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CRIMINAL LAW--Rape--Cautionary Instruction in Sex Offense Trial Relating Prosecutrix's Credibility to the Nature of the Crime Charged is No Longer Mandatory; Discretionary Use is Disapproved

CASENOTES

CRIMINAL LAW—Rape—Cautionary Instruction in Sex Offense Trial Relating Prosecutrix's Credibility to the Nature of the Crime Charged is No Longer Mandatory; Discretionary Use Is Disapproved. *People v. Rincon-Pineda*, 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975).

Defendant was convicted of rape, oral copulation, and attempted sodomy in Superior Court, Los Angeles County.[1] The case against him rested predominantly on the testimony of his adult victim,[2] partially corroborated as to identity by a scratch on defendant's forehead,[3] and further substantiated by defendant's "if I did it I was drunk" admission to the police.[4]

The defendant appealed alleging error by the trial judge for failing to give the mandatory cautionary instruction that:[5]

> A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent.
>
> Therefore, the law requires that you examine the testimony of the female person named in the information with caution.

The California Supreme Court held that because the defendant was entitled to the cautionary instruction the trial judge had committed

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1. People v. Rincon-Pineda, 14 Cal. 3d 864, 870, 538 P.2d 247, 251, 123 Cal. Rptr. 119, 123 (1975). There were two trials. The first resulted in a hung jury and "involved substantially the same evidence as the second." *Id.* The supreme court, however, noted "important differences in the evidence at the two trials." *Id.* In the second trial the victim was more specific as to the strength of illumination which allowed her to identify her assailant. In the first trial defendant's "if I did it I was drunk" admission was not in evidence. At the second hearing, the victim refused to answer questions as to her past sexual conduct which in the first trial had been examined in "some detail." *Id.*, 538 P.2d at 251-52, 123 Cal. Rptr. at 123-24. Finally, the mandatory cautionary instruction was given in the first trial, but in the second trial was not given, *id.*, 538 P.2d at 252, 123 Cal. Rptr. at 124, because the trial judge "considered it demeaning of the victim in the instant case," *id.* at 866, 538 P.2d at 249, 123 Cal. Rptr. at 121, and "noted that its compulsory use had not been authoritatively reexamined for decades." *Id.* at 872, 538 P.2d at 252, 123 Cal. Rptr. at 124.

2. *Id.* at 866-70, 538 P.2d at 249-51, 123 Cal. Rptr. at 121-23.

3. *Id.* at 868, 873, 538 P.2d at 250, 253, 123 Cal. Rptr. at 122, 125.

4. *Id.* at 869, 870, 538 P.2d at 250, 251, 123 Cal. Rptr. at 122, 123.

5. *Id.* at 871, 538 P.2d at 252, 123 Cal. Rptr. at 124. *citing* CAL. JURY INSTRUCTION CRIM. No. 10.22 (3d ed. 1970).

error in refusing to give it.[6] Such error, however, was not prejudicial.[7] For the future, the supreme court prohibited mandatory application[8] of the cautionary instruction, and disapproved its discretionary use as it was customarily worded.[9] The defendant's conviction was affirmed.[10]

The cautionary instruction should be regarded as having two parts.[11] The first is a general observation commenting on the character of the crime charged,[12] for example, "rape is easy to charge but difficult to defend against." The second is a conclusion prescribing caution which comments on the credibility of a witness. "Therefore, you are required to examine with caution the prosecutrix's testimony" is a typical formulation. Although the two parts together constitute the cautionary instruction, the cautionary element is only the second part, the need for caution being grounded upon the observation made in the first part.

The origin of the cautionary instruction for rape and other sex offenses is attributed to the seventeenth century writings of Sir Matthew Hale.[13] The first part of the instruction is derived from Lord Hale's observation:[14]

> It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.

The "prescription of caution" is taken from the conclusion of Lord Hale's discussion of proof of rape:[15]

> I only mention these instances, that we may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease

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6. 14 Cal. 3d at 872, 538 P.2d at 252-53, 123 Cal. Rptr. at 124-25.
7. *Id.* at 873, 538 P.2d at 253, 123 Cal. Rptr. at 125.
8. *Id.* at 877, 538 P.2d at 256, 123 Cal. Rptr. at 128.
9. *Id.* at 882, 538 P.2d at 260, 123 Cal. Rptr. at 132.
10. *Id.* at 873, 538 P.2d at 253, 123 Cal. Rptr. at 125.
11. The court suggests such a division in its discussion of Sir Matthew Hale's writings on proof of rape. *See id.* at 874, 538 P.2d at 254, 123 Cal. Rptr. at 126.
12. Traditionally this part of the instruction was considered a comment on the facts, but it is now regarded as a comment on the character of the crime charged. *See* note 60 *infra* and accompanying text.
13. *See* People v. Rincon-Pineda, 14 Cal. 3d 864, 873, 538 P.2d 247, 254, 123 Cal. Rptr. 119, 126 (1975).
14. 1 M. HALE, PLEAS OF THE CROWN 635 (1680).
15. *Id.* at 636.

> be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony sometimes of malicious and false witnesses.

According to the supreme court, Lord Hale cast this need for caution in the context of three propositions: "[T]hat otherwise incompetent, infant witnesses should be allowed to address the jury, that he [Hale] had personally witnessed the malicious prosecution of fabricated allegations of rape, and that rape in general aroused passions ill-suited to fair adjudication."[16] The credibility of a witness, however, was still to be judged by the circumstances of the alleged crime and the witness's narration.[17]

Hale's instruction was introduced into California in the 1856 case of *People v. Benson*.[18] The only convicting evidence was the accusatory testimony of the thirteen year old prosecutrix.[19] The defendant was found guilty of rape,[20] but on appeal the supreme court reversed and ordered a new trial remarking:[21]

> From the days of Lord Hale to the present time, no case has ever gone to the jury, upon the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the Court warning them of the danger of a conviction on such testimony.

Thus California adopted Hale's charge in a *rape* case in which the prosecutrix was a *minor*, her *uncorroborated testimony* was the only convicting evidence, and the court viewed that evidence as *improbable*.[22]

Early in the twentieth century, California law required that upon

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16. People v. Rincon-Pineda, 14 Cal. 3d 864, 877, 538 P.2d 247, 256, 123 Cal. Rptr. 119, 128 (1975).

17. *Id.*

18. 6 Cal. 221 (1856).

19. *Id.* at 223.

20. *Id.* at 222.

21. *Id.* at 223.

22. *Id.*

> The case before us is supported alone by the evidence of the prosecutrix, a young ignorant girl, thirteen years of age, and is so improbable of itself as to warrant us in the belief that the verdict was more the result of prejudice or popular excitement, than the calm and dispassionate conclusion upon the facts by twelve men sworn to discharge their duty faithfully.

Id. at 223-24.

request cautionary instructions were to be given in rape cases "either when the prosecutrix is a child of tender years, or when her testimony is uncorroborated."[23] The first part of the instruction, which observes how easy it is to charge rape and comments on the diffculty of defense, was subsequently discarded as an impermissible comment by a trial judge on the facts of the case.[24] Though not cited in the decision, the court presumably relied on the state constitutional prohibition against judicial comment upon the facts.[25]

In 1934 California amended its constitution to permit the trial judge broader discretion by allowing him to comment on the evidence, testimony, and credibility of *any* witness.[26] With the constitutional impediment removed, the stage was set for resurrection of the first half of Hale's instruction and an expansion of the use of the cautionary charge to protect defendants with whom Lord Hale never purported to be concerned.

Six years after the amendment, *Benson's* version of the Hale instruction was extended to an other-than-rape sex offense[27] in which the infant complainant's testimony was corroborated;[28] and it was

23. People v. Caldwell, 55 Cal. App. 280, 298, 203 P. 440, 448 (1921). The trial court's failure to give cautionary instruction cannot constitute reversible error if the defendant has failed to request the instruction. People v. Rangod, 112 Cal. 669, 672, 44 P. 1071, 1072 (1896). *Rangod* also suggests that when the prosecutrix's testimony is materially corroborated by other evidence it is improper to give the cautionary instruction because "such [an] instruction might well [be] construed by the jury as an intimation from the judge that he did not regard the corroboration as material or worthy of consideration . . . ." *Id.*

24. People v. Anthony, 185 Cal. 152, 160, 196 P. 47, 50 (1921).

> The statements that it is particularly difficult for a defendant to clear himself of such a charge, that no charge is more easily made or more difficult to disprove, and that the two parties are usually the only witnesses to the act are statements of fact, not of law. . . . [T]hey are not proper in an instruction to the jury, though they may be entirely harmless. Some of these remarks have been included in instructions given and which have not been condemned as error in the above-cited cases. But the court is not bound to give an instruction containing them, and error cannot be predicated upon the refusal to do so.

Id. (citations omitted). This statement implies that *Anthony* nonetheless regarded precedent as authorizing the second part of the instruction which cautions the jury to examine with care the testimony of the complainant.

25. CAL. CONST. art. VI, § 19 (1879), "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." *Id.*

26. CAL. CONST. art. VI, § 19 (1934).

27. People v. Lucas, 16 Cal. 2d 178, 105 P.2d 102 (1940). The defendant was charged with contributing to the delinquency of a minor. *Id.* at 180, 105 P.2d at 103.

28. The complainant's testimony was corroborated to the extent that the defendant owned a car matching complainant's description, admitted knowing complainant, and admit-

suggested that the instruction be required in all such cases.[29] The suggestion was adopted in *People v. Putnam*[30] where a minor's accusation of lewd and lascivious acts was held to require the trial court to give the cautionary instruction sua sponte.[31] Because California has no corroboration requirement for conviction of sex crimes,[32] *Putnam* reasoned that a counter-weight was needed to protect the accused.[33] Paradoxically, the complainant's testimony in *Putnam* was corroborated.[34]

The next development was to shield the defendant from his adult accusers. In 1951 the court supplied cautionary protection to a defendant accused by two adult prosecutrices, one a rape victim and the other a victim of assault with intent to rape.[35] Thus, over the course of a century, the four factors[36] in *Benson* which had induced California to import the Hale charge were expanded beyond recogni-

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ted taking complainant to the cinema and on several occasions giving him theater passes. *Id.*

29. *Id.* "We are firmly of the view that in all cases of this character a defendant should be afforded the benefit of a cautionary instruction as was here requested . . . ." *Id.*

30. 20 Cal. 2d 885, 129 P.2d 367 (1942).

31. *Id.* at 891-92, 129 P.2d at 370.

32. *See* People v. Fleming, 94 Cal. 308, 310, 29 P. 647 (1892); People v. Benson, 6 Cal. 221, 223 (1856) (by implication); People v. Stevenson, 275 Cal. App. 2d 645, 650, 80 Cal. Rptr. 392, 395 (1969), *cert. denied*, 397 U.S. 1014 (1970); People v. Raich, 26 Cal. App. 286, 287, 146 P. 907, 908 (1915). *See also* 7 J. WIGMORE, EVIDENCE § 2061, at 342 n.1 (3d ed. 1940); Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1366-67 n.16 (1972).

33. 20 Cal. 2d at 891-92, 129 P.2d at 370.

> The rule permitting a conviction on the uncorroborated testimony of the prosecuting witness is necessary to protect the public but it needs a counterweight to protect the accused. The policy that requires the court to instruct *of its own motion* on the law relative to corroboration imposes a corresponding duty to give cautionary instructions . . . . [A] necessary safeguard against injustice is a warning to view such accusations cautiously.

Id. (emphasis added). Thus *Putnam* adds to the *Lucas* rule a mandate that trial judges must give the cautionary instruction when an infant complains of sexual abuse and thereby eliminates the *Rangod* request by defendant requirement. *See* People v. Rincon-Pineda, 14 Cal. 3d 864, 875-76, 538 P.2d 247, 255, 123 Cal. Rptr. 119, 127 (1975); People v. Nye, 38 Cal. 2d 34, 40, 237 P.2d 1, 4 (1951). For use of the no-corroboration-necessary-to-convict rule to reason to the opposite conclusion, see State v. Fedderson, ___ Mich. ___, ___, 230 N.W.2d 510, 515 (1975).

34. In *Putnam* the infant's complaint was corroborated by his mother's testimony. 20 Cal. 2d at 887, 129 P.2d at 368. *See* People v. Rincon-Pineda, 14 Cal. 3d 864, 878-79, 538 P.2d 247, 257, 123 Cal. Rptr. 119, 129 (1975).

35. People v. Nye, 38 Cal. 2d 34, 36, 237 P.2d 1, 5 (1951).

36. *See* text accompanying note 22 *supra*.

tion. The cautionary charge was mandatory for *any sexual offense* regardless of whether the evidence was considered *improbable*. It was also immaterial whether the defendant was accused by infant or *adult*, and *corroboration* of the complainant's testimony did not excuse the requirement for cautionary instruction.

Curiously, the rule of mandatory cautionary instruction often afforded but slight protection. When the trial judge failed or refused to give the instruction the error resulting from his breach of the mandatory rule was considered harmless, unless there was a reasonable probability that the instruction would have resulted in a verdict more favorable to the defendant.[37] Only in *Putnam* was the absence of the instruction prejudicial,[38] not because of the failure to charge caution, but because the complaining witness's testimony was regarded as improbable.[39] However, the protection of the cautionary charge should not be regarded as illusory insofar as it is conceivable that acquitals were prompted at trial by the giving of the cautionary instruction.[40]

People v. Rincon-Pineda[41] disavowed the mandatory nature of the cautionary instruction for two reasons, one involving due process developments in criminal law,[42] and the other concerning recent empirical studies on sex crimes in general and rape in particular.[43] Observing that the virtually defenseless accused of Lord Hale's day is now armed with the "potent accouterments of due process,"[44] the court concluded that the mandatory instruction omitted by the trial

37. People v. Watson, 46 Cal. 2d 818, 836, 299 P.2d 243, 254 (1956). When the evidence clearly points to the defendant's guilt, or when there is ample corroboration of the complainant's testimony, or when other factors indicate that the defendant received a fair trial, failure to give the mandatory cautionary instruction is not prejudicial. People v. Merriam, 66 Cal. 2d 390, 395, 426 P.2d 161, 164, 58 Cal. Rptr. 1, 4 (1967). "Under this standard, a finding that failure to give the instruction was harmless error has been far more the rule than the exception:" People v. Rincon-Pineda, 14 Cal. 3d 864, 872, 538 P.2d 247, 253, 123 Cal. Rptr. 119, 125 (1975) (citation omitted).

38. 20 Cal. 2d at 892, 129 P.2d at 371.

39. *Id.* at 892-93, 129 P.2d at 371. "In view of the circumscribed extent of the acts alleged and the inconsistencies in the witnesses' [complainant's] testimony, it is doubtful whether the same verdict would have been rendered had the cautionary instruction been given." *Id.* at 893, 129 P.2d at 371.

40. *See* notes 1, 39 *supra*.

41. 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975).

42. *Id.* at 877-78, 538 P.2d at 256-57, 123 Cal. Rptr. at 128-29.

43. *Id.* at 879-82, 538 P.2d at 256-59, 123 Cal. Rptr. at 128-31.

44. *Id.* at 878, 538 P.2d at 257, 123 Cal. Rptr. at 129.

judge has outlived its usefulness[45] and offers today but superfluous protection against malicious and fabricated prosecution.[46] The court then analyzed the validity of the first part of the instruction by reviewing contemporary studies of rape and other sex offense prosecutions.[47] Using persuasively the statistical data of these studies, the court reduced the assertion that sex crimes are easy to charge and difficult to defend against to mere conventional wisdom. On the contrary, when police discretion and trial tactics of defense counsel are considered, it would appear more accurate to instruct that sex crimes are difficult to charge and easy to defend.[48] The complainant's plight at the station house attempting to convince the police to pursue the charge, and the public embarrassment and humiliation encountered confronting both police and defense counsel[49] frequently cause the sexually assaulted victim to wonder who is on trial.[50] The court decided that "[s]ince it does not in fact appear that the accused perpetrators of sex offenses in general and rape in

45. *Id.* at 877, 538 P.2d at 256, 123 Cal. Rptr. at 128.

46. *Id.* at 878, 538 P.2d at 257, 123 Cal. Rptr. at 129.

47. The court discussed the following studies: M. AMIR, PATTERNS IN FORCIBLE RAPE (1971); G. ASTOR, THE CHARGE IS RAPE (1974); H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966); A. MEDEA & K. THOMPSON, AGAINST RAPE (1974); CAL. DEPT. OF JUSTICE, CRIME AND DELINQUENCY IN CAL., 1972, *Adult Prosecution Reference Tables* (1973); FBI, Uniform Crime Reports, 1973 (1974); Amir, *Victim Precipitated Rape*, 58 CRIM. L.C. & P.S. 493 (1967); LeGrand, *Rape and Rape Laws: Sexism in Society and Law*, 61 CAL. L. REV. 919 (1973); Note, *The Victim In A Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335 (1973); Comment, *Police Discretion And The Judgment That A Crime Has Been Committed—Rape In Philadelphia*, 117 U. PA. L. REV. 277 (1968); Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365 (1972).

48. 14 Cal. 3d at 880-81, 538 P.2d at 258-59, 123 Cal. Rptr. at 130-31. Two other factors which the court notes in this regard are: (1) forcible rape has the highest rate of acquittal or dismissal of the FBI's form "violent crimes" (murder, forcible rape, robbery, and aggravated assault); and (2) rape is "grossly" under-reported. *Id.* at 879-81, 538 P.2d at 257-59, 123 Cal. Rptr. at 129-31.

49. Note, *The Victim In A Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 347-51 (1973). *See also* People v. Rincon-Pineda, 14 Cal. 3d 864, 880-81, 538 P.2d 247, 258-59, 123 Cal. Rptr. 119, 130-31 (1975).

50. 14 Cal. 3d at 871, 538 P.2d at 252, 123 Cal. Rptr. at 124.

> Given the overall context of the first trial, there was as much truth as irony in a slip of the tongue by the arresting officer during his testimony at that trial. When asked to identify several photographs of the victim showing the injuries inflicted by her assailant, the officer replied: "In these photographs is a picture of the defendant in different positions." The victim too seemed to feel that it was she who had been the defendant in the first trial.

Id.; *see* Note, *The Victim In A Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 351 (1973).

particular are subject to capricious conviction by inflamed tribunals of justice . . . the requirement of a cautionary instruction in all such cases is a rule without a reason."[51]

The court disapproved of discretionary use of the conventional cautionary instruction as inappropriate "in any context"[52] for three reasons. First, the instruction was disfavored because defendants accused of sex offenses no longer suffer any special prejudice.[53] Secondly, the charge was regarded as performing "no just function, since criminal charges involving sexual conduct are no more easily made or harder to defend against than many other classes of charges, and those who make such accusations should be deemed no more suspect in credibility than any other class of complainants."[54] Finally, the first part of the instruction was removed from the scope of the trial court's discretion by characterizing it as a comment on the "nature of the crime."[55]

The court's first objection to discretionary use of the charge was based on the reasoning developed in rejecting the rule of mandatory application.[56] However appropriate this reasoning is to invalidate a rule of decisional law, it is inadequate to support a limitation of the discretion conferred by the state constitution on the trial court. To the extent that a fabricated or malicious accusation could be made, however infrequently that may occur, the trial court should be free to exercise its constitutional prerogative to comment on facts. The supreme court's disapproval of the charge on this ground amounts to a substitution of the court's judgment for that of the State of California, and implies that the trial court is incompetent to administer the charge properly.[57]

The objection that the instruction discriminates unjustly among classes of charges and classes of complainants could have been rem-

51. 14 Cal. 3d at 882, 538 P.2d at 259, 123 Cal. Rptr. at 131.

52. *Id.*, 538 P.2d at 260, 123 Cal. Rptr. at 132.

53. *Id.*

54. *Id.* at 883, 538 P.2d at 260, 123 Cal. Rptr. at 132. *But cf.* Comment, *Police Discretion And The Judgment That A Crime Has Been Committed—Rape In Philadelphia*, 117 U. PA. L. REV. 277, 277-78 (1968).

55. 14 Cal. 3d at 885 n.9, 882 n.6, 538 P.2d at 262 n.9, 260 n.6, 123 Cal. Rptr. at 134 n.9, 132 n.6.

56. *See* text accompanying notes 41-51 *supra*.

57. *See* People v. Cady, 267 Cal. App. 2d 189, 194, 72 Cal. Rptr. 772, 776 (1968) (concurring opinion).

edied equally well by extending its application to all criminal charges and complaining witnesses.[58] Thus, this criticism, however compelling it might have been in the context of the mandatory rule, adds no persuasive force to the decision to disapprove discretionary use.

The third objection is the most sound, but was presented in a conclusive fashion without supporting reasoning. The court labeled the instruction's observation that a sex offense is easy to charge but difficult to defend against as a comment on the "nature of the crime," and announced that such comment was impermissible.[59] There was no explanation of why this observation, which for so long had been considered a comment on the *facts*,[60] was now regarded as a comment on the "nature of the crime," nor was there any enlightenment as to why a comment on the "nature of the crime" was or should be impermissible.[61]

While it would have been helpful had the court developed this third objection more fully, the criticism is nonetheless valid. The term "comment on the nature of the crime" describes the first part of the instruction more accurately than does the former term "comment on the facts." The assertion that a sex offense is easily charged and defended against with difficulty is a generalization whose accuracy will vary with each particular case. It should therefore be con-

58. However, if the instruction is a bad one, as *Rincon-Pineda* appears to consider the conventional one, 14 Cal. 3d at 879-83, 538 P.2d at 257-60, 123 Cal. Rptr. at 129-32, then it is better to get rid of it entirely than to allow it to be extended to all criminal cases.

59. 14 Cal. 3d at 885 n.9, 882 n.6, 538 P.2d at 262 n.9, 260 n.6, 123 Cal. Rptr. at 134 n.9, 132 n.6.

60. In People v. Anthony, 185 Cal. 152, 196 P. 47 (1921) the court disapproved of the first part of the instruction because it was a charge on the facts of the case. *Id.* at 160, 196 P. at 50. CAL. CONST. art. VI, § 19 (1879), upon which *Anthony* presumably relied, was amended in 1934 to permit trial judges to comment on the evidence, testimony, and credibility of any witness. People v. Lucas, 16 Cal. 2d 178, 105 P. 2d 102 (1940) expressly read the 1934 amendment as "authorizing a trial court to comment on the facts," and found the first part of the instruction permissible. *Id.* at 182, 105 P.2d at 104. Thus while *Anthony's* criticism of the cautionary instruction is no longer followed, its characterization of the first part of the instruction as a comment on the facts of the case has been consistently accepted until *Rincon-Pineda*.

61. The court found the instruction impermissible because it "focusses on the character of the crime rather than the nature of the evidence," 14 Cal. 3d at 882 n.6, 538 P.2d at 260 n.6, 123 Cal. Rptr. at 132 n.6, implying that giving the charge is an abuse of the trial judge's discretion to comment on the evidence, testimony, and credibility of witnesses, CAL. CONST. art. VI, § 10 (1966) *renumbering* CAL. CONST. art. VI, § 19 (1934).

sidered as a broad statement on the nature of the crime rather than a comment on specific facts.

The court is correct in forbidding such a general comment because it could interfere with the jury's task of trying fact and credibility. An instruction advising caution by relating credibility of the witness to the nature of the crime provides the jury with imprecise direction for evaluating the testimony of the witness whose truthfulness has been cast in doubt. The instruction speaks only of the ease of complaint and the difficulty of defense. It invites the danger that the jury will interpret the need for caution as the judge's expression of incredulity and substitute his apparent distrust of the testimony for their own independent judgment.[62] This danger threatens the jury's exclusive domain as trier of credibility and thus ironically jeopardizes the defendant's right to a jury trial.

Should the trial judge wish to comment on the credibility of any witness, he must do so, the court directed, "in terms of the evidence adduced at trial, i. e., inconsistent statements, lack of character for veracity, bias, etc."[63] Consequently, the second part of the instruction, the comment on credibility, is permissible when joined with comment on the "nature of the evidence."[64]

A cautionary instruction proposed by amicus curiae would prescribe caution when "the case against the defendant 'substantially rests upon the testimony of the complaining witness' uncorroborated by 'substantial evidence.' "[65] It would seem that this suggestion relates the credibility of the complainant to the general "nature of the evidence," but the court rejected[66] the suggestion neglecting to explain its demerits. Even if only intuitive, the rejection was correct. An instruction tying credibility with the general nature of the evidence contains the same deficiencies as the character of the crime charge.[67] It fails to apprise the jury of the cause of the judge's

62. *Cf.* People v. Putnam, 20 Cal. 2d 885, 889, 129 P.2d 367, 369 (1942); People v. Rangod, 112 Cal. 669, 672, 44 P. 1071, 1072 (1896); People v. Cady, 267 Cal. App. 2d 189, 193, 72 Cal. Rptr. 772, 775 (1968) (concurring opinion).

63. 14 Cal. 3d at 885 n.9, 538 P.2d at 262 n.9, 123 Cal. Rptr. at 134 n.9.

64. *Id.* at 882 n.6, 538 P.2d at 260 n.6, 123 Cal. Rptr. at 132 n.6.

65. *Id.* at 883, 538 P.2d at 260, 123 Cal. Rptr. at 132.

66. *Id.*

67. Arguably such an instruction amounts to an implicit charge on the nature of the crime since the line between the nature of the crime and the nature of the evidence is at best a tenuous one. The observation that a "charge is easily made and defended against with

suspicion and thus invades the jury's exclusive province.

The problem with the traditional instruction is that it has come to be associated with particular crimes at the expense of forgetting its essence as a credibility instruction. The purpose of the instruction is to protect defendants from malicious and fabricated accusations of criminal sexual conduct.[68] In some jurisdictions use of the instruction is inconsistent with the role of the trial judge and the requirement of corroboration to convict.

Since the instruction necessarily involves judicial comment on facts (general or specific) and credibility, only those jurisdictions which permit the trial court such latitude should use the instruction. Those which confine the judge to no more than stating the law advance a policy of judicial restraint to insure the jury's exclusive fact finding role, and therefore should shun the instruction. Those favoring judicial comment on evidence maintain that the judge's observation of numerous witnesses accentuates his insight into truth telling. Together with his knowledge of the law and indifferent position vis-a-vis the parties, this insight equips him to be the most qualified of the lawyers present at trial to assist and guide the jury.[69] The purpose of permitting judicial comment on the evidence is to assist the jury by clarifying issues and focusing attention on the crucial aspects of the case.[70]

A corroboration requirement for conviction of a particular crime promotes a policy identical to that of the cautionary instruction[71]—to protect the defendant from concocted charges. Use of a cautionary instruction, either the conventional one or the kind suggested in *Rincon-Pineda*,[72] in a jurisdiction which requires corroboration is duplicative and could serve more to confound the jury than to enlighten it. If the corroboration requirement for rape, for exam-

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difficulty" is only a step removed from the remark that "the two parties are usually the only witnesses to the act" which is a frequent characterization of the crime of rape. Thus a general nature of the evidence comment is really a description of how the crime usually occurs.

68. People v. Rincon-Pineda, 14 Cal. 3d 864, 874-75, 538 P.2d 247, 254-55, 123 Cal. Rptr. 119, 126-27 (1975).

69. A.B.A. Comm. of the Section of Judicial Admin., Instructions to Jurors, *reprinted in* 10 F.R.D. 409, 412 (1951).

70. *Id.*

71. *See*, Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 Yale L.J. 1365, 1373-84 (1972).

72. *See* text accompanying note 63 *supra*.

ple, is satisfied, then an instruction casting suspicion on the prosecutrix's credibility is counterproductive. The danger of duplication exists also where there is no corroboration requirement, but the cautionary instruction is mandatory and the prosecution has introduced evidence corroborating the complaint. Where sufficient corroboration has been presented, whether required or not, the cautionary instruction should not be given.

Thus, from a policy perspective, the cautionary instruction should be employed only by jurisdictions which allow the trial court to comment on evidence and credibility, and then only when there has been insubstantial or no corroboration of the complaint. If the wisdom implicit in *Rincon-Pineda* is perceived and followed, judges would charge caution only in terms of specific evidence, recognizing that the general comment, either on the "character of the crime" or the "nature of the evidence," usurps the jury's role. By abandoning the rule of mandatory application and requiring that the prescription of caution be linked to comment on specific evidence, *Rincon-Pineda* establishes a salutary rule for the California courts.