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Criminal Law and Procedure—Coram Nobis Not to Be Granted Where No Showing that Perjured Testimony Was Used

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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.

Paul J. Di Giulio

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.

New York Court of Appeals, expressed the underlying reason for the necessity to correct perjured testimony denying a promise of consideration from the prosecutor. He said "that the existence of such a promise might be a strong factor in the minds of the jurors in assessing the witness' credibility and in evaluating the worth of his testimony."[6]

Notwithstanding that the other evidence is sufficient for a conviction, the conviction obtained when the prosecutor fails to correct perjured testimony will not stand.[7] It is fundamental that the disclosure of the promise be made to the jury. Disclosure by the prosecutor to a judge about the granting of immunity to a witness from felony counts did not remedy the defect which was brought about when, afterwards, the witness denied to a jury that there was a promise of consideration.[8] The courts of New York, have said that the prosecutor should have corrected the testimony in the following instances. A district attorney who allowed testimony to go uncorrected because he thought the issue about one witness meeting another witness was trivial, had his conduct labeled as a "fraud."[9] Testimony denying a promise from the prosecutor should have been corrected when the prosecutor had given an inducement "in the nature of a promise."[10] In regard to evasive and half-true testimony which, in effect, concealed an understanding with the prosecutor, the court said that the defendant "was entitled to full, unequivocal disclosure to the jury of any understanding between the witness and the prosecution."[11] The witness' testimony about his own moral character is a factor which the prosecutor must correct since his moral character is relevant to the issue of credibilty.[12] The doctrine concerning perjured testimony has several limitations. In the event that the perjured testimony is stricken from the record, on motion of both the defense counsel and the prosecutor, there is no need for correction of the deleted testimony.[13] In order to procure a writ of coram nobis it is necessary that the prosecutor had knowledge of the perjured nature of the testimony.[14] Coram nobis relief will be denied if there is not shown a sufficient link between the perjured testimony and the prosecutor's knowledge of the perjury.[15]

In the per curiam opinion which incorporated the Appellate Division dis-

6. People v. Savvides, 1 N.Y.2d 554, 557, 136 N.E.2d 853, 855, 154 N.Y.S.2d 885, 887 (1956); *cf.* People v. Capuano, 15 A.D.2d 400, 225 N.Y.S.2d 252 (4th Dep't 1962) (prosecutor's objection to question about receiving benefit from testifying should have been overruled).

7. See People v. Savvides, *supra* note 6, at 557, 136 N.E.2d at 854-55, 154 N.Y.S.2d at 887.

8. People v. Taylor, 2 A.D.2d 977, 157 N.Y.S.2d 102 (2d Dep't 1956).

9. People v. Steele, 65 N.Y.S.2d 214, 221 (Ct. Gen. Sess. N.Y. County 1946).

10. People v Mangi, 10 N.Y.2d 86, 88, 176 N.E.2d 86, 87, 217 N.Y.S.2d 72, 73 (1961).

11. People v. Podinker, 27 Misc. 2d 282, 289, 210 N.Y.S.2d 174, 180 (Ct. Gen. Sess. N.Y. County 1961).

12. People v. Brandau, 19 Misc. 2d 477, 481, 189 N.Y.S.2d 818, 824 (Oneida County Ct. 1959) (dictum).

13. People v. Lester, 10 A.D.2d 971, 202 N.Y.S.2d 385 (2d Dep't 1960).

14. People v. Oddo, 300 N.Y. 649, 90 N.E.2d 896 (1950); Petition of Meisel, 133 N.Y.S.2d 534, 535 (Sup. Ct. 1954).

15. People v. Rodriquez, 13 Misc. 2d 1004, 178 N.Y.S.2d 993 (Ct. Gen. Sess. N.Y. County 1958).

sent,[16] the Court of Appeals said that since the jury knew of Gramando's request to have his wife released from the revolver charge and the actual release of his wife, there was no basis for concluding that there was falsification of testimony or suppression of fact by the prosecutor. The Court said that when the witness and prosecutor said no promises, they meant that no promises of leniency for Gramando, himself, were made to Gramando. The statement about no promises did not include promises to Gramando about leniency for his wife. The Court concluded that the statement about no promises did not affect the "jury's appraisal of Gramando's credibility."

The Appellate Division dissent said that the test for determining whether or not a new trial should be given, is whether the false testimony "may have had an effect on the outcome of the trial."[17] An unwillingness to upset a long standing conviction "upon finely-spun technical considerations of theoretical fair play" was indicated. It agreed with the majority of the Appellate Division that some type of promise was made to Gramando but said that "any claimed discrepancy could not in any reasonable likelihood have prejudicially affected the defendant." The dissent thought that Gramando was shown at his worst in regard to his credibility because the jury knew about his request for help for his wife, his wife's release and his murder indictment. Because promises for testimony and promises for the giving of information are different, it was reasoned that the promise was not for testimony but for information. The basis of this reasoning was that the prosecutor had Gramando's wife released before Gramando gave the testimony. The prosecutor was said to be not so impractical as to release the wife before the testimony was given unless the promise was for information. Then, since the promise was merely for information, there was no falsification of fact. The failure to mention the promise of help for the wife was said to be merely a breach of "courtroom etiquette." But, still, in regard to the difference between the two types of promises, the dissent said that the "trial prosecutor would have been better advised to have qualified his statement with a more ample disclosure of the distinction."

In *Napue v. Illinois* the jury was given some ground for believing that the witness had an interest in testifying.[18] But he denied the existence of a promise from the prosecutor. In the instant case the jury was apprised of some facts which show that the witness had an interest in testifying and the promise was also denied. The Court in the *Napue* case said: "The jury's estimate of truthfullness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest in testifying falsely that a defendant's life or liberty may depend."[19] In this case the witness may have been deceptive on the witness stand after his wife's

16. People v. Romeo, 16 A.D.2d 240, 226 N.Y.S.2d 957 (1st Dep't 1962).
17. People v. Romeo, *supra* note 16, at 244, 226 N.Y.S.2d at 961; *accord*, Napue v. Illinois, 360 U.S. 264, 272 (1958).
18. Napue v. Illinois, *supra* note 17, at 270.
19. *Id.* at 269.

release because he may have feared that his wife would be charged with the revolver violation again, if he didn't give the testimony after he gave the false information. In regard to the difference between a promise for testimony and a promise for information, the Appellate Division majority in the instant case said that they were the same in substance.[20] It seems impractical that the prosecutor would not use the informant after information is given. In fact, the prosecutor received testimony from Gramando at the trial. It seems that the jury should know about the promise for information so that it can consider whether the witness was deceptive when he gave the information and continued telling falsehoods at the trial. Jurors rather than appellate courts should evaluate the witness' credibility.[21] The physical benefit of the promise to the witness may run to the witness' wife, but this does not mean that the husband will not fabricate for his wife. In this case the witness wanted his wife free for his baby's sake. He said "my baby means more to me than anybody."[22] Even though these considerations exist, it is apparent that the jurors were sufficiently informed of the facts surrounding the promise for the information. But, a case with a weaker indication of the witness' interest in testifying should warrant a new trial.

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LEGAL INSANITY NOT ESTABLISHED BY SHOWING DEFENDANT OPERATES UNDER OWN STANDARD OF MORALITY

Defendant was convicted of murder in the first degree and sentenced to death. On appeal to the Court of Appeals, the defense urged that defendant was insane in that he believed his acts to be pursuant to the command of God. Defendant's statement to an Assistant District Attorney revealed that while panhandling on Broadway, he obtained an invitation from one Rescigno to spend the night at the latter's apartment; that defendant intended to rob Rescigno; that following extensive drinking at the apartment, defendant learned that Rescigno was degenerate; that defendant thereafter killed both Rescigno and one Sess, Rescigno's roommate, who was asleep in another room; that defendant hated degenerates and believed himself to be commissioned by God to kill them; that he was able to deceive psychiatrists into believing that he was insane, and that he had perpetrated such deception while in prison for a prior conviction in order that he could thereby obtain privileges not allowed in prison. At trial, expert testimony on the issue of legal insanity clashed, although it appeared that defendant was not able to control his impulses, had a pathological personality, and had an undeveloped moral judgment. *Held*, conviction affirmed, three judges dissenting. Legal insanity is not established where one operates under a standard

20. People v. Romeo, 16 A.D. 2d 240, 242, 226 N.Y.S.2d 957, 959 (1st Dep't 1962).
21. People v. Mleczko, 298 N.Y. 153, 163, 81 N.E.2d 65, 70 (1948).
22. People v. Romeo, 16 A.D.2d 240, 241, 226 N.Y.S.2d, 957, 958 (1st Dep't 1962).