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SPONTANEOUS DECLARATION AS EVIDENCE: PREJUDICIAL STATEMENTS OF PROSECUTING ATTORNEY

The problem of whether or not a hearsay statement was admissible as a spontaneous declaration, and the problem of fairness as raised by statements of a prosecuting attorney tending to prejudice a jury against a defendant in a murder trial, were considered in *People v. Marks*.[13] A reversal of a conviction of murder in the second degree was sought on the ground that the trial court improperly excluded a statement of the victim, made six minutes after the shooting, in which the victim accused a person other than defendant of shooting him, and on the ground that the prosecutor made prejudicial statements in his summary to the jury. The Court of Appeals, in a 4-3 decision, affirming the Appellate Division and the Court of General Sessions of the City of New York, held that the statement was not admissible under the spontaneous declaration exception to the hearsay rule,[14] and that the behavior of the prosecuting attorney was not so prejudicial as to require a reversal of the judgment and a new trial. Judge Desmond, speaking for the dissenting judges, argued that the "gross impropriety of a prosecutor's 'making himself an unsworn witness and supporting his case by his own veracity and position'" was sufficient to warrant a reversal and new trial.

A statement made to a person out of court cannot be offered by that person in court as evidence of the truth of the matter contained in the statement.[15] Such a statement is hearsay, and it is traditionally objected to on the ground that there is no opportunity to test the veracity of the statement by cross-examination of the non-present declarant. The spontaneous declaration exception to the hearsay rule, permits a hearsay statement to be admitted if it was made so close in time to the event commented on, that there was insufficient time to fabricate a falsehood, provided no motive to misrepresent is shown.[16] The statement in the *Marks* case, made six minutes after the shooting, failed to meet the test of nearness in time, and a motive to misrepresent was shown. During the six minute period between the time the victim was shot until he made his statement, the victim left the basement wherein he was shot, climbed fifteen steps, walked over 150 feet, talked to a woman and gave no indication that he thought he was dying.[17] The Court found,[18] that "it cannot be held that the Trial Judge erred as a matter of law in finding the

13. People v. Marks, 6 N.Y.2d 67, 188 N.Y.S.2d 465 (1959).

14. People v. Marks, 6 A.D.2d 677, 173 N.Y.S.2d 850 (1st Dep't 1958), *motion granted* 5 N.Y.2d 761, 179 N.Y.S.2d 103 (1958).

15. Donnelly v. United States, 228 U.S. 243 (1912).

16. People v. Del Vermo, 192 N.Y. 470, 85 N.E. 690 (1908).

17. The Court distinguished the victim's statement under these circumstances, and said that it was not a dying declaration because the declarant did not believe death was near at hand. See Shepard v. United States, 290 U.S. 96 (1933). New York disfavors the dying declaration exception. See People v. Allen, 300 N.Y. 222, 40 N.E.2d 48 (1949).

18. It should be noted that the Court rejected defendant's contention that the question of spontaneity should have been submitted to the jury, and held that it is the province of the court and not of the jury to decide preliminary questions of fact on which the admissibility of the declaration depends.

preliminary fact to be that the declaration of this homicidal victim lacked spontaneity, and that sufficient time had elapsed under the circumstances so that it could have been a reflective fabrication."[19] Since the victim did not think he was dying, the Court found that he probably fabricated a false accusation to save himself from being shot again by the same person, the person from whom the victim, a drug addict, had stolen several packages of heroin. Failing to meet the definition of a spontaneous declaration, the statement was properly excluded from evidence.

On summation, the defendant's attorney injected the personality of the prosecuting attorney into the case by accusing him of suborning his drug addicted witnesses by threatening to withhold drugs from them. In turn, the prosecuting attorney, it is said, "attempted to bolster the credibility of witnesses for the prosecution with the prestige of his office, character and personality."[20] No clear pattern emerges from the decisions on the point as to when a conviction is to be reversed because of the misbehavior of the prosecuting attorney. The interplay of a number of factors must be considered before the court can find that "there has been a substantial infringement of the fundamental demand of our law that the defendant shall have a fair trial."[21] It would seem, if rules are to be formulated, that if the statements of a prosecuting attorney to a jury were "undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury,"[22] and, if "the case against [defendant] . . . may properly be characterized as weak . . . [i]n these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence."[23] On the other hand, if the case against defendant had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming,' a different conclusion might be reached.[24] Where the prejudice is great,[25] a reversal is proper.[26] In the *Marks* case, no reversal and new trial were granted where the prejudice was not great in view

19. *Supra* note 13 at 76, 77, 188 N.Y.S.2d 465, 472 (1959).

20. *Id.* at 77, 188 N.Y.S.2d 465, 473 (1959).

21. People v. De Martine, 205 App. Div. 80, 88, 199 N.Y. Supp. 426, 433 (2d Dep't 1923). In this case both judge and prosecutor made prejudicial statements.

22. Berger v. United States, 295 U.S. 78, 85 (1934).

23. *Id.* at 88, 89. In the *Berger* case the federal prosecutor misstated facts in his cross-examination. Also People v. Burley, 282 App. Div. 408, 122 N.Y.S.2d 760 (4th Dep't 1953), in which the prosecutor charged the defendant with sodomy, a crime not charged in the indictment. Said the court, at 411, ". . .[t]he question of guilt was a very close one and great care should have been taken not to introduce into the trial any extraneous facts or issues which would tend to create prejudice against the defendants or arouse the disgust or passion of a jury.'

24. *Supra* note 21 at 89.

25. N.Y. CODE CRIM. PROC. § 542: "After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." Prejudicial statements may affect the substantial rights of parties if they affect the verdict. An error is substantial under § 542 if it influences the verdict, People v. Sobieskoda, 235 N.Y. 411, 139 N.E. 558 (1923).

26. People v. Fielding, 158 N.Y. 542, 53 N.E. 497 (1899). A reversal and new trial were granted because of the prosecutor's ". . . assertion . . . of facts not proved, . . . inflammatory appeals to passion and prejudice, and . . . his threat to the jury of popular denunciation, all under the sanction of the trial court."

of the strong case presented against defendant by other evidence. While this may be the present New York rule, it can be observed that Judge Desmond, with two other Judges, has maintained that misconduct alone can be enough for reversal.[27] Quoting an 1899 case to the effect that warnings unheeded led to reversals where dangerous appeals continued to be made to juries,[28] Judge Desmond asks, in regard to the *Marks* case, "[W]hat possible remedy is there but a reversal? . . . 'How long will you abuse the patience of this court?' "[29] Perhaps the judicial climate is changing, and this is a "word to the wise."

IMPEACHMENT OF WITNESS WHO IS DRUG ADDICT

The question and extent of admissibility of expert evidence to show the effect of drug addiction upon the credibility and competency of a witness is a subject on which there is conflicting authority in American jurisdictions. "The view adhered to by the majority of American jurisdictions is that testimony as to narcotic addiction, or expert testimony as to the effects of such drugs, is not considered admissible to impeach the credibility of a witness, unless followed by testimony tending to show that he was under the influence while testifying, or when the events to which he testified occurred."[30] The minority view holds such evidence generally admissible for impeachment purposes.

Although there are numerous cases dealing with this problem,[31] there is a surprising lack of articulation of the underlying reasons for either exclusion or admission.[32]

The New York Court of Appeals,[33] in passing on the question for the first time, indicated an adherence to what is termed the majority American view.

In *People v. Williams,* the defendant was convicted of feloniously selling a narcotic drug to a person who became the State's chief witness against him. At the trial, defense counsel arduously sought to attack the credibility of this witness through his history of prior drug addiction. The witness had been addicted to the use of heroin for about five years prior to the day of the sale in question. He had had no drugs on that day, nor during the four months period prior to the trial. Defense counsel attempted to introduce expert medical testimony regarding the effects of addiction upon the truthfulness of addicts. Objections to the introduction of such testimony were sustained by the Trial Judge, ruling that the witness' credibility was a matter for the jury.

27. Where prosecutor's prejudicial statements on summation warranted reversal even though the evidence was sufficient to sustain a verdict of guilt, see People v. Swanson, 278 App. Div. 846, 104 N.Y.S.2d 400 (2d Dep't 1951).

28. *Supra* note 13 at 79. The case was People v. Fielding, *supra* note 26 at 547.

29. *Supra* note 13 at 79. See People v. Lovello, 1 N.Y.2d 436, 154 N.Y.S.2d 8 (1956), in which an illegal delay in arraignment, plus ". . . serious and prejudicial error . . . made by the prosecutor in his summation" warranted a reversal. Judge Desmond wrote the opinion for a unanimous court.

30. Annot., 52 A.L.R.2d 848 (1955).

31. See cases collected in note 30 *supra;* Annot., 15 A.L.R. 912 (1921).

32. See *Note,* 33 So. CALIF. L. REV. 333 (1943).

33. 6 N.Y.2d 18, 187 N.Y.S.2d 750 (1959).