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Criminal Law—Evidence—Prosecuting Attorney as Unsworn Witness

Robert Casey Jr.

Evidence—Impeachment

It is universally maintained by the courts that evidence of prior self-contradictions made by a witness is admissible only to impeach or discredit the witness or to refresh his recollection and as such is not competent as substantive evidence of the facts to which the statements relate.[50] In *People v. Cannizzaro*[51] the Court of Appeals unanimously reversed a conviction, affirmed by the Appellate Division, where the trial court, in applying section 8-a of the Code of Criminal Procedure,[52] permitted the jury to see the entire extra-judicial statement of a witness which included hearsay, conclusory and prejudicial language. It was held that, for impeachment purposes, only so much of the pretrial statement of the witness as controverted his trial testimony should have been admitted into evidence.

The reason generally given for the above proposition is that the pretrial statement is made out of court by one not subject to cross-examination and thus falls within the hearsay rule. It seems clear that the contents of such a statement should not be allowed to constitute affirmative evidence against the defendant.[53]

Virtually alone in a dissenting position, although he concedes that the Court of Appeals' view is universally followed, is Wigmore in his treatise on evidence.[54] However, notwithstanding this practical evaluation, the preponderence of authority holding in accord with *People v. Cannizzaro* would indicate that the point is now settled law in New York in both civil and criminal proceedings.[55]

Evidence—Prosecuting Attorney as Unsworn Witness

The conviction in *People v. Lovello*[56] was reversed by the Court of Appeals

50. *People v. Portese*, 279 App. Div. 63, 108 N. Y. S. 2d 471 (3rd Dep't 1951); *People v. Bishop*, 270 App. Div. 133, 58 N. Y. S. 2d 711 (2d Dep't 1945).

51. 1 N. Y. 2d 167, 134 N. E. 2d 206 (1956).

52. N. Y. CODE CRIM. PROC. § 8-a. In addition to impeachment in the manner now permitted by law, any party may introduce proof that a witness has made a prior statement inconsistent with his testimony, irrespective of the fact that the party has called the witness or made the witness his own, provided that such prior inconsistent statement was made in any writing by him subscribed or was made under oath. See §343-a N. Y. CIV. PRAC. ACT.

53. *People v. Portese*, 279 App. Div. 63, 108 N. Y. S. 2d 471 (3d Dep't 1951); *People v. Bishop*, 270, App. Div. 133, 58 N. Y. S. 2d 711 (2d Dep't 1945); *People v. Shingles*, 281 App. Div. 647, 121 N. Y. S. 2d 651 (3d Dep't 1953).

54. 2 WIGMORE, EVIDENCE § 1018 (2d ed. 1923). The witness, being present, can be subjected to cross-examination to test the basis of his former statement. Thus the hearsay rule is satisfied, and nothing prevents the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve.

55. *Roge v. Valentine*, 280 N. Y. .268, 20 N. E. 2d 751 (1939); *People v Ferraro*, 293 N. Y. 51, 55 N. E. 2d 861 (1944); *People v. Marino*, 288 N. Y. 411, 43 N. E. 2d 466 (1942); *People v. Shingles*, 281 App. Div. 647, 121 N. Y. S. 2d 651 (3d Dep't 1953).

56. 1 N. Y. 2d 436, 136 N. E. 2d 483 (1956).

on two grounds: first, an illegal delay in arraignment and second, an attempt by the prosecutor to act as an unsworn witness in his summation to the jury.

The defendant was arrested on a Saturday night and was not arraigned until Monday morning, notwithstanding the fact that the arresting officers knew there was a court open on Sunday in which he could have been arraigned. The Court of Appeals held that it was error for the trial court to refuse to charge that such delay was unnecessary as a matter of law[57] and erred further by submitting the necessity or reasonableness of the delay to the jury as a question of fact.[58]

Further, defense counsel criticized the prosecutor for his failure to produce stenographic notes of the defendant's alleged police station statements. The prosecutor in his summation, referring to these statements, said:

> "Gentlemen, with all the sincerity at my command, I say to you that if that conversation did not take place, in your judgment, you stop right there. Don't waste another ten seconds on this case. Come back and say that this defendant is not guilty. If that conversation did not take place, then I am an aider and abetter to Omark's (a police officer) perjury."

The prosecutor thereby made himself an unsworn witness and supported his case by his own veracity and position. Such practices have been condemned as error[59] and the Court properly reversed the conviction here.

Trial—Prejudicial Statements by District Attorney

In *People v. Reade*[60] the defendant was tried for first degree murder. At the trial, defense counsel, in his summation to the jury, referred to his brother, who, being found insane, was confined to a mental institution until his death. The purpose thereof was obviously to allay the fears of the jury that this defendant, who had interposed the defense of insanity, would be set free upon the public if

57. N. Y. CODE CRIM. PROC. §165. The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night. N. Y. PENAL LAW §1844. A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.

58. *People v. Snyder*, 297 N. Y. 81, 91, 92, 74 N. E. 2d 657 (1947); *People v. Kozicky*, 275 App. Div. 862, 89 N. Y. S. 2d 286 (1949). The jury may consider an illegal delay in determining the weight to be given to evidence comprising statements made by the defendant during the illegal detention.

59. *Berger v. United States*, 295 U. S. 78, 88 (1935); *People v. Tassiello*, 300 N. Y. 425, 430, 91 N. E. 2d 872, 874 (1949); *People v. Swanson*, 278 App. Div. 846, 847, 104 N. Y. S. 2d 400 (1951).

60. 1 N. Y. 2d 459, 136 N. E. 2d 497 (1956).