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EVIDENCE—IMPEACHING CREDIBILITY—PRIOR SEXUAL EXPERIENCE
—The Superior Court of Pennsylvania has held it impermissible to question a rape victim about her prior sexual experience for the purpose of impeaching her credibility.

Commonwealth v. Crider, 361 A.2d 352 (Pa. Super. 1976).

In 1971, Richard David Crider was convicted of forcible rape¹ in a non-jury trial and sentenced to three and one-half to seven years in prison. More than one year after his post-verdict motions were denied, Crider appealed the conviction under the Post Conviction Hearing Act² and the Dauphin County Court of Common Pleas filed an order allowing his appeal *nunc pro tunc* from the judgment of sentence.³

The appellant based his appeal to the Superior Court of Pennsylvania on the trial court's refusal to permit the prosecutrix to answer the question whether she had ever had sexual relations prior to the alleged rape. He argued that in Pennsylvania a prosecutrix in a rape case may be asked if she had engaged in sexual intercourse on prior occasions,⁴ and asserted that the question should have been permitted on either of two grounds: to determine whether the prosecutrix understood the meaning of the word "intercourse," or to impeach her credibility.⁵

The superior court quickly dismissed the appellant's first contention, describing as "preposterous" the argument that a female

1. Recent legislation revising the rape law was pending at the time of the *Crider* decision and was enacted approximately two months afterwards. Act of May 18, 1976, No. 53, §§ 1-2, [1976] Laws of Pa. —, amending PA. CONSOL. STAT. ANN. tit. 18, §§ 3104, 3106 (1973). For the text of the relevant amendments see note 16 *infra*.

Appellant and two companions had approached the prosecutrix on a rural road. One of the companions and the appellant forced her to the ground and had sexual intercourse with her. Crider's companion was also charged with rape, but pleaded guilty to assault with intent to ravish and testified for the Commonwealth. *Commonwealth v. Crider*, 361 A.2d 352, 353 (Pa. Super. 1976).

2. PA. STAT. ANN. tit. 19, §§ 1180-1 to -14 (Supp. 1976).

3. 361 A.2d at 353.

4. *Id.* at 354. See notes 11 and 12 and accompanying text *infra*.

5. 361 A.2d at 353-54. The appellant also argued that the verdict was against the weight of the evidence. Relying on *Johnson Appeal*, 445 Pa. 270, 284 A.2d 780 (1971), and *Commonwealth v. Richardson*, 232 Pa. Super. 123, 334 A.2d 700 (1975), the court affirmed the "long standing" rule that the testimony of the victim, without more, is sufficient to prove the element of penetration. The court found that every other point of the prosecutrix's testimony was corroborated and the verdict was therefore amply supported by the evidence. 361 A.2d at 356.

may not understand sexual intercourse without first experiencing it.⁶ The unanimous court then held that prior sexual experiences are not relevant to a witness' character for truth and veracity and therefore may not be introduced to impeach a prosecutrix's credibility.⁷

The court, speaking through Judge Spaeth, first discussed the use of evidence of prior sexual experience to impeach the credibility of a witness. It relied primarily on *Gilchrist v. McKee*⁸ for the general proposition that if the witness' veracity is at issue, the only legitimate consideration is his character for truthfulness.⁹ The law of Pennsylvania, noted Judge Spaeth, has long been that a person's previous sexual experience may not be introduced to impeach him as a witness.¹⁰ Focusing on the particular crime of rape, the court next addressed the appellant's contention that *Commonwealth v. Eberhardt*¹¹ provided authority for permitting him to ask the prosecutrix whether she had engaged in sexual intercourse on previous occasions. In *Eberhardt*, the Pennsylvania Superior Court upheld an instruction which said the testimony of a rape victim that she was not a virgin, coupled with evidence of her bad moral reputation, was relevant to the jury's consideration of whether she consented to the sexual intercourse.¹² The *Crider* court limited *Eberhardt* to cases in which consent was an issue, and since no issue of consent was involved in *Crider*,¹³ the appellant's reliance on *Eberhardt* was unfounded.¹⁴ Judge Spaeth also noted that even in cases involving the issue of consent, only proof of reputation, rather than proof of specific instances of intercourse, is permitted. Insofar as the *Eberhardt* instruction would permit asking the prosecutrix if she was a virgin

6. The court suggested that if counsel thought the prosecutrix did not understand the meaning of sexual intercourse, he should have asked her to define the term. *Id.* at 353.

7. *Id.* at 354.

8. 4 Watts 380 (Pa. 1835) (action to recover proceeds of sheriff's sale).

9. The court also relied on two murder cases as upholding the *Gilchrist* principle. See *Commonwealth v. Williams*, 209 Pa. 529, 58 A. 922 (1904); *Commonwealth v. Bubnis*, 197 Pa. 542, 47 A. 748 (1901).

10. 361 A.2d at 354.

11. 164 Pa. Super. 591, 67 A.2d 613 (1949) (evidence of bad reputation for chastity admissible as bearing on the question of prosecutrix's consent).

12. The *Eberhardt* jury instruction described as "improper" in *Crider* read:

The girl admitted that she was not a virgin . . . The Jury should be instructed that this fact, together with evidence of bad repute for morality and chastity, could be a basis for a finding by the Jury that the carnal knowledge by them was with her consent.

Id. at 603, 67 A.2d at 619, cited in 361 A.2d at 355.

13. *Crider* himself testified that the prosecutrix did not consent. 361 A.2d at 354.

14. *Id.*

prior to the alleged rape, it was specifically overruled by the *Crider* court.¹⁵

Crider and the subsequent legislation it foreshadowed¹⁶ must be analyzed against the background of general principles of evidence and their relationship to the particular crime of rape. It is well established that for any evidence to be admissible it must be relevant;¹⁷ it must tend to establish the proposition for which it is offered to prove.¹⁸ When the issue is the credibility of a witness, evidence sought to be introduced for impeachment purposes must tend to show the witness is not to be believed. In Pennsylvania the only character evidence relevant to credibility is evidence of a witness' specific reputation for truth and veracity.¹⁹ Even introducing evidence of general reputation, as opposed to specific reputation for truth and veracity, in order to impeach credibility is generally rec-

15. *Id.* at 355.

16. The Pennsylvania General Assembly amended the rape law to specify that a rape victim's testimony shall be viewed in the same way as the testimony of the victim of any other crime:

The credibility of an alleged victim of an offense under this chapter shall be determined by the same standard as is the credibility of an alleged victim of any other crime [N]o instructions shall be given cautioning the jury to view the alleged victim's testimony in any other way than that in which all victims' testimony is viewed.

Act of May 18, 1976, No. 53, § 2, [1976] Laws of Pa. —, amending PA. CONSOL. STAT. ANN. tit. 18, § 3106 (1973). The amendments also prohibit the introduction of evidence of the victim's past sexual conduct:

Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

Act of May 18, 1976, No. 53, § 1, [1976] Laws of Pa. —, amending PA. CONSOL. STAT. ANN. tit. 18, § 3104 (1973).

Discussing the legislation then pending before the General Assembly, Judge Spaeth noted that even where consent is an issue, the bill would prohibit the use of prior sexual experiences with men other than the defendant. 361 A.2d at 355. *Accord*, *State ex rel. Pope v. Superior Court*, 113 Ariz. 22, 545 P.2d 946 (1976) (evidence of prior consensual experiences with defendant sufficiently probative to outweigh its inflammatory effects).

17. *E.g.*, *Bowers v. Garfield*, 382 F. Supp. 503, 510 (E.D. Pa. 1974) (malpractice suit construing Pennsylvania law); *Rich Hill Coal Co. v. Bashore*, 334 Pa. 449, 483, 7 A.2d 302, 319 (1939) (relevance of evidence discussed in constitutional challenge to Workmen's Compensation Act); MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 184 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]; J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 264-65 (1898).

18. *See* MCCORMICK, *supra* note 17, § 185.

19. *Gilchrist v. McKee*, 4 Watts 380 (Pa. 1835).

ognized as intended only to excite prejudice against a witness for reasons that have little if anything to do with credibility.²⁰

Although these fundamental rules of evidence have "long been the law of Pennsylvania,"²¹ in cases involving the crime of rape, the issue of the prosecutrix's credibility has often been accorded different treatment than the credibility of other witnesses.²² Inquiry into past acts or reputation for unchastity has generally been considered irrelevant to a witness' character for truth and veracity and therefore beyond the reach of trial court examination. As demonstrated in *Eberhardt*, however, the jury in a rape case has been permitted to consider evidence that the prosecutrix had sexual intercourse on prior occasions as proof bearing on credibility, even though such evidence has been rejected in cases not involving rape.²³ In relying on *Gilchrist*, a civil case which did not involve rape,²⁴ and by explicitly limiting *Eberhardt* to cases where consent is an issue, the *Crider* court sought to eliminate this distinction in testing a witness' credibility. This judicial mandate has now become statutory law in Pennsylvania.²⁵

Other jurisdictions have split over whether credibility can be impeached by evidence of prior sexual conduct. In *Redmon v. State*,²⁶

20. See, e.g., *Commonwealth v. Payne*, 205 Pa. 101, 54 A. 489 (1903) (general reputation evidence inadmissible to impeach credibility of witness in murder trial). In *Payne*, the lower court remarked that although evidence of a witness' general reputation might include his reputation for the specific trait of veracity, insofar as his general reputation included reputation for other traits, it must be excluded as irrelevant. *Id.* at 102, 54 A. at 490.

21. See 361 A.2d at 354 & n.2.

22. A sponsor of the recent amendments to the rape law commented:

As it presently stands, [rape] is the only offense where the victim has to establish her own good conduct. No other offense in this state requires that the victim, the person who has been assaulted, robbed and so forth, has to establish his own good conduct to be a victim. Rape does.

1 PA. LEGIS. J., 159th Sess. 3249 (1975) (House) (remarks of Representative Berson). This recognition by Representative Berson was reflected in the eventual legislation which, among other things, is designed to rectify this imbalance. See note 16 *supra*. See generally S. BROWN-MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

23. See, e.g., *Commonwealth v. Gates*, 392 Pa. 557, 141 A.2d 219 (1958) (evidence of extramarital relationship not admissible to impeach witness in murder trial); *Gerhart v. Gerhart*, 162 Pa. Super. 252, 57 A.2d 595 (1948) (evidence of adultery inadmissible to impeach witness in divorce hearing).

24. *Gilchrist v. McKee*, 4 Watts 380 (Pa. 1835).

25. See note 16 *supra*.

26. 150 Neb. 62, 33 N.W.2d 349 (1948). Although *Redmon* was a sodomy case, the court noted that its holding would apply to rape cases and used rape cases as authority for its view.

the Nebraska Supreme Court concluded that evidence of the witness' previous sexual experiences was admissible on the issue of credibility; moreover, if such evidence were excluded, the defendant could not obtain a fair trial. The *Redmon* court reasoned that a rape victim's chastity or lack of it has some bearing on her credibility. However, in a well-reasoned opinion, the Supreme Court of Virginia reached the opposite conclusion. *Wynne v. Commonwealth*²⁷ involved a rape victim who had previously had sexual intercourse with the defendant. The defendant proposed to call four witnesses to testify that each had engaged in sexual intercourse with the prosecutrix on prior occasions. The court upheld the trial court's refusal to admit the testimony, holding that specific acts of bad conduct may not be used to impeach a witness' credibility.²⁸ The court reasoned that the admission of evidence of such acts, and the rebuttal evidence that would follow, would inject collateral issues into the case and divert the jury's attention from the guilt or innocence of the accused.²⁹

Although *Wynne* and *Crider* reached their conclusion by different reasoning, both decisions recognize that logically, the character or reputation of an alleged crime victim is relevant only insofar as it enables the fact finder to determine if she is telling the truth. Evidence of a witness' past reputation for veracity tends to prove present untruthfulness indirectly,³⁰ and when evidence of prior sexual experiences or immoral reputation is admitted, the inference of untruthfulness is even more remote from the evidence. The fact finder is first asked to infer from the witness' previous sexual conduct that her character for veracity is poor, then to infer from this that she is unlikely to be telling the truth on this occasion.³¹

See also McCORMICK, *supra* note 17, § 44; 3A J. WIGMORE, EVIDENCE § 924a (Chadbourn rev. ed. 1970). Although Professor Wigmore is often cited as authority for allowing impeachment by evidence of prior sexual experience, what he advocates is psychological examination of the victim to distinguish those persons emotionally disturbed to the point they fabricate rape charges. *Id.* For a well-reasoned opinion holding that the trial judge has the discretion to order such an examination, see *Ballard v. Superior Court*, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966).

27. 218 S.E.2d 445 (Va. 1975).

28. *Id.* at 446; *accord*, *State v. Wolf*, 40 Wash. 2d 648, 245 P.2d 1009 (1952).

29. 218 S.E.2d at 446.

30. Indeed, McCormick suggests: "[I]n this elusive realm of reputation as to character it is best to reach for the highest degree of relevancy that is attainable." McCORMICK, *supra* note 17, § 44 at 91.

31. See, e.g., *State v. Wolf*, 40 Wash. 2d 648, 653, 245 P.2d 1009, 1012 (1952) (holding that

It might be argued, as in *Redmon*, that prejudice against the defendant will result if evidence of the prosecutrix's prior sexual conduct is excluded. However, the traditional methods of impeaching a witness—contradictory evidence, inconsistent statements, proof of bias, reputation for veracity, and conviction of certain crimes—are available to the rape defendant and would be sufficient to ensure that he receives a fair trial, just as they are sufficient protection for other criminal defendants.³² Limiting impeachment to these methods accommodates the interests of both the defendant and the prosecutrix; prejudice to the defendant is minimized and the victim's integrity is not impugned by inquiry into past intimate conduct which has no bearing on her ability to give a truthful account of the activity giving rise to the charge of rape.

Although the impact of *Crider* has been largely superseded by subsequent legislation,³³ the superior court's opinion represents a logical, objective and enlightened view of the rape victim's situation. Previously, many rape victims had been reluctant to proceed with a rape complaint because of the possibility their private sexual conduct would be scrutinized in the courtroom.³⁴ The superior court's decision in *Crider* and the legislation passed by the Pennsylvania General Assembly go far to obviate this situation, and should encourage victims to report rapes and prosecute rapists without having to fear that their own reputation and sense of self-esteem will be damaged in the process.

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the jury should not be permitted to deduce the victim's character for veracity from her reputation for lack of chastity).

32. See Note, *If She Consented Once, She Consented Again—A Legal Fallacy in Forcible Rape Cases*, 10 VAL. U.L. REV. 127, 147 (1976).

33. See note 16 *supra*.

34. See NATIONAL COMMISSION ON THE OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR, ". . . TO FORM A MORE PERFECT UNION . . ." JUSTICE FOR AMERICAN WOMEN 264 (1976).