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Failure to Exploit Evidence Tending to Discredit Witness - Grounds for Reversal?

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Appellant's conviction of murder in the first degree was based primarily upon the testimony of his co-defendant who was adjudicated insane subsequent to trial. Moving for a new trial on the ground of newly discovered evidence, appellant contended that the inability of the jury to consider his co-defendant's long history of mental illness (and subsequent adjudication of insanity) in reaching their verdict had constituted prejudicial error. The Court of Appeals reversed the order denying the motion and *held* that, in view of the gravity of the offense involved and in the interests of justice, the jury was required to consider the mental condition of the material witness on the issue of his credibility. *People v. Rensing*, 14 N.Y.2nd 210, 199 N.E.2d 489, 250 N.Y.S.2d 401 (1964).

For more than one hundred years the courts have recognized that a witness suffering from mental illness is not absolutely barred from testifying in both criminal[1] and civil[2] cases. Such testimony is deemed admissible if the judge finds that the witness has sufficient intelligence to accurately relate the events in question.[3] Indeed, the capacity of an adult to act as a witness is presumed.[4] Upon motion of either the prosecution or the defense, however, the question of a witness' mental capacity to testify may be put in issue[5] and decided by the court as a matter of law.[6] The trial court's finding is not subject to reversal except where an abuse of discretion is shown.[7] Even when the question of a witness' capacity to testify is not put in issue by counsel, evidence of the witness' mental condition is admissible on the issue of credibility so that the jury may consider what weight is to be given to the witness' testimony.[8] It is quite possible that a jury's determination would be affected by its knowledge of the witness' actual state of mind.[9] Since the jurors are the sole judges of a witness' credibility,[10] information which will assist them in rendering a correct decision should properly be developed by the trial counsel. This includes the burden of conducting the cross-examination and marshalling the evidence which will serve as the basis for the attack on the credibility of the witness.[11]

In *People v. Salemi*,[12] the quality of the trial counsel's tactics, including the art of cross-examination, was an important factor in the final determination of the case. Counsel for the defendant had moved for a new trial on the grounds of newly discovered

[1] Regina v. Hill, 2 Den. 254, 169 Eng. Rep. 495 (Cr. Cas. 1851).

[2] Rivara v. Ghio, 3 E.D. Smith 264 (N.Y.C.P. 1854).

[3] District of Columbia v. Armes, 107 U.S. 519 (1882).

[4] Aguilar v. State, 279 App. Div. 103, 108 N.Y.S. 2d 456 (3d Dep't 1951); 2 WIGMORE, EVIDENCE § 497 (3d ed. 1940).

[5] See, *e.g.*, Wright v. United States, 250 F.2d 4 (D.C. Cir. 1957).

[6] 2 WIGMORE, EVIDENCE §§ 487, 497 (3d ed. 1940).

[7] Henderson v. United States, 218 F.2d 14 (6th Cir. 1955).

[8] Barker v. Washburn, 200 N.Y. 280, 93 N.E. 958 (1910); Note, *The Mentally Abnormal: Challenges to His Competency and Credibility*, 13 RUTGERS L. REV. 330 (1958).

[9] 4 JONES, COMMENTARIES ON EVIDENCE § 723 (1914); see generally People v. Savvides, 1 N.Y. 2d 554, 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956).

[10] Wright v. Southern Exp. Co., 80 Fed. 85 (W.D. Tenn. 1897); People v. Peller, 291 N.Y. 438, 52 N.E.2d 939 (1943).

[11] State v. Downs, 50 La. Ann. 694, 23 So. 456 (1898).

[12] 309 N.Y. 208, 128 N.E.2d 377 (1955).

evidence, claiming that the state's star witness who had positively identified the defendant as the felon was discovered to be mentally incompetent subsequent to defendant's conviction. The court denied the motion for a new trial on the ground that defense counsel had adequately apprised the jury of the witness' mental instability, although the actual finding of insanity occurred after trial. The court deemed the defense counsel's reference to the witness' attempt to commit suicide by banging his head against the cell bars as sufficient notice to the jury of the witness' mental state. In addition, the defense counsel's summation repeatedly referred to the witness as "the man that purposely banged his head against the bars."[13] The court reasoned that the "newly discovered evidence" of actual insanity did not present the issue of credibility in a new light and "was not new matter at all, but had been before the court and jury. . . ."[14] Judge Fuld's dissent in *Salemi* was based on the premise that the jury had not had sufficient evidence before it as to the witness' mental state. Since the witness was found insane after trial, Judge Fuld concluded that the jury never really had an opportunity to hear and weigh the evidence sufficiently in order to convict.

> My view is simply that the original jury, or another, could reasonably and conscientiously have reached a verdict contrary to the one that was reported, on the basis of the matter recently uncovered and not adducible by the defense at the time of the original trial.[15]

The instant case, however, presented a fact pattern sufficiently different from that in *Salemi,* so as to render the latter case not controlling. Here the witness' mental condition was not put in issue during the trial and though some evidence was presented to the effect that the witness had suffered a brain injury and had spent some time in private sanitariums,[16] the jury was not directly apprised of the witness' mental condition at the time of trial.[17] In *Salemi,* however, the trial counsel's repeated references to the witness' attempt at suicide immediately prior to trial was deemed sufficient to directly apprise the jury of the witness' mental condition at the time he had testified.

Thus, in *Rensing,* the majority reasoned that the subsequent adjudication of the witness' actual insanity constituted "newly discovered evidence" which should properly be submitted for the jury's consideration in reaching their verdict.[18] This reasoning was supported by additional circumstances. Defendant had repudiated his confession and the only evidence which pointed to defendant's guilt other than the witness' testimony was defendant's possession of the murder weapon. In this setting the witness' testimony assumed monumental impor-

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[13] *Id.* at 212, 128 N.E.2d at 379.

[14] *Ibid.* See also People v. Priori, 164 N.Y. 459, 58 N.E. 668 (1900); *cf.* Markert v. Long Island R.R., 175 App. Div. 467, 161 N.Y. Supp. 926 (1st Dep't 1916).

[15] People v. Salemi, 309 N.Y. 208, 227-28, 128 N.E.2d 377, 389 (1955) (dissenting opinion).

[16] People v. Rensing, 14 N.Y.2d 210, 215, 199 N.E.2d 489, 492, 250 N.Y.S.2d 401, 405 (1964) (dissenting opinion).

[17] Indeed, the trial court remarked during the argument of the new trial application that the material witness' demeanor in the courtroom and on the witness stand furnished no basis for inferring that there was something mentally wrong with him. *Id.* at 212, 199 N.E.2d at 490, 250 N.Y.S.2d at 403.

[18] In *Salemi,* the subsequent finding of the witness' insanity did not constitute "newly discovered evidence" since such a finding was regarded as merely cumulative and would not have changed the jury's verdict. The jury had sufficient notice of the witness' mental instability at trial.

tance. The majority could not, in retrospect, determine how the jury would have reacted with knowledge of the actual mental condition of the material witness. Accordingly, the majority declared the necessity for a new trial in the interests of justice.

The majority, however, failed to scrutinize the defense counsel's trial tactics in the instant case. It might have been found, for example, that counsel did not exploit to the fullest extent the evidence that had been presented to the jury. The evidence revealed that the witness had sustained a brain injury many years previous to trial and had been institutionalized on several occasions. Counsel, however, did not even attempt to discredit the witness' testimony on cross-examination. When defendant's counsel sought to have the witness' mother testify as to the witness' mental incompetency and the trial court refused to allow such testimony, defendant's counsel was reminded by the court that he could produce medical testimony on that issue. Defendant's counsel, however, did not proceed further, thereby impeding the jury's full consideration of the witness' credibility. The apparent incongruity which arises from a comparison of the instant case with *Salemi* is that defendant is here benefited by his counsel's failure to sufficiently question the credibility of the material witness. In *Salemi,* on the other hand, the defense counsel's astute attack on the material witness' credibility subsequently precluded defendant from obtaining a new trial.

The majority in the principal case does not appear to have sufficiently inquired into whether the defense counsel's failure to directly question the mental competency of the witness was due to strategy or inadvertance. By leaving this question open, the majority's decision is implied authority for the view that a counsel's conduct, at least in cases where the death penalty is invoked, will not affect the rights of his client in obtaining a new trial where the material witness is subsequently found to be insane.[19] With this in mind, counsel for a defendant may purposely withhold an attack on a material witness' mental condition in order to reserve a ground whereby a new trial might be obtained. A diligent counsel, however, who proceeds to question a material witness' mental condition risks the possibility that a subsequent adjudication of insanity will not be considered "newly discovered evidence" but rather "merely cumulative" evidence. Instead, the majority focused upon the impairment of a jury's consideration of a witness' credibility in reaching its verdict. If the material witness was insane at the time of trial his reasoning process may have been impaired.[20] Since it is not feasible to determine a witness' mental competence from his mere composure at trial,[21] the jury's awareness of his inability would be requisite to a fair and impartial trial.[22]

The dissent in the instant case rejected the majority's view on the ground that a new trial should not be granted simply

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[19] It should be noted that we are not dealing with a situation wherein the defense counsel has been grossly negligent in defending his client. In such a case, a new trial would be required on the grounds of due process.

[20] Doctors, who had examined the co-defendant when he first was admitted to an institution, discovered that he was a paranoid. A paranoid suffers from perverted and illogical ways of thinking "upon matters even apart from those outwardly connected with the delusions." GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 367 (1925).

[21] See note 17, *supra.*

[22] *Cf.* People v. Buchalter, 289 N.Y. 181, 45 N.E.2d 225 (1942); People v. Becker, 210 N.Y. 274, 104 N.E. 396 (1914).

because one defense attorney pursues different trial tactics than another.[23] Judge Burke would not distinguish the instant case from *Salemi,* since defense counsel here had sufficient opportunity to introduce medical testimony as to the witness' condition. In addition, counsel could have attacked the witness' credibility, as the defense counsel had done in *Salemi,* by cross-examination. The jury would then be apprised, in greater detail, of the evidence that was before it.[24] Consequently, Judge Burke reasoned that the witness' testimony was merely cumulative and the jury's verdict would not be different at a new trial.[25]

The decision in the instant case reiterates the well-settled rule that the jury must be allowed to determine the credibility of witnesses.[26] With regard to whether a new trial should be granted, the decision adheres to the general rule that the court has to determine what effect the omitted evidence would have had upon the final determination of the case.[27] Difficulty is encountered when, as in the case at bar, the attorney presents pertinent information to the jury at the trial but does not take advantage of it by utilizing fully the ordinary methods of attacking a witness' credibility. Does the attorney's duty to inform the jury of evidence which might have a direct bearing on the witness' credibility rest solely with the attorney? Must the court perform this duty if counsel fails to do so? Would it be reversible error if neither the trial court nor the attorney had sufficiently presented to the jury fully developed evidence that bears upon a witness' credibility?

It would appear that a defense counsel's failure to attack the credibility of a material witness by not developing the issue of mental competence, does not thereby preclude the judge himself from informing the jury that mental incompetence has bearing on a witness' credibility. The trial judge generally has the right to question the witness in a reasonable and impartial manner in order to elicit pertinent facts.[28] In so doing, however, he should refrain from indicating his doubt as to the credibility of the witness. A judicial attempt to discover or present additional evidence to the jury might well result in the judge's disparagement of the witness. Thus, the guarantee of judicial indifference with respect to all witnesses testifying would be lost.[29] Since the court does not have the requisite machinery for discovering sources of information not presented by the parties which will have a bearing on the witness' capacity and credibility, it would be well to rely on the zeal and self-interest of the parties and their lawyers to evoke all information which is necessary for a fair and proper verdict. If the attorney fails in this endeavor, the court may refuse to grant a

[23] *Accord,* Hendrickson v. State, 233 Ind. 241, 118 N.E.2d 493 (1954).

[24] *Cf.* United States v. Duhart, 269 F.2d 113 (2d Cir. 1959); People v. Lee, 4 App. Div. 2d 770, 165 N.Y.S.2d 338 (2d Dep't 1957), *aff'd,* 4 N.Y.2d 843, 150 N.E.2d 241, 173 N.Y.S.2d 815 (1958).

[25] People v. Hovey, 30 Hun 354, 1 N.Y. Crim. 324 (Sup. Ct.), *aff'd,* 93 N.Y. 651, 1 N.Y. Crim. 477 (1883).

[26] United States v. Hiss, 88 F. Supp. 559 (S.D. N.Y. 1950), *cert. denied,* 340 U.S. 948 (1951).

[27] See 5 JONES, COMMENTARIES ON EVIDENCE § 815 (1914).

[28] *Ibid.*

[29] "In the interest of fairness, the trial judge should refrain from examining witnesses unless it becomes necessary for clear understanding of an issue involved." ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 2027 (1957).

new trial.[30] Courts also recognize, however, that there is a level below which the actions of the attorney cannot fall or the due process requirement will be violated.[31]

Upon a defendant's conviction, the defense counsel might well be expected to attempt to secure a new trial. However, the state cannot be expected to provide a forum when mere bad judgment of counsel, or a failure of trial tactics, has resulted in the defendant's evidence on the main trial not being adequately introduced or exploited.[32]

If the Court in the instant case had allowed a new trial merely because the defense counsel had not diligently established the mental incompetence of a material witness, other attorneys might follow suit. By obtaining a new trial as a result of a subsequent finding of the witness' insanity, the defense counsel's position will invariably be enhanced at the expense of a successful prosecution. At the new trial the prosecutor's case will have already been exposed and the defense attorney would receive the ultimate benefit resulting from his failure to perform effectively at the first trial. Substantial justice can be best achieved when the lawyer performs his moral, if not legal, obligation by utilizing his best learning, ability and skill in his duties toward his clients.[33] In this regard, all the available evidence and issues must be presented to the jury. It appears that this was not done in the present case and it is quite possible that the Court granted a new trial because of the counsel's inadvertence. While the Court distinguished the *Salemi* case from the instant decision, it failed to clarify the incongruous result that a diligent defense precludes a new trial, while a non-enthusiastic defense justifies a new trial. Also to be clarified is the question of whether a new trial would have been granted if the trial court had informed the jury of the material witness' mental condition when counsel failed to do so sufficiently.

[30] Tompsett v. State, 146 F.2d 95 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945).
[31] See, *e.g.*, United States v. Handy, 203 F.2d 407 (3d Cir. 1953).
[32] *Cf.* Giaramita v. Flow Master Mach. Corp., 234 N.Y.S.2d 817 (Sup. Ct. 1962).
[33] See A.B.A. CANONS OF PROFESSIONAL ETHICS, Canon 15; WARVELLE, ESSAYS IN LEGAL ETHICS § 247 (2d ed. 1920).

Religious Belief Held Irrelevant in Child-Custody Case

Although she attended a church, the appellant-wife in a child-custody case considered herself an agnostic, since she had some doubt as to the existence of a deity. The trial court found both parties able parents, but awarded custody to the husband, principally on the ground that a home in which a firm faith in a deity is expressed is preferable to one in which doubt, skepticism, or agnosticism is professed. The Supreme Court of Wisconsin reversed, *holding* that a religious belief is not a relevant consideration in awarding child custody unless that belief is inimical to the welfare of the child. *Welker v. Welker*, 129 N.W.2d 134 (Wis. Sup. Ct. 1964).

At common law the father had a paramount right to the custody of his minor