

Crimes--Admissability of Evidence to Show Professional Criminality (People v. Zackowitz, 254 N.Y. 192 (1930))

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not be affected by the manner in which the parties treat it.² Plaintiff, therefore, could not rely on section 67 of the Personal Property Law³ to overcome the conditional vendor's reservation of title, since, by the judicial classification already referred to, gas ranges when attached to the realty in the usual manner do not become a "part thereof." In order for the plaintiff to succeed, the doctrine of the Cohen case⁴ was necessarily invoked. There a mortgagee whose mortgage contained a personalty clause covering all chattels used in connection with the mortgaged premises, was held to be a purchaser in good faith within the statute,⁵ and as such prevailed over the conditional vendor whose bill of sale, though prior in time to the mortgage, had not been filed. In the instant case, the Court concluded that the transaction consisted of a purchase of the chattels, as independent of the realty, in the reduction of the purchase price because of the failure of the builder to install certain specified fixtures. This was held to be an indication that a definite portion of the purchase money was given as payment for the furnishings necessary to finish the house according to contract. The installation of gas ranges was clearly contemplated by the phrase "in a fashion similar to buildings of the same type in said location," and hence plaintiff was a purchaser in good faith for value without notice and as such comes within the protection of the statute⁶ and must prevail over the conditional seller whose bill of sale was not filed.

J. V. M.

CRIMES—ADMISSIBILITY OF EVIDENCE TO SHOW PROFESSIONAL CRIMINALITY.—The indictment charged the defendant with the crime of murder in the first degree. The deceased and three other men were at work repairing an automobile on the street and defendant's wife claimed that one of them had insulted her. Defendant was enraged and threatened "to bump them all off." After arming himself with a pistol at his apartment, he returned to the scene, where words and blows were followed by a shot which killed the deceased. Defendant then threw the pistol in the river. In a confession, he sought to justify the homicide by saying he had been threatened by the deceased with a monkey-wrench. Upon the trial, the prosecution was permitted to prove that at the time of the homicide and arrest defendant possessed other weapons which were received in evidence. No claim was made that any of them had been used by the defendant. Cross-examination brought out the fact that the defendant had no

² McRea v. Central National Bank of Troy, 66 N. Y. 469 (1876).

³ Laws of 1922, ch. 642, art. 2.

⁴ Cohen v. 1165 Fulton Avenue Corp., 251 N. Y. 24, 166 N. E. 792 (1929); (1929) 4 St. John's L. Rev. 131.

⁵ N. Y. Personal Property Law, sec. 65.

⁶ *Supra* Note 5.

license to carry a pistol. On appeal from a judgment of conviction, *Held*, reversed and new trial ordered. The admission of proof of possession of other weapons for the purpose of showing a murderous disposition constituted error which was not cured because cross-examination disclosed defendant had no license for a pistol. The jury should have been instructed that possession of the weapons had significance only insofar as possession without a license had a tendency to cast a shadow on defendant's character, and so to impair the faith to be given to his word. *People v. Zackowitz*, 254 N. Y. 192, 172 N. E. 466 (1930).

In the dissenting opinion of Pound, *J.*, in which Crane and Hubbs, *JJ.*, concur, it is urged that the proof elicited was part of the history of the case, having a distinct relation to and bearing upon the facts connected with the killing. The fact that possession of the weapons constituted another distinct crime did not render the evidence inadmissible. Moreover, since the defendant had in his confession, which was received without objection, admitted owning the weapons at the time of the killing, the evidence which corroborated the confession on that point was also admissible as they both related to the crime charged in the indictment.

When the defendant in a criminal case takes the stand in his own behalf, he occupies a double position; as a defendant, his character cannot initially be attacked by the prosecution; as a witness, it can be.¹ In introducing circumstantial evidence as bearing upon the character of a defendant, the important inquiry is whether it is relevant. If it is irrelevant, it does not come in at all; if relevant, it may nevertheless be excluded because of undue prejudice.² The reason for the rule is found in the tendency of human nature to punish not because a victim is guilty but because he is a bad man and may well be condemned now that he is caught.³ Resort may not be had to past acts of a defendant for the purpose of fastening guilt upon him but to evidence character, design, motive or some other quality, and through that quality to infer that it led to the act charged.⁴ On the other hand, evidence of the murderous propensity of the victim of the homicide is admissible when the issue is self-defense, the defendant being confined to proof of general reputation.⁵ In the instant case, the evidence which was sought to be barred had the tendency to withdraw and mislead the attention of the jury from the real issue under inquiry and subjected the accused to charges connected with that issue against which he had no reason to prepare.⁶ Proof of the purchase of a weapon in contemplation of a crime is

¹ 1 Wigmore, Evidence, sec. 61.

² *Id.*, secs. 42, 55.

³ *Id.*, sec. 57.

⁴ *Id.*, sec. 192; *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286 (1901).

⁵ *People v. Druse*, 103 N. Y. 655, 8 N. E. 733 (1886); *People v. Rodawald*, 177 N. Y. 408, 70 N. E. 1 (1904); *supra* Note 1 at secs. 63, 246.

⁶ *People v. Richardson*, 222 N. Y. 103, 109, 110, 118 N. E. 514 (1917); *People v. Sharp*, 107 N. Y. 427, 461, 14 N. E. 319 (1887).

competent as tending to show preparation and thus bearing upon premeditation and guilt.⁷ The defendant, by offering himself as a witness, subjected himself to interrogation as to any vicious or criminal act of his life for the purpose of impeaching his character and credibility as a witness.⁸ Where his credibility is assailed by compelling him upon cross-examination to give testimony which, although competent for the purpose of impeachment, is collateral to the main issue, the prosecution, at whose instance the collateral evidence was elicited, is bound thereby and has no right to contradict it.⁹ It is then the province and duty of the trial court to clearly state the limitations of the scope of such evidence and the application to be observed by counsel and jury.¹⁰

In the circumstances of this case, the dissenting opinion questions whether the evidence, even if technically objectionable, so influenced the jury against the defendant that justice requires a new trial, and expresses the view that whether the defendant had one weapon or a dozen would not materially change the nature of his offense. As pointed out by the prevailing opinion, however, it is essential, in order to assure to a defendant a fair trial, that well-established principles regulating the orderly procedure of trial be observed, for the question of whether a guilty man goes free or not in a criminal prosecution is a small matter compared with the maintenance of those principles which safeguard a person accused of a crime.

R. L.

CRIMES—MURDER—WHETHER A CONFESSION IS VOLUNTARY IS A QUESTION OF LAW.—Defendant was convicted of murder in the first degree. Prosecution relied on defendant's confession to establish his guilt. The defense was an alibi and convincing evidence was offered to show that the confession was entirely involuntary and extracted by means of threats and severe physical violence. This evidence was only partially denied and wholly uncontroverted. The question on appeal was whether, where the weight of the evidence is that the confession is involuntary, the jury should be left to determine whether the confession was voluntary. *Held*, reversed. *People v. Barbarto*, 254 N. Y. 170, 172 N. E. 458 (1930).

The practice of forcing confessions from defendants in criminal actions, or the commonly-called "third degree" has been a well-

⁷ *People v. Scott*, 153 N. Y. 40, 46 N. E. 1028 (1897); *supra* Note 1 at sec. 238.

⁸ *People v. Hinksman*, 192 N. Y. 421, 85 N. E. 676 (1908); *People v. Webster*, 139 N. Y. 73, 34 N. E. 730 (1893).

⁹ *Stokes v. People*, 53 N. Y. 164, 176, 13 Am. Rep. 492 (1873); *People v. De Garmo*, 179 N. Y. 130, 134, 71 N. E. 736 (1904).

¹⁰ *People v. Webster*, *supra* Note 8.