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Evidence—Corroboration of Testimony of Accomplice

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ruling of the trial court was too inconsequential to adversely affect any substantial right of the defendant in view of the overwhelming evidence of guilt.⁶⁶ Had this remark been systematically repeated the prejudice sustained would have been great, and reversal proper, but a new trial is unwarranted in this case where the remark was isolated and therefore falling within Section 542 of the Code of Criminal Procedure.

The decision in the instant case is a culmination of a warning advanced sixty years ago,⁶⁷ manifested in the dissenting opinions of many previous cases,⁶⁸ which stated that a prosecuting attorney should put himself under proper restraint and should not, in his remarks to the jury, go beyond the evidence.

CORROBORATION OF TESTIMONY OF ACCOMPLICE

The Code of Criminal Procedure Section 399 states, "A conviction cannot be had on the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime." In the case of *People v. Weiss*,⁶⁹ a small store was robbed by five men, four of whom were apprehended, convicted, and were awaiting sentence at the time of the present case. The defendant Weiss was allegedly the fifth robber. Two of those convicted testified for the People and implicated Weiss. The other two were called by the defendant and, contrary to expectations, also implicated the defendant. The owner of the store testified that "I couldn't say with certainty that this (Weiss) is the man," and "I looked at him but I wouldn't remember his face because I was frightened," and "I think it's the same man."

The issue of this case was whether the testimony of the store owner was sufficient to corroborate the accomplices who testified for the people. The People argued that such testimony did satisfy the "tends to connect" requirement of Section 399, whereas the defendant contended such testimony was too vague. The Court, in affirming the conviction, held that positive identification is not the minimum standard, but that it is sufficient that the owner believed Weiss was the fifth robber and that the jury believed the owner.

The People also argued that assuming, arguendo, the owner's testimony did not corroborate the accomplices who testified for the People, since the defendant's own witnesses also implicated him, he must be convicted, because Section 399 does not apply to testimony given by an accomplice called by the defense. The Court held that since the owner's testimony was sufficient to corroborate the People's witnesses, this question need not be decided.

66. *People v. Lovello*, 1 N.Y.2d 436, 154 N.Y.S.2d 8 (1956); *People v. Marks*, supra note 63; *People v. Broady*, supra note 60.

67. *People v. Fielding*, 158 N.Y. 542, 53 N.E. 497 (1899).

68. *People v. Marks*, supra note 63; *People v. Broady*, supra note 60.

69. 7 N.Y.2d 139, 196 N.Y.S.2d 76 (1959).