Hallam, J and Dibell, J.,
, Dissenting.

State of Minnesota,
Respondent

22590 --vs--

Max Mason,
Appellant.

SYLLABUS

1. The Constitution of this state provides that no person shall be compelled in any criminal case to be a witness against himself. Under this provision a man cannot be compelled to give evidence against himself before a grand jury, but one called before a grand jury investigating a particular crime may be indicted on the evidence of others, so long as he is not compelled to give evidence against himself. No constitutional right of the defendant in this case was impaired.

2. The identification of defendant as one of those engaged in the commission of a crime charged was sufficient though the person making it cannot remember the face of the person identified. Identification based upon other peculiarities may be reasonably sure.

3. In a prosecution for rape evidence is admissible that the defendant had a venereal disease and that the complainant soon after the alleged commission of the crime contracted the same desease. The evidence in this case as to the time when defendant and complainant had such a desease is sufficient to render it admissible.

4. In a prosecution for rape, penetration may be proven by circumstantial evidence. The evidence of penetration in this case was sufficient.

AFFIRMED.

Dissenting opion of
Hallam,J and Dibell, J.

The story which the conviction rests is a strange one. The young man and woman separated themselves from two other boys and girls. They wandered about.They, like others, watched the animals as they were taken from the menagerie. Suddenly they were alone. They were attacked by six Negroes, taken unobserved by any-one to a secluded spot a block away, and the girl was assaulted by the six successively, and ravished , as the opinion says, by five ,the last two of the six quarrelling over the right of precedence . One Negro held a gun pointed at the young man. He was quiet throughout.

Continuing the stroy it is proper to note that the young man and woman , when released and told not to return to the show grounds,walked a few blocks to the Merritt School-house, sat there on the steps talking for a few mi nutes, walked back to the Grand Avenue Car Line, took a car and rode ten blocks west,and then walked two or three blocks to the young womans house. They sat on the porch for a while talking . The Father was in the house reading . The Mother had retired . The young man then left took a street car home , going past the show grounds, and thence to the docks and to work . The young woman went up stairs , passing her father with the remark,"I am going to bed ,"stopped at her Mothers room saying, " Mama,I met Jimmie tonight and we went to the Circus , " Received the kindly response,"All right , dear, go to bed now,"went to her room , then to the bathroom , and then to bed and to asleep,She made no complaint. "While the rule requiring immediate complaint is not inflexible, yet the unexplained failure to do so is a very important fact.It is so natural as to be almost ineviable that a female upon the crime has been committed will make immediate complaint ,if she have a mother or other confidential friend to whom she can make it. The rule is found upon the law of haman nature ,"State vs.Connelly.57 Minn.482.

Some time between one and two she was awakened by her mother, and later went to the Cannadian Northern Yards to identify the Negroes . The Family Physician called at ten . He knew the occassion of his call. he had

Dissenting opinion of
Hallam, J. and Dibell, J.

He had the sympathy attendant upon the relation of a family physician and patient. He "found a Normal condition" "though" she seemed slightly nervous; the physical condition was good. His examination was thorough. There were no abrasions nor bruises nor inflammation nor evidence of soreness or tenderness. He did not call again. Some of the best evidence of a crime if there was one of this kind, was not preserved. State v. Cowing, 99 Minn. 123, 134. There is other testimony that the girl was "very hysterical and nervous" for several days. So were other Duluth people in the days following June 14. Mason denied that he was guilty, claimed that he was at work, and was corroborated by some of his negro fellow-workers. There is perhaps a possibility that six negroes committed the crime just as charged. Convictions are not rested on possibilities. The story in its entirety is unusual and strikingly improbable.

Now pass to identification. Mason was brought before the young man and woman at the yards about 5 in the morning of June 15. They did not identify him. There was testimony that the girl shook her head when Mason was presented. He was discharged and went to Virginia with the show. The boy and girl assumed to identify some, partially at least, and they and the officers selected from the 100 or 120 negroes following the show, thirteen as likely suspects. They were taken to the city jail. Seven were released before noon. That left six. Three were hung that night. That left three. The three who escaped hanging were spirited to Superior and brought to the county jail the next day. Ten were brought down from Virginia later, Max Mason among them, and taken to the county jail so there were thirteen in the jail for the Grand Jury.

It is common knowledge that colored men are not easily distinguished in daytime and less readily in the dark or in the twilight. Young Southern Negroes such as these look much alike to the northerner. The proof is in the case. Mason and nine others were arrested in Virginia on the 15th. Two officers who were active in the work of identification at the yards in the morning went there and apprehended them. They started to Duluth by Auto with four of them. They were stopped a few miles back of Duluth because of the lynching in progress, and the negroes were kept over night in a nearby

Dissenting opinion of
Hallam, J. and Dibell, J.

house. One of these officers, on the witness stand with Mason before him, was not quite sure that he was one of the four, but said, "I believe he was". Mason was not one of the four. He was brought down by train the next day and taken to the county jail. The other officer on the witness- stand, with Mason before him, stated with positiveness that he was one of the thirteen taken from the cars on the morning of the fifteenth, was one of the six kept in jail, that he gave his name as Green, and that he was one of the three not hung. He says that Mason denied thath he had offended and "cried in the police station". These officers were trained by their calling to observe closely and identify men. They were honest. They helped round up the ten negroes in Virginia, rejecting two or three. They were in the Auto with four of them. One thought Mason was along. The other was positive that he was one of the six who were taken to the police station and so was never in Virginia. Mason concededly was never in the auto, nor in the police station, never was accused of anything there, never denied anything there, and never cried there. Both officers were mistaken each in a different way. They were unable to distinguish from others the negro who had been in jail for five months charged with this crime. What of the identification by the young man and woman? The grand jury was in session , had been in session for a long while. They had been before it. It was time for identification. The young man and woman had a natural interest in making an identification The identification of a guilty negro was rightly enough to their liking. The boy and girl assumed to identify Mason and Miller-one short-, one tall or slim, On their testimony if one was guilty the other was. What they said at the time was incompetent. There was no objection, there evidence is not impressive. It must be read from the settled case foor the paper book is abbreviated. The assumed identification was something like a month after June 14. Some distracting things had happened since. Their recollection of the black men was no more trustworthy then that of the officers. To my mind the evidence is legally insufficient upon which to rest an identification sustaining a conviction.

That the girl was diseased on July 10, and Mason on July 19, is not of much weight as an identifying circumstance. The state's

physician says that infection would follow in from two to ten days after contact. The girl says she first noticed it in ten days or two weeks. She again says she first noticed it three days before the doctor came. She had not told her mother. The doctor was not called by the family. He was sent by the prosecution.The date of the examination, July IO, does not seem disputed. There was a lapse of twenty-six days between the contact alleged and the examination. She either did not notice infection for 23 days, or had it for ten to sixteen days without mentioning it. Perhaps their is an explanation , though none is offered. But this aside, about all that can be said is that the condition of Mason was consistent with guilt, ifa crime was committed. It was not inconsistent with his innocense.A like condition in any other man in Duluth that night, white or black, on or off the show grounds, was consistent with his guilt of this crime. Likewise it was not inconsistent with his innocence. Identification was first necessary and the disease did not identify. If the state had found the ones who participated in the assault one only being infected, and infection followed, there would be proof that he accomplished the more serious crime. On the State's theory there four or five other contemporaneous sources of infection.There was no elimination. As the proof is it is not forceful. Nor can the chance stat4ment made by Mason's counsel in his brief in support of his objection to the testimony on constitutional and other grounds- an objection which he had a right to make- an admission against the defendant of its materiality or importance. That it furnishes the basis for an argument which might mislead is evident, Care was necessary to avoid being misled by a specious argument.

It was not for Mason to show what occurred at the show grounds and who participated. To my mind it is only a chance guess that he was connected with any offense at the show grounds. It is a less likely guess that he was an actor in a crime such as was charged. In my view the evidence does not sustain the conviction.