PARTIES: THE QUEEN

v

NOEL JAMES GOTTWALTZ

TITLE OF COURT: Supreme Court of the Northern Territory

JURISDICTION: Criminal

FILE №: 135 of 1993

DELIVERED: Delivered at Darwin on 10 May 1994

HEARING DATES: Heard at Darwin 26 & 27 April 1994

JUDGMENT OF: Mildren J

CATCHWORDS:

Criminal Law: Evidence - Whether Judge has discretion to withhold corroborative evidence from jury.

Corroboration: Whether evidence equally consistent with another inference can amount to corroboration - Whether evidence common to both crown and accused's case can amount to corroboration - no different legal list test for evidence of distress - background facts to evidence ought to be considered.

LEGISLATION

NT Criminal Code: s192(1) s192(4)

Cases

Berrill and Others (1981-1982) 5 of Crim R 431, referred to
R v Schlaefer (1984) 37 SASR 207, referred to
The King v Baskerville [1916] 2KB 658, applied
Doney v The Queen (1990-1991) 171 CLR, applied
The Queen v Lindsay [1978] 18 SASR 103, followed
The Queen v Stephenson [1978] 18 SASR 381, discussed
Edwards v The Queen (1993) 68 ALJR 40, discussed
R v Flannery [1969] VR 586, discussed

REPRESENTATION:

Counsel
Applicant: Mr David Q.C.
Respondent: Mr Adams

Solicitors
Applicant: Messrs Mildrens
Respondent: Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

№ 135 of 1993

BETWEEN:

THE QUEEN

AND:

NOEL JAMES GOTTWALTZ

CORAM: Mildren J

REASONS FOR JUDGMENT
(Delivered 10 May 1994)

The accused is charged with one count of aggravated sexual assault, contrary to S.192(1) and (4) of the Criminal Code.

The Crown case is that in early June 1993, the accused, who was the manager of Mt Keppler Station near Adelaide River, engaged two English backpackers, Stuart Hutchins and the complainant, to do work on the property. Mr Hutchins and the complainant were driven to the property by the accused on 10 June 1993, when they began their duties. There was no-one else living on the property.

On 24 June 1993 Mr Hutchins flew back to England as he had contracted glandular fever. The complainant decided to remain on the property. From the next day on, the complainant noticed a change in the accused's manner towards her. For example, he became more familiar - referring to her by names such as 'Princess' and 'Precious' and 'Wench' - as well as other things upon which it is unnecessary to dwell.

On 25 June, there was a bushfire on the property, and the complainant and the accused used a Toyota utility with a water tank on the back of it in order to put the fire out. After the fire had been extinguished, the accused requested the complainant

to accompany him to collect some horses and ponies from a paddock some miles from the homestead. The complainant and the accused went together in the same Toyota which still had the tank full of water on it. About 5 to 8 miles from the homestead, the vehicle overturned as it went around a bend, ending upside down. The accused and the complainant were then forced to walk back to the homestead. As a result of the accident, the complainant was told that she would lose her job, and she told the accused that she intended to leave the following day.

On 26 June, the complainant asked the accused to drive her to the township of Adelaide River in order for her to catch the bus to Darwin. The accused asked her to go with him to assist him to bring the Toyota back to the homestead and offered to drive her to Darwin when that was done, as he was intending to go to Darwin in any event. The complainant, who said that she felt some responsibility for the accident, agreed to this course, notwithstanding that she felt uncomfortable with the accused.

The accused drove a tractor to the crash site with the complainant sitting on the back. Upon arrival, some photographs were taken of the overturned Toyota, including one taken by the accused in which the complainant appeared standing in the foreground. The complainant says that at this stage the accused urinated in her presence making no effort to conceal himself, and then sat on the tractor to wait for it to cool down before attempting to right the vehicle. The complainant then decided to sit down on a tyre which had fallen off the utility, and as she was about to do so, the accused grabbed her from behind around the waist. The complainant then alleges that the accused, despite her resistance, and lack of consent, pushed her forcibly towards the Toyota, forcibly removed her clothing, licked her vagina and then raped her. It is unnecessary to go into other details, other than to say that there is no evidence that the accused battered the complainant, although she did say that he caused a bruise to her left thigh from pressure from his hand and caused bruising to her buttocks from pressure from his fingers. It was also alleged that there were two acts of penetration, the first of which occurred whilst the victim had her hands on the utility, by which I understood her to mean that she was

penetrated from behind whilst standing or bending, and the second occurred on the other side of the utility when she was naked, laying on her back on dry grass.

The complainant gave evidence that she was told to put her clothes on, that she was crying and sobbing, that the accused righted the Toyota by himself, that she got in the ute to attempt to steer it whilst the accused towed it back, that the ute could not be steered, that she was then taken back to the homestead, and that she was then driven by the accused back to Darwin. She claimed that she was still crying on the journey back to Darwin, and that she wanted to get back to Darwin to see Lucy Pupos, the only person she knew in the Northern Territory.

When they arrived in Darwin, some hours after the alleged rape (the precise time is not given, but it could not have been less than 2 hours later given the distance to be travelled) the accused parked outside the Transit Centre and watched her as she met Lucy Pupos. She said that she had a short conversation with Mrs Pupos outside Larrakeyah Lodge, (which is on the opposite side of Mitchell Street to the Transit Centre) and then a further conversation after she had booked her room. The complainant's evidence was that Mrs Pupos asked her, outside Larrakeyah Lodge 'What's the matter?'; that she broke down crying, and that it was not until the second conversation inside the Lodge that she told Mrs Pupos that she had been raped. Mrs Pupos' evidence was that when she first saw the complainant that day, she looked 'sad, very sad' and 'there's tears in her eyes', and that about 15 minutes later, there was a second conversation when she told her she wanted to see a doctor, because she had been raped. At that stage both the complainant and Mrs Pupos said that the complainant was crying. The evidence is that Mrs Pupos was the first person to have seen the complainant at close quarters, other than the accused, since the alleged attack.

The crown called evidence from Dr Berrill who had examined the complainant on 26 June 1993, the complainant having arrived at her rooms at 1:30pm. She found grazes in the middle upper back covering an area 5cm x 5cm; a large fresh bruise on the upper

outer level of her left thigh; a very large fresh bruise on the right upper inner thigh measured at 10cm x 10cm, and on her left buttock there were fresh bruises which had a configuration fitting fingertip marks. The complainant also had other bruises and injuries to her elbow and shins which she said were caused by the accident. Dr Berrill also noted many other bruises of varying ages on her body.

Mr Adams, for the crown, submitted that there were two items of evidence which were capable in law of amounting to corroboration of the complainant's evidence:

(1) the evidence of Mrs Pupos as to the complainant's state of distress; and

(2) the evidence of Dr Berrill as to the bruise to her inner thigh, the bruises to her buttocks and the grazes to her back.

Mr Adams submitted that evidence was capable in law of being corroborative of the complainant even if that evidence was capable of giving rise to more than one inference: Berrill and Others (1981-1982) 5 A Crim R 431.

Mr David QC submitted that neither pieces of evidence were capable in law of being corroborative of the complainant's testimony that she had not consented, to the accused's knowledge, to having sexual intercourse with him, as both pieces of evidence were equally capable of other explanations: R v Schlaefer [1984] 37 SASR 207. Mr David sought to distinguish Berrill's case on the basis that, in that case there was no evidence - apart from a suggestion in cross-examination which the complainant had denied - to provide any alternative possible explanation other than the inference that the evidence did tend to corroborate the complainant's testimony in a material particular. Alternatively, he submitted that I ought to, in the exercise of my discretion, withhold that evidence from the jury's consideration as being in law corroborative of the complainant's testimony.

After hearing submissions, I ruled that I would instruct the jury that the evidence of Dr Berrill as to the bruises on the complainant's buttocks, and the evidence of Mrs Pupos as to the complainant's state of distress when she first saw her outside Larrakeyah Lodge were capable in law of corroborating the complainant's testimony and that I would provide reasons for my ruling at a later time. I do so now.

In The King v Baskerville [1916] 2 KB 658 at 667, the Court of Criminal Appeal (England) said:

> "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."

In Doney v The Queen (1990-1991) 171 CLR 207 at 211, the High Court, in a joint judgement observed that

> "The essence of corroborative evidence is that it "confirms", "supports" or "strengthens" other evidence in the sense that it "renders [that] other evidence more probable": Reg. v. Kilbourne [1973] AC 729 at p758, per Lord Simon of Glaisdale";

and that

> "... it is not necessary that corroborative evidence, standing alone, should establish any proposition beyond reasonable doubt."

It is well established that it is a question of law for the trial judge to decide whether any particular evidence is capable of corroborating the complainant's evidence in a material particular; but it is for the jury to decide whether in fact that

evidence does corroborate the complainant's evidence in a material particular, and if so, what weight is to be attached to it.

In this case, the accused had made no admissions to the police that he had had sexual intercourse with the complainant at the time in question and no formal admission to that effect had been made pursuant to S.379(1) of the Criminal Code. Nevertheless, it was clear from the way Mr David presented the accused's case that the accused did not dispute the fact that sexual intercourse had occurred. The real issues were whether or not:

(1) the accused had had sexual intercourse with the complainant without her consent, and

(2) the accused had intended to have sexual intercourse with the complainant without her consent, and was not mistaken about any lack of consent which the complainant had withheld.

In those circumstances I considered that, in order to be capable in law of amounting to corroboration of the complainant's evidence, the evidence had to go to those issues alone and not, to some other matter that was not in issue, such as penetration. Mr Adams for the crown did not contend otherwise, although, on reflection I may have been too generous to the accused. In The Queen v Lindsay [1978] 18 SASR 103 at 122, Zelling and Wells JJ said:

> "We may have expressed ourselves a little widely in The Queen v. Yates [1970] S.A.S.R. 302, at p.306, when we said:
>
> > "Nothing which merely tends to confirm any matter which is common to the case of the Crown and the case of the accused can amount to corroboration (R v McConnon [1951] S.A.S.R. 22.)".

> That statement was sufficient for the disposition of the appeal then before us. We think the true test is that no evidence which is common to the case of the Crown and the case of the accused can amount to corroboration unless either the evidence itself bears a different character when viewed in relation to the Crown case from what it bears in relation to the case of the accused or unless the inferences which can be drawn from such evidence, if the jury are constrained to draw them, support the evidence of the prosecutrix in a material particular. Certainly an accused person cannot, by a timely admission of facts which could otherwise amount to corroboration, deprive them of that quality by making an admission."

See also The Queen v. Stephenson [1978] 18 SASR 381 at 393, 399-400; a fortiori, if no admissions are made, but the accused does not dispute relevant aspects of the complainant's evidence, e.g., that intercourse occurred on a particular occasion.

I was not referred to any clear statement of principle as to the test to be applied by a trial judge whose function it is to decide whether or not a particular piece of evidence is capable of amounting to corroboration. Obviously, there is no difficulty at all with evidence that simply does not bear on the issues in question. However, there are apparent differences of opinion to be found in the authorities when a particular piece of evidence is capable of giving rise to more than one inference. On the one hand there is the view of McPherson J in Berrill at 448 that evidence may, as a matter of law, amount to corroboration even though that evidence is equally consistent with the defence case, and it is for the jury to say whether in fact the evidence does corroborate the complainant's testimony. On the other hand there is the view of King C.J. in The Queen v Schlaefer, at 217 that evidence which is equally consistent with some other inference cannot amount to corroboration.

In Edwards v The Queen (1993) 68 ALJR 40 at 50, a majority of the High Court thought that in the circumstances of that case, a lie

told by the accused about a material matter ought not to have been left to the jury as amounting to corroboration, because an innocent explanation for the lie was "... so plausible that the lie could not have been probative of guilt."

One possible explanation for the apparent differences in approach is that differing tests are to be applied depending upon the nature of the evidence said to be corroborative, i.e. a stricter test is applied where the evidence is evidence of distress or of lies by the accused, than, in other cases. Another possible explanation may be that some authorities suggest that the trial judge has a discretion not to instruct juries that evidence is capable of being corroborative if other inferences are equally open, or if the evidence is more prejudicial than probative, see, for example, Berrill at 436, per Andrews, SPJ.

I consider that, the mere fact that there is some explanation other than one which would tend to confirm the complainant's account in a material particular, does not, by itself, mean that the evidence is incapable in law of amounting to corroboration: see Doney v The Queen, supra, at 211-212. However, if the evidence in question is, when considered against the background facts which are either not in dispute or at least not substantially in dispute, truly equivocal, the judge ought not to direct the jury that that evidence is capable in law of amounting to corroboration either because the evidence is not capable of amounting to corroboration because it is not probative, or because the judge in the proper exercise of his discretion should withdraw it from the jury's consideration. I further consider that there is no different legal test for evidence of distress than there is for other types of evidence although the reasons for excluding it or according little weight to it are often more obvious: see Berrill at 448 for example. That the background facts ought to be considered is recognised by many authorities: eg Berrill at 435; Stephenson at 399; R. v. Flannery [1969] VR 586 at 591.

In this case, I did not consider that the evidence of the bruise to the inner thigh standing alone ought to be left to the jury's

consideration because the evidence was equivocal. That injury might have been caused by the accident; equally it might have been the result of non-consensual intercourse. There was nothing in the nature of the injury or its location on the body or anything else about it, other than what the complainant hereof said of it, from which it was possible to draw any inference that the injury tended to support the complainant's testimony that sexual intercourse was probably non-consensual. I therefore did not consider that evidence to be probative of the allegation that non-consensual intercourse had occurred.

Similarly, the evidence of scratches to the complainant's back were equally consistent with consensual intercourse as non-consensual intercourse and may also have been caused when the complainant got out of the vehicle after the accident. The evidence left all of those possibilities equally open.

However, in my view the evidence of the bruises seen by Dr Berrill on the complainant's buttocks were probative of the issues. These bruises were consistent with having been made by fingertips, and it was open to the jury to conclude that they were made by the accused. Whilst there was no evidence from Dr Berrill as to the amount of force likely to be required to leave these bruises, I considered that the jury were entitled to rely upon their own experience as to the amount of force likely to be required to sustain bruising and that the jury were entitled to take the view that this was more consistent with the complainant's story of forcible intercourse than with the accused's apparent story of consensual intercourse. I saw no reason, based on any independant discretion I may have, to withdraw this evidence from the jury's consideration as evidence in law capable of amounting to corroboration.

As to the evidence of Mrs Pupos, there are a number of relevant background facts. Firstly, the complainant's age. There was no evidence of her precise age, but she appeared to be in her early twenties; certainly she was not a child, nor did she give the impression of immaturity. The time of the alleged rape is imprecise, but it occurred on the morning of 26 June. The

complainant said that she had received a telephone call that morning at 6:00am before she and the accused left to retrieve the Toyota and there was evidence that she had been seen by Dr Berrill at 1:30pm that day, after having spoken to Mrs Pupos. The evidence is imprecise but it seems likely that the time lapse between the alleged rape and the moment Mrs Pupos first saw the complainant was no more than six hours and quite probably a lot less. I did not think the time lapse to be likely to be so long as to sever the apparent causal connection between the alleged rape and the distress. There is no evidence, other than the complainant's evidence and the accused's statement to the police of what happened in the meantime, and these two versions are conflicting. According to the complainant she was tearful on occasions throughout the journey from the scene of the accident to Darwin; the accused, on the other hand, says there was never a tear in her eye. There is no suggestion in the evidence of any particular motive or reason that the complainant might have had to simulate distress and put on an act; nor is there anything in the evidence which might suggest this is a real possibility. On the other hand it is common ground that the complainant had not known the accused for very long and both were alone on the property that day. The distress was seen at a time before any complaint had been made and was not strictly part of the complaint, although the complainant intended to complain to Mrs Pupos when the opportunity arose. There was nothing in the circumstances to suggest that the alleged rape could be a figment of the complainant's imagination. In those circumstances it seemed to me that the alleged signs of distress visible to Mrs Pupos, (assuming Mrs Pupos' evidence of what she saw was accepted by the jury) were probative of the issues which were material in this case and should go to the jury.

To the extent that I had a separate discretion to exclude this evidence from the jury's consideration as being material fit for their consideration on the issue of corroboration, I bore in mind that the complainant probably did know that her distress was visible to Mrs Pupos; that she intended to make a complaint to her; the quality of Mrs Pupos' testimony, and the evidence of Mr Hope, a private investigator who said that he was later told by

Mrs Pupos that she had seen no crying, the complainant did not seem upset, and no complaint of a sexual assault had been made. As to the first two matters, this is not a case where the circumstances suggested a feigned complaint or imagined attack as a real possibility, and it is of relevance that the accused declined to answer questions of the police concerning whether or not sexual intercourse had occurred other than to deny any rape and did not give evidence to the jury, so that there was no evidentiary basis for such a suspicion. As to the evidence of Mr Hope, that evidence I considered to be truly a jury question. The complainant conceded that an opportunity to leave the accused's vehicle at Adelaide River had arisen but gave reasons for not taking that opportunity which I considered plausible and ought to be left to the jury. In those circumstances I considered that the proper course was to instruct the jury that the evidence of Mrs Pupos was capable in law of corroborating the complainant's account, assuming they accepted Mrs Pupos' evidence, but that the weight they gave to it was a matter for them.