

## R. v. LAMBERT.

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March 5, 6, 27.

*Criminal law—Rape—Consent—Capacity of girl to consent—Girl mentally defective—Complaint—Evidence of—When admissible—Demeanour in Court of girl—Proof—Mens rea.*

Evidence relating to an unsworn oral statement, not part of the *res gestæ*, but alleged to have been made by a woman or girl at the first reasonable opportunity after the occurrence of an alleged sexual offence against her, is not admissible to prove the facts complained of. It is admissible only where it supports the sworn testimony of some person.

The general principle of English law with regard to alleged mental incapacity is to consider it with reference to the particular matter under investigation, and not to lay down any rigid rule applicable to all varieties of circumstances.

Capacity to consent to carnal knowledge presupposes some perception of what is about to take place.

Where in a case of alleged rape want of consent depends upon an alleged want of capacity to consent, the prosecution is entitled to give evidence tending to show that the accused knew of such want of capacity, and is probably bound to give *primâ facie* evidence that the accused knew at least that there was a possibility of such want of capacity.

Where want of capacity to consent is relied upon in a case of rape the woman's or girl's appearance and manner, where she is produced in Court, if coupled with sworn testimony that they correspond with her appearance and manner at the time of an alleged offence, may be taken into consideration by the jury.

## APPEAL TO FULL COURT.

The prisoner was charged, at Ballarat, before Irvine, C.J., and a jury, with having had carnal knowledge of D. M., a girl 20 years of age, without her consent.

The girl was of defective intelligence. When examined on the *voire dire* as to her capacity it was found that she was incapable of giving evidence on oath, and, being twenty years of age, was unable to make a statement.

Evidence was given for the prosecution that the prisoner admitted to the police that he had had intercourse with the girl, but alleged that she consented.

Medical evidence was given that the mental calibre of the girl was equal to that of a child about 4 or 5 years of age, and that physically she was a fully developed woman and might have strong sexual instincts.

The evidence included the following:—A. G. S.:—I know D. M. On Tuesday, 12th November, about five o'clock, I went home from Casterton. I went up Henty-street and through railway gates passing through reserve towards McKinley-street. I saw a man and a girl. They were in enclosure to pumping station.

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They were about 50 yards from pumping shed in McKinley-street side. They were moving towards the town. He was a little in front of her—about two or three feet. They would be about forty yards from me. I sang out to the girl, whom I recognized as D. M. I also recognized the prisoner. I said—"Dot, come on home with me." She: "Yes, I'm coming home." She came across to me. She was fumbling with her blouse and rubbing down her sleeves. At my home I gave her a drink of water. She appeared to be confused and excited. She told me nothing, and I asked her no questions. On same evening, I, with A. M. (Dot's sister) saw prisoner about 8.30 p.m. at entrance to Tanner's Hotel. A. called him. He came. In middle of road A. M. said—"What were you doing with my little sister this afternoon?" Prisoner: "Me?" A.: "Yes, you; and here's a witness." Prisoner: "Me?" A.—"Yes, you." He turned his head and said—"Don't speak to me," and walked away.

Cross-examined.—I said—"Dot, what are you doing with that man? You have no business to be with him; that's Bugler Lambert." This was when I called her first. She said—"He has got no hands."

A. M. (sister of D. M.):—I am a shop assistant at Casterton. I have known prisoner ever since I was a child. He lives about two miles from my home. On 12th November I got home between 5.30 and 6 o'clock. About a quarter of an hour later D. M. came home with Miss S. (*Pearson objects.*) After conversation with Miss S. I asked D. M. a question. To the Court—After conversation with Miss S., at which D. M. was not present, I went into the house where D. M. was. (*Pearson objects.*) I said—"What did Bugler Lambert do to you?"

[*Gurner, K.C., for the Crown, cited The King v. Norcutt (a).*]

IRVINE, C.J. I allow answer to question.

Witness:—When I asked her this question she burst out crying, and said—"He did something to me. He was a big, strong brute, and I could not get away. He hurt me. He asked me my age, and I said—'I can't know.'" My mother and sister were present during the conversation. I asked her where it happened. She said—"Down at the railway station." She pointed to the low part of her body. She said—"He hurt my rummies." I understood her to mean "He hurt my stomach."

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She never speaks distinctly. In the evening with Miss S. I saw prisoner. I said—"What were you doing with my little sister this afternoon?" Prisoner said—"Me?" I: "Yes; there is a witness, too." Prisoner: "Me? I don't want to listen to you." He tossed his head and walked off. I told Constable Wright.

K. M. (sister of D. M.):—On 12th November D. M. and I went into town together. When we were going home we parted company about 4.45 p.m. at Tanner's corner. I told her to hurry home. Cross-examined by Pearson—She went with me to the celebrations. When I left her she was going home. I thought she was competent to go home. Re-examined—When I parted with her at the celebrations she was with my mother. To Irvine, C.J.—She would have to go about three-quarters of a mile or a mile from "Tanner's" to get home.

E. M. (sister of D. M.):—On 11th November D. M. put on clean underclothing. On the evening of 12th November I made her take her things off—they were stained with blood, her bloomers and her underskirt.

E. M. (mother of D. M.):—D. was 20 years of age on the 23rd April 1918. She has always been mentally deficient. She has always been treated just as a little child. She has not exhibited any knowledge of sexual subjects. She has never been out alone at night.

A verdict of guilty with slight mitigating circumstances was returned.

The prisoner appealed, on the ground of misdirection, the particulars of which were:—

(1.) The learned Judge was wrong in directing the jury—

(a) That the real question for them was whether the girl was capable of consenting.

(b) That the point which the jury had to decide was whether the girl was mentally capable of understanding the nature of what was proposed to her or to appreciate how far it was right or wrong sufficiently to have enabled her to give her consent.

(2.) The learned Judge should have directed the jury—

(a) That the onus of proving that the connection was without the consent of the girl lay upon the Crown.

(b) That unless the girl was so mentally deficient that she was not conscious of what was being done to her she would not be "incapable of consenting."

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(c) That unless the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent she would not be "incapable of consenting."

(d) That if there was consent induced by mere animal instinct the accused would not be guilty of rape.

(e) That the guilt or innocence of the accused must depend on the circumstances as they appeared to him at the time; that he must have a "*mens rea*," and if the girl actually consented and her mental incapacity was not so obvious that the accused must have known that she was "incapable of consenting" he would not be guilty of rape.

(3.) The learned Judge should have directed the jury to find the accused not guilty.

The evidence objected to as improperly admitted was the conversation between the girl and her sister after the girl arrived home.

*Macarthur, K.C.* (with him *Joske*), for the prisoner—The only evidence against the prisoner was the prisoner's own admission made to a police constable. The girl was of weak intellect, but there was no evidence that the girl was incapable of giving consent. For a woman to be incapable of giving consent she must be of such feeble intellect that she was not conscious of what was being done. The test of capacity is not the same as the test of capacity to commit a crime. The girl did not give evidence on oath, and the rule allowing children to give a statement does not apply to adults. The evidence of the sister that the girl said that the prisoner had had intercourse with her was not admissible, as evidence of fresh statements is only admissible in corroboration of complainant's story. There is a distinction between ejaculations made at the time and statements made that an assault has been committed: *R. v. Lillyman* (a); *R. v. Guttridges, Fellowes, and Goodwin* (b); *R. v. Nicholas* (c). If the principal witness cannot give evidence, you cannot receive evidence of statements that are confirmatory only. Where a person is incapable of giving evidence statements made by that person to another cannot be given in evidence, although they could have been given in corroboration if the person was capable of giving evidence: *R. v. Mullan* (d);

(a) [1896] 2 Q.B. 167.

(b) [1840] 9 C. & P. 471.

(c) [1846] 2 C. & K. 246.

(d) [1888] 9 A.L.T. 179.

*R. v. Bates*, *R. v. Brown* (e); *R. v. Lillyman* (f). A statement made by a woman is confirmatory only of evidence which has been given: *R. v. Osborne* (g). As long as the girl was not asked leading questions, the mere asking of questions would not prevent the complaint from being given in evidence: *R. v. Norcott* (h). But these were leading questions. If the evidence of the sister is not admissible the conviction ought to be quashed and no new trial ordered. The evidence of the sister was not admissible, on the ground that it was given in answer to leading questions. The Judge at the trial must be careful to warn the jury that the only way these statements can be received is as corroboration of the evidence of the complainant. The question "What did Bugler Lambert do to you?" suggests the making of some statement against Lambert and laying blame on him. Statements of assault, if made, should be made voluntarily. In *R. v. Osborne* (i) it is said that if the circumstances indicate that but for the question the statement would never have been made, it may not be received as evidence. *R. v. McNeill* (k) turned on the ground that the statement was not made on the first opportunity. There was no evidence fit to be submitted to the jury that the prisoner had committed the offence charged: *Archbold, Criminal Pleading* (25th ed.), 978; *R. v. Fletcher* (l); *R. v. Bourke* (m). If the offence is not without actual consent it is not rape. Evidence of idiocy may not justify the jury in saying that she was not capable of giving consent. The Judge at the trial must make up his mind whether the prosecutrix is such an idiot as to prevent her from giving consent. The duty that lies on a Judge is similar to that in a civil case where a nonsuit is applied for. Consequently, under sec. 594 of the *Crimes Act* 1915, the conviction should be quashed and an acquittal directed.

Counsel referred to *Stephens's Digest of Evidence* (9th ed.), pp. 168, 169, and 170; *R. v. Camplin* (n); *R. v. Ryan* (o); *R. v. Fletcher* (p); *R. v. Reid* (q); *R. v. Barratt* (r); *R. v. Flattery* (t);

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| (e) [1882] 8 V.L.R. (L.) 310, at p. 315.         | (l) [1859] 8 Cox 131 and 1 Bell's Crown Cases, p. 63, at p. 68. |
| (f) [1896] 2 Q.B. 167, at p. 170.                | (m) [1915] V.L.R. 289.  |
| (g) [1905] 1 K.B. 551, at pp. 559, 560, and 561. | (n) [1845] 1 Den. Crn. C. 89.                                   |
| (h) [1917] 1 K.B. 347, at p. 350.                | (o) [1846] 2 Cox C.C. 115.                                      |
| (i) [1905] 1 K.B. 551.                           | (p) [1859] 8 Cox C.C. 131.                                      |
| (k) [1907] V.L.R. 265.                           | (q) [1848] 1 Den. Crn. C. 377.                                  |
|  | (r) [1873] 12 Cox 498, at p. 500.                               |
|  | (t) [1877] 2 Q.B.D. 410, at p. 414.                             |

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*R. v. Young (u)*; *Roscoe's Criminal Evidence* (13th ed.), p. 729; *East's Pleas of the Crown*, vol. i., p. 443; *Kenny on Criminal Law*, p. 366; *Peacock v. R. (v)*.

[CUSSEN, J., referred to *R. v. Lock (w)*.]

*Gurner, K.C.*, for the Crown—In the long history of the offence of rape it has always been considered essential that there should have been a recent complaint. Now it is as a matter of practice that the necessity for a recent complaint exists: *Hawkins's Pleas of the Crown*, vol. i., p. 122. Where there is capacity to make a complaint it should be made; the case of complete idiocy would no doubt be an exception: *R. v. Camplin (x)*; *Russell on Crimes* (7th ed.), pp. 931, 934; *R. v. Fletcher (y)*; *R. v. Bourke (z)*. The violence required to constitute the crime of rape is not violence in the ordinary sense. Rape is having intercourse with a woman without her consent: *R. v. Bourke (a)*. Nothing more is required than the absence of consent on the part of the woman. This the Crown may prove either by the direct evidence of the woman or by other evidence: *R. v. Osborne (b)*; *R. v. Lillyman (c)*; *Stephens's Digest of the Law of Evidence*, p. 11, art. 8; *R. v. Mullan (d)*. The jury may judge of the person's insanity in the witness-box: *R. v. Goode (e)*; *R. v. Cox (f)*. The jury are entitled to take notice of what they see in Court. They may observe the demeanour of the prisoner and of the witnesses. The jury saw that the girl with whom the prisoner had had intercourse was of feeble intellect, and they were entitled to make use of that. Capacity to give consent is determined by the capacity of the girl to give a rational consent. This girl is to be taken as mentally equal to a child four or five years old.

Counsel referred to *R. v. Barratt (g)*; *R. v. Bourke (h)*.

[CUSSEN, J., referred to *Re Wilbourne (i)*.]

*Cur. adv. vult.*

(u) [1878] 14 Cox 114.

(v) [1912] 13 C.L.R., at p. 619.

(w) [1872] 2 Crn. Cases Resd. 10.

(x) [1845] 1 Dennison 89.

(y) [1859] 8 Cox C.C. 131.

(z) [1915] V.L.R. 289, at p. 292.

(a) [1915] V.L.R., at p. 292.

(b) [1905] 1 K.B. 551, at p. 557.

(c) [1896] 2 Q.B. 167.

(d) [1888] 9 A.L.T. 179.

(e) [1837] 7 A. & E. 536.

(f) [1897] 18 Cox C.C. 672.

(g) [1873] 12 C.C.C. 498.

(h) [1915] V.L.R. 289, at p. 293.

(i) [1917] Cohen's Crim. App. Reps. 280.

IRVINE, C.J. I ask my brother Cussen to read his judgment first.

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CUSSEN, J., read the following judgment:—With reference to the admissibility of evidence relating to an unsworn oral statement, not part of the *res gestæ*, but alleged to have been made by a woman or girl at the first reasonable opportunity after the occurrence of an alleged sexual offence against her, the expressions used in *R. v. Osborne (k)* seem to be capable of two interpretations. The first is that evidence of the statement is admissible only as evidence of the consistency of her conduct with the story told by her on oath at the trial, including in such conduct the matter of non-consent; and the second is that it is admissible under two heads—first as showing consistency of conduct as above stated; and secondly, and independently, to support an allegation of non-consent—or, putting it the other way round, “to negative consent.” The difference can be illustrated by an example. Suppose the woman or girl had died before the trial, and her depositions were not available as evidence, but the prosecution was able to call a witness whose evidence would be sufficient to justify the jury in concluding that there was no consent. Might evidence of the woman or girl’s unsworn oral statement be admissible to support the evidence of the witness and to rebut the defence of consent? I think it is unnecessary to answer this question in the present case, where it is sufficient to say that the unsworn statement cannot by itself be used as evidence of the facts complained of; and that here the statement which was admitted does not support the sworn evidence of any person. The statement was of such a character that it could not be used to support the allegation that there was want of capacity to consent, and probably such a statement could never be so used.

It may be mentioned in passing that the Victorian cases—*R. v. Bates* and *R. v. Brown (m)* and *R. v. Mullen (n)*—tend to support the first of the two interpretations stated above—namely, that evidence of the unsworn statement cannot be given unless the woman or girl is called at the trial—to which may possibly be added a case where, through death or illness, her depositions are admissible. But in the Victorian cases the question of the evi-

(k) [1905] 1 K.B. 551.

(m) [1882] 8 V.L.R. (L.) 310.

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dence being admissible as tending to support or negative other evidence relating to non-consent or consent respectively was not specially considered. I leave it unanswered for the reason already stated.

It follows from what I have said that here evidence was wrongly admitted; but I have had some doubt whether (having regard to the way in which the case seems ultimately to have been left to the jury as really depending on want of capacity to consent) any substantial miscarriage of justice occurred by reason of such wrongful admission. The point now relied upon by accused's counsel as to such admission was unfortunately not brought to the notice of the learned Judge at the trial, and he did not direct his mind to it or to the necessity of specially charging the jury having regard to it. I am not satisfied that there may not have been such a miscarriage, and therefore I think the conviction should be quashed.

The next question is—Should there be a new trial? In my opinion, apart from the challenged evidence, there was evidence fit to be submitted to the jury that the girl in question was incapable of consenting even to the physical act involved in “carnal knowledge,” and that the accused at the time must have known that there was at least a possibility of such want of capacity, and took the risk notwithstanding. The jury should not, I think, convict the accused unless satisfied beyond reasonable doubt as to both these points. I will state shortly my reasons for coming to this conclusion.

The general principle of English law with regard to alleged mental incapacity is to consider it with reference to the particular matter under investigation, and not to lay down a rigid rule applicable to all varieties of circumstances. This is illustrated by many cases relating to wills, contracts, crimes, &c. Applying this general principle to the present case, where the offence charged is carnal knowledge without consent, and want of capacity to consent is alleged by the prosecution, the first question is—Was there a want of capacity to consent to carnal knowledge? Now, carnal knowledge is merely the physical fact of penetration, though, of course, there cannot be consent even to that without some perception of what is about to take place.

Again, though a person cannot be convicted unless it is shown that he had a guilty mind, yet if the other facts constituting the



offence are proved, the guilty mind may generally be presumed, unless its absence is affirmatively shown. But in the very peculiar circumstances existing here, where in a case of alleged rape want of consent depends upon an alleged want of capacity to consent, the prosecution is, I think, *entitled* to give evidence tending to show that accused knew of such want of capacity, and is probably *bound* to give *prima facie* evidence that the accused knew at least that there was a possibility of such want of capacity. It is plain that, though in these cases the question of consent or non-consent is primarily referable to the mind of the woman, if she has really a mind, yet the mind of the man is also affected by the facts which indicate want of consent or possible want of capacity to consent. In a note by Parke, B., in the case of *R. v. Camplin* (o), it is stated that several of the Judges thought that—"The crime of rape is committed by violating a woman when she is in a state of insensibility and has no power over her will . . . the accused knowing at the time that she is in that state." In *R. v. Lock* (p) Brett, J., says in effect that if a child of tender years merely submits to what is done by way of an immoral act, and the accused knows this, there is an assault, but if the child consented to what was so done, his or her ignorance of its immorality would not, apart from a statutory enactment, make it an assault. In the report of the same case in 27 L.T. 661, the learned Judge is reported in other words, but to the same effect. It must be admitted that in many of the cases the question of knowledge does not seem to have been emphasized, but the matter should, I think, be dealt with in the way I have indicated.

If this be so, the girl's appearance, or even her manner, in Court, coupled with evidence on oath that her appearance and manner at such time correspond with her appearance and manner at the time of the alleged offence, is admissible. The production in Court of either a person or thing identified by sworn testimony is generally allowed where it will assist the jury in arriving at a decision, care being taken in appropriate cases to warn the jury against hastily arriving at a conclusion from it, and in a case like this to warn them that the unaccustomed surroundings of a Court may make some difference, even to a person of little mental capacity. Such evidence, which is sometimes called "real evidence," generally involves inspection merely, but I do not think

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(o) [1845] 1 Den. C.C. 89.

(p) [1872] 2 C.C.R. 10.

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that the direct appeal to the senses of the jurymen is confined to inspection. If such production in Court was not allowed, the jury would have to act on a narration on oath by a witness about something which could be decided much better by such production, and the possibility of the witness's narration being inaccurate would be eliminated to a large extent. In *R. v. Goode (q)* Lord Denman, C.J., on the trial of an issue whether an accused person was fit to plead or not, said that it was quite unnecessary to call a medical man to prove the insanity of the accused (who had shown violent symptoms of mental derangement in Court), and that the jury could judge from what had passed. In *R. v. Fletcher (r)*, as here, a girl whose capacity to consent was in question was placed in the witness-box and asked several questions by the Judge, in the hearing of the jury, to ascertain if she possessed sufficient intelligence to be sworn, and the Judge was satisfied she did not. No objection appears to have been taken to this course, although the Bench was a strong one, and the argument elaborate, and, in the opinion of the Court, very satisfactory. The fact is that the greater the degree of mental incapacity the less risk there is in permitting the jury to see the girl or even to hear her incoherent remarks. If there is any suggestion of a cunning desire to deceive, it might be better to tell the jury to disregard altogether what they have heard from her, and in any event her utterances, if coherent or intelligible at all, should in no way be regarded as evidence of anything beyond an indication of her usual manner at the time of the alleged offence.

I do not propose to discuss the many cases cited to us about assaults, etc., on girls alleged to be idiots, or on young children. An examination of them leads to the conclusion that the answer to the question whether there was a want of capacity to consent was in each case determined by all the facts of that case.

I think that the conviction should be quashed, and that there should be an order for a new trial.

IRVINE, C.J. I agree with the conclusion at which my learned brother Cussen has arrived, and with the reasoning on which it is founded as applied to the facts of this case, but I wish to guard myself against deciding that, having regard to the decision in *Osborne's Case*, in no circumstance can the statement by a

(q) [1837] 7 A. &amp; E. 536.

(r) [1859] 1 Bell C.C.R. 63.

woman who has been violated, made shortly after the occurrence, taken by itself, be made evidence of the fact of non-consent. But, having some doubt whether this evidence should have gone before the jury, I agree with the decision that there should be a new trial.

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HODGES, J. I agree with the conclusion at which my brother Cussen has arrived, and I agree with his view on the points on which the Chief Justice has spoken. I feel very strongly that it would be an extraordinary thing if this exception to the law of evidence were so far extended that a man could be convicted of a capital offence on proof of a statement that the woman had made—that statement being no essential part of the charge, being nothing said or done in the presence of the accused, nor a statement that would be received in evidence, in ordinary cases, at all, but a statement which is allowed to be proved in such cases for the purpose of disproving consent, or for the purpose of proving the consistency of the woman's story.

If proof of such a statement were allowed for the purpose suggested, then a man might be convicted on a capital charge, and possibly hanged, upon a statement which was not proved on oath, or at all, by the person who made it, and of the facts of which there is otherwise no proof, and which is ordinarily not evidence, nor a part of the case, nor of the *res gestæ*, and the accused person would be convicted on an unsworn statement which neither he nor his counsel had any opportunity of testing by the examination or cross-examination of the person who made it.

*Conviction quashed. New trial ordered.*

Attorney for the Crown : Guinness, Crown Solicitor.

Attorney for the prisoner : L. S. Lazarus (for S. I. Silberberg, Hamilton).

H. D. W.