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Warkentin, Hanson and Brown v. The Queen - Murphy and Butt v. The Queen

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Warkentin, Hanson and Brown v. *The Queen* *Murphy and Butt* v. *The Queen*

By TERRANCE O'SULLIVAN*

There have been two recent decisions by the Supreme Court of Canada, dealing with the rather convoluted area of law known as "corroboration." Unfortunately, these two cases, *Warkentin, Hanson and Brown* v. *The Queen*[1] and *Murphy and Butt* v. *The Queen*[2] have only added to the confusion which already exists in this field. Both dealt with allegations of multiple rape and raised the issue of corroboration of the victim's testimony under section 142 of the *Criminal Code*.[3] The repeal of this section by Parliament may have reduced the impact of these cases.[4] However, there are other instances where corroboration is either mandatory or advisable, and in view of the traditional discretion of a trial judge to comment upon the evidence and the weight of the evidence when instructing a jury, both these cases warrant close scrutiny.

In *Warkentin, Hanson and Brown*, it was alleged by the Crown that the complainant, an eighteen year old native woman, had travelled from the Sugarcane Reserve where she lived to the town of Williams Lake in British Columbia. She testified that the three accused had forced her into a red Mustang and driven her to an isolated spot in the bush where an act of intercourse took place in the presence of the three accused and a fourth person. At the trial, a written admission was filed on behalf of all three accused which indicated that the three accused and the fourth man were together at a dance in Williams Lake, and that the accused Hanson owned a red Mustang vehicle which had been parked at the dance. It was urged before the Supreme Court of Canada that the learned trial judge had erred in his application of the principles of law relating to corroboration in that he held

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[1] 9 N.R. 301; [1976] 5 W.W.R. 1; 35 C.R.N.S. 21; 30 C.C.C. (2d) 1. The Supreme Court of Canada handed down its decision on July 12, 1976.

[2] 9 N.R. 329; [1976] 5 W.W.R. 44; 35 C.R.N.S. 44.

[3] R.S.C. 1970, c. C-34, subsequently repealed by S.C. 1974-75-76, c. 93, s. 8. Section 142 provided:

> Notwithstanding anything in this Act or any other Act of the Parliament of Canada, where an accused is charged with an offence under section 144, 145, subsection 146(1) or (2) or subsection 149(1), 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.

[4] See *R.* v. *Camp*, unreported decision of the Ontario Court of Appeal released on June 29, 1977.

that the following pieces of evidence were capable of corroborating the evidence of the complainant: (a) the admission of the accused, (b) the distraught condition of the complainant when picked up at the roadside by friends, (c) the presence of seminal fluid in the complainant's vagina and on her underclothing, (d) the presence of a human scalp hair of Caucasian origin on her jeans, which was similar to hair found on the clothing of one of the accused, and (e) the presence of pine needles in the complainant's underclothes.

Mr. Justice Dickson, writing on behalf of himself, Chief Justice Laskin, and Spence and Pigeon JJ. registers a very strong and able dissent in this case. He quite accurately starts out his reasons by saying, "There are few problems more troublesome and difficult for a trial judge than that of deciding what evidence is in law susceptible of corroborative effect and what evidence is not."[5] He then goes on to define corroboration, not in the loose sense of evidence which tends to confirm or support the story of the complainant, but as meaning evidence which corroborates a material particular of the story of the complainant, and which implicates the accused as well. Mr. Justice Dickson, in referring to *D.P.P.* v. *Hester*[6] and *D.P.P.* v. *Kilbourne*,[7] seems to draw a distinction between corroborative evidence generally and evidence which is capable of being corroborative within the meaning of section 142. He indicates that corroborative evidence in its ordinary sense is evidence which serves to give weight to, confirm or render more probable other relevant evidence in the case. Section 142, however, goes beyond that test to require that the evidence must be on a material point in the case, and above all it must implicate the accused by connecting or tending to connect him with the crime.

Mr. Justice Dickson indicates that in this case there are two issues: the issue of intercourse without the consent of the complainant, and the issue of identity. It is his opinion that corroboration was required on each issue, and there was nothing in the record of the case at bar which disclosed any evidence capable of corroborating the allegations of the complainant that she had been raped by the accused. Mr. Justice Dickson in support of his position refers to two cases, *Kolnberger* v. *The Queen*[8] and *Hubin* v. *The King*.[9]

In *Kolnberger*, the issue was solely identity, the rape having been established beyond a doubt. The complainant on the question of identity described her assailant's automobile as an older model Chrysler, cream or off-white in colour and very dirty. She then purported to identify an automobile as the one in which she was attacked, which automobile belonged to the appellant and was a 1957 blue Chevrolet with a white top, dirty inside and out. This evidence was held not to be corroborative of the identity of the assailant.

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[5] *Supra*, note 1 at 4 (C.C.C.).

[6] *D.P.P.* v. *Hester*, [1972] 3 All E.R. 1056.

[7] *D.P.P.* v. *Kilbourne*, [1973] 1 All E.R. 440.

[8] *Kolnberger* v. *The Queen*, [1969] S.C.R. 213; 2 D.L.R. (3d) 409; 66 W.W.R. 560; [1969] 3 C.C.C. 241.

[9] *Hubin* v. *The King*, [1927] S.C.R. 442; [1927] 4 D.L.R. 760; 48 C.C.C. 172.

In *Hubin*, the offence was one of carnal knowledge, and again the defence related to identity. The complainant purported to identify the accused's car as the car of her assailant by its plate number and by a certain cushion on the seat. It was the accused's position that he was twenty miles from the site of the offence at the time that it took place. This evidence was held not to be corroborative, again, basically, because it was not evidence which was independent of the complainant.

Mr. Justice Dickson has in this case taken a very strict, nearly classical approach to the question of corroboration as it has evolved through the years. There is probably little doubt that the definition of corroboration adopted by him and by those Judges who concurred in his decision represented the view of virtually all the appellate courts of this country as to the definition of corroboration prior to these two cases.

After dealing with the principles of corroboration, Mr. Justice Dickson turns to the facts of the case. He feels that where identity is the sole issue, there is little assistance to be gained from those cases in which consent to the act of intercourse was the issue. He indicates that the emotionally distraught condition of the complainant does not in any material way implicate the accused with respect to identity. He further indicates that the presence of seminal fluid will no doubt support the complainant's story of intercourse, but serves no purpose with respect to the issue of identity. The evidence of the pine needles in his view does not strengthen or confirm the evidence of the complainant on any issue, and the human scalp hair is of such little probative value as to be incapable of corroborative effect because corroboration, in his words, "must not be so meagre as to create a mere possibility that the accused committed the crime charged."[10] Mr. Justice Dickson goes on to say that the mere presence of the four men in the town, pursuant to their admission, and the ownership of the red Mustang cannot serve as nexus between the three accused and the act of forced intercourse. He agrees that the items of evidence must be looked at collectively and within the total picture of the evidence, but deems their lack of independence from the complainant fatal to their corroborative effect on the issue of the identity of the assailants.

The approach of Mr. Justice Dickson to corroboration as a carefully evolved legal concept is to be contrasted with the approach of Mr. Justice de Grandpré in his reasons for judgment which are concurred in, as to the merits of the case, by his four brother Judges. Although he felt that the Court had no jurisdiction to hear the appeal, he went on to deal with the facts of the case.

After reciting the facts in some detail, he cites with approval those explanations of corroboration which were given in *R.* v. *Parish*,[11] and in

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[10] *Supra*, note 1 at 11 (C.C.C.), referring to *Macdonald* v. *The King*, [1947] S.C.R. 90; [1947] 2 D.L.R. 625; (1946), 87 C.C.C. 257.

[11] *R.* v. *Parish*, [1968] S.C.R. 466 at 472-73; 68 D.L.R. (2d) 528 at 533; 64 W.W.R. 310 at 315-16; 3 C.R.N.S. 383 at 388-89; [1968] 4 C.C.C. 11 at 16-17.

R. v. *Boyce*[12] which identified corroboration as evidence tending to show in a general way that the complainant's evidence is true. According to Mr. Justice de Grandpré: "Corroboration is not a word of art. It is a matter of common sense."[13] Mr. Justice de Grandpré then refers to two decisions, *R.* v. *Kanester*[14] and *R.* v. *Thomas,*[15] for support. In both these cases the issue was not one of identity, but one of consent. Likewise, neither of these cases dealt with situations where there were multiple accused. It is respectfully submitted that both these facts detract from any support which Mr. Justice de Grandpré might find in them for the positions adopted in his reasons. In the *Kanester* case, the accused admitted that he was a person involved with the complainant, but asserted consent as a defence. The complainant testified that she had been tied up by the accused with string. Some string that was found in the car belonging to the accused was held to be capable of corroboration on the issue of consent. In the case of *Thomas*, again, the issue was consent and it was held that a torn button on the complainant's blouse, a missing clasp from her brassiere and a separation in that material, as well as her distraught and dishevelled emotional and physical condition, all were capable of constituting corroboration on the issue of consent. It is submitted that both these cases have very strong facts in support of their decision, and both fall within the classical test of corroboration as enunciated by Mr. Justice Dickson in his dissent.

Mr. Justice de Grandpré however, goes on to take a dangerous departure from the traditional concept of corroboration and adopts a seriously *ad hoc* approach to what has been, up until this point at least, a carefully evolved rule of law in Canada. He says that where the indictment alleges that a "gang" rape has been committed, a common sense approach to corroboration must be adopted. His Lordship says it is erroneous to assert that there are separate issues of intercourse, absence of consent and identity with respect to each of the accused who are charged in a multiple rape situation. He supports his position by saying that rape is a "crime of the shadows," and that the Crown would never be able to adduce evidence which would satisfy the criteria for each issue and each accused. He says: "On that basis, one can well imagine the difficulties in the way of the Crown if the rape had been committed by six, eight or ten persons."[16]

Mr. Justice de Grandpré buttresses his argument by referring to the provisions of section 21 of the *Criminal Code*, which make all persons who commit, or aid or abet the commission of an offence, or who form a common intention to carry out an unlawful purpose, parties to the offence committed

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[12] *R.* v. *Boyce* (1975), 7 O.R. (2d) 561; 28 C.R.N.S. 336; 23 C.C.C. (2d) 16.

[13] *Supra*, note 1 at 16 (C.C.C.). In making this remark it would appear that Mr. Justice de Grandpré is referring to the cases of *D.P.P.* v. *Hester supra*, note 6 and *D.P.P.* v. *Kilbourne, supra*, note 7.

[14] *R.* v. *Kanester*, [1966] 4 C.C.C. 231; 48 C.R. 352; rev'd [1966] S.C.R. *v*; 57 W.W.R. 576 *n*; 49 C.R. 402 *n*; [1967] 1 C.C.C. 97 *n*.

[15] *R.* v. *Thomas*, a unreported decision of the Supreme Court of Canada, May 19, 1971.

[16] *Supra*, note 1 (C.C.C.) at 20.

by any one of them. Mr. Justice de Grandpré is evidently stating that there need be no independent corroborative evidence of the identity of each of the accused in a multiple rape situation, even though such evidence is clearly required in those cases in which the identity of a single accused is in issue. With respect, Mr. Justice de Grandpré appears to have evolved a completely separate definition of corroboration for those situations dealing with "gang" rape. He states: "I am satisfied that the corroborative evidence of which Section 142 speaks need not identify each accused separately when the evidence to be corroborated is that a 'gang' rape has been committed. It is sufficient to establish that intercourse without consent has taken place, and that the group was a party to it."[17] He does not, however, go on to say how it would be possible to satisfactorily identify a member of the group as being a party to the "gang" rape if there is no corroborative evidence independent of the complainant of that individual's identification.[18]

Mr. Justice de Grandpré also refuses to accept the position that the corroborative evidence must relate to different issues, namely, intercourse, non-consent and identity. He says that the required corroboration must only corroborate the evidence of the complainant in a material particular by evidence which implicates the accused. This overlooks the prospect of the only corroborative evidence available to the complainant being on an issue which is not in dispute, for instance identity as opposed to non-consent. Surely, what must be required is corroboration in every material particular of that aspect of the story of the complainant that is in dispute. Mr. Justice de Grandpré then goes on to deal with circumstantial evidence as corroboration, and takes the position that individual pieces of evidence which are not of themselves corroborative may be in their totality corroborative. This would again appear to be a substantial departure from the previous law governing the corroborative effect of circumstantial evidence.[19]

To conclude his decision, Mr. Justice de Grandpré refers to the particular facts of this case to determine whether they are capable of constituting corroboration within the meaning of section 142. He finds that the intercourse is clearly established by the presence of seminal fluid, the non-consent is established by the distraught condition of the complainant, as well as the pine needles (for "in this day and age if the complainant had no objection to have intercourse with one or the other of the accused it was certainly open to the jury to decide that there was no need to go into the bush"),[20] and in dealing with the question of identity he relies on the written admission by the accused and the human scalp hair. He says that the fact that the four men were together at the time of their arrest, that they admitted being together earlier in the evening, and that one of them was in possession of a red Mustang, when coupled with the presence of the human scalp hair of Caucasian origin on the jeans worn by the complainant, constituted "evidence

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[17] *Id.*

[18] A useful discussion of the principles relating to corroborative evidence where identification is in issue may be found in *R.* v. *Turnbull* (1976), 63 Cr. App. R. 132.

[19] *Supra*, note 12.

[20] *Supra*, note 1 at 22 (C.C.C.).

which might help the jury to determine the truth of the matter."[21] He appears to have taken all the evidence which was tendered as being capable of being corroborative and lumped it together to make it corroborative. To say that the presence of the Caucasian hair of similar origin, which was found on the jeans of the complainant and the shoulder of one of the accused, links the other two accused to the crime merely because they admitted being together with the third accused earlier in the evening is not only unusual, but practically mystical.

Regina v. *Murphy and Butt* is a decision of the same nine man Court released the same day, although one would never know it from reading the decision. Spence, Martland, Judson, Pigeon, Beetz, de Grandpré and Ritchie JJ. concurred in the decision which was written by Mr. Justice Spence, with the dissents being written by both Chief Justice Laskin and Mr. Justice Dickson.

In this case a sixteen year old Indian girl testified that she was offered a ride by the two accused, Murphy and Butt, who took her to their home. She took off her coat and went to sleep on a couch in the living room. Some time later she was awakened by the presence of Murphy, who had intercourse with her against her will as a result of his threats. After Murphy left the living room, Butt entered from the bedroom naked and by the use of similar threats also had intercourse with her against her will. She indicated that Murphy then drove her to a bus depot where she telephoned a cousin in Prince Rupert, following which she spoke to the Vancouver Police. Both appellants testified on their own behalf. Murphy admitted he had intercourse with the complainant, but he alleged that it was with her consent. Butt testified that he had gone to bed upon reaching the apartment and had no knowledge of any events until Murphy awakened him for the keys to the automobile. The difficulties from a legal point of view in this case when comparing it to *Warkentin, Hanson and Brown* are that the issues are different as between the two accused. With respect to Murphy the issue is consent, while with respect to Butt the issue is intercourse. Also, the offences are not true "gang" rapes in that the acts of intercourse are alleged to have taken place in the absence of anyone else.

The issue before the Supreme Court was whether evidence of the complainant's distraught condition at the time she was seen by a police officer was capable of constituting corroboration in this case.

Dealing first of all with the dissent of Chief Justice Laskin, the learned Chief Justice, in what is perhaps an uncharacteristic display of legal muscle on his part, indicates that he would dismiss the appeal with respect to the accused Murphy, but allow the appeal with respect to the accused Butt. He indicates that where co-accused are tried for the same offence, which was allegedly committed by each separately, then each accused is entitled to have the benefit of a proper direction to the jury that relates to each of them separately on the issues that go to their separate culpability. Chief Justice Laskin, in adopting the same approach to the question of corroboration that had been so

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[21] *Supra*, note 1 at 19 (C.C.C.), quoting from headnote of *Kilbourne, supra*, note 6.

painstakingly detailed by Mr. Justice Dickson in his dissent in *Warkentin, Hanson and Brown,* indicates that he does not quarrel with the proposition that a complainant's hysterical condition may be adduced as evidence of corroboration of an alleged rape where the accused admits sexual intercourse, as Murphy did, but at the same time alleges consent. However, Chief Justice Laskin states that he is unable to understand how a complainant's hysterical condition can implicate an accused in any material particular where he has denied intercourse, and there is no other evidence apart from the evidence of the complainant that can support a finding of intercourse. Chief Justice Laskin lists seven cases in which he indicates that the evidence of the complainant's hysterical or emotional condition has been held to be admissible as corroboration, and in each of those cases the evidence was brought in on the issue of consent where there was either an admission of, or independant evidence of, intercourse. Chief Justice Laskin's departing comment in his dissent would seem to be directed primarily at Mr. Justice de Grandpré's decision in *Warkentin, Hanson and Brown,* where he says that the mere fact that a "gang" rape is alleged, does not justify any different application of the rules of law in that case than in a case where there is an allegation of rape by one person who denies intercourse. His Lordship points out that even if there is no proper corroborative evidence there may still be a conviction. Chief Justice Laskin would have allowed the appeal of Butt and directed a new trial.

The dissent of Mr. Justice Dickson, who adopts the remarks of Chief Justice Laskin, again reveals a difference in approach (along with Chief Justice Laskin) to that of the majority in both these cases. Both Chief Justice Laskin and Mr. Justice Dickson approach corroboration as it relates to an individual accused, rather than as it relates to the evidence of the complainant, relying no doubt, on the premise that the evidence must in some material way implicate the accused. This point is perhaps even better taken in this case than in *Warkentin, Hanson and Brown,* because it is not alleged that either of the accused was a party to the offence committed by the other accused. This particular point is not dealt with by Mr. Justice Spence in his majority reasons. The displeasure of Mr. Justice Dickson is even more obvious than that of Chief Justice Laskin, and he indicates his unhappiness with the decision in *Warkentin, Hanson and Brown* by saying that he feels that there was no corroborative evidence as to identity in that case, and indeed there is none with respect to Butt. He ends his dissent by saying pointedly, "It is not enough to find guilt by association."[22]

Mr. Justice Spence writing for the majority of the Court says first of all that there is no jurisdiction in the Court to hear the appeal. He applies the provisions of section 605 of the *Criminal Code,* and says that the dissent of Mr. Justice Branca of the British Columbia Court of Appeal, which held that the circumstantial evidence as to the distraught condition of the complainant was consistent with two rational conclusions and therefore was not capable of corroborating the evidence of the complainant, was not a question of law, and the appeal should stand dismissed, as the appellants had ap-

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[22] *Supra,* note 2 at 56 (C.R.N.S.).

pealed to the Supreme Court as of right. He goes on to indicate that the appellants have applied to the Court for leave to appeal in accordance with the provisions of section 618(1)(b) and at the time for hearing, this application for leave to appeal was extended to the date of hearing of the appeal, and the argument upon the appeal was in fact an argument upon the questions set out in the application for leave to appeal. However he does not indicate anywhere in his judgment whether leave was granted, although one might presume that since he took the time to write a decision that it was.

Mr. Justice Spence begins his majority reasons with a curious reference to circumstantial evidence as it relates to corroboration, which may well be obiter in the context of the case, but which is a radical departure from the law as it existed up to this point. Mr. Justice Spence indicates[23] that before circumstantial evidence can be accepted as corroboration that it must be consistent with the guilt of the accused and inconsistent with any other rational explanation. This would appear to be in direct conflict with the test set out in *R.* v. *Boyce*,[24] which test was arguably implicitly accepted by Mr. Justice de Grandpré in *Warkentin, Hanson and Brown*. Mr. Justice Spence points out that the telephone call wherein the emotionally distraught condition was first observed was made within fifteen minutes after the complainant had been driven by Murphy to the bus terminal in Vancouver, inferring that this time frame no doubt makes it very hard to distinguish Murphy from Butt when one is assessing that evidence for its corroborative value. Mr. Justice Spence in discussing corroboration points out that it is a material particular of the complainant's evidence which must be corroborated, and that there is no requirement that the whole of her evidence be corroborated. While this is quite correct, it ignores the fact that the evidence must necessarily implicate the accused against whom it is sought to be used. The approach of Mr. Justice de Grandpré in *Warkentin, Hanson and Brown* and Mr. Justice Spence in *Murphy and Butt* is to relate the adequacy of the evidence as corroboration to the story of the complainant, rather than to ask whether or not it necessarily implicates the accused against whom it is sought to be used. Mr. Justice Spence appears to adopt Mr. Justice de Grandpré's "all in" method of determining whether evidence is corroborative or not. He says the Crown was relying on all the evidence including the complainant's distraught condition as corroboration, not only of Murphy's rape, but of Butt's rape as well, and that the jury was entitled to consider all of the evidence and to come to the conclusion of whether that evidence did corroborate the evidence of the complainant against both accused. Mr. Justice Spence in an apparent reference to Murphy indicates that evidence should not be robbed of its corroborative value by the effect of an admission made by the accused, but this completely overlooks the fact that Butt denied having intercourse at all.

The sum total of the effect of these two cases upon the law of corroboration as it was known in Canada prior to these two decisions may not be known for some time. It may be that the provincial appellate courts will seek to distinguish the cases on the jurisdictional point argued or because they

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[23] *Id.* at 45.

[24] *Supra*, note 12.

deal with multiple accused. Perhaps they might go so far as to indicate that they do not believe the decisions are correct. Whatever course is taken it is to be hoped that in the future the Supreme Court of Canada will refrain from deciding what facts in a case do or do not constitute corroboration and will confine itself to determining what facts are capable of constituting corroboration. The former is a question of fact which should be dealt with by the trier of fact. The latter is a question of law. It is further to be hoped that the Court will take the next opportunity it has to clarify the uncertainty which must necessarily arise in the minds of lawyers and judges upon the reading of these two cases.