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SILENCE IN FACE OF INCRIMINATING STATEMENTS AS AN ADMISSION OF GUILT.

In a recent case, the question arose whether evidence of silence while under arrest when incriminating statements were made in his presence by a co-defendant, was admissible as an admission of the truth of such statements to establish such defendant's guilty participation in a conspiracy. The Court of Appeals,[1] reversing the Appellate Division,[2] held, that a person under arrest jointly with another person, is not called upon to contradict statements prejudicial to him, made in his presence by the other person in answer to inquiries made by an officer, and that such statements, though not contradicted by him, are not admissible in evidence against him.

The situation may arise where silence may spell out an admission. As a general proposition, where a statement is made in the presence of party under such circumstances that the party would ordinarily and naturally reply unless he admitted the truth of the statement, such statement together with the fact of his silence will be received in evidence as an admission of its truth.[3] This rule admitting such evidence, however, is applied with careful discrimination. Such evidence has been held to be most dangerous and should be received with great caution, and not admitted unless of statements or acts which naturally call for contradiction or unless it consists of some assertion with respect to his rights in which, by silence, the party plainly acquiesces. The circumstances must not only be such as to afford him an opportunity to speak or act, but such as would ordinarily and naturally call for some action or reply from persons similarly situated. If the case is a doubtful one as to whether a reply should have been made, the evidence should not be received.[4] In *People* v. *Kennedy*,[5] the Court stated:

> "There are circumstances under which the declaration of persons made in the presence of the accused are competent, but they should not be admitted unless the evidence clearly brings them within the rule. Declarations or statements made in the presence of a party are not received as evidence in themselves, but for the purpose of ascertaining the reply of the party to be affected makes to them."

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[1] People v. Dolce, 261 N. Y. 108, 184 N. E. 690 (1933).

[2] 236 App, Div. 574, 260 N. Y. Supp. 32 (1st Dept. 1932).

[3] Commonwealth v. Kenney, 12 Metc. (Mass.) 235, 46 Am. Dec. 572 (1847); RICHARDSON, EVIDENCE (4th ed.) §363; see also Wallace v. Wallace, 216 N. Y. 28, 109 N. E. 872 (1915); Cohen v. Toole, 184 App. Div. 70, 171 N. Y. Supp. 577 (1st Dept. 1918).

[4] People v. Koerner, 154 N. Y. 355, 48 N. E. 730 (1897); People v. Kennedy, 164 N. Y. 449, 58 N. E. 652 (1900); People v. Smith, 172 N. Y. 210, 64 N. E. 814 (1902).

[5] *Ibid.*

In the case of *People* v. *Cascone*,[6] the Court restated the principles laid down in *People* v. *Kennedy* and *People* v. *Smith*,[7] and held that evidence of silence in the face of accusatory statements were inadmissible and could constitute no admission against one where he was accused in a language he did not understand and he did not know he was being accused. In *People* v. *Willett*[8] upon a trial of an indictment for murder, the Court received evidence to the effect that upon the coroner's inquest, a witness had pointed out the defendant and had made accusatory statements concerning him, which the defendant did not deny. Upon appeal, it was held that this evidence was improperly received, holding that since the proceedings were of a judicial character, the defendant was not bound to speak, and evidence of silence was therefore inadmissible. The Court stated: "The doctrine as to silence being taken as an implied admission of the truth of allegations spoken or uttered in the presence of a person, does not apply to silence at a judicial proceeding or hearing." In *People* v. *Conrow*[9] it was held that it was error to admit evidence of silence of the accused where he refused to answer by advice of counsel, the Court holding that under such circumstances, the defendant was under no duty to speak. *People* v. *Koerner*[10] raised the question as to the admissibility of evidence of a conversation had between the doctor and a police officer in the presence of the defendant while he was apparently unconscious, in which he was charged with "shamming." The Court held that such evidence was inadmissible, irrespective of the question of whether or not the defendant was in fact unconscious at the time. Martin, *J.*, laid down the following test:

> "A more serious difficulty, however, arises, when we consider whether even if the defendant understood what the witness said, there was any presumption of acquiescence to be drawn from his silence. Were the circumstances such as not only afforded the defendant an opportunity to act or speak, but were they also such as would properly and naturally call for some action or reply from persons similarly situated? If not, then clearly, the evidence was improper. The statement of the witness was to the effect that the defendant was feigning unconsciousness. Under the circumstances, was a reply to that statement naturally to be expected? If he was unconscious, none could have been made. If he was not, but was feigning unconsciousness, naturally neither he nor any other person similarly situated would have replied. It is impossible upon any theory to justify this ruling. We think it was error."

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[6] 185 N. Y. 317, 78 N. E. 287 (1906).
[7] *Supra* note 4.
[8] 92 N. Y. 29 (1883).
[9] 200 N. Y. 356, 93 N. E. 943 (1911).
[10] *Supra* note 4.

In the light of the above test, the following question presents itself: whether the fact that the accused is under arrest at the time the statements are made is such a circumstance as will take the case out of the general rule. Is it such a circumstance as will relieve the defendant of the duty to deny the accusations made in his presence? In the present case, the Appellate Division in affirming the ruling admitting the evidence relied entirely upon the case of *Kelley* v. *People*.[11] In the latter case, the Court held that evidence of silence of the accused after arrest, in face of charges, was admissible, broadly laying down the rule that: "It is no objection to the admission of the declarations of the accused, as evidence, that they are made while he is under arrest, and his admission either express or implied, of the truth of a statement made by others under the same circumstances is equally admissible. His conduct and acts, as well when in custody, as when at large, may be given in evidence against him and their cogency as evidence will be determined by the jury." [12] In its later decisions, there is seen the gradual tendency of the Court of Appeals to break away from this holding. Opposed to the *Kelley* case, we have *People* v. *Smith*[13] and *People* v. *Marendi*.[14] In the former, the Court in discussing the admissibility of such evidence after arrest, said: "Moreover, he was at the time under arrest and in the custody of an officer and might well have been silent without it being regarded as an acquiescence to any act proved to have been performed," the Court citing *Commonwealth* v. *McDermott*[15] as authority for the proposition. Following the *Smith* case, the Court in *People* v. *Marendi* said: "Even if he had stood mute his silence could not have been construed as an admission because he was then under arrest and not called upon to speak or deny an accusation."

In *People* v. *Rutigliano*,[16] decided simultaneously with the present case, Pound, *Ch. J.*, writing for a unanimous court, approved the rulings in the *Smith* and *Marendi* cases and flatly rejected the holding of the *Kelley* case and adopted the dicta of these later cases: "To avoid confusion, we must take it that New York has adopted the Massachusetts rule. * * * It is a wise rule. * * * No cautious person when in custody, accused of crime, would care to enter into a discussion of his guilt or innocence with his captors and co-

[11] 55 N. Y. 565 (1874). A consideration of the cases cited by Allen, *J.*, in the Kelley case reveals that none are authority for the proposition that evidence of mere silence under such circumstances is admissible. In each case, the accused either testified, confessed, or denied his guilt. There was in each instance an affirmative act by the accused. 1 GREENLEAF, EVIDENCE (15th ed.) 275; see also dissenting opinion of Jenks, *P.J.*, in People v. Cascia, 191 App. Div. 376, 181 N. Y. Supp. 855 (2d Dept. 1920).

[12] See also People v. Cascia, *ibid.*, where the Court felt bound to follow the holding of the Kelley case.

[13] *Supra* note 4.

[14] 213 N. Y. 600, 107 N. E. 1058 (1915).

[15] 123 Mass. 440, 25 Am. Rep. 120 (1877).

[16] 261 N. Y. 103, 184 N. E. 689 (1933).

defendants when what he said may be used against him." This holding, however, is merely dicta, the judgment of conviction being affirmed on the ground that subsequent confessions were sufficient to sustain the conviction. In the present case, the Court, in reversing the Appellate Division, adopted the principle it stated in the *Rutigliano* case and a reversal was had on that ground.

Whether this latter decision has in effect overruled the *Kelley* case, as it purports to do, may indeed be questioned. It is submitted that the rules laid down in the *Rutigliano* and in the present case are too broad and unnecessary for the decision of the question therein involved. The *Rutigliano* case is admittedly dicta. As to the present case, it should be noted that the accusatory statements which the defendant left unanswered were not made by a victim of the accused or by a police officer as is usually the situation in cases where this question has been raised. The accused remained silent to statements made by an alleged co-conspirator. What then is the effect of this added circumstance? Independently of the question of whether silence constituted an admission, the question is raised whether the statements of the accused's co-defendant are binding upon him at all and therefore admissible.

Having been made after arrest they were, of course, made after the common design of the parties was either accomplished or abandoned. In such instances, the rule is that acts, confessions and declarations of a conspirator are admissible and binding upon his fellow conspirator only when made during the conduct of the conspiracy. The theory of the law is that in the course of a conspiracy, each act made or done by a conspirator is in furtherance of the purpose of the conspiracy and therefore admissible against all members of the conspiracy. But where the admissions of one conspirator are made after this common design has been abandoned, they are inadmissible since they were not made in furtherance of this common object and do not constitute part of the *res gestae*.[17] Or if it be claimed that there was no previous evidence of a conspiracy and such incriminating statements of the co-defendant tended to involve the defendant and connect him with the conspiracy, such evidence is inadmissible, the rule being that the declarations of an alleged conspirator cannot be received for the purpose of proving the conspiracy.[18] Viewed from either angle, the incriminating statements made by the co-defendant were inadmissible since they were not binding upon this defendant.

It is thus seen that the evidence in the present case was inadmissible because of the fact that the statements were made by an alleged co-conspirator. It was entirely unnecessary for the Court to base its decision on the broad ground that the evidence was inad-

[17] RICHARDSON, EVIDENCE (4th ed.) *supra* note 3, §383; People v. Davis, 56 N. Y. 95 (1874); Garnsey v. Rhodes, 138 N. Y. 461, 34 N. E. 199 (1893); People v. Storrs, 207 N. Y. 147, 100 N. E. 730 (1912).

[18] Cuyler v. McCartney, 40 N. Y. 221 (1869); Lent v. Shear, 160 N. Y. 462, 55 N. E. 2 (1899).

missible because the resulting silence occurred after arrest. It is therefore this writer's opinion that the rule laid down in the present case, like that of the *Rutigliano* case, is only dicta.

It is, however, well considered dicta, and is in accordance with the inevitable trend of the decisions of the courts of this state in gradually rejecting the rule of the *Kelley* case,[19] and adopting the Massachusetts rule.[20]

There is a wide divergence of judicial opinion among the various states as to the effect of the accused being under arrest at the time the accusation is made. In some jurisdictions it is held that the mere fact of arrest alone is not sufficient to render the evidence inadmissible, but that such fact deserves consideration only as one of the circumstances under which the accusation was made, in determining whether the accused was afforded an opportunity to deny and whether he was naturally called upon to do so.[21] In other states, it is held that the fact of arrest alone is sufficient to render inadmissible the fact of the accused's failure to deny the accusatory statements made in his presence and hearing. These cases maintain that it is the common knowledge and belief of men in general that silence while under arrest is most conducive to the welfare of an accused whether he be guilty or innocent.[22]

This state is drifting towards what we believe to be the more logical rule. As stated above, such evidence is cautiously guarded and the slightest circumstances have been seized upon as ground for excluding such evidence. Where there is the least restraint upon the accused, the evidence has been held inadmissible. It is submitted that the fact that the accused was under arrest at the time is such a circumstance. Such implied admission of truth can result only when the circumstances are such as afford an opportunity to speak and would naturally call for some reply from a person similarly situated. After arrest, the accused has the undoubted right to remain silent as to the crime and should not be called upon to reply or contradict such statement.[23] Without an opportunity to

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[19] *Supra* note 11.

[20] People v. McDermott, *supra* note 15.

[21] People v. Amaya, 134 Cal. 531, 66 Pac. 794 (1901); State v. Booker, 68 W. Va. 8, 69 S. E. 295 (1910); People v. Courtney, 178 Mich. 137, 144 N. W. 568 (1913); Simmon v. State, 7 Ala. App. 107, 61 So. 466 (1913); State v. Won, 76 Mont. 509, 248 Pac. 201 (1926); Rierson v. Commonwealth, 229 Ky. 584, 17 S. W. (2d) 697 (1929). But see Hayden v. Comm., 140 Ky. 634, 131 S. W. 521 (1910); State v. Porter, 200 N. C. 142, 156 S. E. 783 (1931).

[22] People v. McDermott, *supra* note 15; State v. Diskin, 34 La. Ann. 919, 44 Am. Rep. 448 (1882); State v. Epstein, 25 R. I. 131, 55 Atl. 204 (1903); O'Hearn v. State, 79 Neb. 513, 113 N. W. 130 (1907); Vaughan v. State, 7 Okla. Crim. Rep. 685, 127 Pac. 264 (1911); Johnson v. State, 151 Ga. 21, 105 S. E. 603 (1921); State v. Ferrone, 97 Conn. 258, 116 Atl. 336 (1922); State v. Hester, 137 S. C. 145, 134 S. E. 885 (1926).

[23] State v. Diskin, *ibid.*

consult counsel, beset by fears and ignorant as to the proper course to pursue, can it be denied that the most natural thing for the accused to do under such circumstances is to keep silent?

RUBIN BARON.

A FORWARD STEP IN LABOR REGULATION.

At the start of the present year Justice Cotillo in Special Term of the New York County Supreme Court named three receivers to manage the affairs of Local 306 of the Motion Picture Operators' Union of Greater New York. This appointment came about as the result of charges of mismanagement of the Local by its parent organization, which was in control of the local by virtue of the lawful exercise of the right of suspension of local officers in an emergency.[1] The board was appointed by the court for a twofold purpose: "(1) To have custody of the funds of the union and to control its expenditures, with full recognition of its financial obligations to the superior union, and (2) to supervise the rights of individual members in their relation to the union and in the preservation of their contractual rights." [2]

This decision will be welcomed by those who regret the attitude of laissez-faire which has been adopted by the New York courts dealing with certain problems of labor.[3] The essential idea of laissez-faire consists in setting aside all interference (in theory at least) of government and all artificial control of groups within the state. It is not within the scope of this note to probe deeply into the fallacies of this principle. We think the present world-wide depression coming at the end of a period of rugged individualism is an adequate indictment. The author is in accord with the principles of that great Christian teacher Leo XIII,[4] that:

> "Laws, institutions, and administration must aim at public well-being as well as private property rights. A just freedom of action is only valid as long as the common good is secured and no injustice entailed. *Whenever the general interest of any particular class suffers, or is threatened with*

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[1] Kaplan v. Elliot, 145 Misc. 863, 261 N. Y. Supp. 112 (1932).

[2] These purposes were laid down in an opinion, denying a motion for reargument of the appointment, Kaplan v. Elliot, N. Y. L. J., January 5, 1933, at 57. The original order is reported in Kaplan v. Elliot, N. Y. L. J., December 28, 1932, at 3015.

[3] Exchange Bakery v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927); Stillwell v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932); Note (1932) 7 ST. JOHN'S L. REV. 68.

[4] LEO XIII, ENCYCLICAL ON THE CONDITION OF THE WORKING CLASSES (1892).