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Chapter 27: Evidence

Walter H. McLaughlin

John S. Leonard

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PART IV

Adjective Law

CHAPTER 27

Evidence

WALTER H. MC LAUGHLIN, JR. *and* JOHN S. LEONARD

§27.1. Insanity defense: Expert testimony and permissible inferences. In *Commonwealth v. Smith*,[1] the defendant was tried a second time[2] for an atrocious sexual assault-murder of a five-year-old female and was found guilty.[3] At trial, the defendant raised insanity as a defense.[4] The only testimony concerning his mental condition came from two psychiatrists, the only two witnesses for the defense. The defendant did not testify, and he waived his right to make an unsworn statement to the jury after the close of the evidence. Each psychiatrist concluded his testimony on direct examination by stating that, in his opinion, the defendant was insane within the meaning of *Commonwealth v. McHoul*[5] on the date of the alleged crime. At the close of

WALTER H. MCLAUGHLIN, JR. and JOHN S. LEONARD are partners in the firm of McLaughlin Brothers, Boston. Mr. McLaughlin is also an Instructor in Law at Boston University Law School.

§27.1. [1] 1970 Mass. Adv. Sh. 409, 258 N.E.2d 13.

[2] An appeal of the original conviction resulted in reversal due not to legal error at trial but to (1) the Supreme Judicial Court's restatement of the law of insanity as affecting criminal responsibility in Commonwealth v. McHoul, 352 Mass. 544, 226 N.E.2d 556 (1967), and (2) the possibility of prejudicial pretrial publicity. Commonwealth v. Smith, 353 Mass. 487, 232 N.E.2d 915 (1968).

[3] The jury returned a verdict of guilty of murder in the first degree with a recommendation that the sentence of death not be imposed. See G.L., c. 265, §2.

[4] "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law." Commonwealth v. McHoul, 352 Mass. 544, 546-547, 226 N.E.2d 556, 557-558 (1967).

[5] Id. at 544, 226 N.E.2d at 556 (1967), noted in 1967 Ann. Surv. Mass. Law §9.16. In Smith, both of the defendant's experts testified that Smith had a long history of abnormal sexual activity (Record at 546-552) and an extremely strong sex drive (Record at 580). However, one expert testified that the defendant showed no

all the evidence, the defendant excepted to the denial of his motions that the jury be directed to return verdicts of "Not Guilty . . . by reason of insanity." The defendant argued that all the evidence pertaining to insanity indicated that he was legally insane at the time of the commission of the crime; accordingly, the jury was compelled, as a matter of law, to find the defendant not guilty by reason of insanity, and the trial judge was so compelled to direct the jury to return such a verdict.

On appeal, the Supreme Judicial Court stated that, while the Commonwealth had the burden of proving the defendant sane at the time of the crime alleged against him, the prosecution did not necessarily have to present evidence that the defendant was sane in order to secure a valid conviction. The Court reasoned that the jury is the sole judge of the credibility and weight of all the evidence on the issue of insanity and, in *Smith,* was not required to accept as conclusive the opinions of the two psychiatrists, even though no contrary opinions were introduced at trial.[6] As an additional basis for its decision, the Court invoked and reaffirmed the rationale of *Commonwealth v. Clark,*[7] that is, that "although the burden of proof is on the Commonwealth to prove the defendant mentally responsible for crime . . . the fact that a great majority of men are sane, and the probability that any particular man is sane, may be deemed by a jury to outweigh, in evidential value, testimony that he is insane."[8] Moreover, the Court explained that the *Clark* rule does not merely create a presumption in favor of sanity which disappears at the moment evidence to the contrary is introduced. Rather, the jury may draw a *permissible inference* that the defendant is sane from their common knowledge of the fact that a great majority of men are sane and of the probability that any particular man is sane.[9] Some of the factors which a jury may consider in deciding whether to draw the inference of sanity under the *Clark* rule include the presence of such circumstances as anger, revenge, rejection, jealousy, hatred, insult, and intoxication, any

signs of an overt psychosis upon examination on August 11, 1965. His initial diagnosis was sociopathic personality disorder with sexual deviation (Record at 619). It was not until after a second period of observation on October 26, 1965, that a final diagnosis in agreement with the other expert opinion (namely, schizophrenic reaction of a chronic undifferentiated type, moderate, long term, with prominent depressive features, mild paranoid features and sociopathic personality disorder with sexual deviation) was reached (Record at 625). Both experts agreed that it was possible that defendant's commitment to the Massachusetts Correctional Institution at Bridgewater could tend to precipitate or exacerbate an existing or previously existing illness.

6 1970 Mass. Adv. Sh. 409, 418-419, 258 N.E.2d 13, 19-20.

7 292 Mass. 409, 415, 198 N.E. 641, 645 (1935).

8 Ibid.

9 1970 Mass. Adv. Sh. 409, 419, 258 N.E.2d, 13, 20. The Clark decision is cited in Connolly v. John Hancock Mut. Life Ins. Co., 322 Mass. 678, 681-682, 79 N.E.2d 189, 191 (1948), and Krantz v. John Hancock Mut. Life Ins. Co., 335 Mass. 703, 712, 141 N.E.2d 719, 725 (1957).

or all of which might account for a murderous act by a sane person. However, in the last analysis the jury is the sole judge of the factual issue of sanity.[10]

While the *Smith* opinion appears to be supported by the technical rules of law enunciated in the case law, the result appears at variance with both the rationale and the sense of compassion evidenced in earlier discussions.

The *Smith* case is distinguishable from *Commonwealth v. Francis*[11] and *Commonwealth v. Clark*[12] in that the defendants in the latter cases testified, thus affording the jury the opportunity to observe their attitudes, demeanor, responsiveness and reaction under cross-examination and to weigh these observations against expert opinion of insanity; in *Smith,* however, the defendant was merely present in the courtroom. Additionally, in *Commonwealth v. Ricard,*[13] unlike *Smith,* there was evidence of provocation which could have led a sane man to perform the murderous act. Furthermore, while there was unanimous, uncontradicted psychiatric evidence of insanity in *Francis,* Smith not only failed to testify but also waived his right to make an unsworn statement to the jury.

The facts of the *Smith* case closely approximate those of *Commonwealth v. Cox.*[14] In *Cox,* the defendant, after the brutal and premeditated murder of his wife, called the police and signed a confession. At

[10] 1970 Mass. Adv. Sh. at 420, 258 N.E.2d at 21.

[11] 355 Mass. 108, 243 N.E.2d 169 (1969), noted in 1969 Ann. Surv. Mass. Law §19.5, wherein the defendant was charged and convicted of murder in the first degree. At trial, two defense experts testified as to defendant's mental incapacity; a prosecution expert, on direct examination, stated the defendant had met the tests of substantial capacity defined in the McHoul case, but later contradicted himself on cross-examination. The defendant testified at length as to his movements and motive prior to the killing. The Court held that when expert evidence conflicts on the matter of sanity, the decision is to be left to the jury. The Court distinguished Commonwealth v. Cox, 327 Mass. 609, 100 N.E.2d 14 (1951), asserting that, in Francis, the jury had before it the activity of the defendant before and after the crime as well as the opportunity to see and hear the defendant on the stand.

[12] 292 Mass. 409, 198 N.E. 641 (1935), wherein the defendant was convicted of a brutal murder in the first degree. Expert witnesses for the defendant and Commonwealth disagreed as to the nature and extent of defendant's mental illness. The defendant testified extensively on his life, work, and habits. The Court affirmed the conviction, emphasizing the jury's ability to form an opinion as to mentality based upon his testimony on the witness stand.

[13] 355 Mass. 509, 246 N.E.2d 433 (1969), wherein a chronic alcoholic, by means of an ambush, killed a man with whom he had an altercation and fight in a bar earlier in the evening. The only medical expert testified that the defendant lacked substantial capacity as defined in McHoul but that it was possible, though not probable, that the defendant was sane. The Court affirmed the conviction, ruling that the jury should weigh "the fact that a great majority of men are sane, and the probability that any particular man is sane." The Court emphasized the evidence of provocation that could lead a sane man to perform the murderous act.

[14] 327 Mass. 609, 100 N.E.2d 14 (1951).

trial, the defendant did not testify and called as his only witnesses two psychiatrists, both of whom testified, without contradiction, that the defendant was insane at the time of the commission of the crime. As in *Smith,* the defendant in *Cox* argued that the uncontradicted testimony of the psychiatrists required, as a matter of law, a directed verdict of not guilty by reason of insanity. Though this contention was rejected, the Supreme Judicial Court, observing the extraordinary facts and lack of motive, stated:

> . . . The only issue in the case was the criminal responsibility of the defendant. The only direct testimony on this issue came from two psychiatrists who had examined the defendant in the course of their official duties, one under the so-called Briggs law, and the other as medical director of the institution to which the defendant was committed. Each psychiatrist testified to his opinion, which we have accepted as an expression of a belief that the defendant was not criminally responsible at the time of the killing. There was no medical testimony that he was responsible. The fact that most men are sane, and a rational probability that the defendant, too, may have been sane on February 21, 1948, notwithstanding what he then did and later said about it, seem to us inadequate reasons upon which to disregard this unanimous medical opinion that he was not. In the opinion of a majority of the court, the verdict was against the weight of the evidence, and there should be a new trial.[15]

In *Commonwealth v. Smith,* however, the Court, noting that the defendant had two complete, error-free trials before a different judge and jury, both addressing the same issue, refused to rule that the jury's verdict was against the weight of the evidence or that justice required a new trial.[16]

While the *Smith* case did not evoke a dissenting opinion,[17] the Court was unnecessarily placed in the awkward position of going one step beyond the *Cox* rationale. The district attorney knew of defendant's

[15] Id. at 615, 100 N.E.2d at 17.

[16] 1970 Mass. Adv. Sh. 409, 422, 258 N.E.2d 13, 22.

[17] See Commonwealth v. Francis, 355 Mass. 108, 243 N.E.2d 169 (1969), wherein, despite the testimony of the defendant, and conflicting medical opinion, Justices Whittemore and Cutter in dissent stated: "As we read the transcript, the expert for the Commonwealth gave his only adequately informed opinion on cross-examination. He then agreed with the two experts called by the defendant that the defendant was affected with paranoid schizophrenia and lacked substantial capacity to conform his conduct to the requirements of law. In all the circumstances we would order a new trial under G.L. c. 278, §33E, as amended. These include the risk of the jury misunderstanding some of the expert medical opinion, the extended medical history of the defendant's disease (a 1963 report stated that he was 'potentially homicidal'), and, in the light of the history, the evidential significance of the dreadful killing itself as an act inexplicable if tested by normal conduct." 355 Mass. at 112, 243 N.E.2d at 172.

reliance on the insanity defense and failed, or was unable, to introduce affirmative evidence of Smith's sanity. If the Commonwealth merely chose not to introduce psychiatric evidence of sanity, such lack of diligence and proper preparation of the case is reprehensible. If the district attorney could not secure affirmative medical evidence of the defendant's sanity, then he should not have prosecuted Smith as a sane man. As a result of the district attorney's preparation and presentation of the Commonwealth's case, the jury was compelled to determine the issue of sanity based upon mere probability. In the absence of affirmative evidence of sanity, such procedure must be considered highly suspect. Jurors of necessity will be affected by the manner of men they are, their attitudes towards crime and insanity, which they bring with them from the popular culture, and the extent to which they know the consequences — for the defendant and for society — of a verdict of not guilty by reason of insanity.[18] Moreover, it must be recognized that the law offers little assistance to jurors in resolving issues of sanity. It leaves them very much to their own devices in appraising conflicts in credibility, in choosing among experts and their testimony. The little assistance they receive comes to them at the close of the trial through the judge's instructions — those dealing with the insanity defense itself and those dealing with burden of proof and presumptions. However, due to the Commonwealth's poorly developed case and the absence of psychiatric evidence of defendant's sanity, the *Smith* rationale, rather than focusing the jury's attention upon the evidence, allows an instruction concerning the drawing of permissible inferences of sanity that can be easily misunderstood by the uninitiated juror and abused by the prejudiced juror.[19] More importantly, the *Smith* opinion lessens both the trial and appellate courts' control of the decision-making process in criminal prosecutions in which the insanity defense is raised — an undesirable result where the possible sentence of death is involved. It is hoped that the Court, in future cases, will delineate guidelines requiring the introduction of affirmative evidence of sanity by the Commonwealth in order to promote fuller presentation of the sanity issue and fairer trials.

§27.2. Impeachment by conviction of crime: Not a matter of trial judge's discretion. The question of the discretion of the trial judge to receive or exclude evidence of impeachment by proof of prior conviction, pursuant to G.L., c. 233, §21, was decided in *Commonwealth v. West.*[1] In *West,* the defendant was indicted for armed robbery and related offenses.[2] At the conclusion of the Commonwealth's case, the

[18] Goldstein, The Insanity Defense 5 (1967).
[19] See 1969 Ann. Surv. Mass. Law §19.5, at 510-514.

§27.2. [1] 1970 Mass. Adv. Sh. 495, 258 N.E.2d 22.
[2] The related offenses were assault with intent to murder and assault and battery by means of a dangerous weapon arising out of the robbery of a bank in which a police officer was shot.

defendant asked the trial judge to rule that, if he elected to testify, his prior six convictions, all for robbery, would not be received in evidence for impeachment purposes. The prosecutor opposed the motion. The trial judge doubted whether he had any discretion to exclude this evidence, but, if he did, he would not exercise his discretion in the defendant's favor under the obtaining circumstances.[3] The defendant did not testify and was convicted.

On appeal to the Supreme Judicial Court, the defendant argued that, since the Massachusetts statute governing the admissibility of prior convictions to affect credibility is not phrased in mandatory terms,[4] the trial judge is not required to allow impeachment by evidence of prior conviction(s) and that, in this specific instance, the judge abused his discretion in refusing to exclude the evidence. The Court ruled that when the statute provides that a prior conviction of a witness "may be shown" to impeach credibility, it is speaking of an option open to the party cross-examining the witness. The word "may" in the statute does not clothe the trial judge with the discretion to receive or exclude such evidence. The statute used the word "may" instead of "shall" to indicate that the right to introduce evidence of this type and purpose belongs to the cross-examiner, but that he is not obliged to offer it.[5]

In so holding, the Court noted the existence of contrary authority construing similar statutes[6] and adopted without discussion the rationale of a New Jersey case, *State v. Hawthorne*.[7] Specifically, at early

[3] A motion for a ruling that, if defendant took the stand, the prosecution would be permitted to introduce only one record of conviction was similarly denied.

[4] General Laws, c. 233, §21, in pertinent part, provides that "the conviction of a witness of a crime *may* be shown to affect his credibility," subject to exceptions not here material. (Emphasis added.) See 1969 Ann. Surv. Mass. Law §19.1, at 499-502.

[5] 1970 Mass. Adv. Sh. 495, 498, 258 N.E.2d 22, 24.

[6] See, e.g., State v. Hawthorne, 49 N.J. 130, 228 A.2d 682 (1967), holding that the option to introduce such testimony belonged solely to the parties and, when exercised, the Court must receive the evidence. Cf. Luck v. United States, 348 F.2d 763, 767-768 (D.C. Cir. 1965), wherein the court ruled: "Section 305 is not written in mandatory terms. It says, in effect, that the conviction 'may,' as opposed to 'shall,' be admitted; and we think the choice of words in this instance is significant. The trial court is not *required* to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case. There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. This last is, of course, a standard which trial judges apply every day in other contexts; and we think it has both utility and applicability in this field."

[7] 49 N.J. 130, 228 A.2d 682 (1967).

common law, the mere conviction of a person disqualified him as a witness. The legislature, feeling that total disqualification was too harsh a sanction, directed that a convicted person could be admitted as a witness if he chose to testify. However, if he did take the witness stand, his convictions of crime "may" be used to affect his credibility. In this historical context, "may" denotes a right in the cross-examiner and not discretion in the trial judge.

While the Supreme Judicial Court may have felt bound by the historical accuracy of the *Hawthorne* rationale, such reasoning is nevertheless based upon a questionable premise which fails to require any demonstrable connection between the crime of which the defendant was earlier convicted and the present truth-telling capacity of the witness.[8] Moreover, when dealing with independent past criminality, the possibility of a massive prejudicial impact upon the jury[9] — one which cannot be cured by a limiting instruction[10] — is distinct. Lastly, a vehicle for effecting substantial justice by allowing the discretion and reason of an experienced trial judge to properly balance the interests of the defendant and the public has been lost. Unfortunately, after *West,* the only practical alternative lies in amending G.L., c. 233, §21 to provide that impeachment by prior conviction of witnesses in civil or criminal proceedings be left to the sound discretion of the trial judge, whose ruling may be reviewed by the Supreme Judicial Court only for abuse of such discretion. It is submitted that such an amendment should be promptly made.

§27.3. Impeachment by conviction of crime: Manner of impeachment: Expansion. The manner in which impeachment by prior conviction is effected was considered in *Commonwealth v. Connolly.*[1] In *Connolly,* the defendants were tried for murder in the first degree. At trial, the defendant, Connolly, took the stand. During his cross-examination, several records of previous convictions were offered to impeach his credibility. In each instance, the prosecutor asked Connolly if he was the person named in the record and, after establishing this fact, introduced the record into evidence. The prosecutor then asked Connolly if he was the same person who pleaded not guilty to

[8] Hughes, Evidence, 19 Mass. Practice Series 286 (1961); see Gertz v. Fitchburg R.R., 137 Mass. 77 (1884).

[9] See opinion of Jacobs, J., dissenting in part, in State v. Hawthorne, 49 N.J. at 148, 228 A.2d at 691. See also Richards v. United States, 192 F.2d 602, 605 (D.C. Cir. 1951); Schaefer, Police Interrogation and the Privilege Against Self-Incrimination, 61 Nw. U.L. Rev. 506, 512 (1966); Kalven and Zeisel, The American Jury 124, 126-130, 144-146 (1966).

[10] Krulewitch v. United States, 336 U.S. 440, 453 (1949); Bruton v. United States, 391 U.S. 123, 128 (1968); United States ex rel. Scoleri v. Banmiller, 310 F.2d 720, 725 (3d Cir. 1962), *cert. denied,* 374 U.S. 828 (1963); Pinkney v. United States, 363 F.2d 696 (D.C. Cir. 1966). See also Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L.J. 763 (1961); Note, The Limiting Instruction — Its Effectiveness and Effect, 51 Minn. L. Rev. 264 (1966).

§27.3. [1] 1970 Mass. Adv. Sh. 63, 255 N.E.2d 191.

charges of assaulting a named female person with intent to commit rape, and did in fact rape her but later retracted the plea of not guilty, pleaded guilty to the lesser charge of assault and battery, and was sentenced to two years in the house of correction therefor.[2] Defense counsel objected and moved for a mistrial. However, the court allowed the question and denied defendant's motion for a mistrial.

On appeal to the Supreme Judicial Court, the defendant argued that the question was prejudicial in that it informed the jury that Connolly had been charged with the crime of rape when he had only been convicted of the lesser included offense of assault and battery. It was also averred that mention of the victim's name was highly prejudicial in that there was a possibility that members of the jury could have known or even been related to this girl.

According to the majority opinion, in matters of impeachment of credibility through evidence of convictions for prior crimes, the only evidence admissible is the record of the conviction itself.[3] However, the Court then stated:

> . . . It is obvious that the prosecutor was attempting to show a conviction by the only method available to him, namely, by reading the record of the conviction, and upon the defendant's admission that he was the person named therein, by introducing it in evidence. The defendant Connolly does not contend that the prosecutor was not reading from the record, or that the matter objected to was not contained in it. What the prosecutor was attempting to do was in compliance with the law and the judge did not err in allowing the question.[4]

Justice Kirk, concurring in the result, disagreed with the implication in the majority opinion that the record of conviction, which is read to the jury, may include an *accusation* of a crime of which the witness had not been found guilty or to which he had not pleaded guilty. Accusations which may appear in the certified record are irrelevant to the fact of conviction and the certified copy should not go to the jury room unless the extraneous prejudicial accusations are expunged.[5] However, no reversible error was committed because, in

[2] The prosecutor asked the following question: "Sir, are you the same Daniel Connolly . . . [as to whom it was charged that] on the 29th day of July, 1963 . . . [he] did assault Beverly Neubert with intent to commit rape upon her and her, the said Beverly Neubert, did commit rape upon, and . . . [who] on September the 12th — . . . in Essex Superior Court, number 53742, . . . pleaded not guilty, and during the trial on October the 11th, 1963, . . . retracted the plea of not guilty, and pleaded guilty to assault and battery . . . and . . . [was] sentenced to two years in the House of Correction, are you that same person, sir." Id. at 70-71, 255 N.E.2d at 197.

[3] Id. at 71, 255 N.E.2d at 197-198.

[4] Ibid.

[5] Justice Kirk noted that his statement of the law "should be and probably is observed in the Superior Court." Id. at 74, 255 N.E.2d at 199-200.

the opinion of Justice Kirk, the transcript was susceptible of the interpretation that Connolly's counsel did know of the objectionable feature and permitted it to be read, hoping to thereby secure a mistrial.[6]

The majority opinion in *Connolly* appears to be inconsistent with the rationale of the Massachusetts rule that, since the impeacher is precluded from showing the details of the prior crime or circumstances of aggravation by proof outside the record of conviction, so also the impeached is precluded from offering evidence in explanation of the fact of conviction.[7] Yet to allow the prosecutor to introduce evidence of a crime of which the defendant had not been found guilty would logically require that the impeached, in fairness, be allowed to contradict this evidence.

The *Connolly* opinion, strictly construed, also appears to conflict with the general rule that a defendant, on cross-examination, may not be questioned as to whether he participated in unrelated specific acts of criminal conduct not resulting in a conviction, as such evidence has no relevancy to the issue of the defendant's guilt and is likely to be so prejudicial[8] as to preclude correction by a limiting instruction.[9] For similar reasons, inquiry into the details of crimes such as the name of the victim and aggravating circumstances is not permitted.[10] The fact that the accusation in the principal case involved a related offense hardly constitutes a distinction meriting a substantial revision of settled law, thereby necessitating the undesirable inquiry and testimony on collateral issues merely to avoid undue prejudice.[11] In the interests of fairer and faster trials, it is hoped that Justice Kirk's opinion is in fact the rule observed in the Superior Court. Otherwise, a clarification of the cryptic majority opinion will be necessary to prevent undue prejudice to criminal defendants.

[6] Id. at 76, 255 N.E.2d at 200. In all, ten records of convictions were read. In each, except the one in dispute, the witness had pleaded guilty to the charge as framed in the indictment. Id. at 75 n.3, 255 N.E.2d at 200 n.3.

[7] Lamoureux v. New York, N.H. & H.R.R., 169 Mass. 338, 47 N.E. 1009 (1897), wherein the Supreme Judicial Court held that convictions must be left unexplained, because to allow parties to make explanations would lead to complex inquiries into collateral issues.

[8] See United States v. Rudolph, 403 F.2d 805, 806 (6th Cir. 1968). See also United States v. King, 378 F.2d 359 (6th Cir. 1967); United States v. Benson, 369 F.2d 569 (6th Cir. 1966); Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966); Hurst v. United States, 337 F.2d 678 (5th Cir. 1964); Thurman v. United States, 316 F.2d 205 (9th Cir. 1963); Manley v. United States, 238 F.2d 221 (6th Cir. 1956); Pierce v. United States, 86 F.2d 949 (6th Cir. 1936).

[9] United States v. Smith, 403 F.2d 74 (6th Cir. 1968); Courtney v. United States, 390 F.2d 521 (9th Cir. 1968); Odom v. United States, 377 F.2d 853 (5th Cir. 1967). See also Bruton v. United States, 391 U.S. 123 (1968); Marshall v. United States, 360 U.S. 310 (1959).

[10] See Commonwealth v. Galligan, 155 Mass. 54, 28 N.E. 1129 (1891); Gertz v. Fitchburg R.R. Co., 137 Mass. 77 (1884).

[11] See Lamoureux v. New York, N.H. & H.R.R., 169 Mass. 338, 47 N.E. 1009 (1897).

§27.4. Legislation: Witness immunity. General Laws, c. 233, has been amended by the legislature to provide for the grant of immunity to witnesses required to testify or produce evidence before a grand jury and at trial thereafter.[1] The immunity statute provides that in any proceeding before a grand jury involving specified offenses,[2] after the witness has claimed his constitutional privilege against self-incrimination, the attorney general or a district attorney may make an application to a justice of the Supreme Judicial Court for an order granting immunity to the witness. If, after a private hearing, the justice finds that the witness did validly refuse to answer questions or produce evidence on grounds of self-incrimination, then the justice may order the witness to answer the questions or produce the evidence requested by issuing an order granting immunity.[3] Furthermore, at the time for trial, if a witness has been previously granted immunity by a justice of the Supreme Judicial Court concerning his testimony or production of evidence before a grand jury, then a judge of the Superior Court, on motion by the district attorney or attorney general, may issue an order granting immunity to such witness, as long as the witness refuses to testify or produce evidence on the ground that the testi-

§27.4. [1] Acts of 1970, c. 408, amending G.L., c. 233, by inserting §§20C-20I after §20B. It should be noted that the power to grant immunity is neither implied nor inherent in the governmental power to investigate. Consequently, government officials and courts are without inherent power to grant immunity to a witness and thereby compel him to testify over his proper assertion of the privilege against self-incrimination. However, the legislative power, being derived from the Constitution, carries with it the inherent power to investigate, and to compel the giving of testimony which might incriminate the witness, provided immunity be accorded to him commensurate with the scope of the constitutional privilege against self-incrimination. Hughes, Evidence, 19 Mass. Practice Series 145 (1961).

[2] The enumerated crimes are as follows: abortion, arson, assault and battery to collect a loan, assault and battery by means of a dangerous weapon, assault to murder, breaking and entering a dwelling house or a building, bribery, burning of a building or dwelling house or other property, burglary, counterfeiting, deceptive advertising, electronic eavesdropping, embezzlement, extortion, firearm violations, forgery, fraudulent personal injury and property damage claims, violation of the gaming laws, gun registration violations, intimidation of a witness or of a juror, insurance law violations, kidnapping, larceny, lending of money or thing of value in violation of the general laws, liquor law violations, mayhem, murder, violation of the narcotic or harmful drug laws, perjury, prostitution, violations of environmental control laws (pollution), violations of conflicts-of-interest laws, consumer protection laws, pure food and drug law violations, receiving stolen property, robbery, subornation of perjury, uttering, being an accessory to any of the foregoing offenses and conspiracy or attempt or solicitation to commit any of the foregoing offenses. G.L., c. 233, §20D.

[3] Id. §20E. This section also provides that if the application is made by a district attorney, he shall at least three days before the date for hearing upon his application give notice by certified mail to the attorney general and each other district attorney in the Commonwealth who may file appearances and have the right to be heard at the hearing.

mony or evidence would tend to incriminate him or subject him to a penalty or a forfeiture.[4]

A witness who has been granted immunity cannot be prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he is compelled to testify after having claimed his privilege against self-incrimination. Neither can such testimony obtained under the immunity statute be used as evidence in any criminal or civil proceeding in any court of the Commonwealth except in prosecutions for perjury or contempt committed while giving testimony or producing evidence under compulsion pursuant to the statute.[5]

Upon the failure of a witness who has been properly granted immunity to testify or produce evidence after having been ordered to do so by the appropriate judge, the district attorney or attorney general shall institute contempt proceedings against the witness in the court where the alleged contempt occurred. If the witness, after a hearing, is adjudged in contempt of court, he shall be punished by imprisonment in the house of correction for a term not to exceed one year or until he complies with the order of the court, whichever occurs first. The witness then has the right to appeal to the Supreme Judicial Court an adjudication of contempt, and the Commonwealth has the right to appeal the failure to make an adjudication of contempt.[6]

Lastly, the statute provides that no defendant in any criminal proceeding shall be convicted *solely* on the testimony of, or the evidence produced by, a person granted immunity under the act.[7]

While the enactment of the immunity statute constituted a significant legislative event, an analysis of the act reveals its application and effect to be extraordinarily limited. First, a witness, to even be eligible for a grant of immunity at trial, must have already testified before the grand jury. Thus, the identity and whereabouts of the witness, as well as the information possessed by the witness, must all be known by the Commonwealth before the indictment. This places a heavy and unnecessary burden on the agencies of law enforcement, particularly when notorious crimes are involved which necessitate immediate indictment; much valuable testimony and evidence will be lost. Secondly, the statute will be largely ineffective in combating organized crime, where extensive investigation prior to indictment is possible, because of the weak contempt penalties and possibility of exhaustive hearings and appeals.

The first step in a meaningful attack on crime is amendatory legislation to provide for original applications for grants of immunity to

[4] Id. §20F.
[5] Id. §20G.
[6] Id. §20H.
[7] Id. §20I.

be made before a judge of the Superior Court upon a claim of privilege against self-incrimination at the time of trial upon affidavit by the Commonwealth that the identity or location of, or information possessed by, the witness has been discovered subsequent to indictment. Additionally, the contempt punishment should be increased to deter refusals to testify or produce evidence. Unfortunately, the statute, in its present form and limited application, does not effectively prevent the frustration of justice.