Annual Survey of Massachusetts Law

Volume 1966 Article 28

1-1-1966

Chapter 25: Evidence

Walter H. McLaughlin Jr.

CHAPTER 25

Evidence

WALTER H. MC LAUGHLIN, JR.

§25.1. Exclusion of evidence: Similar crimes. Except in unusual circumstances, the fact that a criminal defendant has in the past committed a crime similar to the one for which he is currently being tried, is generally inadmissible because of the natural tendency of the trier of fact to infer that the defendant is guilty of a later crime because of his commission of the earlier one. This type of evidence is so prejudicial to the defendant that the Supreme Judicial Court has held it inadmissible even in a jury waived trial in which the trier of fact is experienced in disregarding prejudicial evidence.[1] In *Commonwealth v. Nassar*,[2] the Court continued its zealous protection of the accused against the damaging effects of such evidence.

The defendant had been arrested for a murder 16 years ago by the same officers who made the present arrest for the killing of a service station attendant. He had been convicted of this earlier murder. The arresting officer was allowed to testify over objection in the present case as follows:

> I said "Hi, George, do you remember me?" He said "I can't place you." I said "Do you remember sixteen years ago George?" and he said "Oh, yes" and I said "Same thing as sixteen years ago, George" and he said "Yes." Pardon me, he didn't say yes. He shook his head in the affirmative.[3]

It is important to note that the hearsay rule does not make this conversation inadmissible. The accusatory statements were made in the presence of the defendant who nodded his acquiescence to them. This clearly qualifies them as evidence under the admissions exception to the hearsay rule, because the defendant by his action adopted the statement of the police officer. However, a record of prior crimes is inadmissible even in situations in which it would be only shown by inference or in which the acknowledgment of prior crime is made by the defendant himself in an out-of-court statement.

Moreover, in the *Nassar* case, the Court refused to apply the doctrine

WALTER H. MCLAUGHLIN, JR., is a member of the firm of The McLaughlin Brothers, Boston, and an Instructor of Law at Boston University Law School.

§25.1. [1] Commonwealth v. Welcome, 348 Mass. 68, 70, 201, N.E.2d 827, 829 (1964), noted in 1965 Ann. Surv. Mass. Law §22.5.
[2] 1966 Mass. Adv. Sh. 887, 218 N.E.2d 72.
[3] Id. at 893, 218 N.E.2d at 78.

of harmless error to this inadmissible testimony. The defendant, after the introduction of the disputed testimony, chose to take the stand thereby making his prior criminal record admissible for the purpose of impeaching his credibility.[4] The Court, however, refused to speculate if Nassar would have taken the stand if the earlier testimony had been excluded, and resolved the doubt in favor of the defendant. The case was remanded for a new trial.

The Court was disturbed by the clear implication in the arresting officer's testimony that the defendant had previously been accused of murder. The Court in another murder case, *Commonwealth v. Vanetzian*,[5] where the only direct inference to be drawn from the conversation between the defendant and the police officer was that they had previously met, refused to reverse a conviction because it was not convinced that the admission of evidence somewhat similar to that involved in *Nassar* could have appreciably influenced the jury or tainted their verdict.[6]

In still another first degree murder appeal, *Commonwealth v. Stirling*,[7] a case based almost entirely on circumstantial evidence, the Court upheld the admission of evidence that shortly before the killing the defendant had paid for a gun with a check drawn on insufficient funds. The general rule of inadmissibility of evidence of other crimes is qualified when the crime shown is part of the "attendant circumstances" of the crime for which the defendant is being tried, or when it tends to show motive.

These three recent cases seem to be consistent. The evidence presented in the *Nassar* case was extremely prejudicial and only slightly relevant, whereas the conversation offered in *Vanetzian* was so vague as not to be prejudicial, and the evidence in *Stirling*, while admittedly prejudicial, was also highly relevant.

§25.2. **Eminent domain: Proof of compensation.** It is a basic rule of evidence in land damage cases that the trial judge has wide discretion to determine which similar properties have characteristics so much in common with the property being valued that their sales prices are admissible and, in turn, which properties are so remote or dissimilar that evidence of their sale prices would only tend to confuse the trier of fact, and therefore should be excluded. Sales which occur after the date of a taking, or more precisely in Massachusetts, sales which occur after the "beginning of the entire public work which necessitates the taking,"[1] present especially difficult problems because these sales may reflect a value that is enhanced by the very public improvement which necessitated the taking. The owner of land taken is

4 G.L., c. 233, §21.

5 350 Mass. 491, 215 N.E.2d 658 (1966).

6 The evidence was that the police officer asked the defendant if he remembered him, to which the defendant replied, "No, not again" or a similar phrase.

7 1966 Mass. Adv. Sh. 919, 218 N.E. 2d 81.

§25.2. 1 Cole v. Boston Edison Co., 338 Mass. 661, 665, 157 N.E.2d 209, 212 (1959).

not entitled to collect for this enhancement. On the other hand, if there has been no enhancement, comparable sales after the taking may be extremely helpful to the trier of fact in determining value. In three cases decided during the 1966 SURVEY year, the Supreme Judicial Court examined the discretion of the trial judge in admitting comparable sales made after the taking.

In *Burchell v. Commonwealth*,[2] the trial judge admitted evidence of a sale of petitioner's remaining land thirteen months after the taking, a sale on which the petitioner and his expert relied almost exclusively in fixing damages. The Supreme Judicial Court upheld the trial court's discretion in admitting this evidence, because there was no evidence in the record of enhancement of this remainder because of the taking of the original parcel.

Likewise, in *Zambarano v. Massachusetts Turnpike Authority*,[3] the trial judge admitted evidence of the sale of neighboring properties which occurred 15 months after the taking for the turnpike extension. These properties were located near the Prudential complex which was under construction at the time of the taking as well as at the time of the comparable sale. However, since there was no evidence introduced by the Authority that there was an enhancement in value caused by the taking for the extension, the Court upheld the trial judge's discretion.

Alden v. Commonwealth[4] involved the admission of a comparable sale of adjacent land made five days after, and consummated three months after, a taking of a portion of the petitioner's land on Route 9 for the interchange with new Route 495. The Commonwealth, through its experts, contended that the new road and interchange enhanced the value of the petitioner's land so that there was no damage, and objected to the admissibility of the comparable sale because it reflected this enhanced value. The petitioner's expert testified that there was no enhancement because the interchange divided the already valuable Route 9 frontage in a manner which made a large portion of the non-taken land unusable. The trial judge, in his discretion, admitted the sales price of the adjacent land, and refused to admit the testimony of the buyer concerning his reasons for his purchase. The Supreme Judicial Court reversed the trial judge, holding, unlike the two cases discussed above, that there was substantial evidence of enhancement in value which should have barred admission of the sale. While the decision, however, failed to make reasonably clear the basis for overturning the trial judge, it appears from the language of the opinion that the Supreme Judicial Court disagreed with the trial judge concerning enhancement.

Both from the excluded evidence of the buyer and from judicial notice that property at the interchange of a limited access interstate highway is increased in value because of its location near such an inter-

2 350 Mass. 488, 215 N.E.2d 649 (1966).
3 350 Mass. 485, 215 N.E.2d 652 (1966).
4 1966 Mass. Adv. Sh. 937, 217 N.E.2d 743.

change, the Court concluded there was a strong possibility that the offered sale, even though practically contemporaneous with the taking, indicated more accurately the value of the remaining land after the taking than it did of the land taken before the taking.

The Court, however, especially when distinguishing the cases discussed above, did not use these reasons for reversing the judge's discretion, but rather said that the fact that there was evidence of enhancement was controlling. So as not to close the door completely to the admission of subsequent sales whenever the taking authority comes forth with a theory of enhancement, the Court suggested that in some cases a trial judge under proper instructions could admit evidence of a subsequent sale even when there had been evidence of enhancement. Just which cases these may be, and the extent of the trial judge's discretion once any evidence of enhancement has been introduced, is left unclear from the opinion.

The trial judge's discretion in admitting comparable sales of land was also attacked in *H.E. Fletcher Co. v. Commonwealth.*[5] In that case, the petitioner, the owner of a large and successful granite quarry in Chelmsford, sought approximately four million dollars in damages resulting from a taking by the state of 174 acres of "wild land traversed only by hunters," approximately one fourth of which was purchased for $1,475 about seven weeks prior to the taking. The theory by which the petitioner hoped to show such damage was that the taken land had beneath it extensive and valuable deposits of a granite rock which could be quarried by the petitioner at a substantial profit. The Commonwealth introduced the evidence of the purchase price under the sale seven weeks earlier. It was also successful in introducing eight sales in the area, made up to six years prior to the taking, which were clearly comparable in size and surface characteristics. The respondent vigorously objected because the Commonwealth had not shown comparable mineral deposits upon these parcels. Principally relying upon the trial judge's discretion, the Supreme Judicial Court upheld the admission of these sales. The fact that other similar sales had come in without objection led the Court to believe that even if erroneously admitted, the admission was harmless.

This case also raised the question of the correctness of the trial judge's exclusion of the petitioner's computations of its potential profit from the land taken. The calculations were excluded as being too speculative "as a matter of law." The petitioner argued that this language meant that the trial judge had ruled that he did not have the power to admit the evidence in his discretion. The Supreme Judicial Court did not adopt the petitioner's construction of this term and suggested other possible interpretations of the phrase. It held it was certainly not required to adopt any particular meaning and that, so long as the judge in his discretion had the power to exclude evidence of the type he did here, then the evidence was properly excluded.

[5] 350 Mass. 316, 214 N.E.2d 721 (1966).

Thus in the land damage field, the Supreme Judicial Court during the 1966 SURVEY year continued to emphasize the broad discretion of the trial judge in the admission and exclusion of comparable sales and of other evidence of value. However, the *Alden* case stands as a reminder that if the Supreme Judicial Court either fundamentally disagrees with the trial judge's conclusion, or is concerned that the jury would be unduly confused by certain evidence, it will order a new trial.

§25.3. **Exclusion of confessions.** Although the subject is covered more extensively in the chapter on criminal law, it is important to note that the United States Supreme Court in the case of *Miranda v. Arizona*,[1] substantially changed the standards in this Commonwealth, as in the other states, which must be met before confessions are admissible in evidence. Ever since the *Escobedo*[2] case expanded the rights of the accused to be fully warned of his rights and have the assistance of counsel, the Supreme Judicial Court has taken a very narrow view of the extent of the expansion, generally confining the applicability of *Escobedo* to those cases which fell squarely within its fact pattern. The clarification in *Miranda* of the right of the accused to remain silent and to have the assistance of counsel will substantially affect the admissibility of confessions and other statements by the accused in criminal trials.

§25.4. **Hearsay rule.** In the case of *Commonwealth v. Massod*,[1] the defendant was tried on the charge of using a telephone for the purpose of accepting bets. There was evidence that the police entered the defendant's premises and answered the telephone each time it rang and talked with each caller. A typical conversation was initiated from a caller who asked for Brockton Eddy and then said "5-5-0 on Now Do It in the 7th at Lincoln." The police officers were permitted to testify to this and similar conversations. The Supreme Judicial Court upheld the admissibility of these conversations on the ground that they were " 'highly cogent first hand information as to the actual use of the phone equipment,' "[2] citing *Commonwealth v. Jensky*.[3] While not discussed by the Court, this evidence presents a problem of hearsay. It can be argued that each of these conversations is merely circumstantial evidence of the opinion of the caller that the defendant's premises were being used for the purpose of accepting bets. Since the caller is not in court to be cross examined, circumstantial evidence of his opinion might be considered inadmissible.

However, this evidence could also be considered as being offered for

§25.3. [1] 384 U.S. 694, 86 Sup. Ct. 1602, 16 L. Ed. 2d 694 (1966). See Chapter 12 *supra*.

[2] Escobedo v. Illinois, 278 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964), noted in 1964 Ann. Surv. Mass. Law §§11.3, 22.2; 1965 Ann. Surv. Mass. Law §§11.4, 12.1, 12.2, 12.3, 22.1.

§25.4. [1] 1966 Mass. Adv. Sh. 829, 217 N.E.2d 191.

[2] Id. at 831, 217 N.E.2d at 191.

[3] 318 Mass. 350, 352, 61 N.E.2d 532, 534 (1945).

a non-hearsay purpose. The conversation of the caller was in effect a verbal act, the placing of a bet, and the statement of his words was not offered for the truth of any assertion they might contain but merely to show that these words constituted the placing of a bet. This in turn is circumstantial evidence of the fact that the telephone was being used to register bets. If there is evidence of several calls of the same nature in a brief period of time, then the circumstantial inferences from the words spoken grow very strong and the court should admit the evidence.

The case of *Commonwealth v. Gardner*[4] illustrates another difficult hearsay problem involving the reliance of an expert on out-of-court statements in the formation of his opinion. The expert in this rape case, a gynecologist who had examined the victim shortly after the incident, testified that in his opinion the victim engaged in intercourse during the twelve hours previous to his examination. He then testified over objections that in his opinion there was forcible entry. In response to a question posed by the trial judge, the doctor admitted that part of his opinion was based upon "a history from the patient as to what happened." The Court held this evidence should have been excluded because it permitted the expert to base an opinion on areas outside of his professional competence — the emotional state of the victim and what the victim told him. He admitted that he could not have rendered his opinion solely on the basis of his first-hand knowledge gained through the physical examination. The Court finally concluded that since members of the jury were capable, equally with the expert, of reaching a conclusion on the issue of forcible entry, his opinion was inadmissible. It would seem that the point noted by the Court in a footnote, the reliance by an expert on hearsay, might be an equally important reason for exclusion of the opinion in the form it was asked. Although an expert is entitled to rely upon hearsay information acquired in training for his specialty, an opinion not based upon facts observed by the expert witness or upon facts assumed and put into evidence through the witnesses, but rather based upon the facts taken on the hearsay of others out of court, is not admissible.[5]

The doctor's opinion might thus have been attacked because it was based upon hearsay. Since the hearsay facts concerning forcible entry were introduced into evidence through the testimony of the victim, however, the expert might well have been able to give his opinion if a hypothetical question were put to him that assumed as one of its facts the truth of the testimony of the victim.

§25.5. Illegal search and seizure: Seach warrants and valid arrests. Ever since *Mapp v. Ohio*[1] rendered illegally seized evidence inadmis-

[4] 1966 Mass. Adv. Sh. 733, 216 N.E.2d 558.

[5] Commonwealth v. Russ, 232 Mass. 58, 74, 122 N.E. 176, 182 (1919).

§25.5. [1] 367 U.S. 643, 81 Sup. Ct. 1684, 6 L. Ed. 2d 1081 (1961), noted in 1961 Ann. Surv. Mass. Law §10.4; 1962 Ann. Surv. Mass. Law §§10.2, 11.7, 21.6; 1963 Ann Surv. Mass. Law §§10.2, 21.1; 1964 Ann. Surv. Mass. Law §12.2; 1965 Ann. Surv. Mass. Law §§12.2, 12.3, 22.3.

sible in state courts, two areas of the law, heretofore neglected — the law of arrest and the law of search warrants — have undergone intensive development. A seizure as a result of a search must either be incident to a lawful arrest or pursuant to a valid warrant to be legal. During the 1966 SURVEY year both questions were presented to the Supreme Judicial Court.

(a) Search incident to an arrest. In *Commonwealth v. Ballou*,[2] the defendant was convicted of unlawfully carrying a firearm. He was a known criminal and an associate of many persons involved in a wave of gangland killings. A police officer, one Captain Bulens, acting on a tip that the defendant was in the Charlestown area and was armed, approached the defendant in a very cautious manner, unsnapping the top of his holster to free his gun. When he reached the defendant he saw no visible evidence of a firearm. However, he lifted the defendant's sweater, patted him down and uncovered a loaded 38 calibre revolver and then took him into custody. The defense argued that there was no probable cause to believe a felony was committed before the defendant was searched so that the search was not incident to a valid arrest and, therefore, was illegal.

The Supreme Judicial Court, analyzing the facts in evidence that were known to the police officers, concluded that the claim of unreasonable and unconstitutional search had to be balanced against the need of the police officers to protect themselves and the public generally, and found the latter controlling.

In *Ker v. California*[3] the United States Supreme Court had concluded that states had the right to develop workable rules governing arrests, searches, and seizures in order to meet the practical demands of effective criminal investigation and law enforcement. The Supreme Judicial Court in *Ballou* emphasized the mildness of the indignity to the defendant as compared to the sensible means taken to preserve human life. The opinion certainly does expand the right of the police in Massachusetts to search without a warrant, since there was no mention by the Court of any probable ground for arrest prior to the discovery of the weapon, which in turn was found by the very search attacked as unreasonable. But the decision does recognize the common sense rule that police officers, when approaching known danger, should have the fundamental right to take steps to protect themselves.

(b) Search warrants. Prior to the early 1960s, when the presence or absence of a search warrant was not relevant in the admissibility of illegally seized material, a valid warrant could be obtained by an officer as long as, in applying for it, he stated that he believed that certain premises were being used for an unlawful purpose. He did not have to state the grounds for his belief and the issuing authority was not required to pass upon the validity of that belief. Obtaining a search warrant was a routine formality. The United States Supreme Court,

2 1966 Mass. Adv. Sh. 835, 217 N.E.2d 187.
3 374 U.S. 23, 83 Sup. Ct. 1623, 10 L. Ed. 2d 726 (1963).

in *Aquilar v. Texas*,[4] invalidated search warrants so obtained because the issuing magistrates had no way of determining if probable cause for searches existed.

General Laws, Chapter 276, Sections 1, 2, 2A, 2B, and 2C,[5] substantially increased the statutory requirements for obtaining a valid search warrant in Massachusetts. The person seeking the warrant is now required to appear personally before the court and give an affidavit stating both the facts and the source of the facts upon which he relies to establish sufficient grounds for the issuance of a warrant. In *Commonwealth v. Dias*,[6] *Commonwealth v. Rossetti*,[7] *Commonwealth v. Mitchell*,[8] (a narcotics case in which General Laws, Chapter 276, was not directly applicable but in which it was used to furnish standards), and in *Commonwealth v. Coldaro*,[9] the Court reversed convictions because the search warrants were improperly applied for and were thus invalid under the new and stricter procedures. It does not appear, however, that the Court felt that prior Massachusetts standards were unconstitutional. In *Commonwealth v. Owens*,[10] the Court upheld a warrant issued in 1963 that was based upon belief of the applying officer when the official issuing the warrant had before him basic facts sufficient to permit him to determine for himself whether probable cause existed.

4 378 U.S. 108, 84 Sup. Ct. 1509, 12 L. Ed. 2d 723 (1964).
5 Effective, as amended, June 23, 1964.
6 349 Mass. 583, 211 N.E.2d 224 (1965), also noted in §12.2 *supra*.
7 349 Mass. 626, 211 N.E.2d 658 (1965), also noted in §12.2 *supra*.
8 1966 Mass. Adv. Sh. 485, 215 N.E.2d 324, also noted in §12.2 *supra*.
9 1966 Mass. Adv. Sh. 929, 217 N.E.2d 775, also noted in §12.2 *supra*.
10 1966 Mass. Adv. Sh. 689, 216 N.E.2d 411.