Marquette Law Review

Volume 26
Issue 3 *April 1942*

Article 8

Criminal Law: The Use of Inconsistent Defenses

Robert T. McGraw

(2d) 310 (Tex. 1934). However, in the case of *State* v. *Wilson,* 123 So. 624 (La. 1929), where the defendant represented himself to the prosecuting witness as a fictitious person and wrote out a check in his name to pay for goods obtained, a different result was reached. The court stated the general proposition, that the essence of forgery is the making of a false writing with the intent that it shall be received as the act of another, than the one signing it. Therefore, the mere use of a fictitious or false name, it reasoned, as long as the writing purported to be the act of the very one issuing it, and of no other, was not forgery, although it might constitute false pretences or some other crime. In another Louisiana case, where the defendant indorsed a check with one of his aliases, he was found not guilty of forgery. *State* v. *Melson,* 161 La. 423, 108 So. 794 (1926). This same result was reached in *Harris* v. *State,* 96 So. 316 (Ala. 1923), where the court stated that the signing of a fictitious name to an instrument, with a fraudulent intent, was forgery, but in signing one of his aliases the defendant did not sign the name of a fictitious person, but his own. "For it is not forgery when the offense is not assumption of the name of a supposed third person, but the adoption of an alias by the party charged."

However, in line with the principal case, it was held forgery for a person to sign his own name to an instrument with a fraudulent intent to have the instrument received as executed by another person having the same name. *People* v. *Rushing,* 62 Pac. 742 (Cal. 1900); *U. S.* v. *National City Bank of N. Y.,* 28 F. Supp. 144 (S.D. N.Y. 1939).

JAMES D. GHIARDI.

Criminal Law—The Use of Inconsistent Defenses.—The defendant, Rubin Jersky, was convicted of murder and sentenced to twenty years. He became involved in a quarrel with the deceased. The deceased had provoked the quarrel but when the defendant joined the affray, armed with a pistol, the deceased retreated to his door-step and was killed there by the defendant. On the trial the defendant offered inconsistent defenses: 1) that he killed the deceased in self-defense, and 2) that the gun went off accidentally. In charging the jury the lower court gave instructions both on the point of self-defense and accidental killing. The defendant appealed from his conviction.

Held, judgment affirmed. As to the inconsistent defenses the court stated that the defendant's difficulties and complaints in regard to instructions were of his own creation, since the defendant sought to escape punishment by leaving the law bewildered between two inconsistent defenses thrown into one case. While the defendant had a right "to present as many defenses as he had or thought he had," and could do this "for the express purpose of confusing the jury," he could not complain that the jury was not confused. *People* v. *Jersky,* 36 N.E. (2d) 347 (Ill. 1941).

The general rule would seem to be that in a criminal prosecution the defendant may set up inconsistent defenses. While relatively few courts have been called upon to decide such a question, the weight of authority would certainly seem to favor such a rule.

The basis for the decision in *People* v. *Jersky, supra,* is probably the case of *People* v. *Lee,* 284 Ill. 64, 93 N.E. 321 (1911). This case involved a charge that the defendant had mingled carbolic acid with beer with intent to cause death of one Emma Lee. The defendant tried to offer as evidence 1) that he was not guilty, and 2) that the amount of acid placed in the beer was not sufficient to produce death. He was convicted when the lower court refused

to allow evidence on the latter point. This judgment of conviction was reversed, the upper court holding, "The plea of not guilty to an indictment for a criminal offense is all that is necessary to render competent any evidence that tends to prove or disprove any issue involved, and it is no objection to testimony which tends to prove one defense that it is inconsistent with other defenses relied upon."

A similar line of reasoning was applied in a Texas case. Here the defendant was convicted of violating a statute requiring the driver of an automobile, which strikes a person, to stop and render the necessary aid. The defense mainly relied upon was an alibi, but the defendant also sought to prove want of knowledge that the accident had happened. The lower court refused to allow any evidence to be presented upon this latter point. The appellate court held this refusal to be reversible error, reasoning that although the defendant relied upon an alibi this did not deprive him of the right to have submitted to the jury any other defensive theory sanctioned by law which arose from the evidence. *Stalling* v. *State,* 90 Tex. Cr. Rep. 310, 234 S.W. 914 (1921).

By way of dicta a California court seems to be committed to the rule laid down in *People* v. *Jersky, supra.* The defendant was charged with and convicted of murder in the second degree. At the trial the defendant in the opening statement relied entirely upon an alibi, but later in the course of the trial attempted to introduce evidence that the defendant had been drinking heavily. The state objected to this, and when the court asked defendant what the purpose of the evidence of the intoxication was, the defendant said it was merely to support the alibi. The lower court then ruled, that as such, the evidence would not be admitted. The conviction was affirmed by the upper court, but the court stated that if the defendant had adherred to the theory upon which they first offered the evidence—that is, to mitigate the grade of the crime in case the jury rejected the evidence addressed to proof of the alibi—the lower court's ruling would have been erroneous, "since it is well settled that inconsistent defenses or claims may be interposed in a criminal case as well as in a civil action, if counsel or defendant may choose to take that course." *People* v. *Conte,* 17 Cal. App. 771, 122 Pac. 450 (1912).

In an Alabama case the defendant, convicted of the statutory offense known as lynching or whitecapping, offered two defenses: 1) that, conceding he was guilty, he was merely avenging an insult to the victim's daughter, and 2) an alibi. The lower court would not admit evidence of the first defense to the beating. The upper court reversed the conviction on the ground that inconsistency is no reason for excluding evidence, saying, "It has been held that the defendant in a criminal prosecution may set up inconsistent defenses." *Love* v. *State,* 75 So. 189 (Alabama 1917). See also, *Reeves* v. *State,* 186 Ala. 14, 65 So. 160 (1914), where the defendant was tried and convicted of murder. The question in this case was whether the defendant was able to show circumstances reducing the offense from murder to manslaughter when he claimed to have acted in self-defense. The higher court held that refusal to allow the defendant to do so constituted error and reversed the conviction, holding, "a defendant who claims to have acted in self-defense is not thereby precluded from asserting that the homicide was committed under circumstances reducing it to manslaughter where the evidence before the jury would so authorize."

A similar decision was reached in a Georgia case, where a defendant indicted for murder claimed that he did not do the shooting, and also offered evidence to the effect that the killing was justified and in self-defense. The appellate court held it to be error for the lower court to exclude the matter

of self-defense in its charge to the jury. *Green* v. *State,* 7 Ga. App. 803, 68 S.E. 318 (1910).

Although a New York court has gone along with weight of authority on this question, it would seem that they have qualified the general rule somewhat. In a case where the defendant was convicted of murder in the first degree, the defendant offered in his behalf the allegation that he acted in self-defense and also that the homicide was the result of accident. The state objected on the ground that these defenses were inconsistent. The conviction was affirmed in the higher court, and on the question of these inconsistent defenses, the court held that the defendant clearly had the right to rely on inconsistent defenses. This, however, was qualified by the statement, "but it is significant that only one (of the defenses) could rest on truth." *People* v. *Gaiman,* 176 N.Y. 84, 68 N.E. 112 (1903).

Apparently, Louisiana is the only jurisdiction which does not adhere to the general rule that a defendant may rely, in a criminal prosecution, upon inconsistent defenses. This is evidenced by a case in which the defendant was charged and convicted of having been an accessory before the fact to a murder. At the trial the defendant denied that he had any connection whatever with the crime, but he also attempted to show that on the day of the murder he told one of the murderers that he did not wish the deceased harmed. In other words he offered as defenses a denial of the procurement, and also that he had repented and countermanded the procurement. The conviction was reversed for other reasons, but on the question of admissibility of inconsistent defenses the court held, "a defendant cannot be allowed to occupy the inconsistent position, as the defendant in this case attempts to do, of denying the procurement and at the same time contending that he repented and countermanded it." *State* v. *Kinchen,* 126 La. 39, 52 So. 185 (1910).

ROBERT T. MCGRAW.

Federal Procedure—Ability to Bring an Original Suit or Counter-Claim for Tort against the United States.—The United States brought suit against defendants for property damages alleged to have been caused by a collision between a government mail truck and a truck owned by defendants. Defendants filed a counter-claim for damages to their truck, and the United States filed a motion to dismiss the counter-claim on the grounds that the court lacked jurisdiction to entertain a claim of this nature against the United States, a sovereign nation. This motion was denied, but on reargument it was granted, the court *holding* that a suit against the United States on a tort claim cannot be maintained whether it be in the form of an original suit or a counter-claim, unless there is specific Congressional authority. *United States* v. *Dugan Bros.,* 36 F. Supp. 109 (E.D. N.Y. 1941).

The reason for immunity of the United States from suit is well stated by Justice Fields as follows: "It is a familiar doctrine of the common law, that a sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen and, consequently, controlled in the use and disposition of the means required for the proper administration of the Government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme