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VIGNETTES OF THE CRIMINAL LAW¹

I. *A Jury Is Sensitive About Its Intelligence.*

CHARLES C. ARADO²

The defendant was out on bail, neatly dressed and well-groomed. He was substantially built, of light complexion and blond hair, his ruddy cheeks and clear eyes indicating robust health. It appeared that he had stepped from his car in front of a pool-room, rushed into a crowd of boys who were standing in front of the store, drew back his fist and swung at the jaw of one of them. The victim sank to the ground. The defendant addressed one of the eye-witnesses of the affair, saying, "That was meant for you." The defendant then accompanied the owner of the pool-room in removing the injured boy to a hospital. After receiving first aid medical attention, he was permitted to leave. On the next day he went to work. It was the day following that he felt dizzy. He was marked for his fatal illness, soon falling into a comatose state from which he never regained consciousness. The accused had visited him at his home, before his death, expressing profound sorrow for the unfortunate occurrence.

Of course the defense had to deal with the eye-witness, who was at the same time the real object of the assault of the accused. It was natural to expect him to be very hostile. Another eye-witness, a friend of the intended victim and who worked at the same establishment, testified as to the happening in the same manner. A coroner's physician, called to testify as to the nature of the skull fracture, was asked his opinion as to its cause. He replied that in his opinion it occurred by reason of a blunt object striking the left temple of the victim. The defense endeavored to question the doctor with a view of bringing out the possibility of the fracture resulting from contact with the pavement. Counsel might then argue that the real cause of the death was a misadventure, which should not be charged to the defendant. The defense attorney having studied the subject of skull fractures, questioned the doctor thoroughly along these lines. The physician explained that intercranial pressure will cause headache and dizziness. He explained, further, that a person might be suffer-

¹The last contribution under the general title and authorship appeared in this Journal, Vol. XXV, No. 3.

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ing from an intercranial fracture without the same being detected by an examination of the skull. He said that the inner cranium is finer and fractured more easily than the outer skull. The defense attorney spoke of an incomplete fracture but the doctor did not recognize such a term.

A thin, wiry physician, with a Polish name, was next called by the state. He had been in the courtroom but the defense attorney had not observed his presence before stepping to the stand from one of the benches in the courtroom. This doctor was very positive in all his assertions, answering the questions on cross-examination quickly and caustically. When the victim had first come to him, he directed the latter to bathe his jaw with a lotion. He did not again see the patient until he had fallen into the coma. The defense cross-examined the doctor with a view of showing that the victim had not received proper medical treatment in the first instance, this being one of the causes of death. The doctor used the expression, "I observed contusions on the jaw and left temple." He was asked to indicate on himself, precisely where these contusions were located. When the doctor saw him the second time he described the condition of the patient as sluggish, as though he were in a stupor. He explained that there was an inward bleeding and that the blood was escaping into the brain. He maintained that at the time of his first examination the patient showed no symptoms of suffering a skull fracture.

The defendant took the stand and after preliminary questions had been asked, the answers to which indicated that he had been engaged as a sheet metal worker, he told of arriving at the scene of the tragedy. Before this however, he explained, significantly, that a younger brother of his had just been beaten by the eye-witness whom he intended to strike on the fateful day. He advanced toward the group of boys in front of the poolroom and grabbed the deceased. The latter sank to the ground as though he had suffered heart failure. He had stayed with the victim and accompanied him to a physician. There were no other witnesses for the defense. In final argument, defense counsel read the statute on misadventure to the jury. In his closing argument the prosecutor touched only upon the vital features of the case. He said that the facts were easily understood, that disinterested eye-witnesses had explained the transaction; that the defendant had put into motion those causes which produced death; that the assault was unlawful, rendering the defendant liable for any of its consequences; that the state was not compelled to prove that the defendant intended to kill the victim; that the accused would not

suffer nearly as much as the deceased and his family had by reason of the defendant's wrongful acts; that the latter's claim that he did not strike the deceased branded him as not only a slugger but a wilful perjurer; that the statute prescribed the penalty, about which the jury had no concern; and that they had no duty to perform other than to determine whether or not the defendant committed an unlawful assault upon the deceased and whether the deceased died therefrom. The jury was out only a short time before they returned a verdict of guilty.

The following points of criminal law and evidence arose during the trial.

When the coroner's physician was on the stand and asked to refer to his notes the court asked him whether he had exhausted his recollection of the facts.

In an attempt to impeach the eye-witness by his testimony before the coroner, the judge instructed defense counsel to put his question in the following manner: "Was this question asked you and did you make this answer?"

The second eye-witness testified that although he worked at the same company as the intended victim, he had not discussed this case with him on a single occasion. This was plainly an untruth. Witnesses repeatedly prevaricate in their answers to such questions.

The brother of the deceased testified as to a conversation that he had with the defendant at the home of the victim, in which the defendant had related that he had become tired of his (the defendant's) brother becoming involved in brawls and calling upon him for aid. The defendant denied such a conversation and was probably asserting the truth. But the witness wanted to have the jury infer that both the defendant and his brother were quarrelsome and vicious. As a matter of fact, the other circumstances indicated a purely mistaken assault which nevertheless made the defendant guilty of its consequences. This little incident illustrates, however, how witnesses will extend themselves in order to color the charge against a man for whom they have a grievance.

The only questions the prosecutor asked the defendant on cross-examination were those relative to the defendant's acts at the time of the occurrence. He had recognized this feature of the case as being the vital one, that which would in all probability send the defendant to the penitentiary. A preposterous story had been told on direct examination. Its preposterousness was again laid before the

jury, and he wisely ended his examination by proving the defendant to be unworthy of belief.

An instruction based upon the statute of misadventure was given to the jury. Instructions on justifiable and excusable homicides were also given to them. From the fact that an instruction on circumstantial evidence was given to the jury, it might be inferred that practically every instruction submitted by the defense was given by the judge.

A prosecutor once told me that in his previous experience as defense counsel he repeatedly kept the defendant from the witness stand. He claimed to be a tactician in doing this. He said that in most instances the defendant does his cause more harm than good when he is on the stand. Especially is this so when he must rely upon an untruth for his acquittal. This was an important suggestion, only too true.

Here was a case where the facts showed beyond a doubt that the defendant had been the unfortunate cause of a homicide. The jury could readily believe that the fall on the pavement was the actual cause of the fracture. While this did not legally excuse the defendant it was an extenuating circumstance in behalf of the defense. A jury can readily conceive of instances where they have been the cause of results which they did not intend; and they would be apt to sympathize with an accused of good character held to criminal responsibility for an unforeseen result of his act. They might have reasoned that the defendant's will to kill had not been in operation at the time of the occurrence; and that it was only due to unexpected developments that the victim met death. Although not legally the issue before them, the following issues would occur to them. Should a defendant be sent to the penitentiary for causing a death that he had no intention of bringing about? This defendant had not left the victim of his mistaken assault to die on the street. He had exhibited human compassion by accompanying the unfortunate youth to a place where he could receive medical attention. By his conduct he had shown that he was sorry for the unforeseen developments and did all in his power to rectify his mistake. Should such a man be prosecuted? Wasn't prosecution of such a man persecution?

Had the defendant told the truth in regard to his attack and his conduct following it, it would have been far better for him, than to have submitted a story impossible to believe. The jury could not stomach such an effort to deceive them.

They could not feel sympathetic for the accused, under these

circumstances. He not being fair to them, did they owe him any duty to be fair to him? While his testimony, if believed, permitted them to return a verdict of not guilty, yet twelve intelligent men would not want the court and other interested parties to believe that they had swallowed a tale which shocked common sense. A verdict of not guilty, under the circumstances, would cast a reflection upon their intelligence. Jurors are very sensitive as to their intelligence. They wish to handle the case in an intelligent manner, by all means. In returning a verdict of guilty they felt that they were informing the court and spectators that they were not fools. The issue finally narrowed itself into this: "Are we to return a verdict which indicates that we are intelligent or are we to return a verdict which stamps us as dunces?" They rendered a verdict which not only satisfied their conscience but which vindicated their intelligence.

It is an error in trial tactics to present a preposterous proposition to a body of twelve men, with the expectation that they are going to believe it upon its mere recitation from the witness stand. If the theories of a defense do not impress the every-day acquaintances of an attorney with their logic, they will not impress the twelve men who will decide the issues in his pending case.

2. *Husband, Wife, and Paramour. Self-Defense.*

The defendant was a tall, bony-faced, angularly-built, coal-black negro wearing glasses. He was charged with the murder of his wife. He had stabbed her in the back a number of times with an ice-pick. Numerous relatives and friends of the wife's family testified to the fact that on divers occasions the defendant had threatened to kill her. The state attempted to introduce evidence of conversations between the wife and these witnesses to the effect that the former feared violence at the hands of her husband. The defendant had been married to his wife for about fifteen years before serious trouble arose between them. It was intimated that the difficulties started over money matters, that the defendant had been trying to secure possession of funds which his wife had received from insurance companies upon the death of her mother. Two witnesses for the state testified as to the above facts. The accused appeared to be a very simple, illiterate negro, and by his straightforward manner, made a favorable impression upon the jury. He was on the stand for hours on cross-examination, the prosecutor bringing out a thousand and one details of his entire life and of the trouble culminating in the wife's death. The story which he told the jury and to which he adhered in spite

of the long and minute cross-examination was to the effect that his wife, upon this fateful day, had asked him to go down-stairs and look into the ice-box for some bottles. He stepped into the dark basement and was leaning over the ice-box when his wife, or at least he thought it was she, hit him over the head with a bottle or lead pipe. This stunned him. As he arose he felt himself shot in the back.

He claimed that his senses had been dispelled by the first blow and that from this period he did not know what he was doing. He maintained that he was not conscious of and did not now know that he had chased his wife with an ice-pick and struck her repeatedly with it.

At this juncture we must introduce George Smith, half-brother of the deceased, who was in jail at the time of the trial, charged with making an assault with intent to commit murder upon the defendant. He was the man who had fired at the defendant at the time of the homicide but maintained that he discharged his gun while facing the defendant in an endeavor to compel him to desist from attacking his wife. The physical fact remained that the gun-shot wound was in the defendant's back. The prosecutor told me, after the trial, that Smith's insistence upon lying in connection with his shooting of the defendant had a tendency to cause the jury not only to disbelieve him but to believe that the entire case of the state was a deliberate frame-up upon the part of the wife's relatives and friends to hang an innocent man. A very important feature of the defense was found in the testimony of the accused to the effect that he had been driven from his own home on a previous occasion through the intrusion of Smith. Also, he testified that he had grounds to believe that Smith had been on intimate terms with his wife. With this testimony as a background, the defending attorney argued that the evidence revealed a deliberate attempt upon the part of the wife and Smith to do away with the defendant so that they might be together.

Defense counsel had about twenty-five Illinois reports on the courtroom table at the time of his final argument. He referred to them in supporting his different propositions as to the law which was applicable to the facts in question. He had made such a complete and thorough study of the law in homicide cases, especially those wherein the accused claimed self-defense, that he was able to refer to specific authorities during the conduct of the trial on every occasion when the state attempted to introduce improper testimony; and also, and more particularly, on those occasions where he desired to introduce such testimony as previous relations between the deceased

and members of the defendant's family; communicated threats (even though they had not been actually made); and other instances, where courts have decided as to the propriety of testimony in his favor. When the trial courts obtain authorities for rulings urged, they acquire confidence, and make their rulings in accordance with those in the previous cases.

In another murder case involving self-defense, as here, I recall the effort by this attorney to show both by the wife of the deceased as well as the sister of the accused, that the deceased had made attacks upon the sister because she would not agree to his demands. The cases he submitted in that trial were to the effect that these instances of attack made by the deceased upon members of the defendant's family, when communicated to the defendant, were permissible for the purpose of explaining his state of mind at the time of the homicide, and his reason for relying upon a deadly weapon to protect himself or his family on that occasion.

Defense counsel's line of questioning in bringing out the relation just referred to was as follows in the case of the eleven-year-old sister: "What is your name? Where do you live? Do you go to school? What relation are you to the defendant? Do you recall September 19, 1921? Did you know the deceased in the summer preceding September, 1921? Did you see him at that time? Where were you living then? Did you see the deceased at your home? Now tell us about it. In what room of the house did you see him? Was anybody else in the house at the time? Did you tell anybody about this affair?"

In answer to these questions the girl related that the deceased had made an attack upon her and that she had told her brother and mother about it. In the same case counsel then similarly questioned the wife of the deceased who answered the following questions: "When was the last time before September 11, 1921, that you saw the deceased? Where was it? Who was present? What did you see or hear the defendant do at that time?" In answer to these questions the witness replied that the deceased, her husband, had demanded improper relations with the defendant's sister and that when the latter refused him he beat her. She was then asked when she saw him on a previous occasion and what he did at that time. She repeated another story of an attack by the deceased upon the girl for the same cause. She, also, testified that she communicated this information to the girl's brother who was then on trial.

Returning to the instant case under discussion, the jury returned a verdict of not guilty.

3. *Collateral Issues Arise in Auto Manslaughter Case.*

While three defendants were indicted for auto manslaughter there was in fact but one of them criminally liable for the homicide. He was the driver. The scene of the crash of the automobiles was at or near the intersection of 60th and Kedzie Avenue. The defendant was driving his Dodge car south. The victim, with his wife, who was also killed as a result of the accident, and their fifteen-year-old daughter, were traveling north. It was a head-on collision. It occurred, according to the explanation advanced by the defendant, as the accused turned slightly to the east in order to avoid a car running in the same direction, which was cutting him off and forcing him to move to the left as it passed him. A plain-clothes detective appeared at the scene almost immediately after the smashup. Two other officers claimed to be eye-witnesses. They testified that the defendant was driving about thirty-five or forty miles an hour, on the left hand side of the street. A doctor examined the defendant and claimed that he possessed bleary eyes, his gait was unsteady, pulse high, and that his breath indicated to him that he was under the influence of liquor and in no condition to drive a car.

The defense seemed to center upon the contention that the plain-clothes officer had approached the family of the accused and told them that it was a tough case; that he was the arresting officer; that he was on top of the fence; that he could fall either way; and that he had influential friends who would fix the case, providing there was sufficient money forthcoming. The theory of the defense was that because the family refused to come across with a bribe, this officer proceeded to frame a case against the boy; furthermore, he was in the employ of the complaining parties, and the entire case was prepared and prosecuted because of the case disbursements made to him.

The theory of the state's case was that the three defendants had been on a drinking party, that a girl was in the car at the time of the accident, and that she made her escape immediately thereafter. The defendants maintained that no girl was in the car at any time that afternoon. A woman's hat was in evidence; but where it was found or under what circumstances it was admitted into evidence, was not learned. The state had finished its case and the defendant, too, had rested. The prosecutor was directing the rebuttal. He

called the three defendants to the stand, as state witnesses. Each was asked whether there was a woman or girl in the car upon the day in question. They all denied her presence. Then he called an old man, a conductor, who lives 150 feet from the scene of the tragedy. He said that his attention had been called to the accident by reason of the noise of the crash. He hurried to the scene and testified that he helped a girl out of the Dodge car. Defense counsel cross-examined him crossly, but the old man stuck to his story. The effect of this evidence was electrical. It seemed to declare the three defendants rank perjurers, to tear the foundation of the defense from its moorings. The way that one of the defense counsel met this piece of evidence in his argument was to contend that there was a mistake somewhere. The arresting officer and another state witness had testified that a girl stepped from the car *immediately* after the collision. Therefore, he wanted to know how the old man could have been attracted to the accident, walk about 150 feet to the Dodge Car, and still find the girl in it. This is an example of a sophisticated argument that may be without a genuine premise, but nevertheless, sounds convincing.

A witness, a very young boy had been called by the defense, but for some reason was hastened to the state's attorney's office upon his arrival at the courthouse. When he was later approached by the driver's lawyer, he refused to talk to him. Counsel brought out these facts when he called the boy to the stand.

In impeaching the credibility of the testimony of one of the state witnesses, defense counsel provided for the attendance of a Criminal Court Clerk who brought his dockets along in order to testify that this witness had been arrested, indicted and tried on a charge of committing the crime of robbery with a gun. He had been duly convicted by a jury and sentenced to serve from ten years to life at Joliet prison.

In impeaching the plain-clothes officer, defense counsel introduced one of the clerks in the office of the Chief of Police who testified, when asked if he had ever seen a certain paper and if he recognized it, that it purported to be a suspension order directed to this arresting officer. He explained that the suspension was ordered, pending the disposition of charges made against him.

This officer was quoted as telling the defendant's family that the lawyer who represented the driver at the inquest was the first attorney that he ever saw, in his long experience as a police officer, who omitted to interrogate him as to the nature and extent of the acci-

dent, before the trial. Police officers expect to be interviewed by counsel; and as a matter of fact, will usually talk freely about their evidence.

In the course of the final argument, one of defense counsel said that an attorney would be foolish to call a witness to the stand if he had not first talked to him and known the substance of his testimony. He thereby explained his own conduct with reference to the boy called first by him as a witness.

Throughout the trial no effort was made to arouse sympathy, passion or prejudice. The defense attorneys rested the fate of their clients primarily upon an attack on the credibility of the state witnesses.

It was dangerous for them to mention the old saying, "False in one thing, false in all things," for it came right home. On that score, the stories of the three defendants would have to be thrown out of the case because everyone present must have been convinced that they were lying when they said that no girl was in the car at the time of the accident. The old conductor was from all appearances unimpeachable, with no motive to tell a falsehood.

The prosecutor failed to make the most of the opening he had created by reason of the conductor's refutation of the veracity of the three defendants, however. This evidence and the deductions therefrom could have formed the structure for the climax of his final argument.

He met the charge of impeached witnesses by saying that he was sorry that the eye-witnesses were not doctors, bankers and lawyers. But it is not reasonable to suppose that these professional men view every crime that is committed. He continued, "We are forced to call the witnesses who actually have seen what happened, regardless of their position in life or their previous history."

The state nolle prosequit crossed the charge against two of the defendants before the case went to the jury. The driver was acquitted.