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CRIMINAL LAW CASE NOTES AND COMMENTS

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Admissibility of Other Offenses to Prove Intent in Sex Cases

In the past decade the legislatures of many states have found it necessary to overhaul their criminal laws in an attempt to deal with the social problem presented by an increasing number of sex crimes.¹ Likewise, the courts have been compelled by the pressure of public opinion to deal strictly with sex offenders, and where the categories of crime which the state has set up are inadequate to meet modern needs, the courts have been forced to expand their ancient doctrines and modify orthodox rules of evidence. The case of *McKenzie v. State*² illustrates well the dangers inherent in using old tools for new problems, and demonstrates the urgent need for legislative revision in this area of the criminal law.

In the *McKenzie* case the Alabama Supreme Court affirmed a ruling of the Court of Appeals upon the question of the admissibility of a subsequent offense to prove specific intent. *McKenzie* was tried and convicted upon a charge of assault with intent to rape. While driving through the streets of Birmingham the defendant saw the prosecutrix, a fifteen year old girl, and offered to drive her home. She accepted, and the defendant, instead of taking her home, on a pretext headed in another direction. Once out of the city he parked his car and made known his intention to have sexual intercourse with her. She refused, and he threatened bodily harm. After making several physical advances he abandoned his aim and returned the girl to the city. This scene occurred on June 13th. On August 4th the defendant under similar circumstances picked up a married woman. Only after this woman showed him an unhealed scar from an operation which she said prevented her from having intercourse, did he abandon his aim.³

The state chose to prosecute for the first offense.⁴ It offered in evidence the testimony of the married woman concerning the subsequent attack upon her to rebut the contention of the defendant that he did not intend to forcibly ravish the prosecutrix. The trial court allowed testimony of the subsequent offense in evidence but instructed the jury

¹ Some states have passed laws aimed at criminal sexual psychopaths. For one example, see Ill. Rev. Stat. (1947), c. 38, §820. Other states do not treat sexual offenses separately, but bring the more extreme cases under their habitual offender statutes. ² Minn. Stat., c. 617, §617.75 (1945). Over a period of years many states have raised the age of consent in rape cases, thus making it illegal to have intercourse with a girl under a certain age. See Penal Code of Calif. (1941), Title 15, c. 2, §645; Ill. Rev. Stat. (1947), c. 38, §490; 4 Burns Ind. Stat. Ann., c. 42, §10-4021; 25 Mich. Stat. Ann., c. 286a, §28.785; 2 Minn. Stat. (1945), c. 617, §617.01. Where the age of consent has been raised, it is usually found that the severe rape penalties have been modified.

² 33 So. (2d) 488 (Ala., 1947).

³ See *infra* note 33 for cases involving similar fact patterns.

⁴ See *infra* note 30.

that they were to consider this evidence solely on the issue of intent.⁵ The Alabama Court of Appeals affirmed the ruling of the lower court.⁶ The Alabama Supreme Court affirmed the Court of Appeals, but there were two dissenting opinions.⁷

This case raises questions concerning the application of certain exceptions to the Character Rule. American courts have never permitted a defendant's character to be attacked in a criminal proceeding unless he first puts it in issue.⁸ Thus evidence of other offenses tending to show a *general* disposition to commit crime cannot be used to prove the specific crime charged. Likewise, evidence of other similar offenses cannot be used to show a disposition to commit a *particular* type of crime. This type of evidence is not admissible because the state has the burden of showing beyond a reasonable doubt that the defendant committed the crime charged, and if the state were allowed to bring in proof of other offenses the attention of the jury would not be focussed upon the elements necessary to make out the crime charged, but upon the defendant's bad record. The prejudice to the accused in such circumstances cannot be underestimated.⁹ Such evidence is also objectionable because it requires the defendant to defend himself against crimes with which he is not charged in the indictment,¹⁰ and tends to complicate the issues for the jury.

Nevertheless, proof of other offenses has a legitimate probative value in certain situations where the elements of a crime are peculiarly difficult or impossible of proof without such evidence. The situations where this has been found to be true are fairly well-defined, and have resulted in certain well-known exceptions to the Character Rule.¹¹ Evidence of other similar offenses has been allowed for the purpose of proving

⁵ But see *People v. Deal*, 357 Ill. 634, 192 N.E. 649 (1934) ("Human nature does not change merely because it is found in the jury box. The human mind is not a slate from which can be wiped out, at the will and instruction of another, ideas and thoughts written thereon"); *Brockman v. State*, 60 Okla. Cr. 75, 61 F. (2d) 273 (1936).

⁶ 33 So. (2d) 484 (Ala., 1946).

⁷ 33 So. (2d) 490, 492 (Ala., 1947).

⁸ *People v. Zackowitz*, 254 N.Y. 192, 172 N.E. 466 (1930). 1 Wigmore, *Evidence* (3rd ed., 1940) §§55, 192.

⁹ *Barber v. Commonwealth*, 182 Va. 858, 30 S.E. (2d) 565 (1944); *People v. Cordes*, 391 Ill. 47, 62 N.E. (2d) 465 (1945).

¹⁰ "The legal objection of unfair surprise, so far as it is ever recognized, is not founded on the notion that the opponent was not in fact anticipating this specific evidence but on the notion that he could not have anticipated evidence which might easily be fabricated; and the objection is recognized as having force only when the evidence offered is of a class capable of involving the entire range of a person's life." 2 Wigmore, *Evidence* (3rd ed., 1940) 206.

¹¹ These exceptions have since 1927 been incorporated in the Michigan Code of Criminal Procedure, Michigan, 3 Comp. Laws 1929, §17320: "In any criminal case where the defendant's motive, intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing the act in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant." See also, Ohio Gen. L. 1929, §13444-19; Louisiana C. Cr. P. 1928, §416.

1) knowledge,¹² 2) the absence of accident, inadvertence or mistake,¹³ 3) motive,¹⁴ 4) intent,¹⁵ 5) design, plan or system,¹⁶ and 6) identity.^{17 18}

In the *McKenzie* case the testimony of the married woman concerning the defendant's subsequent assault upon her was permitted to come in under the intent exception. Under this latter exception evidence of other offenses is usually allowed for the limited purpose of negating the defendant's claim of innocent intent. This exception postulates the criminal *act* as proved, *i.e.*, as established by other independent evidence. Evidence of other offenses may then be brought in to show that the defendant had the criminal intent normally accompanying his act. For example, if the defendant in the *McKenzie* case had grabbed the prosecutrix by the throat as she was walking down the street at night and struggled with her until interrupted by a third person, what he intended to do after he had succeeded in overcoming his victim would not be clear.¹⁹ In such a case the act is equally consistent with an intent to rob, to murder, to rape or to assault. If the defendant insisted that he intended merely to scare the prosecutrix, or to inflict some injury out of malice, evidence of other rapes or attempted rapes would have definite probative value. The evidence of similar offenses would tend to overcome his defense, and to establish a strong probability that his intent in this instance was the same as on the other occasions. The trial court would, of course, exercise its discretion in determining

12 Suppose that it is necessary to prove that A knew goods which he received from B were stolen goods. Evidence that A had twice before been caught in the act of receiving stolen goods would be admissible to show A's knowledge. 2 Wigmore, Evidence (3rd ed., 1940) 193.

13 This is Wigmore's classic example. A is hunting with B. A bullet whistles by B's head, but he attributes it to A's bad aim. A short time later another bullet whistles by even closer. If on the third occasion B is hit in the arm, he will be justified in inferring that A was aiming at him since the chances are that A would not accidentally come near hitting him three times in the same day. 2 Wigmore, Evidence (3rd ed., 1940) 198.

14 *People v. Harris*, 137 Cal. App. 332, 31 P. (2d) 218 (1934) (motive to kill wife proved by evidence that defendant had performed illegal abortions on the deceased, that he had illicit relations with a paramour and had conspired with her to kill her husband).

15 Example cited *supra*, note 12. Intent is proved indirectly by negating accident, mistake or inadvertence. 2 Wigmore, Evidence (3rd ed., 1940) 39. For a slightly different situation involving the intent exception see text, note 19.

16 The classic case illustrating the application of the design exception is *People v. Cosby*, 137 Cal. App. 332, 31 P. (2d) 218 (1934). If A had been lured by a newspaper advertisement to B's apartment and assaulted, evidence of another instance where he had used the same device would be admissible for the purpose of showing that A had committed the crime charged, by reference to a common design or scheme.

17 *Whiteman v. State*, 119 Ohio St. 285, 164 N.E. 51 (1928) (peculiar plan "ear-marked" robberies).

18 For good discussion of these exceptions see (1937) 28 J. Crim. L. & Crim. 917; (1931) 29 Mich. L. Rev. 473; Stone, Exclusion of Similar Fact Evidence: England (1933) 46 Harv. L. Rev. 954; Exclusion of Similar Fact Evidence: America (1938), 51 Harv. L. Rev. 988. Mr. Stone after an elaborate historical analysis of the exceptions concludes that they should be abolished and other offenses allowed in evidence whenever they are relevant to the issue before the court, and when the probative weight of the evidence outweighs its prejudicial effect.

19 *Wilkins v. State*, 29 Ala. App. 349, 197 So. 75 (1940). The majority opinion in the *McKenzie* case purported to follow this case. The *Wilkins* case involved an admittedly forceful and felonious assault, which was, of course, the question in the principal case.

how many other offenses could be shown and in what detail,²⁰ as well as the degree of similarity required,²¹ and the relation of the other offenses in point of time.²² It would probably require the state to exhaust all other proof available upon the issue of intent before admitting evidence of other offenses.²³ Upon the actual facts of the *McKenzie* case, however, the question for the jury was whether the defendant had attempted to procure sexual relations by consent or by force, since the crime of assault with intent to commit rape requires the latter type of extreme conduct.²⁴

The typical example of an assault with intent to commit rape at common law was the situation where the defendant had satisfied all the requirements of rape but had failed to effect penetration, or where the defendant was surprised in the attempt to rape and escaped.²⁵ In any event, the crime of assault with intent to rape required an aggravated assault. In the *McKenzie* case the majority of the Alabama Supreme Court assumed that McKenzie's "masher" tactics were so extreme as to constitute the crime of assault with intent to rape.²⁶ One of the justices, in his dissenting opinion, argued that this assumption was unwarranted. He pointed out that the defendant was not interrupted in his assault by any external circumstances, nor did the prosecutrix escape from him. The defendant, he said, had voluntarily desisted from his purpose in response to the girl's entreaties.²⁷ According to the dissenting opin-

²⁰ When other offenses are allowed in evidence under one of the exceptions it is important that such proof be limited to relevant details, especially in sex offenses where the circumstances surrounding the other offense are likely to be charged with emotional content.

²¹ ". . . some judges . . . admit such instances as bear a similarity liberally interpreted by the standard of everyday reasoning. Other judges set their faces firmly against every instance which is not on all fours with the offense in issue . . ." 2 Wigmore, *Evidence* (3rd ed., 1940) 201.

²² Of course the greater the period of time separating the other offense from the offense charged, the greater the probability that a repetition can be explained away as "accident."

²³ *State v. Gilligan*, 92 Conn. 526, 103 A. 649 (1918).

²⁴ *Toulet v. State*, 100 Ala. 72, 14 So. 403 (1893). Without force, actual or constructive, there can be no rape. It must be shown that the prisoner intended to gratify his passion at all events and notwithstanding the utmost resistance on the part of the woman. *State v. Gilbert*, 28 Ala. App. 206, 180 So. 306 (1938). To justify a conviction of assault with intent to commit rape the evidence must show such acts and conduct by the accused as to leave no reasonable doubt of his intention to gratify his lustful desire against the female's consent and notwithstanding her resistance. *People v. Kruse*, 385 Ill. 42, 52 N.E. (2d) 200 (1943).

²⁵ "All of the constituent elements which go to make up the crime of rape, except penetration, must be alleged in an assault with intent to rape." *Edwards v. State*, 37 Tex. Cr. 242, 244, 39 S.W. 368, 369 (1897).

²⁶ The Alabama court could have made out the aggravated assault of assault with intent to rape under these facts if they had assumed that the fifteen year old prosecutrix was under the age of consent. In this event, any attempt to have intercourse would have constituted an attempted rape. However, Alabama has not set an age below which a child cannot consent, unless such a policy is to be inferred from the penal provisions of the Alabama code, Ala. Code, Tit. 14, c. 71, 88395, 88398, "Rape and Kindred Offenses." The death penalty is imposed for rape, and for carnal knowledge of a girl under the age of twelve. The penalty is imprisonment from two to fifteen years for carnal knowledge of a girl between the ages of twelve and sixteen. The penalty for assault with intent to rape is two to twenty years imprisonment. It is probable that the court did not consider the age of the prosecutrix in finding an aggravated assault.

²⁷ Voluntary abandonment is not always decisive. See *People v. Lutes*, 179 P. (2d) 815 (Calif., 1947).

ion, the conduct necessary to make out an assault with intent to rape was the same type of forceful conduct required to make out a rape because the legislature in either instance had prescribed a severe penalty. The view was also expressed that the majority of the court by permitting the defendant's conviction of an assault with intent to rape to stand, subjected the defendant to the same punishment attending forceful assaults in a case where the attempt had been to procure intercourse by consent. The conclusion of the well-reasoned dissent was that the court had very little justification for expanding and relaxing the elements of the crime to take care of a class of cases which the legislature had not yet recognized as a separate category of criminal act.

The majority of the Alabama court, having assumed that the defendant's acts satisfied the requirements for the crime of assault with intent to rape, allowed the state to bring in evidence of other offenses to prove his intent. Once this assumption is made the intent can be inferred from the act itself.²⁸ It is noteworthy that in rape cases intent is seldom if ever in issue.²⁹ Assuming in the *McKenzie* case that the intent to use the utmost force was in issue, it is difficult to see how the second attack which lacked the same element of force is of any value in proving the issue in the first assault.³⁰ On the other hand, it can be argued that the second attack, if it proved anything, tended to prove that the defendant would not go so far as to use the "utmost force" to obtain his desire. But an untrained jury of laymen cannot be expected to discriminate to this extent in its evaluation of the subsequent offense.

Wigmore in his treatise has indicated that the courts were inclined to err in favor of the defendants in the application of the exceptions to the Character Rule.³¹ But courts in recent years have had before them with increasing frequency cases involving forceful sexual assaults committed in, or with the use of automobiles.³² The only criminal categories available to the courts in the absence of legislative action are the crimes of assault, assault with intent to rape, and rape. Rape, because of its stringent requirements, is inapplicable.³³ The penalty for simple assault is hardly proportionate to the seriousness of the crime. Assault with intent to rape has been the only criminal category which could be stretched to cover some of the aggravated "masher" cases. As has been indicated, to achieve this result the courts have seen fit to relax both the elements required to make out the crime and

²⁸ *People v. Mayer*, 392 Ill. 257, 64 N.E. (2d) 372 (1945).

²⁹ 2 Wigmore, *Evidence* (3rd ed., 1940) 266.

³⁰ "Proof of similar transactions involving crime must be clearly shown. Mere suspicion is not enough. The evidence must be such that there can be no room for speculation in the minds of the jury whether the similar crimes attempted to be shown were actually committed or not." *State v. Cotton*, ___ Ia. ___, 33 N.W. (2d) 880 (1948). The second offense in order to be of value in establishing intent would have to be an actual rape or a proven assault with intent to rape. If the second offense points only to a general lustful disposition, it is inadmissible because it contravenes the character rule. There is an exception to the character rule where the evidence reflects a "specific emotional propensity." However, under this exception the prior crime, or prior conduct indicating a lustful nature, must have been directed specifically toward the prosecutrix. *Cf. Note* (1947) 25 *Tex. L. Rev.* 421.

³¹ 2 Wigmore, *Evidence* (3rd ed., 1940) 201.

³² *People v. Lutes*, 179 P. (2d) 815 (Calif., 1947), *Barber v. Commonwealth*, 182 Va. 858, 30 S.E. (2d) 565 (1944), *People v. Kruse*, 358 Ill. 42, 52 N.E. (2d) 200 (1943).

³³ *Supra* note 24.