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Evidence - Admissions against Interest - Implicating Confession of One Co-Conspiration in a Joint Trial

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have been adopted upon the theory that prosecutions should not be allowed to ferment endlessly in files of the government to explode only after witnesses and proofs necessary to the protection of the accused have by sheer lapse of time passed beyond availability.[12]

The decision in the instant case rests upon the interpretation of a criminal statute, and the rules of statutory construction should be followed. The New Jersey Supreme Court has come to a conclusion that is contra to the weight of authority and the better legal reasoning. The better view is that statutes of limitations in criminal cases must be liberally construed in favor of the defendant,[13] and against the state.[14] Had the legislature intended to exclude second degree murder from the statute of limitations they would have so provided. The court was not justified in implying the legislature's intent.

RICHARD A. RAHLFS.

EVIDENCE — ADMISSIONS AGAINST INTEREST — IMPLICATING CONFESSION OF ONE CO-CONSPIRATOR IN A JOINT TRIAL. — The United States District Court in a joint trial convicted petitioner and four co-defendants of violating a federal statute by conspiring to deal unlawfully in alcohol.[1] At the close of the prosecution's case the trial court admitted the confession of a co-defendant, made after the termination of the alleged conspiracy and without deleting references to the petitioner.[2] The jury was instructed to consider the confession only in determining the guilt of the confessor. The petitioner did not request a separate trial but moved to exclude the co-defendant's confession contending it was prejudicial error against him. The United States Supreme Court, four Justices dissenting, *held* that a restricted admission of a post conspiracy confession by one co-conspirator which implicated petitioner did not constitute reversible error. *Paoli v. United States,* 77 S.Ct. 294 (1957).

The decision in the instant case is supported by the weight of

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Alliance of Theater State Employees and Moving Picture Mach. Operators of U. S. and Canada, 55 Cal. App.2d 357, 130 P.2d 788 (1942).

12. United States v. Eliopoulos, 45 F. Supp. 777 (D. N. J. 1942).

13. State v. Colvin, 284 Mo. 195, 223 S.W. 585 (1920); Jacox v. State, 154 Neb. 416, 48 N.W.2d 390 (1951); State v. Patriarca, 71 R. I. 151, 43 A.2d 54 (1945).

14. State v. Brenner, 132 N.J.L. 607, 41 A.2d 532 (Ct. Err. & App. 1945); State v. Patriarca, 71 R. I. 151, 43 A.2d 54 (1945).

1. 62 Stat. 701 (1948), 18 U. S. C. § 371 (1952).

2. Once the conspiracy is over the acts or confessions of a conspirator are admissable only against the confessor and are inadmissable hearsay as to the other defendants. Krulewitch v. United States, 336 U. S. 440 (1949); Fiswick v. United States, 329 U. S. 211 (1946); Logan v. United States, 144 U. S. 263 (1891).

authority in Federal Courts in holding that the prejudicial effect of a co-defendant's confession can be cured by proper instructions.[3] In the absence of a motion for a separate trial,[4] there seems to be no practical way of reaching a just result without admitting the confession. The injury to the defendant is outweighed by the added difficulties of enforcement if the confession is left out entirely.[5] Thus while the courts have often recognized the possibility of prejudice in such cases,[6] they have adhered to the basic premise of our jury system, namely, the ability of the jury to follow instructions and correctly separate, weigh, and determine the credibility of the facts.[7]

The dissenting Justices in the principal case question the fairness of the holding and point out that admitting a co-conspirator's confession into evidence, despite instructions to the jury, does not achieve the desired results and that too often such implicating statements cannot be wiped from the minds of the jurors.[8] This view is supported by an increasing number of legal writers and judges.[9] The dissenters feel that when a conspirator's statement is so damning to another against whom it is inadmissable, the trial court's discretion in granting a separate trial should not be binding upon the appellate court.[10] They suggest that the trial judge must either refuse to admit the statement or, sever the trial of the other defendants.[11] Several states have tried to remedy this situation by relaxing

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3. See, *e. g.*, Cwach v. United States, 212 F.2d 520 (8th Cir. 1954).

4. Such a motion would probably be denied anyway. See Hall v. United States, 168 F.2d 161, 163 (D. C. Cir. 1948) ("The mere fact that admissions made by one defendant which are not evidence against others is not conclusive grounds for ordering parties to be tried separately."); United States v. Glasser, 116 F.2d 690, 701 (7th Cir. 1940) (No separate trial will be granted merely because an unfavorable atmosphere might be created by the presence on the trial of codefendant.).

5. See People v. Buckminster, 274 Ill. 435, 113 N.E. 713 (1916) (dictum).

6. See Krulewitch v. United States, 336 U. S. 440 (1949); Blumenthal v. United States, 332 U. S. 539 (1947); United States v. Gottfried, 165 F.2d 360 (2nd Cir. 1948) (Certiorari denied 68 S. Ct. 738 [1948]).

7. Opper v. United States, 348 U. S. 84, 95 (1954) ("To say that the jury might have been confused amounts to nothing more than unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict.").

8. United States v. Paoli, 77 S.Ct. 294, 304 (1957) (dissent).

9. See Krulewitch v. United States, 336 U. S. 440, 453 (1949) ("The naive assumption that prejudicial evidence can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. See Skidmore v. Baltimore & Ohio R. Co., 167 F.2d 54 [2nd Cir.]"); Hale v. United States, 25 F.2d 430, 438 (5th Cir. 1928) (". . . [I]t is inconcievable that the impression made upon the minds of the jurors could have been removed by the formal remarks of the court."); Lutwak v. United States, 344 U. S. 604, 623 (1922) ("But one of the additional leverages obtained by the prosecution through proceeding as for conspiracy . . . is that it may get into evidence against one defendant acts or omissions which color the case against all."); Osborn, *The Mind of the Juror* (1937).

10. See United States v. Paoli, 77 S. Ct. 294, 303 (1957) (dissent). That the trial court's discretion is binding, see Krause v. United States, 147 Fed. 442 (8th Cir. 1926); North Dakota v. Whitman, 79 N.W.2d 528 (N. D. 1956).

11. United States v. Paoli, 229 F.2d 319, 324 (2nd. Cir. 1956) (dissent). It would seem that a contrary result would merely substitute the appellate court's discretion in place of the trial court's. See also Rex. v. Martin, 9 Ont. L. Rep. 218, 4 Ann. Cases 912

(1905) which suggests the prosecution must say if it intends to use the confession so the prisoners can be tried separately.

the requirements for the granting of a separate trial.[12] When one considers that the courts do not assume all errors are prejudicial, but regard the whole record in determining the substantial correctness of the decision,[13] the majority opinion reaches a just result in admitting the confession and taking the chance of possible prejudice toward the defendant. In fact, the admission seems to further the search for truth.[14]

WILLIAM F. LINDELL.

FEDERAL RULES OF CIVIL PROCEDURE — REMOVAL OF ACTIONS — FAILURE TO FILE COPIES OF REMOVAL PETITION IN STATE COURT.— Plaintiff commenced action in state court by service of summons.[1] Defendant filed a removal petition and bond in Federal Court, gave notice to the plaintiff and brought copies of the removal petition to the state court where they were not filed because plaintiff had not yet filed her action.[2] Defendant impleaded third-party defendant who after expiration of the time for removal moved to quash the third-party complaint and to remand the action to the state court on the ground that the removal statute[3] was not complied

12. Suarez v. State, 95 Fla. 42, 115 So. 519 (1928); People v. Feolo, 282 N.Y. 276, 26 N.E.2d 256 (1940); Flamme v. State, 171 Wis. 501, 177 N.W. 596 (1920); 1 Burn's Indiana Ann. St. § 2300 (1926) (". . . [A]ny defendant requiring it, before the jury is sworn must be tried separately. See also People v. Buckminster, 274 Ill. 436, 113 N.E. 713 (1916) (Which held that the admission of the part of the codefendant's confession which implicated defendant was error despite instruction to the jury to disregard the implications.).

13. 28 U.S.C. § 391 (1946); See Lutwak v. United States, 344 U.S. 604, 619 (1952) ("A defendant is entitled to a fair trial but not a perfect one.").

14. As Judge Learned Hand stated the problem, "In effect, however, the rule probably furthers, rather than impedes, the search for truth, and this perhaps excuses the device which satisfies form while it violates substance." Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

1. See N. D. Rev. Code § 28-0501 (1943) "Civil actions in the courts of this state shall be commenced by service of a summons."; see also Coman v. Williams, 78 N. D. 560, 50 N.W.2d 494, 498 (1952) (dictum) (the court obtains jurisdiction at service of the summons). The state court must have jurisdiction before the federal court can acquire jurisdiction on removal. See Weeks v. The Fidelity and Casualty Company of N. Y., 218 F.2d 503, (5th Cir. 1955).

2. See N. D. Rev. Code § 28-0511 (1943) (requiring the summons and the several pleadings in a civil action to be filed with the court within ten days after service thereof); see also Crum, *Proposed North Dakota Rules of Civil Procedure,* 32 N. Dak L. Rev. 88, 98-99 (1956) (that the state court may have jurisdiction of the action without a record of the case); see also Schaff v. Kennelly, 61 N.W.2d 538, 543 (N.D. 1953) (dictum) (". . . filing is not a condition precedent to the acquisition of jurisdiction . . .").

3. 62 Stat. 939 (1948), as amended, 28 U.S.C.A. § 1446 (1949) ("Procedure for Removal, (a) File verified petition in federal court, (b) within 20 days of commencement of action in state court, (c) post bond in Federal court and (d) promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State Court, which shall effect the removal and the State Court shall proceed no further unless and until the case is remanded.") Formerly, removal was initiated by filing the petition in state court, and copies of the petition in Federal Court. See 36 Stat. 1095 (1911), 28 U.S.C. § 72 (1946). See also Rule 81, Fed. Rules of Civ. Proc., making