Journal of Criminal Law and Criminology

Volume 39 | Issue 4 Article 10

1949

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limited aspect and leaves the grand jury and the court free to indict and convict on the basis of any constitutional evidence in the possession of the state.

Since prior cases had established the concept that due process of law includes the right to freedom from secret trial by the "third degree," it therefore may be concluded from the other cases considered, not only that the federal district court in *Refoule* v. *Ellis* was within its constitutional power in making available damages and injunctive remedies against state police officers, but also that the action "at law or in equity" given by the Civil Rights Act of 1871 may be extended to include the suppression of confessions obtained by coercion.

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The Admissibility of an Accomplice's Confession Against a Non-confessing Defendant

A rule of evidence recognized by the English Courts as early as 1664[1] was recently reaffirmed by the United States Circuit Court of Appeals, Second Circuit, in *United States v. Gottfried,*[2] wherein it was held that a confession of one of several defendants, on trial jointly, is evidence only against the person who made it and will not be admitted to affect adversely others accused of participating in the crime. Judge Learned Hand, in delivering the opinion of the court, further ruled that it is not erroneous to admit the confession at the joint trial if a cautionary instruction is given by the court that it is to be considered only against the declarant.

Concerning the problem of admissibility of confessions of a co-defendant, the *Gottfried* case reflects the majority view that the confession is receivable only against the confessor.[3] This view is a derivative of the hearsay rule which dictates that only if the confessor reiterates his accusatory statement in court, and thus is subject to cross-examination, can it be admitted against his accomplice. The rule is also supported by the theory that the mere testimony of accomplices should not be of sufficient weight to convict an accused, since the temptation for self-absolution by means of perjury is too great to permit such a statement to be regarded seriously.[4]

tion issued against further arrests, indictments or prosecutions, on ground that where federal rights were shown, they were paramount to state laws and policy, and that plaintiff need not sustain damage by waiting to simply defend himself in the state prosecutions); Alesna v. Rice, 69 F. Supp. 897 (D.C. Hawaii 1947) (injunction issued against criminal contempt prosecution), case cited note 31 *supra; Ex parte* Young, 209 U.S. 123 (1908) (enforcement of penal provisions of railroad rate statute enjoined where unconstitutional deprivation of property was threatened).

1 Tong's Case, Kelyng 18 (1664).

2 165 F. (2d) 360 (C.C.A. 2d 1948).

3 Madigan v. United States, 23 F. (2d) 180 (C.C.A. 8th, 1927); State v. Gargano, 99 Conn. 103, 121 A. 657 (1923) (confession made by a plea of guilty not admissible against a co-defendant); Blanco v. State, 150 Fla. 98, 7 So. (2d) 333 (1942); Comm. v. Epps, 298 Pa. 377, 148 A. 523 (1930).

4 The scope of this article does not include a discussion of confessions made in the prosecution of the common enterprise and during its existence. However, some modifications of the general rule are to be noted in the following cases: State v. Williams, 62 Wash. 288, 113 Pac. 780 (1911) (held that the admissions or confessions of a defendant could be admitted in evidence against a co-defendant in order to prove the plan or conspiracy to commit the crime charged). This rule was reviewed and

Chief among the exceptions to this rule is found where the co-defendant acknowledges the confession, in which case the confession becomes admissible, not as evidence or statements of his accomplices, but as his own statement of facts. This may be done by voluntary affirmance,[5] or under some conditions by silence as an admission of acquiescence.[6] A defendant will be deemed to have assented to his co-defendant's confession, by his silence, when it is read in his presence under conditions and circumstances which would normally bring forth a denial from an innocent person and he makes no reply or otherwise fails to deny.[7] However, if the confession of the accomplice is referred to the defendant under circumstances such that he is in no position to deny it, or if his silence is of such character that it does not justify the inference that he should have spoken, or if in any way he is restrained from speaking, either by fear, doubt of his rights, instructions given him by his attorney, or a reasonable belief that it would be better or safer for him if he kept silent, the statement itself and the fact that the accused kept silent are not admissible in evidence against him.[8] Many jurisdictions go further and do not recognize the principle of assent by silence when in custody, some holding that it must be assumed that the maintenance of silence is the best strategic policy for one accused of crime,[9] others supporting exclusion of evidence of silent assent with the argument that if, when under arrest, the mere silence of the defendant should be held to constitute evidence of his guilt, he would actually be compelled to enter into a discussion of his innocence or guilt and thus his constitutional right against self-incrimination would be violated.[10]

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discarded in *State v. Goodwin*, 186 P. (2d) 935 (Wash., 1947), as it in effect resulted in allowing confessions of a co-defendant to be admitted for all purposes. See also State v. Meyers, 198 Mo. 225, 94 S.W. 242 (1906) (when counsel for defendant, on cross examination of an accomplice who had been convicted, read to the accomplice portions of his alleged confession the court then allowed the state to read the entire confession, including portions damaging to defendant); Goins v. State, 46 Ohio St. 457, 21 N.E. 476 (1889) (admissible when a prima facie case of conspiracy has been made); Scrivener v. State, 32 Ohio App. 433, 168 N.E. 142 (1929) (confession admitted when made by two defendants against all jointly where the conspiracy had been clearly established).

5 Allen v. State, 49 Okl. Crim. 195, 293 Pac. 271 (1930); Comm. v. Oreszak, 328 Pa. 65, 195 A. 45 (1937); Comm. v. Wood, 142 Pa. Super. 340, 16 A. (2d) 319 (1940); 4 Wigmore, Evidence (3rd ed. 1940) 117. "There may also be a joint confession where two or more participants after answering questions at an interview, unite in signing, or otherwise adopting, a single document in which case the statements are admissible against all."

6 Clark v. State, 240 Ala. 65, 197 So. 23 (1940); People v. Bringhurst, 192 Cal. 748, 221 Pac. 897 (1923).

7 Edwards v. State, 155 Fla. 550, 20 So. (2d) 916 (1945); People v. Lehne, 359 Ill. 631, 195 N.E. 468 (1935); Inbau, Lie Detection and Criminal Interrogation (2d ed. 1948) 181.

8 People v. Hanley, 317 Ill. 39, 147 N.E. 400 (1925); People v. Koslowski, 368 Ill. 124, 13 N.E. (2d) 174 (1938); People v. Conrow, 200 N.Y. 356, 93 N.E. 943 (1911) (under instruction given by his attorney). In *Anderson v. State*, 197 Ark. 600, 124 S.W. (2d) 216 (1939), the court applied to confessions of a co-defendant the rule concerning the requisites to admissibility of admissions set forth in *Meriwether v. Comm.*, 118 Ky. 870, 82 S.W. 592 (1904). These requisites are that the person to be bound by the statement heard it, understood it, had an opportunity to express himself concerning it, and was called upon to act upon or reply to it.

9 Comm. v. McDermott, 123 Mass. 440, 25 Am. Rep. 120 (1877) (declared the "Massachusetts view" that co-defendant is not called upon to contradict statements prejudicial to him); People v. Dolce, 261 N.Y. 108, 184 N.E. 690 (1933).

10 U.S. Const. Amend. 5 "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."; Johnson v. State, 151 Ga. 21, 105 S.E. 603 (1921); Ellis v. State, 8 Okl. Crim. 522, 128 Pac. 1095 (1913).

The reasons for admitting the confession in the joint trial are clear. It should be admissible against the confessor just as any competent evidence tending to prove his guilt. The mere fact that the evidence is a confession, subsequently repudiated by the confessor, is not sufficient to change this principle even though the confession may tend to implicate a co-defendant.[11] If the court determines that the confession is to be admitted against the non-confessing defendant, his guilt must nevertheless be clearly established by independent evidence.[12] If it is determined that the confession shall not be used in evidence against the non-confessing defendant as was determined in the *Gottfried* case, the problem of how the confession can be admitted against the confessor and yet not prejudice the rights of his co-defendant then arises. This is the precise problem which is here treated.

The most obvious means of precluding prejudice would be to grant a separate trial to those defendants who have not confessed. Yet the right to a severance must rest upon the ground that the defense to be offered by one of the defendants is so antagonistic to the defense to be offered by the remaining defendants, that severance is necessary to insure a fair trial.[13] Generally all defendants who are jointly indicted should be tried jointly and the matter of granting a separate trial rests within the sound discretion of the court and cannot be assigned as error in the absence of an abuse of that discretion.[14] It is not, in most cases, an abuse of discretion to refuse severance when it is known that a confession in writing made by one of the defendants, implicating the others, will probably be introduced at the trial.[15] However a small minority of courts have held that a severance should be ordered when there is no evidence, other than the accomplice's confession, connecting the defendant with the crime, unless the State's Attorney declares that the confession will not be offered in evidence, or unless there be eliminated from the confession any reference to the non-confessing defendant.[16] This latter rule, which demands that greater deference be paid the rights of the non-confessing joint indictee by requiring trial court scrutiny of the nature and scope of the evidence to be presented by the state in addition to the confession, seems highly desirable.

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11 Randazzo v. United States, 300 F. 794 (C.C.A. 8th 1929); State v. Fox, 133 Ohio St. 154, 12 N.E. 413 (1938).

12 Markley v. State, 173 Md. 304, 196 A. 95 (1938); People v. Fisher, 249 N.Y. 419, 164 N.E. 336 (1928).

13 People v. Payne, 359 Ill. 246, 194 N.E. 539 (1935).

14 Ginsberg v. United States, 96 F. (2d) 433 (C.C.A. 5th, 1938) (severance in the Federal courts is not a right but rests in the court's discretion); Cantaneo v. United States, 167 F. (2d) 820 (C.C.A. 4th, 1948); Federal Rules of Criminal Procedure, Rules 8(b), 14, 18 U.S.C.A. following §687.

15 *Accord:* People v. King, 30 Cal. App. (2d) 185, 85 P. (2d) 928 (1938); Comm. v. Borasky, 214 Mass. 313, 101 N.E. 377 (1913); State v. Guerzon, 23 Wash. (2d) 242, 160 P. (2d) 603 (1945). *Contra:* Flamme v. State, 170 Wis. 501, 177 N.W. 596 (1920) (in charge of adultery the confession of one defendant must inevitably operate to the prejudice of the other defendant's rights).

16 People v. Fisher, 340 Ill. 216, 172 N.E. 743 (1930); People v. Bolton, 339 Ill. 229, 171 N.E. 152 (1930); People v. Serritello, 385 Ill. 554, 53 N.E. (2d) 581 (1944) (reversed because there was little evidence other than co-defendant's confession connecting defendant with the crime); People v. Barbaro, 395 Ill. 264, 69 N.E. (2d) 692 (1946) (reversed because co-defendant's confessions were highly important in contributing to conviction). *Cf.* People v. Feolo, 282 N.Y. 276, 26 N.E. (2d) 256 (1940) (denial of severance was error where it appeared that without the confession of one defendant, the conviction of the other three defendants would have been far from a certainty).

If severance is denied and thus a joint trial becomes necessary, it is imperative to look to the less effective means of insuring that the co-defendant's confession will be considered only against himself. When this problem first arose in England, the courts held that the names of other co-indictees mentioned in a confession used and read against the party making it were to be omitted.[17] Although the courts of the United States have not favored this remedy, there are decisions to that effect.[18] This rule is objected to as not being sufficient in most instances, the inference created by the omission of names in the text being too clear to the jury to be mistaken.

A few courts have gone a step further and held that where part of a confession of one defendant, affecting another defendant, was readily separable and unnecessary to completeness of the confession or admission as to the defendant who made it, expunging of parts which implicated another defendant was permissible.[19] However this remedy is objectionable in a jurisdiction requiring a statement to be introduced in its entirety.[20]

The most widely accepted of these means of precluding prejudice to the co-defendant, and the one adopted in the *Gottfried* case, is the admission of the confession of the accomplice with instructions to the jury to consider it only against the declarant.[21] It is presumed that the jury will follow the court's instructions and thus any prejudicial effect which the admission of the confession might reflect on the non-confessing defendant is thought to be obviated. However it seems apparent to many that this is pure fiction and that actually the jury will not and cannot eliminate the effect of the evidence from their minds entirely, and thus the usual result of the device is to admit otherwise objectionable hearsay evidence.[22] Judge Hand, in the *Gottfried* case, seems to recognize this weakness. After commenting that as a practical result the cautionary instruction is not effective, he rationalizes his position in stating that "hearsay is admissible in all sorts of situations when the truth is not otherwise available and the fact that this may be another exception is not conclusive against it. . . . In effect the rule probably furthers rather than impedes the search for truth and thus perhaps excuses the device which satisfies form while it violates substance."

When the trial judge allows a highly incriminating statement made by a joint indictee to come before the jury, no matter how technically restricted the purpose, it in substance denies the non-confessing defend-

17 4 Wigmore, Evidence *op. cit. supra* note 5 at p. 496.

18 People v. Betson, 362 Ill. 502, 200 N.E. 594 (1936) (co-defendant's name deleted and words "other person" substituted); People v. Meisenhelter, 381 Ill. 378, 45 N.E. (2d) 678 (1943) (court substituted the words "other person or persons" and also gave a cautionary instruction to the jury).

19 Comm. v. Di Stasio, 294 Mass. 273, 1 N.E. (2d) 189 (1936); State v. Boswell, 56 A. (2d) 196 (R.I. 1947) (defendant lost this opportunity by not moving to delete prejudicial matter); Miller v. People, 98 Colo. 249, 55 P. (2d) 320 (1936) (part of co-defendant's confession implicating the defendant excluded).

20 State v. Livsey, 190 La. 474, 182 So. 576 (1938).

21 Skikowski v. United States, 158 F. (2d) 177 (App. D.C. 1946); State v. Sanchez, 59 Ariz. 426, 129 P. (2d) 923 (1942); Blanco v. State, 150 Fla. 98, 7 So. (2d) 333 (1942); State v. Clapp, 94 N.H. 62, 46 A. (2d) 119 (1946); Comm. v. Dolan, 155 Pa. Super. 453, 38 A. (2d) 497 (1944).

22 People v. Sweetin, 325 Ill. 245, 156 N.E. 354 (1927) (remarks that it is practically impossible to remove by instruction the prejudicial effect of the confession). See Nash v. U.S., 54 F. (2d) 1006 (C.C.A. 8th, 1932).

ant one of the elemental rights comprised within the concept of fair trial, namely, the right of confrontation of his accuser. This is so because the confession will normally have been obtained without the presence of the co-defendant, and the confessing defendant cannot be subjected to cross-examination at the trial. By hypothesis the confessor no longer claims the confession as his own. Thus the majority rule, in denying a severance without requiring a careful preliminary inquiry on the question of the possible weight the jury may improperly attach to the confession as to the guilt of the non-confessing defendant, places speed and economy in the administration of justice above the fundamental fairness which a separate trial would insure.[23]

The minority rule disallowing severance only when there appears to be sufficiently strong evidence against the defendant, independent of his co-defendant's confession, would seem to be the more equitable approach. By using a little foresight, the trial judge could base his decision on motion for severance on an estimate of the probable facts in issue. Thus, if identity were contested and the prosecutor admitted having only weak circumstantial proof thereon, and if the confession tended to throw light on this particular issue, a severance should be granted. While this approach requires a review by the trial judge of the prosecution's proposed proof, it would seem to present the only intelligent compromise between the competing considerations of efficiency in the administration of criminal justice and fundamental fairness to the accused.

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23 See dissent of Lehman, J. in People v. Fisher, 249 N.Y. 419, 164 N.E. 336 (1928).