

1959

Abstracts of Recent Cases

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Recommended Citation

Abstracts of Recent Cases, 49 J. Crim. L. Criminology & Police Sci. 460 (1958-1959)

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of Section 605, due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect."³² However, since the *Benanti* case involved a federal action in a federal court, the Court declined to recognize any infringement of the federal-state relationship in rejecting the state procured wire tap evidence.

The significance of the *Benanti* case lies in the fact that the decision makes a practical application of the inherent policy in the federal exclusionary rule. While the Court will not interfere with the state use of illegal wire tap evidence in state courts where no federal question is involved, it will not permit, on the same theory of non-interference with states' rights, the use of such evidence in a federal court. In this way the states' internal judicial procedure is protected, and uniformity in the administration of the federal exclusionary rule in federal courts is obtained.

Although the Supreme Court has not been in a position to decide the specific question in issue since the *Wolf* case, Mr. Chief Justice Warren and Mr. Justice Frankfurter have at least acknowl-

³² It was urged by the government that as long as the wiretapping occurred without the participation or even knowledge of federal law enforcement officers, the evidence should be admitted in the federal court. The *Schwartz* case was heavily relied upon. The Court answered, "However, *Schwartz v. Texas* does not indicate approval of such a proposition. Both a state court and state law enforcement officers were there involved. The rationale of that case is that despite the plain prohibition of Section 605, due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect. In the instant case we are not dealing with a state rule of evidence. Although state agents committed the wiretap, we are presented with a Federal conviction brought about in part by a violation of a Federal law, in this case in Federal court". *Benanti v. United States*, *supra* note 31 at 101.

edged that *Weeks* can no longer be a foundation for the rule and that the question is now open.³³

Of greater significance are the statements of several of the other Justices on this point. Justices Black and Douglas have definitely expressed their opinion that all illegally seized evidence should be excluded in the federal courts regardless of the searcher's affiliation.³⁴ Mr. Justice Clark has also expressed his dissatisfaction with the *Wolf* case,³⁵ and has stated that all evidence "obtained in violation of rights protected by the Fourth Amendment to the Federal Constitution must be excluded in federal criminal prosecutions."³⁶

Certainly, the *Weeks* holding can not now properly be regarded as a binding precedent. The Supreme Court should come to grips with the problem and maintain a uniform rule of evidence regarding unconstitutional action. The illegal actions on the part of state and federal officers are equally repugnant to the federal constitution and the fruits of their illegal ventures should be treated similarly in the federal courts.

³³ Mr. Chief Justice Warren noted that "it remains an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court despite the Fourth Amendment". *Benanti v. United States*, 355 U.S. 96, 102, ft. 10 (1957). See also note 11, *supra*.

³⁴ Mr. Justice Douglas, concurring in *Lustig v. United States*, 338 U.S. 74, 80, (1949) stated: "[T]he important consideration is the presence of an illegal search. Whether state or federal officials did the searching is of no consequence to the defendant, and it should make no difference to us." Mr. Justice Black also concurred in *Lustig*, basing it on his dissent in *Feldman v. United States*, 322 U.S. 487 (1944). This case involved the use in federal courts of evidence obtained by the state under a state immunity statute. Mr. Justice Black stated: "Testimony is no less compelled because the state officer appears to be primarily interested at the moment in enforcing a state rather than a federal law."

³⁵ See Clark, J., concurring in *Irvine v. California*, 347 U.S. 128, 138 (1954).

³⁶ *Breithaupt v. Abram*, 352 U.S. 432, 434 (1957).

ABSTRACTS OF RECENT CASES

Francis A. Heroux

Presence Of Victim's Wife At Counsel Table During Trial Not Prejudicial—This was a prosecution for murder in the first degree. During the course of the trial the victim's wife occupied a chair at the counsel's table next to the state's prosecutor. When her husband's bloody shirt was exhibited to the jury, she became emotionally upset to the extent that the trial judge asked her to leave the

courtroom; this she did, in the company of a bailiff. The defendant appealed his conviction on the ground that the presence of the decedent's wife prejudiced the jury because sympathy for her affected the jury's deliberations. The Court of Appeals of Ohio held that there was nothing to indicate bad faith on the part of the prosecutor or that the wife's presence was used in any improper

manner. Therefore, no prejudice resulted. *State v. Bryant*, 152 N.E.2d 678 (Ohio 1958).

In reaching its decision, the court noted that it was within the province of the prosecuting attorney to make the choice of the person to assist him in the development of the case for the state. Furthermore, there was no emotion on the part of the victim's wife, other than that which normally might follow when the bloody shirt which her husband wore at the time he was killed was produced and exhibited to the jury. In conclusion, the court said, "It may be that her appearance and her testimony evoked sympathy, as it naturally would, on the part of the jury, but this is inevitable in the trial of a criminal case where the facts developed tend to stir the emotions."

Defendant's Partner In Incest Was Victim—Not Accomplice—The defendant was convicted of the crime of incest. At his trial, the only evidence for the State was the uncorroborated testimony of the prosecutrix, defendant's daughter. Her testimony established that the defendant had been carrying on his illicit relationship with her, which was begun when she was thirteen years old and continued almost daily until she was seventeen years old. The daughter was completely dependent on her father for support and was afraid of him.

The defendant appealed his conviction on the ground that the prosecutrix's testimony had to be corroborated. The Court of Appeals of Maryland rejected this contention and affirmed the conviction, holding that the daughter was a victim and not an accomplice; therefore, her testimony was not required to be corroborated. The defendant urged that the prosecuting witness was an accomplice and that he could not be convicted on her testimony alone. His argument was that initially she may have been the victim of his odious actions, but that during the ensuing four-year period there came a time when she acquiesced and therefore became an accomplice. *Lusby v. Maryland*, 141 A.2d 893 (1958).

The court agreed that the question of whether a participant in an incestuous relationship is an accomplice or a victim must depend upon the facts. In this case, however, there was sufficient evidence that, although the daughter had *assented* to the sexual union with her father, she *had not consented* to it. The evidence points out that the incestuous relationship was odious to her. She was afraid of

her father and her dependence on him compelled her to live with him. Furthermore, the brunt of proving that the witness is an accomplice is upon the party alleging it. The defendant had not met this burden.

False Answers On Voir Dire Are Grounds for Reversal—The defendant was charged with unlawfully accepting a bet on a horse race. During the *voir dire* examination of the jury, the defense counsel posed the question whether any of the jury would be prejudiced by the nature of a bookmaking case. All of the jurors answered in the negative. Thereupon, these jurors found the defendant guilty. The defendant appealed, charging misconduct of a juror. Upon affidavits of the jurors, it was determined that the foreman of the jury had told the others that he could explain all about bookmaking to them. He stated that he knew a great deal about things such as bookmaking, for he had in fact lost his house to a bookmaker. Thereafter, this juror spent approximately fifteen minutes explaining to the other jurors the use of a scratch sheet, how bets were made, and about various means of gambling. The Court of Appeals of California held that this was misconduct of the juror and that since the case had been a close one the conviction must be reversed. *People v. Castaldia*, 328 P.2d 1016 (Calif. App. 1958).

The court stated that the conduct of the juror in giving false answers to the question put to him on the *voir dire* constituted misconduct or irregularity sufficient to warrant a new trial. Of course, the granting of a new trial depended upon the case itself. On a consideration of the entire record, the court could not say that in the absence of the misconduct a different verdict would have been improbable. Consequently, the misconduct constituted a miscarriage of justice.

Comment By Judge As To Punishment Held Proper—The defendant was convicted of murder in the first degree for the violent rape and murder of a young girl. After all the evidence had been presented at the trial, the judge commented on it. Before beginning his comments, the judge pointed out to the jurors that they were free to reject anything which did not coincide with their views and that they were the judges of the evidence. Furthermore, it was up to them to decide what was to be

done with the defendant so far as any penalty was concerned. The judge's comments indicated in a general way his view that the penalty should be death. He particularized his reasons for this view, saying that in his opinion the defendant showed no remorse and that the defendant had not fully disclosed details of the crime which were known to him nor had he answered important questions on cross-examination. The defendant claimed that the judge's statements were outside the bounds of proper judicial comment. The Supreme Court of California affirmed the conviction, holding that the judge's comments relating to the penalty involved were properly within the court's power to "make such comment on the evidence and the testimony as in its opinion is necessary for the determination of the case." Three judges dissented. *People v. Friend*, 327 P.2d 97 (Calif. 1958).

The majority stated that the extent to which a judge is free to comment on the evidence is shown by the fact that it has frequently been recognized that a judge may express his opinion as to the guilt or innocence of a defendant. "There is no justification," states the majority opinion, "for holding that a judge has a lesser right to comment on the evidence where punishment is involved than where matters relating to guilt are in issue. The same principles should be applied in determining whether the power has been properly exercised." In any event, the judge's warning to the jury prior to making his comments sufficiently protected the defendant's rights.

Contrary to the majority's position, the dissenters believe there is a clear distinction between judicial comment on matters of punishment as opposed to matters of guilt. The dissent states, "There is justification—indeed not only justification but necessity, if we are to abide by the law previously enunciated—for holding that a judge has a lesser right to comment on the evidence where punishment is involved than where matters relating to guilt are in issue". They believe the difference is an obvious one. Guilt must *depend on evidence and only on evidence*, and the judge may comment on evidence; hence, he may indicate an opinion as to the fact which depends on evidence. However, where punishment (as in a first degree murder case) is involved, the solution of the penalty need not depend in any degree whatsoever on the evidence and, under the legislative plan, must always include exercise of an absolute and unfettered dis-

cretion. This discretion belongs to the jury alone, according to the minority opinion.

Indigent Prisoner Must Allege Specific Error To Get Free Transcript—This was a petition for a writ of error to review convictions of incest, statutory rape, and commission of unnatural acts. Petitioner moved that he be furnished a free transcript of the evidence at his trial. He alleged in his motion that he was an indigent person and that without a copy of the transcript he could not effectively present his argument upon his writ of error. The Supreme Court of Massachusetts denied his petition, holding that adequate appellate review by a writ of error did not require that the petitioner be furnished a free transcript of evidence in the absence of a showing of reasonable need for the transcript. *Guerin v. Massachusetts*, 149 N.E.2d 220 (Mass. 1958).

The petitioner rested his argument upon *Griffin v. Illinois*, 351 U.S. 12 (1956), which he contended requires the state to provide him with a transcript "as a matter of due process." The court rejected this argument, noting that in the *Griffin* case the state of Illinois had considered that a transcript was needed for adequate appellate review. Furthermore, the Supreme Court in *Griffin* left open the possibility that a state may have other means of affording adequate and effective appellate review to indigent defendants.

In Massachusetts, a transcript of the testimony in the trial of proceedings is not required to secure adequate appellate review. For example, a bystander's bill of exceptions, the trial judge's notes, or other methods of reporting may be used. The petitioner did not use these other methods, but instead chose to wait three years until they were not available and then sought a writ of error. Furthermore, his petition only made vague and sweeping suggestions of violations of rights under the United States Constitution and the Massachusetts Constitution. Thus, the court thought that there should be something more than such a broad general charge wholly lacking in specification before the state must provide a free transcript for the prosecution of a writ of error.

Information Gained From Income Tax Returns May Be Basis For Peremptory Challenges To Jurors—The defendant was convicted of willful