1996, after a trial in the Cairns District Court, a jury found each appellant guilty of having raped the complainant, a woman aged twenty-three years, on 1 March 1996 at Kowanyama, Queensland. A co-accused, Tremain Luke, was acquitted. The three were charged separately. The learned trial judge sentenced Major to imprisonment for three years, and Lawrence to imprisonment for four years effective from 11 March 1996, from which day he had been held in custody.

The complainant's evidence was that she left the canteen at Kowanyama on the night in question at about 8.00 p.m. feeling drunk and went to a house where she fell asleep on the floor in

the kitchen near the back door. She said she woke when Luke, her nephew, and Lawrence, her cousin, were dragging her across some grass and they put her down on it. She said she then went with Lawrence to the bathroom of another house and Lawrence threatened her, put a string around her neck making it difficult for her to breathe, and told her to remove her clothes and lie down. She said she did as she was told, and then Lawrence had carnal knowledge of her without her consent; while he was doing so he slapped her. She said that while Lawrence was raping her Luke and Major were outside the bathroom behind the door asking for their turns. After Lawrence had raped her, she said, he left the bathroom and Luke came in and he raped her, holding her down as he did so. Then Luke left the bathroom and Major came in and raped her, she said. Then, she said, Major left, she dressed and went to another house and spoke to Harriet Bernard, a community police officer.

Harriet Bernard gave evidence that when she saw the complainant the latter had mud on her clothes, was crying, and looked nervous.

Lawrence gave evidence to the effect that he had had carnal knowledge of the complainant, but denied that it was without her consent. Major did not give evidence, but there was evidence before the jury of an account that Major gave to the investigating police officers in which he admitted that he too had had carnal knowledge of her, but denied that there had been lack of consent.

Each appellant had three grounds of appeal, but only one was proceeded with in each case: that the trial judge erred in law when he ruled that evidence of the complainant's distressed condition was capable of corroborating her evidence. The argument before us focussed on his Honour's directions to the jury which followed from that ruling.

In his Honour's summing-up he said this about the complainant's distressed condition:

"One other piece of evidence which is capable of corroborating Judy, and once again it is for you to decide whether it does corroborate her, is her distressed condition when she spoke to Harriet Barnard. You recall Harriet told you that she was upset, crying, distressed, nervous, frightened. Members of the jury, once again, you have always got to bear in mind the possibility that such a condition can be feigned.

But if you are satisfied that her distressed condition was genuine, then it may tend to support her account that what had just taken place in that bathroom, did not happen

> with her consent. It is capable of corroborating her account in respect of each accused. But it may not give you a great deal of assistance, because on the cases that have been advanced on behalf of the accused, in Lawrence's case, there is no dispute that he had intercourse with her. What is disputed is that she did not consent. In Luke's case, and on his account to police, he appears to suggest that she was not consenting to what took place, but he did not have intercourse with her. And in Major's case, he suggests that he had intercourse with her, that is not in dispute, but he basically told the police that she was consenting.

> So what you may make of that distressed condition is a matter for you. You have got to be careful that if she, for instance, theoretically, if she was raped by one of them, and not by the other two, then she might be distressed because of that single rape. But nevertheless, it is evidence capable of corroborating her. Whether it does or not, is a matter for you and the assistance you get from that distressed condition, is a matter for you. It may assist you in a broad way, it may not assist you very well in relation to each accused.

> So once again, that is the evidence which is capable of corroborating her. It is for you to decide whether it does corroborate her, and in particular, it is for you to decide whether it does corroborate her in relation to any particular accused."

For evidence to be capable of corroborating other evidence against an accused person the former evidence must be independent evidence which is capable of confirming in some material particular not only the evidence that the crime in question has been committed, but also that the accused person committed it: *R. v. Baskerville* [1916] 2 K.B. 658 at p.667; *R. v. Kerim* [1988] 1 Qd.R. 426 at pp.432-433 per Andrews C.J. and at p.445 per Macrossan J.; *R. v. Bryce* [1994] 1 Qd.R. 77 at p.78 per Macrossan C.J. and at pp.81-82 per Davies J.A.

On behalf of the appellants Mr Hamlyn-Harris submitted that the evidence of the complainant's distressed condition was capable of corroborating, or confirming, her evidence that she had been raped, but it was not capable of corroborating, or confirming, her evidence that Major had raped her, because it was as consistent with her having been raped only by Lawrence or only by Luke or only by Lawrence and Luke as it was with her having been raped by Major alone or by Major and one or both of the others. The same analysis applied *mutatis mutandis*, Mr Hamlyn-Harris submitted, to the case against Lawrence: the evidence of the complainant's distressed condition was not capable of corroborating, or confirming, her evidence that Lawrence had raped her because it was as consistent with her having been raped only by Major or only by Luke or only by Major and Luke as it was with her having been raped by Lawrence alone or by Lawrence and one or both of the others. It would follow from those submissions that the direction that the

evidence of the complainant's distressed condition was capable of corroborating her account in respect of each accused was erroneous. That argument was in essence that rejected by the Court of Criminal Appeal in *R. v. Berrill and Ors* [1982] Qd. R. 508, the facts of which were similar to those of this case.

In *R. v. Berrill and Ors.* the complainant alleged she had been raped by three men and three others had attempted to rape her in a park or playground in the course of a continuous attack, in which the men had taken turns to assault her. The case went to the jury on separate charges against each man and each was convicted. Each man admitted to having had, or having attempted to have, carnal knowledge of the complainant on the night in question, so no proof beyond those admissions, if accepted by the jury, was required to establish their involvement or to implicate each of them in the alleged incident. It was held that evidence of subsequently observed injury to the complainant - a black eye - could be regarded as corroboration of the issue of absence of consent in each case.

Andrews S.P.J. set out the evidence in some detail:

"According to her evidence the complainant had in a general sense accompanied the group of young men, previously strangers to her, from the Shamrock Hotel and into this park or children's playground following on a suggestion by Grant Michael Berrill that they should just go in there for a few beers before going to a party somewhere else. She had stated that she quite happy to be with him and come into the park with him. Her evidence was to the effect that they were there together and that they sat on a plank or form in front of a small shed in the grounds and that the rest of the group went to a corner of the park some distance away. It was not so far as to prevent her from hearing, using my phrase, a mumble of conversation when it took place in that area. She said that she and Grant Michael Berrill kissed passionately, that he left her and went to talk to the others or get beer on two or three occasions. She said that she could see a little bit of them, there was not much lighting. She was able to identify Gary Vivian Olsen who came during one of the intervals and sat next to her. She said that he tried to kiss her and was rejected by her in rather vulgar terms and that she was aware that he was angry because of the manner in which he threw away a beer can which was in his hand at the time.

She had told Grant Michael Berrill that she would be intimate with him (my terms) only if she was drugged so that she did not know what she was doing, but that she was willing to go with him to get such drugs if he got a car for that purpose. She was able to say also that Kevin Olsen `the one with the glasses' came over and kissed her, as he said, for his birthday presumably on one of the intervals while Grant Michael Berrill was away from her. In evidence she stated that she said to him she didn't really think it was his birthday. She says that then she and Grant Michael Berrill went to another shed in the grounds to get away from the others and to be with Grant Michael Berrill.

She said that she felt pretty drunk but that she knew what she was doing and she was aware of the fact that Grant Michael Berrill went with her. She said that at this other shed she was sitting on a plank or form and that she thought that, at the moment to which I shall refer, Grant was crouched down beside her. She said that then she was dragged from the shed down a pathway between a fence and a tennis court during which time `they were laughing'. She had been seized from behind and held by the arms in the dragging process. This is evidence which might be considered as showing at least that Grant Michael Berrill knew she was being subjected to force just prior to his intercourse with her and prior to acts of intercourse, or attempts, by the others. She said also that each of the five referred to by her got on top of her for about a minute at a time; that while the third man was on top of her she took some steps by way of resistance which I need not describe, and received a blow in the area of the right eye. Her evidence was that after the fifth man got on top of her somebody said `Quick the pigs, whereupon she was released and left lying there, her clothes being strewn about in that her shoes and underpants could not at once be found and, as the evidence indicates, some other underpants which she had in a packet or a bag were also strewn about." (pp. 510-511)

As Andrews S.P.J. noted, the trial judge "made it clear to the jury that had there been separate instances or alleged rapes which were separate and defined as to place and time, he would have withheld the evidence as to the black eye as evidence of corroboration against any of the accused . . " (p.512). It is also clear from the following words of Andrews S.P.J. setting out his conclusion that it was the fact that the alleged attack was a concerted one which led to his approval of the course taken by the trial judge:

"His Honour the learned trial judge made it clear in his direction that evidence of a black eye sustained by the complainant could be in law by regarded as corroborative on the issue of consent in that it was sustained by her during a continuing episode or incident at one particular part of the park or playground, to which reference is made above. With respect I think this was quite correct in the light of other evidentiary matters to which I have referred which make it nothing to the point that the black eye was sustained during the third assault, when two of the six had already had intercourse." (p.517)

McPherson J., with whose reasoning and conclusions Andrews S.P.J. was broadly in agreement, concluded that independent evidence that the complainant bore marks of injury in the form of a black eye was capable of corroborating her testimony that she did not consent to intercourse with *any* of the accused and that in the course of her resistance she received the facial blow or blows to which the black eye was attributed, even if that evidence fell short of *direct* proof of the absence of her consent to sexual intercourse with each accused. His Honour said:

"The evidence concerning the black eye was, as Mr. *Nase* for the Crown submitted, tendered not to implicate the accused but to afford corroboration of the complainant's testimony with respect to the contested primary issue in each case; that is, whether penetration had been effected or attempted without her consent. The essence of the submission for the accused both at trial and on appeal was that the black eye was incapable of having the necessary corroborative effect because, although it might in some circumstances be said to support a story that she did not consent to intercourse with a particular individual accused, it was here not capable of doing so in the cases of any of the six accused. In my view, this mistakes the nature and function of the corroborative evidence required. As was in *R. v. Baskerville* [1916] 2 K.B. 658, 665:

`What is required is some additional evidence rendering it probable that the story of the accomplice is true, and that it is reasonably safe to act upon it.'

Substituting `complainant' for `accomplice' in this passage, all that was here required was additional evidence rendering it probable that the complainant's evidence that she did not consent was true. Independent evidence showing that in the course of the evening she received a black eye was capable of rendering it probable that her story (which was that she received facial blows while resisting sexual intercourse) was true and so made it safer to act upon that story. It was sufficient that this evidence tended to confirm her testimony in a material particular, even if it fell short of direct proof of the disputed element, namely, the absence of her consent to sexual intercourse with each accused: cf. *R. v. May* [1962] Qd.R. 456, 459-460, per Gibbs J.

. . . .

The conclusion I have reached on this aspect of the appeal therefore is that independent evidence that the complainant bore marks of injury in the form of a black eye was capable of corroborating her testimony that she did not consent to intercourse with any of the accused and that in the course of her resistance she received the facial blow or blows to which the black eye is attributed. It may be added that if this view is not correct, then it is difficult to see how in any case of double or multiple rape the independent evidence commonly relied on and consisting of injury to the person or clothing of the complainant, or her subsequent distressed condition, can ever be regarded as corroborative of non-consent, except perhaps in the rare case where she can identify each offender with a particular injury received, or where the accused are charged with having jointly assisted the commission of the several rapes by the others or other of them." (pp.524-525)

*R. v. Berrill and Ors* was then a case in which the accused all admitted having had or having attempting to have carnal knowledge of the complainant in the course of a single continuing episode or incident. It is authority for the proposition that in those circumstances when the complainant gives evidence that the single continuing episode or incident was a concerted attack of a sexual nature on her, evidence of subsequently observed physical injury is capable of

confirming her allegation of the absence of consent to the acts of each assailant. It is essential to that proposition that the allegation be of a single continuing episode or incident constituting a concerted attack and not of separate instances or of separate alleged assaults which are "separate and defined as to place and time", as the trial judge in *R. v. Berrill and Ors* put it. If the attack is concerted any threat uttered, force applied, or blow struck by one assailant will, on this analysis, be regarded as uttered, applied, or struck on behalf of all assailants. It is obvious that of itself evidence of an injury to a victim of a concerted attack will not, as a general rule, point to any individual assailant as the one who inflicted the injury. Such evidence will then not be capable of *directly* corroborating the evidence against any one accused person. But in accordance with the proposition for which *R. v. Berrill and Ors* is authority such evidence may be capable of doing so *indirectly* by confirming the collective attack by all, and, by that means, the evidence against each individual assailant.

There is, in my view, no material difference between the facts in *R. v. Berrill and Ors* and the facts this case. The difference between physical injury and distress is not material. Both appellants admitted having had carnal knowledge of the complainant in the course of what could properly be described as a single continuing episode or incident; Mr Hamlyn-Harris, correctly in my view, conceded on behalf of the appellants in the course of his oral submissions that there had been "all one transaction" in this case. The complainant's evidence was of a concerted attack.

I see no proper basis for declining to follow *R. v. Berrill and Ors*, upon which the Crown relies. Accordingly I can detect no error in his Honour's direction to the jury, so both appeals should be dismissed.