St. John's Law Review

Volume 15
Number 1 *Volume 15, November 1940, Number 1*

Article 3

Separate Prosecutions of Co-Defendants for Fair Trial

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NOTES AND COMMENT

SEPARATE PROSECUTIONS OF CO-DEFENDANTS FOR FAIR TRIAL

I

In 1926, the New York Code of Criminal Procedure underwent a number of changes designed to facilitate the prosecution of criminal cases.[1] One of the most important of these was an amendment to Section 391 of the Code, which now provides: "Defendants jointly indicted may be tried separately or jointly in the discretion of the court." [2] The original section, enacted in 1829, prior to the amendment, provided as follows: "When two or more defendants are jointly indicted for a felony, any defendant requiring it must be tried separately. In other cases, defendants jointly indicted may be tried separately or jointly in the discretion of the court." [3] The background of this generous statute is found in the early common law which gave inadequate protection to the rights of an accused when jointly tried with others.[4] Under special circumstances, however, the practice arose to permit a defendant to be tried separately.[5] The right of a prisoner in a joint trial to exercise his full number of peremptory challenges [6] and the small number of jurors returned at the assize were the reasons for the necessity to direct a separate trial when the prisoner refused to join in the challenges.[7] This is not to be construed as meaning that the prisoner could demand to have a severance as a matter of right. But it was believed that he was at least entitled to object to and exclude certain of his "neighbors" [8] who might be unduly prejudiced against his case.[9] The common law rule became well established that severance of the prosecution was entirely a discretionary matter.[10]

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[1] (1926) 26 COL. L. REV. 752; REPORT OF THE JOINT COMMITTEE ON THE COORDINATION OF CIVIL AND CRIMINAL PRACTICE ACTS (Leg. Doc. 84, N. Y. 1926) 21; O'Toole, *Artificial Presumptions in the Criminal Law* (1937) 11 ST. JOHN'S L. REV. 167.

[2] N. Y. CODE CRIM. PROC. § 391 (1926).

[3] REV. STAT. § 20, codified by the Laws of 1881, c. 504, § 391.

[4] United States v. Marchant, 12 Wheat. 480 (U. S. 1827); Rex v. Noble, 15 How. St. Tr. 731 (1713).

[5] See note 4, *supra*.

[6] 4 BL. COMM. *352, 353.

[7] See note 4, *supra*.

[8] See BOWMAN, HANDBOOK OF ELEMENTARY LAW (1929) 178.

[9] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (1927) 324 ("As early as the days of Bracton, it was recognized that upon an inquiry as to his guilt or innocence, the prisoner ought to be allowed to object to members of the jury on the ground that they were his personal enemies"); Note (1939) 14 ST. JOHN'S L. REV. 142.

[10] People v. Howell, 4 Johns. 296 (N. Y. 1809) (In all cases, at least where the right of peremptory challenge does not exist, and two persons are indicted jointly, they may be tried jointly or separately in the discretion of the court); People v. Vermilyea, 7 Cow. 369 (N. Y. 1827); Rex v. Noble, 15 How. St. Tr. 731 (1713).

In New York, for almost a century, any accused could avail himself of the protection afforded him by the legislature and could demand as a matter of right to be tried separately and apart from any of his co-defendants.[11] Not only did this statute assure him of his full number of peremptory challenges,[12] but it acted as a guarantee of a fair and impartial trial, free from the evils that result from mass indictments and its mesh of evidence. It is, therefore, with some seriousness and concern that we must view this amendment which has deprived him of so valuable a right. This concern mounts to a higher degree when we observe that within the fourteen years that this statute has been in operation, there have been distressingly few motions for severance granted.

II

The amended Section 391 of the Code was enacted to secure certain advantages to the prosecution, namely, to discourage the intimidation and inconvenience of witnesses, to cut down the number of necessary panels of jurymen, to eliminate some of the hardship in the preparation of a case for the state, to lessen the cost of prosecution for the taxpayer, and in general, to expedite justice.[13] But the expedition of justice is not necessarily justice, and the legislature and judiciary should not blind themselves to this very significant element of the democratic process, which for so long a time guaranteed the fairest trial that could be given an accused.[14]

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[11] See note 4, *supra;* People v. Williams, 19 Wend. 377 (N. Y. 1838) (before this statute the discretion existed in all cases where the right of peremptory challenge was not involved; the statute secures a right to a defendant indicted upon a charge of felony that did not exist before; that is, a separate trial where he is not entitled to a peremptory challenge).

[12] Peremptory challenges are regulated by statute. See N. Y. CODE CRIM. PROC. §§ 359, 372, 385, 386; see also Note (1939) 14 ST. JOHN'S L. REV. 142.

[13] REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON THE COORDINATION OF CIVIL AND CRIMINAL PRACTICE ACTS (Leg. Doc. No. 84, N. Y. 1926) 21; 1936 COL. L. REV. 1359; Hiscock, *Criminal Law and Procedure in New York* (1926) 26 COL. L. REV. 257.

[14] Tumey v. Ohio, 273 U. S. 510, 47 Sup. Ct. 437 (1927) (The defendant, according to the due process of law, is entitled to a fair and impartial tribunal inluding the jury); United States v. Mathews (C. C. S. D. N. Y. 1843) Fed. Cas. No. 15741b ("In a capital case and in favor of life, I am disposed to secure every protection to the prisoner against the influence of testimony not strictly applicable to him"); Lehman, J., dissenting in People v. Fisher, 249 N. Y. 419, 432, 164 N. E. 336, 341 (1928) ("We destroy the age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence by a legalistic formula, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high. Our ideal is that justice should be swift and certain. Human justice is still far from that ideal; and sometimes I feel that a proper zeal to destroy technicalities and achieve a more efficient administration of justice leads us to disregard fundamental principles and guaranties").

In the carrying out of this new legislative pattern for law enforcement, it was promptly settled that a defendant has no constitutional right to a peremptory challenge and that it is a matter resting solely with the legislature.[15] In other words, co-defendants must share only a proportionate number of the challenges that are permissible to a single defendant.

Where a trial judge has been extended discretionary powers, it is well established that his decision will not be reversed unless that discretion has been abused.[16] When a motion for severance has been made at the beginning of a trial, the court must decide whether or not the case as to any defendant can be weighed fairly by the jury.[17] Judge Lehman, in a dissenting opinion, aptly set forth these significant and thought-provoking remarks: "Upon a joint trial, the jury is called upon to decide the guilt of each accused. The jury hears the evidence produced against all. Evidence which is relevant as to the guilt of one accused may be irrelevant upon the guilt of a co-defendant. One defendant made admissions or confessions which are competent evidence against him. They are inadmissible against the other defendants. The jury must sift the evidence produced before it, and in arriving at its determination of the guilt of each defendant it may consider only the evidence which is competent and relevant against that particular defendant. We may assume that jurors will try to obey the instructions of the court and to give to each defendant a fair trial. The question will always remain whether they can do so in a particular case." [18]

What attitude has our Court of Appeals adopted toward the question of separate trials? In *People* v. *Feolo*,[19] the court, for the first time in the history of the statute, found an abuse of discretion on the part of a trial judge in denying motions made for severance. Three of the moving defendants were indicted with one other for murder in the first degree. Six years prior to the trial a speak-easy was held up and a police officer was killed. One Funicello, imprisoned for life as a fourth offender, motivated by wrath and a desire for vengeance, was given a hearing by the authorities at his request, the outcome of which was the trial of these defendants. The fourth defendant confessed, implicating the three moving defendants, and his confession coincided factually with the testimony of Funicello. But there was no other damaging evidence.

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[15] People v. Doran, 246 N. Y. 409, 159 N. E. 379 (1927); People v. Gaskill, 132 Misc. 318, 229 N. Y. Supp. 731 (1920); People v. Kassis, 145 Misc. 483, 259 N. Y. Supp. 339 (1931); N. Y. CODE CIV. PROC. § 360.

[16] People v. Ferris, 76 N. Y. 326 (1879); People v. Doran, 246 N. Y. 496, 159 N. E. 379 (1927); People v. Coffin, 7 Hun 608 (N. Y. 1876); Silverman v. Baruth, 42 App. Div. 21, 58 N. Y. Supp. 663 (1st Dept. 1899).

[17] People v. Fisher, 249 N. Y. 419, 164 N. E. 336 (1928) (the point at which discretion ends and severance becomes a duty is at times hard to fix).

[18] Lehman, J., dissenting, in People v. Fisher, 249 N. Y. 419, 428, 164 N. E. 336, 339 (1928).

[19] 282 N. Y. 278, 26 N. E. (2d) 257 (1940).

Before we can fully appreciate the reasoning which led to the decision of the court in the *Feolo* case, it may be best to examine the rulings of the court in three other related cases. It is also necessary to keep in mind that confessions may be used as evidence only against the confessor and cannot be binding upon another.[20] In *People* v. *Doran*,[21] both defendants confessed to the killing. Doran, at the trial, retracted his confession and sought to establish an alibi. Both defendants moved for separate trials, but both were denied. This was held not to constitute error. The mere fact that confessions had been made did not require the granting of separate trials.[22] That same year the case of *People* v. *Snyder* [23] presented the court with a similar issue. Here both defendants confessed. Snyder then retracted her confession and asked for a separate trial, claiming that Gray would attempt to exculpate himself by shifting the blame to the moving defendant. Her motion was denied, and in affirming the conviction, the Court of Appeals laid down a general test as to when the discretion of the trial judge should be exercised: "Will a separate trial impede or assist the proper administration of justice in a particular case and secure the accused the right of a fair trial? The decision of the trial court rendered before the trial is dictated by a reasonable anticipation based on the facts then disclosed. The decision of this court rendered upon a review of the trial itself rests upon the determination of whether the prophecy had been realized." [24] The court could find no possible injustice resulting to Mrs. Snyder from the presentation to the jury of Gray's confession. Although it accused her, and in spite of the fact that his testimony confirmed her own, the court was satisfied that her guilt was demonstrated by her own disclosures.[25]

In *People* v. *Fisher*,[26] two of the three defendants confessed their guilt implicating Fisher, the third accused, who denied his guilt. The confessions were then withdrawn. The trial judge denied motions for separate trials and the Court of Appeals affirmed, holding that if Fisher's conviction rested solely upon the confessions, it could not

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[20] Hogan v. United States, 268 Fed. 344 (C. C. A. 9th, 1920); United States v. Rockefeller, 222 Fed. 534, 536 (S. D. N. Y. 1915); People v. Kief, 126 N. Y. 661, 27 N. E. 358 (1891); People v. Doran, 246 N. Y. 409, 159 N. E. 379 (1927); People v. Malkin, 218 App. Div. 635, 219 N. Y. Supp. 5 (2d Dept. 1926).

[21] 246 N. Y. 409, 159 N. E. 379 (1927).

[22] *Id.* at 425, 159 N. E. at 385; Ball v. United States, 163 U. S. 662, 16 Sup. Ct. 1192 (1895).

[23] 246 N. Y. 491, 159 N. E. 408 (1927).

[24] *Id.* at 497, 159 N. E. at 410.

[25] People v. Snyder, 246 N. Y. 491, 498, 159 N. E. 408, 410 (1927) (The court said: "Possibility of injury to Snyder by presentation of Gray's confession which accused her, to the jury, though it might not be properly used as evidence against her, is not substantial when her own confession shows her guilt. Possibility of such injury disappears when Gray takes the stand at the trial and gives testimony of the very same facts which Mrs. Snyder claimed should not be disclosed to the jury").

[26] 249 N. Y. 419, 164 N. E. 336 (1928).

stand. The court was satisfied that even without the confession the result would be the same,[27] since the evidence independent of the confession was strong enough to warrant conviction.

Judge Lehman, with whom Judge Kellogg concurred, did not agree with the majority. He contended that the guilt or innocence of Fisher was based on disputed facts and circumstances which the jury was called upon to weigh independent of those confessions. Is it a certainty that they did so when those confessions and admissions had been considered by the jury to establish the truth and accuracy of the witnesses for the state? Judge Lehman doubted their ability to do so.[28]

To have a complete understanding of the fullest significance of these cases it is relevant to quote from another part of the *Fisher* case: "In a case, where without the existence of a confession by one defendant, the evidence against another would be too weak to justify a conviction or even where a conviction would be doubtful, our review of the judgment would compel us to conclude that an abuse of discretion had been committed. One who makes no confession must be found guilty, if at all, only on proof independent of a confession by a co-defendant." [29]

In both the *Doran* and *Snyder* cases it will be observed that the confessions were not directly pertinent to the guilt of the moving defendants, though it is hypocritical to maintain that the jury goes entirely uninfluenced by the confession of the co-defendant.[30] However, in the *Fisher* case, which seems to be on the borderline, the confessions played a decisive factor in arriving at the guilt of Fisher, inasmuch as they were used to establish the credibility and accuracy of testimony which led to conviction.

Therefore, in the final analysis, the *Feolo* decision gives reason to believe that the Court of Appeals has relented somewhat in its attitude toward the problem of dealing with confessions on joint trials. As in the *Fisher* case, the jury was permitted to consider the confession of a co-defendant in order to find substantiation for the very damaging

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[27] *Id.* at 426, 164 N. E. at 336 (The Court reasoned: "Varying circumstances bear upon the soundness of discretion to be exercised under Section 391, in refusing to grant motions for separate trials. The rule is not doubtful. We have expressed it in the *Doran* and *Snyder* cases. Its correct application must rest upon the facts in each case. Prospection by the trial judge is not final. A retrospective view by an appellate court may reveal injustice or impairment of substantial rights unseen at the beginning").

[28] People v. Fisher, 249 N. Y. 419, 431, 164 N. E. 339, 340 (1928) (dissenting opinion, *per* Lehman, J.) ("We may well assume that the jury understood that the confessions and admission might not be considered against Fisher, but when the confessions and admission had resulted in establishing the truth of the testimony given by Krassner and Stoller [witnesses for the state], could the jury then weigh the credibility of that testimony over again, ignoring the very testimony which had already substantiated it? Certainly jurors are not accustomed to weigh evidence in that manner and I confess that neither legal training nor long judicial experience has given me the ability to do so").

[29] People v. Fisher, 249 N. Y. 419, 427, 164 N. E. 336, 339 (1928).

[30] People v. Wargo, 149 Misc. 461, 462, 258 N. Y. Supp. 400, 401 (1933).

testimony of Funicello, a doubtful witness.[31] In both the *Fisher* and *Feolo* cases it seems quite uncertain that if the confession were entirely out of the evidentiary picture that the jury would, beyond all doubt, have reached the same conclusion.

In several instances, trial courts of this state granted motions for severance. In *People* v. *Wargo*,[32] there was a situation similar to that of the *Snyder* case, except for the fact that the moving defendant had not confessed. The motion was granted because of the antagonistic interests [33] of the two defendants, as the woman denied actual participation in the killing. In addition, her co-defendant confessed but she did not. We quote from the court's opinion: " * * * the possible and perhaps probable fact that without the improper effect upon a juror's mind of the confession of the man, a conviction could not be had of the woman * * * " [34]

The late case of *People* v. *Lashkowitz* [35] also illustrates how Section 391 may be applied. Where a substantial part of the evidence against the moving defendant consisted of no more than the confession of one accomplice and testimony of another accomplice as witness for the People, the case is of such a nature as possibly to "unconsciously result in an unfair trial to the one who had neither confessed nor become a witness for the prosecution, if they were all tried together." [36] Severance was properly granted.

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[31] There was also the question for the jury to decide whether or not Funicello was an accomplice, since his story of antecedent association with Feolo did not go wholly uncontradicted.

[32] 149 Misc. 461, 268 N. Y. Supp. 400 (1933).

[33] Antagonistic defenses calculated to prejudice one of several defendants jointly accused, will move the discretion of the court to grant that one a separate trial. United States v. Ball, 163 U. S. 672, 16 Sup. Ct. 1192 (1895); People v. Braune, 363 Ill. 551, 2 N. E. (2d) 839 (1936) (In view of the substantial hostility between the defendants, with each condemning the other, the judge could not have protected the defendants); for other grounds for severance, People v. Singer, N. Y. L. J., Dec. 29, 1937, p. 2295, col. 7 M and People v. Kleinman, N. Y. L. J., Mar. 14, 1939, p. 1256, col. 1 F (holding that since co-defendant's reputation was good as a lawyer and assistant district attorney, the court would grant a separate trial from other co-defendants whose records might result in prejudice to the moving defendant). See also Suarez v. State of Florida, 95 Fla. 42, 115 So. 519 (1928).

[34] People v. Wargo, 149 Misc. 461, 462, 268 N. Y. Supp. 400, 403 (1933) (Theoretically easy, it is practically difficult for any court to properly instruct a jury on these important phases of the case. Across that bridge lies the inability of any ordinary juror to grasp and obey such instructions; *citing* People v. Fisher, 249 N. Y. 419 at 425).

[35] 166 Misc. 640, 3 N. Y. S. (2d) 98 (1938).

[36] *Id.* at 640, 3 N. Y. S. (2d) at 102 (The judge defined an impartial jury as "one which is of that frame of mind at the beginning of the trial, one which is influenced during the trial only by legal and competent evidence produced during the trial against the defendant and which bases its verdict upon the evidence connecting that defendant with the commission of that crime"); U. S. CONST. Art. VI.

III

The duties of the trial judge involve great responsibilities.[37] He must constantly be alert to the introduction of evidence into the record which may be indiscreet as to the rights of any one of several defendants, and result in possible confusing and intermingling of issues in the minds of the jury.[38] Deliberate care must be exercised where there is a confession or admission that may possibly incriminate a co-defendant, when the rest of the evidence appears to be of a weak and highly speculative character. In recent years there have been numerous reversals of convictions actually based on that type of flimsy and unreliable evidence which, independent of a confession or uncorroborated testimony of an accomplice, was totally insufficient for the state to rest its case on.[39]

BERNARD STRASSBURG.

THE PRIVILEGE AGAINST SELF-INCRIMINATION AS AFFECTING PUBLIC OFFICERS AND ATTORNEYS

In General

"* * * No person shall be subject to be twice put in jeopardy for the same offense: nor shall he be compelled in any criminal case to be a witness against himself, providing that any public officer who upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall be removed from office by the appropriate au-

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[37] Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580 (1898); 12 REPORTS OF THE AMERICAN BAR ASSOCIATION 275.

[38] People v. Hooghkert, 96 N. Y. 149 (1884); People v. Dixon, 231 N. Y. 111, 131 N. E. 752 (1921); People v. Reddy, 261 N. Y. 479, 483, 185 N. E. 705, 706 (1933) ("Here there is a typical case of conflict between the public need of bringing to justice one against whom suspicion of guilt exists, and the undivided right of the suspect to be safeguarded within the law against the effect of tainted evidence").

[39] People v. Rutigliano, 261 N. Y. 103, 184 N. E. 689 (1933); People v. Dolce, 261 N. Y. 108, 184 N. E. 690 (1933) (The trial court held that a confession in the presence of his co-defendant who did not protest at the time was admissible against the latter. The Court of Appeals reversed on the ground that silence while under arrest was no admission of guilt); People v. Reddy, 261 N. Y. 479, 185 N. E. 705 (1933) (The court held it to constitute error on the part of the trial court to allow the case to go before a jury where all the evidence against the defendant was that he broke parole right after the crime. This was interpreted as flight. On the strength of that evidence and the uncorroborated testimony of an accomplice a jury found him guilty); People v. Pignataro, 263 N. Y. 229, 188 N. E. 720 (1934).