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Criminal Law and Procedure—Admissibility Of Exculpatory Portions Of A Defendant's Statement After Incriminating Portions Have Been Allowed Into Evidence

William J. Kirk

court, there has been recurrent sentiment in favor of making the power to waive absolute. One could safely look to a liberalization of the present rule in the federal courts, much as (though with less than maximum assurance) the rule in New York has been liberalized. Many courts seem disturbed by the sort of reasoning which prohibits a defendant from waiving a right of this nature, since, as Justice Frankfurter put it, close adherence to the rule has the effect of ". . . imprison[ing] a man in his privileges."[33]

James B. Denman

ADMISSIBILITY OF EXCULPATORY PORTIONS OF A DEFENDANT'S STATEMENT AFTER INCRIMINATING PORTIONS HAVE BEEN ALLOWED INTO EVIDENCE

In this criminal proceeding the prosecution introduced as evidence incriminating portions of a record of a pre-arraignment interrogation of defendant. Counsel for defendant requested that exculpatory portions of the same record be read into evidence. This request was denied by the trial judge on the ground that the statements were not being offered as a confession. On appeal from an order of the Appellate Division[1] affirming a judgment of the Kings County Court convicting defendant, *held*, reversed unanimously and new trial granted. It was error to deny defendant's request that exculpatory portions of the record be admitted into evidence after allowing incriminating portions of the same record to be introduced by the prosecution, even though defendant, as a witness, denied making some of the statements contained therein. *People v. Gallo*, 12 N.Y.2d 12, 186 N.E.2d 401, 234 N.Y.S.2d 193 (1962).

The principle of evidence that a verbal utterance must be taken as a whole is deeply rooted in the common law and may be traced back to the seventeenth century.[2] There is no question that where one party offers into evidence only a part of a statement the other party may use any remaining parts of the same statement as he desires insofar as they are relevant.[3] Both the New York Civil Practice Law and Rules[4] and the Federal Rules of Civil Procedure[5] explicitly state the rule. The only limitation is that the parts of the statement which the parties wish to offer into evidence must be relevant and explanatory of those parts already given into evidence.[6]

The state of the law in New York can best be summed up as follows:

> It is well settled that where use is made in a judicial proceeding of a prior declaration the entire declaration at the time made so far as

33. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 280 (1942).

1. People v. Gallo, 16 A.D.2d 795, 227 N.Y.S.2d 943 (2d Dep't 1962).
2. 7 Wigmore, Evidence § 2094, at 475 (3d ed. 1940).
3. 7 Wigmore, Evidence § 2113, at 523 (3d ed. 1940). *E.g.*, People v. Miller, 247 App. Div. 489, 286 N.Y. Supp. 702 (4th Dep't 1936); People *ex rel.* Perkins v. Moss, 187 N.Y. 410, 80 N.E. 383 (1907).
4. N.Y. CPLR R. 3117(b).
5. Fed. R. Civ. P. 26(d)(4).
6. People v. Schlessel, 196 N.Y. 476, 90 N.E. 44 (1909).

> relevant must be taken together; a party may not utilize only so much of the declaration as is for his benefit, but he must also admit that which is against his interest and the whole must stand or fall together.[7]

And also:

> The confession—which gives strong support to defendant's claim in that regard—when introduced by the district attorney as proof of defendant's guilt was legally entitled to be considered as a whole. Its damaging parts should not be accepted, and the exculpating portion rejected unless the latter is disputed by other evidence in the case, or is so improbable as to be unworthy of belief.[8]

The law relied upon by the Court of Appeals as the basis of its decision is clearly well settled.

Though it appears that the Court is simply applying familiar law to a familiar situation, it must be noted that the instant case differs from the authorities relied upon by the Court in reaching its decision. In the instant case, although the defendant, as a witness, denied having made the incriminating statements read into evidence by the prosecution, he did admit making the interview. He had acomplished as a witness all that could have been accomplished had the trial court admitted the exculpatory statements. Why then should the Court of Appeals, in the interest of justice and fair play, reverse the judgment? The basic issue before the Court concerned the admission of testimony regarding a post-arraignment interview between a police detective and the defendant. After defendant had been arraigned, he was committed to a house of detention. He was interviewed there by a police detective who at the trial testified regarding admissions of guilt made by the defendant during that interview. It has been decided in New York that the admission of testimony as to post-arraignment admissions of guilt is illegal and a deprivation of defendant's constitutional rights as amounting to testimonial compulsion.[9] The Court could not rule on this phase of the case without first determining a procedural issue—whether or not defendant's counsel had made a sufficient objection to the admission of the testimony regarding the post-arraignment interview. The Court is limited, except in capital cases, to considering questions of law,[10] with the determination of questions of fact left to the trial courts and the Appellate Division. Questions of law must be preserved for the Court's consideration by a proper and timely objection or exception,[11] *i.e.*, when the "party adversely affected" by a ruling of the trial court, "makes known to the court or judge his position thereon by

7. People *ex rel.* Perkins v. Moss, 187 N.Y. 410, 428, 80 N.E. 383, 389 (1907).
8. People v. Miller, 247 App. Div. 489, 493, 286 N.Y. Supp. 702, 706 (4th Dep't 1936).
9. People v. Meyer, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962); People v. DiBiasi, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).
10. N.Y. Const. art. VI, § 7; N.Y. Code Crim. Proc. § 528. *E.g.*, People v. Spinello, 303 N.Y. 193, 101 N.E.2d 457 (1951); People v. Wrieden, 299 N.Y. 425, 87 N.E.2d 440 (1949).
11. See People v. Steinmetz, 240 N.Y. 411, 148 N.E. 597 (1925); People v. Cummins, 209 N.Y. 283, 103 N.E. 169 (1913); People v. Mingey, 190 N.Y. 61, 82 N.E. 728 (1907); People v. Weichers, 179 N.Y. 459, 72 N.E. 501 (1904); People v. Cory, 148 N.Y. 476, 42 N.E. 1066 (1896); People v. Henze, 82 N.Y. 611 (1880).

objection or otherwise,"[12] except questions concerning jurisdiction.[13] Defendant's counsel had objected at the time to testimony regarding the post-arraignment interview was admitted but he did not give any grounds for the objection. The trial court overruled the objection. It is a long standing and generally accepted court made rule that an objection must be specifically and expressly stated. Therefore, the Court could not decide the constitutional issue without first deciding the procedural problem. Haunted by the spectre of a defendant being deprived of his constitutional rights but unwilling to ring the death knell of the court rule regarding the sufficiency of objections, the Court seized upon the failure of the trial court to admit the exculpatory parts of the record of the pre-arraignment interrogation and reversed the judgment, thereby laying the case to rest. By rationalizing that the fact the defendant admitted making the pre-arraignment interview offset the fact that the defendant denied making the incriminating statements contained in the record thereof, the Court was able to fit the case into a familiar niche in the law and at the same time was able to purge a sticky bone from its throat.

The decision in the instant case is an example of how a principle of law may be stretched to a point where it loses its effectiveness. The purpose of the rule relied upon in this case is to frustrate the effects of using statements out of context and prevent the injustice that would result from presenting only one side of a story. But, in the instant case, the evidence against the defendant was overwhelming and clearly supported his conviction. The defendant was certainly allowed to present his side of the story when he appeared as a witness. In what manner was the defendant prejudiced? The real significance of this decision is as an example of how far the courts will often go in order to protect the rights of a defendant in a criminal proceeding. This brings up a very pregnant question: is it necessary to go to such lengths to protect a defendant when his conviction could be clearly supported by the evidence; and, is the interest of the public being properly protected in allowing an obviously guilty defendant to take advantage of a technical and non-prejudicial error and thereby secure a new and expensive retrial?

William J. Kirk

CORAM NOBIS AND EXHAUSTION OF THE APPELLATE PROCESS

Defendant was convicted in 1955 of several counts of robbery and assault. Six years later he instituted a coram nobis proceeding, alleging in his petition that after he had been indicted and in the absence of counsel he was questioned; that through the use of force and threats a statement was obtained and used by the prosecution at his trial. Defendant was represented by counsel both at the trial and upon sentencing, yet no objection was made to the use of the state-

12. N.Y. Code Crim. Proc. § 420-a. *E.g.*, People v. Friola, 11 N.Y.2d 157, 182 N.E.2d 100, 227 N.Y.S.2d 423 (1962).

13. *E.g.*, People v. Nicometi, 12 N.Y.2d 428, 191 N.E.2d 79, 240 N.Y.S.2d 589 (1963).