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NOTES

CHARGING THE JURY IN PENNSYLVANIA IN A CRIMINAL CASE

The standard that the Pennsylvania Supreme Court has given in regard to the trial judge's function in charging a jury is stated in *Commonwealth v. Chambers*:

> "It is the exclusive province of the jury, not the court, to decide all the facts, the inferences therefrom, the credibility of the witnesses and the weight and effect given to all of the testimony. While the main purpose of a judge is to state and explain the law and briefly review the evidence, it is always the privilege and sometimes the duty of a trial judge to express his own opinion, including his opinion of the weight and effect of the evidence or its points of strength and weakness or even the guilt or innocence of the defendant and verdict which, in his judgment, the jury should render, provided (1) there is a reasonable ground for any statement he may make; and (2) he clearly leaves to the jury the right to decide all the facts and every question involved in the case, regardless of any opinion of the court thereon."[1]

This court has also said that it is the duty of a trial judge to give a calm and dispassionate charge and to insure to the defendant a fair and impartial trial.[2]

The standard laid down by the court is very broad, and a judge has wide discretion in the most important function that he has to perform in a jury trial.[3]

The judge should be the impartial arbitrator between the prosecution and defense.[4] If this is his role, why should he be allowed to express his opinion regarding the guilt or innocence of the defendant? If he does express an opinion, he is no longer the impartial arbitrator but really another counsel for either the prosecution or defense, depending on how he feels the case should be decided.

The court has stated that this practice of the judge in entering into the trial as an advocate is emphatically disapproved.[5] Yet, this is what he actually does when he gives his opinion as to the weight and effect of the evidence and, even in some cases, expresses his own opinion as to the guilt or innocence of the defendant, but the Supreme Court of Pennsylvania continually holds that the charge must be looked at as a whole, and as long as the judge allows the jury to act on their own views it is not reversible error.[6]

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1 367 Pa. 159, 79 A.2d 201 (1951); see also Com. v. Cunningham, 232 Pa. 609, 81 Atl. 711 (1911).
2 Com. v. Trunk, 311 Pa. 555, 167 Atl. 333 (1933).
3 SOPER, THE CHARGE TO THE JURY, 24 J. AM. JUD. SOC'Y 111.
4 Com. v. Cisneros, 381 Pa. 447, 113 A. 2d 293 (1955) (dissent).
5 Com. v. Myma, 278 Pa. 505, 123 Atl. 486 (1924).
6 Com. v. Zietz, 364 Pa. 294, 72 A.2d 282 (1950).

This means that the trial judge can express his opinion, and stress it heavily, but as long as he puts in the "cure-all" phrase: ". . . that this is only my opinion and you are the true triers of fact and are not bound by my decision", the defendant is considered to have had a fair and impartial trial.

In *Commonwealth v. Malone* the court said on this point:

> "A judge's charge must be considered in its entirety and error cannot be predicated on certain isolated excerpts from the charge."[7]

The fallacy, in this argument, is that the jury may base its decision on these errors or remember the remarks of the trial judge in respect to the defendant's guilt and not remember the correct or unbiased part of the judge's charge, or may be so influenced by the trial judge's opinion as to overlook the evidence in favor of the defendant's innocence.

Some Examples of the Trial Judge's Opinion

The case of *Commonwealth v. Moyer* is a good example of a judge trying to influence the jury. There the trial judge said:

> "Here is a man who is deceased, Zerbe, thirty-nine years of age, a family man, working gainfully, stricken down in the vigor of life by men of the reputation of these men, according to evidence introduced here, habitual criminals, who were seeking to gain unlawfully, taking the law into their own hands . . . ."[8]

Doesn't this seem more like a summation to the jury by a district attorney than a charge to the jury by a fair and impartial trial judge?

The judge in *Commonwealth v. Gable* states:

> "That is the principal part of the story as related from the witness stand, and that contains every element necessary to make out the crime of murder in the first degree, and justifies the highest penalty that the law can impose."[9]

Is this an expression of opinion or is it a conclusion of law? The writer believes that the jury would understand this to be a conclusion of law, and it would influence their verdict to a great degree. The court, however, held that this was a fair and impartial charge.

In the case of *Commonwealth v. Simmons,* the judge stated:

> "The court cannot see how you can fail to find a verdict of murder in the first degree."[10]

The appellate court said that this was a strong statement, but there could be no real doubt that he did commit the murder; therefore, a new trial should not be granted.

The case which to this writer represents a clear example of a judge trying to make sure that the jury would bring in a verdict of guilty is the *Moyer* case in which the judge said:

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7 354 Pa. 180, 47 A.2d 445 (1946); see also Com. v. Kloiber, 378 Pa. 402, 106 A.2d 607 (1954).
8 357 Pa. 181, 53 A.2d 736 (1947).
9 323 Pa. 449, 187 Atl. 393 (1936).
10 Com. v. Simmons, 361 Pa. 391, 65 A.2d 353 (1949).

> "I understand counsel here asked for acquittal . . . , but this is a matter entirely for you; you will reach a verdict and it is your verdict, but we do not know why this question was ever presented to you at all, why they should be acquitted under the evidence in this case, we will not submit to you at all.
>
> "We have told you that you have authority to say whether this was murder in the first degree, second degree, or voluntary manslaughter; we cannot conscientiously say to you that we agree with any suggestion made by counsel for the defendants that these men might be set free on the charges preferred against them. However, we are leaving the matter entirely up to you. We are expressing our opinion, and that you will not be influenced by anything we say, but we are quite sure you look to the judge for guidance . . . , but we cannot acquiesce in conscience with the suggestion that these two men should be acquitted."[11]

The judge said that the jury wouldn't be influenced by his opinion. Then why give it to them? The judge knew as he stated later that the jury looks to the judge for guidance, and it would be influenced by his opinion. The defendant was, of course, found guilty of first degree murder and sentenced to death.

As Justice Musmanno said in a later case:

> "This kind of language placed before the jury is a dead end in their path of deliberation; it erected a barrier with which conscience, logic, and intelligence could not cope. This language almost suggested to the jury that they themselves might have to answer for some species of misconduct if they acquitted the defendant."[12]

This was said in regard to the trial judge's remarks that if they would make a finding of not guilty, the jury would be disregarding the evidence bearing on the guilt of the defendant.

The judge has somewhat less discretion in regard to his comments on the penalty which should be imposed in first degree murder cases. These cases which construe the power of a trial judge to comment on the penalty to be imposed are not uniform in their holdings. Sometimes the court will hold that a trial judge may comment on the penalty, but he must leave it up to the jury to render the final decision.[13]

The court in *Commonwealth v. Williams* said:

> "There is no more warrant in the law for judicial intrusion upon the jury's deliberative exercise of its penalty-fixing discretion prior to the rendition of the verdict than there is after the verdict has been rendered."[14]

Here the court reversed the conviction and ordered a new trial because of the prejudicial remarks of the trial judge.

Another restraint which the courts have placed on the trial judge is that he cannot state, in his charge, as an established fact, something which was

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11 357 Pa. 181, 53 A.2d 736 (1947).
12 Com. v. Cisneros, 381 Pa. 447, 113 A.2d 293 (1955) (dissent)
13 Com. v. Foster, 364 Pa. 288, 72 A.2d 279 (1950)
14 307 Pa. 134, 160 Atl. 602 (1932).

the subject of serious controversy in the trial, and upon which the guilt or innocence of the defendant depended. This is brought out in the case of *Commonwealth v. Chambers*,[15] where the defendant was found guilty of first degree murder and sentenced to death in the fatal beating of an old man. The defendant claimed that another person had committed the act. This person had an alibi, so the trial judge in his charge concluded that the defendant was guilty because he believed the other person. This case was reversed and a new trial ordered because the judge concluded as an established fact that the other person's alibi was credible.[16]

In answer to the question, "Are the jurors really influenced by the judge?," Justice Musmanno has said:

> "Keeping in mind the respect and even awe with which a jury looks upon the bench, it would be like gathering figs from thistles to expect that the jury would defiantly oppose what the judge so obviously desired and almost imperiously demanded."[17]

How Can This Discretion By the Trial Judge be Controlled?

The state of Washington has amended its Constitution so that the trial judge is prohibited from conveying his opinion as to the truth or falsity of any evidence.[18]

Another method could be the giving of a standard charge to the jury.[19]

The Supreme Court of Pennsylvania could also make these obviously biased and flagrant opinions as to the guilt or innocence of the defendant reversible error.

It is interesting to note in regard to this that a bill was introduced in the General Assembly of Pennsylvania on December 12, 1955 which states:

> "Section I It shall be grounds for a new trial when a prisoner is convicted of murder in the first degree and the court in its charge to the jury expresses its opinion that the prisoner is guilty of murder in the first degree notwithstanding that the court in addition thereto charges the jury to disregard the court's opinion.
>
> Section 2 The court wherein a prisoner is convicted of murder in the first degree upon petition of the prisoner shall grant a new trial if the court expressed its opinion in its charge to the jury that the prisoner was guilty of murder in the first degree.

This the writer believes is a definite step in the right direction, but that it should be extended to include any criminal trial not just first degree murder.

In conclusion, this writer believes that as long as there is trial by jury it is the jury which should decide the guilt or innocence of the defendant.

ROBERT J. KEY

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15 See note 1, *supra.*
16 Com. v. Broichez, 264 Pa. 368, 77 A. 2d 134 (1950).
17 See note 12, *supra.*
18 WASH. CONST. art. 4, § 16; see also, State v. Brown, 19 Wash. 2d 195, 142 P.2d 257 (1943).
19 58 DICK. L. REV. 354 (1954).