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Rape—Testimony Allegedly Incredible and Contrary to Human Events. The Court was asked in the *Bradley*[1] case to set aside the verdict of the jury because the prosecutrix's version of the evidence was allegedly contrary to human events and inherently incredible. The prosecutrix testified that she was accosted on a lonely street about 2:30 P.M. and dragged through mud and snow to a peanut shed where she was attacked. The defendant then forced the prosecutrix by threats of harm to go with him to several houses which were occupied by his friends. The prosecutrix declared she was afraid to call for help because of these threats. Around 5:00 P.M. the prosecutrix managed to escape and return to her place of employment when she notified the police immediately. Her testimony was corroborated by other witnesses. They testified that the prosecutrix was hysterical; that her clothes were muddy; that peanut hulls were found in her clothes; that impressions were found in the mud near the peanut shed; that the defendant was wearing the clothes described by the prosecutrix; and, that peanut hulls also were found in his clothes. A doctor confirmed that she had been criminally attacked. The defendant's testimony was contradicted on material points, and his testimony was at variance with a prior signed statement. Upon this evidence, the court held that it was the function of the jury to determine whether the testimony was contrary to human experience, and that it could not be held as a matter of law that the reactions of the prosecutrix under the circumstances were not consistent with normal reactions. The court stated:

> Her prompt report when she reached friends, her physical and mental condition at the time and corroboration of much of her testimony warranted the jury in accepting her evidence and returning a verdict of guilty.[2]

Two judges dissented on the fact that she was with the defendant from 2:30 P.M. to 5 P.M., a period of two and one-half hours, without appealing for help. The court's decision is compatible

[1] Bradley v. Commonwealth, 196 Va. 1126, 86 S.E.2d 828 (1955).
[2] 196 Va. 1126, 1137, 86 S.E.2d 828, 835 (1955).

with the result in the *Gary*[3] case, where the court upheld the verdict of the jury, and where there was a similarity of certain facts. The *Legions*[4] case, which is cited by the dissenting judges, can be distinguished on the facts. There the defendant, unarmed, entered the house, took the prosecutrix into another room and committed the alleged act while the husband gave no alarm, made no protest, offered no resistance, although it was a settled neighborhood.

Rape—Breaking and Entering With Intent to Commit Rape. The defendant was indicted under Section 18-160, Code of Virginia (1950), as amended, for breaking and entering a certain storehouse building with the intent to commit rape.[5] The prosecutrix received several indecent proposals over the phone, anonymously made by the defendant. Then the defendant entered a cleaning establishment through the back door and was apprehended by detectives before he could enter through a second door into the well-lighted front office where the prosecutrix was working. A conviction in the trial court was set aside, and the case dismissed on appeal. The court held that where a statute makes an offense consist of an act combined with a particular intent, it is necessary for the intent to be established as a matter of fact before conviction can be had. Surmise and speculation as to existence of intent are not sufficient. The evidence was consistent with the desire to have intercourse, but it was not sufficient to establish intention to use force, merely persuasion. The result in this case is consistent with the decisions in the *Hairston*[6] and *Woodson*[7] cases where the evidence was held not sufficient to prove an intent to commit rape. In the former case, the accused made indecent proposals to the prosecutrix as she stood on the edge of a yard, and then started towards her renewing his requests, but did not touch her. The court observed:

> There was no attempt to use force, no threat, only solicitation. The absence of all violence and of evidence of an intention, if necessary to overcome the will of the prosecu-

[3] Gray v. Commonwealth, 184 Va. 236, 35 S.E.2d 165 (1945).
[4] Legions v. Commonwealth, 181 Va. 89, 23 S.E.2d 764 (1943).
[5] Dixon v. Commonwealth, 197 Va. 380; 89 S.E.2d 344 (1955).
[6] Hairston v. Commonwealth, 97 Va. 754; 32 S.E. 797 (1899).
[7] Woodson v. Commonwealth, 107 Va. 895; 59 S.E. 1097 (1908).

> trix; the time and the place, and all the surrounding circumstances invest the charge with very great improbability. However reprehensible is the conduct of the accused, the evidence is consistent with a desire on his part to have sexual intercourse with the prosecutrix, but, without evidence of an intention to use force, if necessary, to gratify desire—only persuasion.[8]

In the latter case the prosecutrix was accosted by the accused, who seized her arm. The prosecutrix screamed and ran to a neighbor's house, and the accused was not at the scene of the incident when the neighbor returned there. The court reversed a conviction of attempted rape on the authority of the *Hairston* case. Although the *Hairston* case and the *Woodson* case were prosecutions for attempted rape, and the incidents were in the day time and outdoors, and the incidents of the *Dixon* case took place at nighttime after the accused had entered a building, there still was no evidence that the accused had the intent to force intercourse upon the prosecutrix against her will. In view of the above cases, it appears that the Commonwealth must offer evidence of an overt act which is consistent only with an intent to have intercourse by force or threat of force, in order to convict.

Rape—Admissibility of Evidence. The court reversed and remanded for a new trial a conviction in the *Day* case[9] because the trial court erred in admitting evidence that the accused chased another woman a short time before the alleged act. Since this case involved the admissibility of evidence, it is discussed in detail in the EVIDENCE section of this Review.

Homicide—Change of Venue and Sufficiency of Evidence. The accused in the *Farrow*[10] case was charged with the killing of a deputy sheriff, and he moved the trial court for a change of venue on the grounds that the local newspaper had misled the citizens of the county and that there was wide-spread ill feeling toward the accused in the county. Affirming the decision of the trial court, the court held that the accused's evidence was insufficient to support these claims, and the decision of the trial court will not be upset unless there is a clear showing of

[8] Hairston v. Commonwealth, *supra*.
[9] Day v. Commonwealth, 196 Va. 907; 86 S.E.2d 23 (1955).
[10] Farfrow v. Commonwealth, 197 Va. 353; 89 S.E.2d 313 (1955).

abuse of discretion. The only evidence offered by the accused was a short newspaper article stating only the facts and testimony by persons who were interested in the outcome on the side of the accused. This result seems to be the settled rule in Virginia, and in order to overcome the presumption that the defendant will get a fair and impartial trial, it must affirmatively appear that there is such a feeling of prejudice prevailing in the community as will be reasonably certain to prevent a fair and impartial trial, before the court is justified in granting a change of venue.[11] The evidence of the Commonwealth was sufficient to support the verdict of the jury, finding the defendant guilty of second degree murder. The court stated:

> When the Commonwealth proved that the defendant committed the homicide with a deadly weapon there arose a presumption of murder in the second degree and unless evidence of the defendant shows circumstances of justification, alleviation or excuse, sufficient to raise a reasonable doubt of his guilt, the verdict of the jury was warranted and must be affirmed . . .[12]

Although the defendant's evidence was to the effect that the shooting was accidental, the jury was warranted in rejecting the evidence of the defendant from the facts and circumstances attending the homicide. The jury is not required to believe the defendant's testimony just because he said it happened that way. They may take into account the improbability of the defendant's testimony and his manner of telling it in connection with the circumstances attending the facts.[13]

Instructions—Assault and Battery. The court in the *Harper*[14] case laid down the acceptable instruction on the apparent danger test and the correct instruction to be given where the defendant included evidence of his character. The latter instruction will not be discussed in this section since it is a question of evidence. The defendant was convicted of assault and battery on conflicting evidence, and assigned as error the trial court's ac-

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[11] Hampton v. Commonwealth, 190 Va. 531; 58 S.E.2d 1288 (1950).
[12] See note 10, *supra*.
[13] Randolph v. Commonwealth, 190 Va. 256, 56 S.E.2d 226 (1949). Johnson v. Commonwealth, 188 Va. 848, 51 S.E.2d 152 (1948).
[14] Harper v. Commonwealth, 196 Va. 723; 85 S.E.2d 249 (1955).

tion in amending his instruction by deleting the words in parentheses:

> The court instructs the jury if the jury believes from the evidence in this case that the defendant was assaulted . . . in such manner as to make it appear to the defendant at the time that . . . manifested, intended and endeavored to take his life or do him some bodily harm and that the damage was imminent and impending, then in that case the defendant if he was not the aggressor was not bound to retreat but have (had) the right to stand his ground, repel force with force, and do whatever necessary to save his own life or prevent his receiving great bodily injury, (and it is not necessary that it appear to the jury to have been necessary).[15]

The court held that it was not error to delete the above words in parentheses, that the instruction requested made no well-defined distinction between actual and apparent danger, and that the deleted part was awkwardly and ambiguously expressed. Also, it was confusing and was calculated to mislead the jury. The instruction was correct as far as it went, but standing alone it was incomplete. The jury should have been told that before an accused can attack his adversary, he must honestly believe and must have reasonable cause to believe that he was in imminent danger of losing his life, and not what would have appeared to some other reasonable person under similar circumstances. Since the *Wilkinson* case (1923),[16] the court has consistently held that the test is what reasonably appeared to the defendant at the time of the attack, but there is authority in other jurisdictions that the test is what would have appeared to a reasonable man under similar circumstances.[17] Although the defendant was not relying on the "reasonable man" test, he used an instruction similar to a court approved instruction offered in the *Fortune*[18] case. But the court distinguished that case from the present one on the basis that in the *Fortune* case a later instruction clearly explained the expression, and the defendant did not offer such an explanatory instruction in the case now under consideration. The court also

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[15] *Id.* at 729, 85 S.E.2d at 253.
[16] Wilkinson v. Allen, 136 Va. 607; 118 S.E. 94 (1923).
[17] 6 C.J.S., *Assault and Battery*, §18 (1937).
[18] Fortune v. Commonwealth, 133 Va. 669, 112 S.E. 861 (1922).

stated that the trial court fairly and fully instructed the jury, and in fact, one instruction given at the request of the accused, was more favorable than the correct principles of law permitted. This instruction was erroneous because it told the jury that the accused was justified in striking his adversary if the latter "angrily" cursed or acted in a threatening manner. The correct instruction should be that force is justified when the adversary makes some overt act indicative to the accused of imminent danger.[19]

Malicious Wounding—Sufficiency of Evidence. The defendant was found guilty by the jury of malicious wounding.[20] The victim was wounded as he was driving away from the defendant's home. The bullet was of an unknown caliber which was fired at right angles to the defendant's house through the glass window of the car. The defendant later gave contradictory statements as to the firing of a pistol in his house, and denied seeing the victim when questioned by the sheriff. He also had no motive for shooting the victim, but did drive past the victim after the wounding without offering help. No report was heard and the shot could have been fired by other persons on or off the premises. Also, the defendant could not have fired the shot from the position where he was seen only a few moments before the wounding. The court on appeal reversed and remanded the decision because on the facts the evidence was not sufficient to support the verdict. A conviction may be had on circumstantial evidence in a criminal case, but should be acted upon with utmost caution, and the burden is on the Commonwealth to show that time, place, motive, means and conduct concur in pointing out the defendant as the criminal agent.[21] But it is not necessary for the Commonwealth to establish motive, because the proof of motive does not establish guilt or the lack of it establish the innocence of the accused.[22] The actions of the defendant were of suspicious circumstances, but the evidence falls short of the proof which is necessary for a conviction. The commission of crime by the defendant must be shown by evidence beyond a reason-

[19] Stoneman v. Commonwealth, 25 Gratt. (66 Va.) 887 (1874); Berkeley v. Commonwealth, 88 Va. 1017, 14 S.E. 916 (1892).
[20] Van Dyke v. Commonwealth, 196 Va. 1037, 86 S.E.2d 848 (1955).
[21] Dean v. Commonwealth, 32 Gratt. (73 Va.) 912 (1879).
[22] Ferrel v. Commonwealth, 177 Va. 861; 14 S.E.2d 1293 (1941).

able doubt to sustain his conviction.[23] Although the defendant's actions were of a very suspicious nature, and it is not beyond the imagination to come to a conclusion that the defendant was guilty, the decision of the court is supported by a long line of cases which involved the use of circumstantial evidence, and where it was possible, or probable, that the defendant was guilty, but all the evidence did not establish beyond a reasonable doubt that the defendant was guilty.[24].

Narcotic Drugs and Illegally Acquired Liquor–Sufficiency of Evidence. In the *Crisman*[25] and *Sturgis*[26] cases, the defendants argued that the evidence was insufficient to sustain the verdict of the lower court. In both cases, the court cited the rule that on appeal the evidence is viewed in the light most favorable to the Commonwealth, granting all reasonable inferences that can be drawn therefrom.[27] The court in the *Crisman* case reversed and remanded, and in the *Sturgis* case the evidence was sufficient to support conviction; it was reversed, however, for errors of admission of evidence. In the *Crisman* case the defendants, two brothers, were convicted of unlawful possession of narcotic drugs in violation of Section 54-488, Code of Virginia (1950). The Commonwealth's evidence showed that a small quantity of heroin was found on the floor of the back seat of the car in which the defendants were riding, with three men in the front seat, shortly after the defendants had visited a house under police surveillance. The court, citing *Spratley* v. *Commonwealth*,[28] stated:

> . . . The mere presence of a person in an automobile in which intoxicating liquor is being transported, with or without his knowledge, which is not shown to be owned by him or under his possession or control, single or joint, is not a crime; nor is it made by the statute of Virginia

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[23] Power v. Commonwealth, 182 Va. 669, 30 S.E.2d 22 (1941).

[24] Hatchett v. Commonwealth, 76 Va. 1026 (1882); Bundick v. Commonwealth, 97 Va. 787, 34 S.E. 454 (1899); Brown v. Commonwealth, 97 Va. 791, 34 S.E. 882 (1900); Massie v. Commonwealth, 140 Va. 557, 125 S.E. 146 (1924); Power v. Commonwealth, Note 23, *supra;* La Prade v. Commonwealth, 191 Va. 410, 61 S.E.2d 313 (1950); Smith v. Commonwealth, 192 Va. 453, 65 S.E.2d 528 (1951).

[25] Crisman v. Commonwealth, 197 Va. 17, 87 S.E.2d 796 (1955).

[26] Sturgis v. Commonwealth, 197 Va. 264, 88 S.E.2d 919 (1955).

[27] See Note 23, *supra.*

[28] Spratley v. Commonwealth, 154 Va. 854, 15 S.E. 362 (1930).

> Prima Facie evidence of his transportation of or aiding or abetting the transportation of the intoxicating liquor in the automobile; nor is it alone sufficient to sustain a conviction of him upon a charge of transporting intoxicating liquor.[29]

Here the Commonwealth showed merely that a small quantity of heroin was found, and anyone of the five occupants of the car could have placed it there. Also, there was no evidence as to who had possession of it. Mere speculation is not proof of guilt sufficient to support the verdict. The case now under consideration seems to be directly in point with the *Spratley* case, and if anything, the facts were more favorable to the Commonwealth in the present case than in the *Spratley* case.

In the *Sturgis* case the accused was found guilty of transporting illegal alcoholic beverages. The Commonwealth's evidence proved that while the defendant was fleeing arrest he threw out a jug; as soon as the chase had terminated, the officers returned to the point where the jug was thrown, and the area "reeked with the smell of bootleg whiskey." They also discovered a wet spot where the container's contents had spilled on the ground. They found no federal stamps affixed to pieces of the jug, and the defendant offered no evidence to rebut the statutory presumption of illegal acquisition arising from the fact the container bore no Government stamps.[30] The court held that the Commonwealth had proved beyond a reasonable doubt that the defendant was " . . . (1) transporting alcoholic beverages, and (2) that they had been 'illegally acquired' by him." [31] The above was proved by the fact that officers saw the jug thrown; that they found the spot later and that there was no other occupant of the car. Also, the defendant did not offer any evidence to rebut the presumption of "illegally acquired" when no "stamps" were found on the container. In the *Miller* case,[32] the constitutionality of Section 4-75, Code of Virginia (1950) was decided in favor of the Commonwealth, and the *Sturgis* case is directly in point. However, the case was reversed and remanded on other grounds previously stated.

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[29] *Id.*

[30] Va. Code §4-75 (1950); Miller v. Commonwealth, 172 Va. 639, 2 S.E.2d 34 (1939).

[31] See Note 26, *supra.*

[32] See Note 30, *supra.*