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Evidence of the Absence of Fresh Complaint Is Admissible in Sodomy Prosecution— *United States v. Goodman**

Defendant was convicted of two counts of sodomy by a general court martial.[1] The alleged victims of the defendant had failed to complain immediately following the incidents, and evidence of such failure on the part of one of the witnesses had been admitted at trial. A Navy board of review affirmed the conviction, modifying the sentence.[2] Defendant appealed to the United States Court of Military Appeals on the ground that it had been prejudicial error for the law officer to refuse to give a proffered instruction to the court-martial panel respecting the victim's failure to make fresh complaints. On appeal, *held,* reversed, one judge dissenting.[3] Evidence of the absence of fresh complaint is admissible in a sodomy proceeding, and it is prejudicial error to refuse to give instructions concerning such absence.

Although the issue in the principal case was whether instructions should have been given concerning the effect of the absence of fresh complaint,[4] it is necessary first to consider the admissibility of such evidence because the law developed in this area. The rules governing admissibility of evidence establishing fresh complaint were developed by the courts in rape cases. Until the nineteenth century, evidence of fresh complaint in prosecutions for rape was admitted by the courts with little or no attempt to explain the principles which supported admission.[5] In the early nineteenth century, however, courts began to search for principles to justify the admission of these statements and particularly to reconcile their admission with the hearsay rule,[6] which in general denies admission of consistent out-of-court statements to corroborate a witness' testimony.[7] Three theories of admissibility were developed. The first

* 13 U.S.C.M.A. 663 (1963).

1. Defendant was convicted for performing acts of fellatio upon the victims under Article 125, Uniform Code of Military Justice, 10 U.S.C. § 925 (1958).

2. The sentence of dishonorable discharge was reduced to a bad conduct discharge. Principal case at 664.

3. Chief Judge Quinn dissented on the ground that the matter of the absence of fresh complaint should be left solely to counsel's arguments and should not be isolated by the law officer for the court's consideration. Principal case at 670.

4. The court's dictum respecting admissibility of fresh complaint appears to have been based on the UNITED STATES MANUAL FOR COURT MARTIAL ¶ 142c (1951), providing for the admission of evidence establishing a fresh complaint in prosecutions for sexual offenses. See principal case at 666.

5. See 4 WIGMORE, EVIDENCE § 1134 (3d ed. 1940).

6. *Ibid.*

7. See, *e.g.*, Dier v. Dier, 141 Neb. 685, 4 N.W.2d 731 (1942); Grand Forks Bldg. & Dev. Co. v. Implement Dealers Mut. Fire Ins. Co., 75 N.D. 618, 31 N.W.2d 495 (1948). If the complaint itself is not admitted, evidence of a fresh complaint is not, of course, hearsay at all; the problem is merely one of materiality and relevancy.

theory requires the complaint or statement to be a so-called *res gestae* declaration,[8] an exception to the hearsay rule which permits the introduction of certain declarations made spontaneously with the act in question. However, the strict requirement that the complaint have been immediately after the act and while the victim was still under the excitement of the outrage[9] has prevented frequent use of this theory.[10] The second theory permits the admission of evidence of fresh complaint for the corroboration or substantiation of the prosecutrix after she has testified and has been impeached.[11] The courts differ, however, as to what type of an impeachment is necessary in order to admit this evidence. Some jurisdictions require that impeachment have been by prior inconsistent behavior,[12] others require it to have been by general bad character,[13] and still others require it merely to have been by cross-examination of the witness.[14] The final theory of admissibility permits the introduction of evidence of fresh complaint to deter the jury from inferring consent to the offense by the victim when the evidence does not otherwise indicate that a fresh complaint was made.[15] This theory follows the seemingly irregular procedure of admitting evidence to negate other evidence that has not been formally introduced on the assumption that the natural tendency of the jury is to infer that a noncomplaining prosecutrix consented to the crime.[16] For example, fresh complaint would be admissible in a rape case under this theory to refute the inference, permissible under a record silent as to the victim's complaint,[17] that the victim consented to the offense.

The question of the admissibility of evidence of fresh complaint in prosecutions for sexual offenses other than rape has produced much discord among the writers and the courts.[18] An analysis of

8. See, *e.g.*, Luke v. State, 184 Ga. 551, 192 S.E. 37 (1937); Brooks v. Commonwealth, 235 Ky. 19, 29 S.W.2d 597 (1930); Terrill v. State, 133 Tex. Crim. 584, 112 S.W.2d 734 (1937); State v. Linton, 36 Wash. 2d 67, 216 P.2d 761 (1950).

9. See McCORMICK, EVIDENCE § 49 (1954).

10. 4 WIGMORE, *op. cit. supra* note 5, § 1140.

11. See, *e.g.*, Commonwealth v. Ellis, 319 Mass. 627, 67 N.E.2d 234 (1946); State v. Fleming, 354 Mo. 31, 188 S.W.2d 12 (1945); State v. Saccone, 7 N.J. Super. 263, 72 A.2d 923 (1950); State v. Werner, 16 N.D. 83, 112 N.W. 60 (1907).

12. See, *e.g.*, Thompson v. State, 38 Ind. 39 (1871).

13. See, *e.g.*, Pleasant v. State, 15 Ark. 624 (1855).

14. See, *e.g.*, State v. Brown, 125 N.C. 606, 34 S.E. 105 (1899).

15. See, *e.g.*, People v. Luce, 210 Mich. 621, 178 N.W. 54 (1920); Baccio v. People, 41 N.Y. 265 (1869); Harmon v. Territory, 5 Okla. 368, 49 Pac. 55 (1897); Rogers v. State, 124 Tex. Crim. 430, 63 S.W.2d 384 (1933); State v. Willett, 78 Vt. 157, 62 Atl. 48 (1905); State v. Mau, 41 Wyo. 365, 285 Pac. 992 (1930).

16. 4 WIGMORE, *op. cit. supra* note 5, § 1135.

17. Professor McCormick has characterized this theory as a modern sophistication designed to reconcile the ancient admissibility of evidence of fresh complaint with the modern ban upon hearsay. McCORMICK, *op. cit. supra* note 9, § 49. See generally Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1 (1937).

18. *Compare* People v. Romano, 306 Ill. 502, 138 N.E. 169 (1923) *and* Purifoy v.

the theories supporting admission of evidence of fresh complaint indicates the nature of the offense is irrelevant under either the *res gestae* or corroboration of complaining witness theories because these theories rely on generally applicable rules of evidence.[19] However, under the third theory, which allows evidence of fresh complaint to refute an inference of consent, such evidence should be admissible only in proceedings involving sexual offenses to which consent is a defense.[20] Evidence of fresh complaint, therefore, would be immaterial and should not be permitted under this theory in sodomy cases because consent is not a defense to the crime of sodomy.[21] Furthermore, justifying admission of fresh complaint under this theory on the ground that it will support the unimpeached victim's general credibility violates the rule prohibiting support of credibility until it has been disputed.[22]

Even though evidence of fresh complaint is determined to be admissible, as in the principal case, it does not follow that evidence of the failure to complain is also properly admissible.[23] For example, if the evidence of a fresh complaint were admitted under the *res gestae* exception to the hearsay rule, the failure to complain would clearly not be admissible as a *res gestae* declaration.[24] In addition, the failure to complain should not be admissible to impeach the victim of a crime to which consent is not a defense. If the alleged victim of a sexual crime were asked whether he consented to the crime and, upon his denial, if he were confronted with his failure to make an immediate complaint, the witness would have been improperly impeached on a collateral fact[25] in a proceeding in which consent plays no part.

The principal case seems to have analyzed the issue in terms of

State, 163 Tex. Crim. 488, 293 S.W.2d 663 (1956) *and* 1 WHARTON, CRIMINAL EVIDENCE § 437 (11th ed. 1935) *and* 4 WIGMORE, *op. cit. supra* note 5, § 1135, *with* Coplin v. People, 67 Colo. 17, 185 Pac. 254 (1919) *and* State v. Sebastian, 81 Conn. 1, 69 Atl. 1054 (1908) *and* 3 UNDERHILL, CRIMINAL EVIDENCE § 602 (5th ed. 1957).

19. MCCORMICK, *op. cit. supra* note 9, §§ 49, 274.

20. See, *e.g.*, United States v. Mantooth, 6 U.S.C.M.A. 251, 19 C.M.R. 377 (1955); Purifoy v. State, 163 Tex. Crim. 488, 293 S.W.2d 663 (1956); Pepoon v. Commonwealth, 192 Va. 804, 66 S.E.2d 854 (1951).

21. See generally James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941); Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952).

22. See, *e.g.*, Mellon v. United States, 170 F.2d 583 (5th Cir. 1948); State v. Harmon, 278 S.W. 733 (Mo. Ct. App. 1925); Newton v. State, 147 Tex. Crim. 400, 180 S.W.2d 946 (1944).

23. *But see* principal case at 667.

24. In fact, consideration of the *res gestae* exception is largely academic, inasmuch as the failure to complain, not being a statement, may fall outside normal hearsay categories. The question of admissibility, then, would turn upon relevancy and materiality.

25. See, *e.g.*, Consolidated Beef & Provision Co. v. Witt & Co., 184 Md. 105, 40 A.2d 295 (1944); *Klein v. Keresey*, 307 Mass. 51, 29 N.E.2d 703 (1940).

the expected reaction of a victim of the crime of sodomy, concluding that the victim's failure to complain was admissible to contradict his testimony. In reaching this result, the court analogized the expected reaction of a victim of sodomy to that of a victim of rape, stating that a nonconsenting male victim of the crime of sodomy would certainly be expected to make a fresh complaint.[26] There is merit in the court's analysis of admissibility in terms of an attack on the general credibility of the prosecution witness through actions on his part arguably inconsistent with his testimony as to the occurrence of the alleged criminal act.[27] Nonetheless, the relevance of the absence of fresh complaint as used by the defense to impeach the complaining witness is uncertain. Therefore, while the court wisely decided to uphold the law officer's admission of the evidence showing lack of fresh complaint, it may have erred in overturning the officer's determination not to give an instruction which would have isolated the effect of that evidence for the court-martial panel's consideration.[28] Even in the paternalistic setting of a court-martial,[29] the solution of a problem so intimately connected with a close question of relevancy should be left, in the absence of a clear-cut abuse of discretion, to the person conducting the trial.

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26. Principal case at 667.

27. See WIGMORE, *op. cit. supra* note 5, § 1135, at 219.

28. Moreover, if the evidence of the victim's failure to make fresh complaint properly went only to his general credibility, the law officer giving the requested instruction would probably have had to specify this point. Perhaps, without such an instruction, some members of the court-martial panel may have assumed that the evidence of the failure to complain could properly go to the occurrence of the alleged criminal act itself, a circumstance favoring defendant.

29. See 63 MICH. L. REV. 168 (1964).