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Criminal Law and Procedure—Part Possession Of Stolen Goods As Proof Of Theft Of Whole

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interrogation is stressed in further support of the substantial nature of the error. Chief Judge Desmond, speaking for the court, insists that the result of the error is as much of a "fraud" on the court as if the testimony had been deliberately used by the prosecution. The general rule of "perjured testimony knowingly used" has proven to be inadequate to prevent this "fraud" on the court; therefore the scope of coram nobis is expanded in this instance to remedy the violation.

Until the instant case the "rule" of "fraudulent testimony knowingly used" has remained categorical. There has been practically no straying from its confines. This may merely reflect a lack of a proper fact situation. Nonetheless, the majority opinion conspicuously lacks authority favorable to its position. The minority, on the other hand, has considerable support for a strict application of the "rule." For all its myriad of authority, however, it appears that the minority has disregarded the one crucial point relied upon by Chief Judge Desmond in the majority opinion: the prime object of coram nobis is the remedy of violations of due process where no other remedy is available, and consequently, the prevention of a fraud upon the court.[23] It seems quite illogical to consider that the injury to the defendant would have been any greater in the instant case if the prosecution had knowingly used the erroneous testimony, rather than mistakenly used the same. Yet that is the distinction that the minority wishes to make between a proper and an improper ground for the use of coram nobis. There may possibly be considerable danger in expanding the scope of coram nobis as is indicated by the minority. But there is a distinction between expanding the writ into areas of statutory remedies, such as a motion for new trial, and the expansion to encompass a deprivation of due process which lacks a sufficient remedy. Coram nobis has always been adaptable enough for the latter purpose.[24] Judge Dye's dissent also emphasizes the insubstantial nature of the error. This, however, is a question only a jury could adequately answer, and a coram nobis proceeding provides the defendant with the only chance of obtaining that answer.[25] The instant case may well be interpreted as a considerable magnification of the scope of coram nobis, yet within the case itself the purpose and the spirit of the writ of error coram nobis are unimpaired.

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PART POSSESSION OF STOLEN GOODS AS PROOF OF THEFT OF WHOLE

On December 4, 1958, a stolen typewriter and radio were pawned in Brooklyn with the defendant's name signed to the pledge cards. The complain-

23. See People v. Sadness, 300 N.Y. 69, 89 N.E.2d 188 (1949).
24. See People v. Hairston, 10 N.Y.2d 92, 176 N.E.2d 90, 217 N.Y.S.2d 77 (1961).
25. The New York Code of Criminal Procedure § 466 states that a motion for new trial based on newly discovered evidence must be made within one year after judgment of conviction, except in a case of capital punishment, where it may be made at any time until actual execution. All other motions for new trial must be made before judgment. This statute of limitations emphasizes the importance of the writ of error coram nobis.

ing witness testified that upon her return to her apartment on that same day, in addition to the pawned typewriter and radio, a diamond ring, watch, and bracelet were also missing. The radio and typewriter traced to the defendant's possession on the day of the theft, were shown to have been of only such value as would convict the defendant of petit larceny. If the defendant at the same time took also the diamond ring or watch, which were not traced to his possession, he could properly be convicted of second degree larceny. At the trial the defendant was convicted of grand larceny in the second degree, which conviction was affirmed by the Appellate Division.[1] On appeal, *held*, affirmed. The Court adopted the rule for the first time in this state that possession of a part of goods is sufficient to enable the jury to infer that the defendant also stole the other articles missing at the same time and place. *People v. Roman*, 12 N.Y.2d 220, 188 N.E. 2d 904, 238 N.Y.S.2d 665 (1963).

The conscious exclusive possession of goods recently stolen, if unexplained or falsely explained, permits the inference that possession is a guilty one.[2] This is the formulation of the rule of recent unexplained, exclusive possession as it exists in New York. It is to be noted, however, that in New York, "the inference of guilt to be drawn from such possession is never one of law. It is an inference of fact."[3] Also "other facts may neutralize, repel it, or render it so remote or tenuous or uncertain that in a given case we should reject it."[4] As to the contention that the inference is one which must be shown by direct proof, the Court of Appeals in a leading case stated that "a jury may properly infer such possession from circumstances. However . . . the circumstances must be established by clear and convincing evidence and must be of such a character as, if true, to exclude to a moral certainty every other inference but that of recent and exclusive possession by the defendants."[5] It has been said that "the basis for such an inference is the improbability that the accused could have acquired the stolen property so soon after the theft unless he was the thief."[6] "It is true that several other hypotheses are conceivable as explaining the fact of his possession; nevertheless the hypothesis that he was the taker is a sufficiently natural one to allow the fact of his possession to be considered as evidentiary."[7]

A corollary rule that has developed along with the recent unexplained exclusive possession rule is that in a theft prosecution, the jury may infer from the possession of a part of the property taken at the same time and place that the defendant stole the whole.[8] This rule has developed for a long period of time but

1. People v. Roman, 16 A.D.2d 961 (2d Dep't 1961).
2. People v. Berger, 260 App. Div. 687, 23 N.Y.S.2d 739 (1st Dep't 1940), *aff'd*, 285 N.Y. 811, 35 N.E.2d 197 (1941).
3. People v. Galbo, 218 N.Y. 283, 291, 112 N.E. 1041, 1044 (1916).
4. *Ibid.*
5. People v. Foley, 307 N.Y. 490, 492-93, 121 N.E.2d 516, 517 (1954).
6. State v. Dancyger, 29 N.J. 76, 80, 148 A.2d 155, 160 (1959), *cert. denied*, 360 U.S. 903 (1959).
7. 1 Wigmore, Evidence § 152 (3d ed. 1940).
8. Jacobs v. Commonwealth, 260 Ky. 142, 84 S.W.2d 1 (1935); Reza v. State, 151 Tex. Cr. R. 66, 205 S.W.2d 370 (1947); Dean v. State, 142 Tex. Cr. R. 411, 154 S.W.2d

seems to have been first most effectively formulated in an early Texas case often cited by courts adopting this rule.[9] A basis for the rule was suggested by another early decision, concerning a theft of a pocketbook containing money and a drink check with only the drink check being traced to the thief's possession wherein the court said that "if the drink check was traced to appellant's possession immediately after its loss, it would be very clear and cogent evidence of fact that he took the pocketbook and all of its contents; for the check was in the pocketbook . . . there can be no question here that if appellant stole the drink check he stole the pocketbook and all of its contents."[10] Although this decision stresses the evidentiary foundation for the rule and also suggests the necessity of its individual application in each particular case according to the facts under consideration, another element which confines the breadth of the general rule should be pointed out. Several cases are to the effect that where the state has failed to show that all of the articles alleged to have been stolen were taken at the same time, the doctrine, that the finding of a part of the stolen articles in the possession of the defendant will support a finding that defendant stole the rest, did not apply.[11] One court formulated the rule in the following terms. "[E]vidence of the value of articles alleged in the indictment but not recovered in the search of appellant's premises would not be admissable unless the State should discharge the burden of proof cast upon it to show that all such articles were taken at the same time."[12]

The Court in the instant case stated that the circumstantial evidence of the case amply supported the determination by the jury that the defendant was knowingly in recent and exclusive possession of the stolen radio and typewriter without an adequate explanation other than that he was the thief. Also it reminds the reader that possession under such circumstances does not, as in some other jurisdictions, create a presumption of law as to the guilt of the possessor but in New York is sufficient only to create a question of fact to be decided by the jury.[13] Next, the Court frankly admitted that the question whether possession of part of stolen goods is sufficient to enable the jury to infer that the defendant also stole the other articles missing at the same time and place has never been decided in New York. It then stated that the "consensus appears to be that it [possession of a part of the stolen goods] is sufficient for that purpose,"[14] and flatly adopts the rule as it was formulated in an early Texas case.[15] Reference was made to an earlier per curiam opinion of the

459 (1941); Walters v. State, 120 Tex. Cr. R. 629, 46 S.W.2d 679 (1932); Williams v. Commonwealth, 188 Va. 583, 50 S.E.2d 407 (1948).

9. Hill v. State, 41 Tex. 253 (1874).

10. Rose v. State, 52 Tex. Cr. R. 154, 155, 106 S.W. 143, 144 (1907).

11. Clark v. State, 152 Tex. Cr. R. 446, 215 S.W.2d 184 (1948); Williams v. Commonwealth, 188 Va. 583, 50 S.E.2d 407 (1948).

12. Clark v. State, 152 Tex. Cr. R. 446, 448, 215 S.W.2d 184, 187 (1948).

13. People v. Roman, 12 N.Y.2d 220, 221, 188 N.E.2d 904, 905, 238 N.Y.S.2d 665, 666 (1963).

14. *Ibid.*

15. Hill v. State, 41 Tex. 253, 256-57 (1874). See text at notes 8 and 9 *supra.*

Appellate Division where under an essentially identical fact pattern as the instant case the court reached an opposite result stating, "the only verdict which was justified under the proof presented against him was the lesser degree of such crime, to wit, petit larceny."[16] The Court then stated its basis for the adoption of the rule of the "consensus" is that "we believe this to be the wiser rule, leaving to the jury the convincingness and credibility of the testimony of the complaining witness, or other witnesses, concerning what articles of property disappeared at the time and place of the theft of the goods discovered in the possession of the accused."[17]

The difficulties of the newly adopted part possession rule are several. One effect is that the jury is allowed to make an inference on an inference. Although there is nothing inherently evil in giving the jury such a power, the possibilty of dangerous inaccuracy greatly multiplies. The recent, unexplained, exclusive possession rule allows the jury to infer that the defendant is the thief. The part possession rule allows the jury to infer that possession of a part means theft of the whole. It is evident that in a given case, the jury has the power to return a verdict based on a multiplicity of inferences which may be very remote from the reality of the situation. As Justice Cardozo stated the problem, "we may multiply inferences at times, but in multiplying them, we must not refine and rarefy them beyond measure."[18] Another problem inherent in the adoption of the new rule is the danger of exaggerated or trumped-up testimony by the complaining witness as to what articles were stolen and also as to the value of those articles. A complaining witness often has a substantial interest at stake in establishing the value of goods stolen. It is common knowledge that comprehensive insurance policies against theft are generally available to the public. It is not too remote a possibility that one who is to receive compensation for stolen articles from an insurance company will exaggerate the amount of his loss and include articles as stolen which are still in his possession. This possibilty is even more clearly shown where it is probable that a defendant with a prior criminal record will refuse to take the stand and testify for fear of comment on the same under cross-examination by the prosecuting attorney. On the other hand a possible safeguard to prevent abuse of the new rule should be mentioned. As was stated earlier, it is incumbent on the state to show that all of the articles alleged to have been stolen were taken at the same time and place or else the part possession rule does not apply. Although the Court of Appeals in the instant case does not specifically refer to this aspect of the rule, the words "what articles of property disappeared at the *time and place of the theft* discovered in the possession of the accused"[19] seem to acknowledge this limitation. Perhaps the greatest protection against unwarranted application of the new part posses-

16. People v. Molina, 8 A.D.2d 930, 931, 187 N.Y.S.2d 898, 899 (4th Dep't 1959).
17. People v. Roman, 12 N.Y.2d 220, 221, 188 N.E.2d 904, 905, 238 N.Y.S.2d 665, 666 (1963).
18. People v. Galbo, 218 N.Y. 283, 294, 112 N.E. 1041, 1045 (1916).
19. People v. Roman, 12 N.Y.2d 220, 222, 188 N.E.2d 904, 906, 238 N.Y.S.2d 665, 667 (1963). (Emphasis added.)

sion rule will be afforded by employing the device of intensive cross-examination of the complaining witness at the trial. It is here that defense counsel must make his most diligent effort to uncover any falsification of the facts which may lead to a usurpation of his client's rights.

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CORAM NOBIS NOT TO BE GRANTED WHERE NO SHOWING THAT PERJURED TESTIMONY WAS USED

Romeo was convicted for first degree murder. One of the witnesses who testified against him was an accomplice in the murder. The district attorney promised the accomplice witness, Gramando, that he would do all he could to have Gramando's wife released from a charge involving the illegal possession of a revolver, if Gramando would give information leading to the solution of the unsolved homicide. At the trial Gramando, during cross examination, said that he had received no promise or consideration for his testimony; and, that his motive for giving the testimony was the hope that his wife would be released from the revolver charge. The jury was informed that Gramando's wife was released before the trial. In summation the prosecutor said that no promises were made to Gramando. In 1962, sixteen years after the conviction, Romeo applied for a writ of coram nobis which, though denied in the Court of General Sessions, was granted by the Appellate Division on the ground that the prosecutor did not correct testimony which he knew was falsified. The Court of Appeals *held*, reversed per curiam, and found that there was no basis for concluding that Gramando had perjured himself, and that his denial of a promise did not affect "the jury's appraisal of Gramando's credibility." *People v. Romeo*, 12 N.Y.2d 751, 186 N.E.2d 420, 234 N.Y.S.2d 224 (1962).[1]

In order to preserve basic fairness in our system of justice, whenever the state prosecutor, a quasi-judicial officer,[2] introduces testimony which he knows is perjured, the conviction is against due process and the state must supply a remedy whereby the conviction is vacated and a new trial is had.[3] If the prosecutor fails to correct unsolicited perjured testimony when he discovers it at a trial, this is also against due process.[4] The Supreme Court has held that, even though the accomplice witness had apprised the jury that he had an interest in testifying by indicating that the public defender offered him help, the prosecutor should have still corrected the false testimony in which the witness denied a promise of consideration from the prosecutor.[5] Judge Fuld, a member of the

1. Upon motion to amend the remittitur and for reargument, the remittitur was amended with the addition that the defendant's constitutional rights were not violated. People v. Romeo, 12 N.Y.2d 842, 187 N.E.2d 472, 236 N.Y.S.2d 620 (1962).

2. People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497, 498 (1899).

3. Mooney v. Holohan, 294 U.S. 103 (1935).

4. Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957) (false answers misrepresented witness' relationship with defendant's deceased wife); See also Annot., 3 L. Ed. 2d 1991 (1959); Annot., 2 L. Ed. 2d 1575 (1958); 11 Vand. L. Rev. 922 (1958).

5. Napue v. Illinois, *supra* note 4.