Declaration Against Penal Interest Held Inadmissable Against Defendant in Criminal Action

Ralph J. Libsohn

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation
Available at: https://scholarship.law.stjohns.edu/lawreview/vol52/iss4/12

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.
ment made by the employee in the payee’s name is effective. Thus, if a bank pays on such an instrument it is not liable in conversion since the employer is made to bear the risk of loss. In Underpinning, the employee did not merely indorse the instrument in the payee’s name; rather, he restrictively indorsed it. This event, although sufficient in the court’s view to give the drawer a cause of action against the depositary bank, should not alter the legal result obtaining from the imposter rule. Since section 3-405 was drafted with the object of imposing risk of loss upon the drawer, the Underpinning result is inconsistent with the intent of the drafters of the Code.

Bruce A. Antonelli

DEVELOPMENTS IN NEW YORK PRACTICE

Declaration against penal interest held inadmissible against defendant in criminal action

In People v. Brown, the Court of Appeals expanded the declaration against interest exception to include a declaration against penal interest offered by a defendant in a criminal case. The

---

201 N.Y.U.C.C. § 3-405 (McKinney 1964); see notes 174-75 supra.
202 N.Y.U.C.C. § 3-405 (McKinney 1964). An argument might be made, however, that even where the imposter rule applies, if a bank acts contrary to reasonable commercial practices and pays inconsistently with the terms of a restrictive indorsement, the drawer should be allowed to assert such negligence and shift the loss to the payor bank. Under §§ 3-406 and 4-406, if both the bank and its customer are shown to have been negligent with respect to instruments which have been altered or signed without authorization, the resulting loss is borne by the bank. N.Y.U.C.C. §§ 3-406, 4-406 (McKinney 1964); see White & Summers, supra note 173, at 548-49.
205 It had been the settled rule in New York that the declaration against interest exception only included declarations against one’s pecuniary or proprietary interest. See, e.g., Kittredge v. Grannis, 244 N.Y. 168, 175-76, 155 N.E. 88, 90 (1926); Ellwanger v. Whitefold, 15 App. Div. 2d 898, 898-99, 225 N.Y.S.2d 734, 735 (1st Dep’t 1962) (per curiam), aff’d mem., 12 N.Y.2d 1037, 190 N.E.2d 24, 239 N.Y.S.2d 680 (1963). See generally W. Richardson, Evidence §§ 255-266 (10th ed. J. Prince 1973); see also People v. Sullivan, 43 App. Div. 2d 55, 349 N.Y.S.2d 702 (1st Dep’t 1973) (per curiam). Professor Wigmore persuasively urged American courts to “discard this barbarous doctrine [precluding the admission of declarations against penal interest], which would refuse to let an innocent accused vindicate himself even by producing to the tribunal a perfectly authenticated written confession, made on the very gallows, by the true culprit now beyond the reach of justice . . . .” 5 J. Wigmore, Evidence § 1477, at 290 (3d ed. 1940).

In the Brown case, the defendant was on trial for murder and asserted that he had killed the victim in self-defense. 26 N.Y.2d at 90, 257 N.E.2d at 16, 308 N.Y.S.2d at 826. Although
Brown Court did not indicate, however, whether a declaration against penal interest could be used by the prosecution as part of its affirmative case. Since one requirement established by Brown is that the declarant be unavailable for examination at trial, the admission of such testimony would appear to conflict with the constitutional right of a defendant in a criminal case to cross-examine adverse witnesses. Recently, in People v. Cepeda, the Appellate Division, First Department, held that the sixth amendment right of confrontation precludes use by the prosecution of a declaration against penal interest made by an unapprehended co-felon for pur-
poses of inculpating a defendant in a criminal case.\textsuperscript{210}

Ramon Cepeda was convicted in Supreme Court, Bronx County, for his participation in a homicide.\textsuperscript{211} At the trial, a prosecution witness testified that shortly after the crime occurred, and in the company of the defendant, an unapprehended accomplice had stated: "[W]e just shot a colored guy."\textsuperscript{212} On appeal, the prosecution argued that the statement was a declaration against penal interest and, under \textit{Brown}, was properly admitted against the defendant for its truth.\textsuperscript{213} The first department, however, rejected this argument, finding that \textit{Brown} only sanctioned the admission of a declaration against penal interest on behalf of a criminal defendant.\textsuperscript{214} The court reasoned that had the declarant been on trial with the defendant and refused to testify, the admission of the testimony in unredacted form would have been an impermissible infringement of the defendant's right of confrontation.\textsuperscript{215} Positing that a defendant's right of confrontation does not depend on whether his co-felon is being jointly tried, the court held that the admission of the testimony was error.\textsuperscript{216}

\textsuperscript{210} Id. at 963, 403 N.Y.S.2d at 249.
\textsuperscript{211} Id. at 962-63, 403 N.Y.S.2d at 249.
\textsuperscript{212} Id. at 963, 403 N.Y.S.2d at 249.
\textsuperscript{213} Id.
\textsuperscript{214} Id.; see note 205 \textit{supra}. The memorandum opinion expressed the views of Justices Evans, Lynch, Sander and Sullivan. Presiding Justice Silverman concurred in the result only.
\textsuperscript{215} 61 App. Div. 2d at 963, 403 N.Y.S.2d at 249. The \textit{Cepeda} majority felt that \textit{Bruton} v. United States, 391 U.S. 123 (1968), barred the introduction of a declaration against penal interest uttered by a co-felon. 61 App. Div. 2d at 963, 403 N.Y.S.2d at 249. \textit{Bruton} involved the joint trial of Evans and Bruton for postal robbery. 391 U.S. at 124. At trial, a postal inspector recounted an oral confession allegedly made by Evans, incriminating himself as well as Bruton. \textit{Id.} The trial judge instructed the jury that Evans' confession was inadmissible against Bruton and should be disregarded in determining his guilt or innocence. \textit{Id.} at 125. Both Bruton and Evans were convicted and appealed. \textit{Id.} at 124 n.1. The eighth circuit suppressed Evans' confession and reversed his conviction on the basis of Westover v. United States, decided with \textit{Miranda} v. Arizona, 384 U.S. 436 (1966). 391 U.S. at 124 n.1. Bruton's conviction was affirmed, however, on the basis of \textit{Delli Paoli} v. United States, 352 U.S. 232, 241-43 (1957), wherein it was held that where a codefendant's testimony is inadmissible against the defendant but is used for other purposes at trial, limiting instructions by the trial judge sufficiently protect the defendant's rights. On appeal to the Supreme Court, the government urged that Bruton's conviction be reversed "in the interests of justice," and urged that \textit{Delli Paoli} be left intact. 391 U.S. at 125-26. Instead, the \textit{Bruton} Court, in reversing the conviction, overruled \textit{Delli Paoli}. The Court held that the admission of the codefendant's confession violated the defendant's right of confrontation because of the substantial risk that despite limiting instructions the jury might consider this evidence against the defendant. \textit{Id.} The \textit{Bruton} Court emphasized that the hearsay implicating the defendant was inadmissible and did not fit within a recognized hearsay exception. \textit{Id.} at 128 n.3. Dean Prince has restated the \textit{Bruton} rule as follows: "A confession by one defendant, who does not testify, that implicates his co-defendant is . . . not admissible on a joint trial, unless the implicating references can effectively be deleted." \textit{Richardson}, \textit{supra} note 205, \S\ 233, at 207.
\textsuperscript{216} 61 App. Div. 2d at 963, 403 N.Y.S.2d at 249. The court sustained Cepeda's conviction,
Presiding Justice Silverman disagreed with the majority and urged that *Brown* be given a broad construction to encompass incriminating declarations. Justice Silverman argued that the confrontation clause does not preclude the introduction of otherwise admissible hearsay against a defendant in a criminal action.
While the *Cepeda* court correctly recognized that nothing in *Brown* suggests that declarations against penal interest testimony should be admitted to incriminate, its interpretation of the confrontation clause appears overbroad. Generally, defendants are entitled to confront the declarant of hearsay as well as the witness. Occasionally, however, the trier of fact has been permitted to consider incriminating hearsay of great probative value where the declarant is unavailable for cross-examination. While the Supreme Court has not spoken with clarity on the relationship between hearsay rules of evidence and the right of confrontation, the distinction between the two should not be blurred. If the prosecution can show a high level of reliability, justifying the admission of a declaration against penal interest as an exception to the hearsay rule, it is submitted that a defendant's right of confrontation may be satisfied by cross-examination of the witness alone. Only when the intro-

---

Judge Cooke acknowledged this in concluding that the testimony's admission at trial "would not be precluded by the confrontation clause . . . ." *Id.* (Cooke, J., concurring). Justice Silverman noted that the Supreme Court, in *Dutton v. Evans*, 400 U.S. 74 (1970), had found that the right of confrontation was not violated by the admission of an extrajudicial statement by an accomplice which fit within a statutory hearsay exception. 61 App. Div. 2d at 964, 403 N.Y.S.2d at 250 (Silverman, J.P., concurring).  


In *Pointer v. Texas*, 380 U.S. 400 (1965), the Court noted that the admission of certain types of hearsay is not prohibited by the confrontation clause. *Id.* at 407; see, e.g., *Delaney v. United States*, 263 U.S. 586, 590 (1924) (statements of deceased co-conspirator); *Mattox v. United States*, 156 U.S. 237, 243-44 (1895) (former testimony); *Mattox v. United States*, 146 U.S. 140, 151 (1892) (dying declarations). *See also* *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934); *People v. Corey*, 157 N.Y. 332, 347-48, 51 N.E. 1024, 1028-29 (1898).  

As the Supreme Court noted in *California v. Green*, 399 U.S. 149 (1970), the confrontation clause is not a codification of hearsay rules as they existed at common law. *Id.* at 155. Various forms of hearsay may be deemed admissible, while others are held to violate the sixth amendment. *Id.* at 155-56.  

Indicia of reliability are entirely lacking, for example, if the declaration is made to a police officer after arrest. *See* *Dutton v. Evans*, 400 U.S. 74, 81 (1970) (Harlan, J., concurring); *People v. Coble*, 65 Cal. App. 3d 187, 192, 135 Cal. Rptr. 199, 202 (1976); *People v. Shipe*, 49 Cal. App. 3d 343, 353, 122 Cal. Rptr. 701, 708 (1975).  

*See*, e.g., *Dutton v. Evans*, 400 U.S. 74, 89 (1970). The *Dutton* Court was faced with a challenge to the Georgia statutory co-conspirator exception to the hearsay rule. *Id.* at 78. The statute provided that declarations made after the culmination of the charged conspiracy were admissible as evidence-in-chief against all co-conspirators on the theory that there existed a continuing conspiracy to conceal the crime charged. *Id.* The fifth circuit had reversed Evans' conviction on the ground that the introduction of post-conspiracy declarations made by Evans' codefendant violated the strictures of *Bruton v. United States*, 391 U.S. 123 (1968); see 400 F.2d at 827. *See also* *Fiswick v. United States*, 329 U.S. 211, 217 (1946). The *Dutton* Court, in a plurality opinion, upheld the statutory scheme. 400 U.S. at 87-88 (Stewart, J.) (Chief Justice Burger and Justices White and Blackmun joined in the judgment); see note 224 *infra*. Justice Harlan, concurring in the result, stated that a sixth amendment analysis was inappropriate. 400 U.S. at 96-97 (Harlan, J., concurring). Justice Harlan felt that the rules of evidence would be better weighed against a due process standard of fairness. *Id.* at
duction of such evidence is unfairly prejudicial should the trial courts exercise their discretion and exclude it.

The confrontation clause has long been held not to bar the introduction of reliable hearsay.224 Since the Brown court determined that under the rules of evidence declaration against penal interest testimony is sufficiently reliable so as to permit its use by a defendant, there appears to be no constitutional bar to permitting its use by the prosecution.

Ralph J. Libsohn

Press held accountable in punitive damages for trespass

The first amendment’s prohibition on abridging the freedom of the press225 is grounded in the belief that a free society needs an

97 (Harlan, J., concurring). Justice Marshall, joined by Justices Black, Douglas and Brennan, dissented. Id. at 100 (Marshall, J., dissenting). Justice Marshall believed that “[a]bsent the opportunity for cross-examination [of the declarant], testimony about [an] incriminating and implicating statement allegedly made by [an accomplice] is constitutionally inadmissible. . . .” Id. at 103 (Marshall, J., dissenting). Justice Marshall cited Bruton v. United States, 391 U.S. 123 (1968), as controlling. 400 U.S. at 103. Bruton, however, concerned use of inadmissible hearsay against the defendant which did not fall within any recognized hearsay exception. 61 App. Div. 2d at 963, 403 N.Y.S.2d at 250 (Silverman, J.P., concurring); see note 215 supra. It appears, therefore, that Bruton is distinguishable from both Dutton and Cepeda.

The statutory rule at issue in Dutton contrasts with New York law which holds that although admissions by a co-conspirator in furtherance of conspiracy are admissible against all co-conspirators, admissions made after the culmination of the common plan are admissible only against the declarant. Richardson, supra note 205, § 244, at 214-15. See also Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378 (1972).

224 See note 220 supra. This is the teaching of Dutton v. Evans, 400 U.S. 74 (1970), wherein the Court held that indicia of reliability were required for the introduction of incriminating hearsay testimony. Id. at 88-89. The Court noted that such indicia are present if: (1) the declarant’s personal knowledge of the facts contained in the declaration is “abundantly established”; (2) there is little possibility that the statement is the product of a faulty recollection; (3) the circumstances indicate that the declarant has not misrepresented the involvement of the defendant; and (4) the statement appears spontaneous and against the penal interest of the declarant. Id. Whether the statement in Dutton was against the declarant’s penal interest is questionable. Evans’ codefendant made the declaration at issue upon his return to prison after his arraignment on a murder charge. Id. at 77. He was asked by a fellow inmate; “‘How did you make out in court?’” Id. The declarant responded: “‘If it hadn’t been for that dirty son-of-a-bitch Alex Evans, we wouldn’t be in this now.’” Id. The self-incriminating aspect of this statement is unclear, as it appears likely that the declarant was attempting to shift the blame to Evans. One commentator has questioned the precedential value of Dutton in light of its plurality opinion. See Younger, Confrontation and Hearsay: A Look Backward, A Peek Forward, 1 Hofstra L. Rev. 32 (1973).

225 The first amendment of the Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” U.S. Const. amend. I. The freedoms of the first amendment are protected from state action through the