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COMMENTS

ACCOMPLICE TESTIMONY: IS CORROBORATION NECESSARY?

With respect to the problem of whether or not a defendant can be convicted on the testimony of an accomplice in a criminal proceeding, the jurisdictions of the United States are divided, with a slight modification, into two groups. A smaller group holds that a defendant cannot be convicted upon the accomplice's testimony unless it is corroborated, while a larger group holds that a conviction will be sustained on such testimony standing alone.

Those jurisdictions which hold that corroborating evidence is not mandatory follow what is generally termed the common law rule. It is reported to have had its origin in the ancient doctrine of approvement. Under this doctrine, in capital cases, a person indicted for treason or any other felony could confess and accuse his accomplices who had participated in the crime with him. If the accomplices were convicted, the "approver" was pardoned; if they were acquitted, the "approver" was hanged.¹

It is easily understood that the common law rule which contained the characteristics of such a practice could induce the accomplice to implicate others falsely in the hope of gaining his own freedom. Consequently, the rule was tempered with a cautionary charge that the testimony was subject to grave suspicion and should be acted upon with great caution.²

At first the rule allowing conviction upon the uncorroborated testimony of an accomplice was generally adopted in this country by all of the states.³ It was also recognized by the Federal Government.⁴ But some states decided that the danger was too great in accepting testimony that might be motivated by promises

¹ 4 BLACKSTONE, COMMENTARIES 330, 331. As the doctrine developed, it soon became recognized that the accomplice was not entitled to his pardon as a matter of legal right. The accomplice became entitled only to recommendations of mercy if he testified fully, fairly, and in good faith. Today a promise of immunity from prosecution given by a district attorney for an accomplice's testimony is not binding upon the state. *Whiskey Cases*, 99 U.S. 594, 600 (1878).

² Usually the court calls the jury's attention to the tainted character of the testimony and to possible motives that could induce the accomplice to give false testimony. 22 C.J.S., *Criminal Law* § 810 (1940).

³ 7 WIGMORE, EVIDENCE § 2056 (3d ed. 1940).

⁴ *Ibid.*

of freedom,⁵ hopes of leniency,⁶ greed,⁷ or even motivated by the malice and wickedness of the accomplice himself.⁸ As a result statutes were enacted providing that a defendant could not be convicted upon the uncorroborated testimony of an accomplice.⁹ Today some sixteen states have such statutes.¹⁰ Two states, Maryland¹¹ and Tennessee,¹² have attained the same result by judicial decision.

The attitude of the states that chose to jettison the common law rule was well stated in *Watson v. State*:

It is a firmly established rule in this state that a person accused of crime may not be convicted on the uncorroborated testimony of an accomplice. [Case citations omitted.] The reason for the rule requiring the testimony of an accomplice to be corroborated is that it is the testimony of a person admittedly contaminated with guilt, who admits his participation in the crime for which he particularly blames the defendant, and it should be regarded with great suspicion and caution, because otherwise the life or liberty of an innocent person might be taken away by a witness who makes the accusation either to gratify his malice or to shield himself from punishment, or in the hope of receiving clemency by turning State's evidence. [Case citations omitted.]¹³

A few jurisdictions, as was previously suggested, chose to modify the common law rule rather than reject it completely. Illinois,¹⁴ Mississippi,¹⁵ and Nebraska¹⁶ have ruled that if an accomplice has been impeached a conviction cannot be had upon his testimony alone. Washington places a duty to corroborate upon the state if it can do so.¹⁷

In the states where the common law rule is retained, defendants from time

⁵ *People v. Goldberg*, 327 Ill. 443, 158 N.E. 680 (1927), *Hill v. Texas*, 55 Cr. 435, 117 S.W. 134 (1909).

⁶ *People v. Pattin*, 209 Ill. 542, 125 N.E. 248 (1919).

⁷ *People v. Rendas et al*, 366 Ill. 385, 9 N.E. 2d 237 (1937).

⁸ *People v. Rendas et al*, *supra* note 7.

⁹ See *Comba v. State*, 68 Okla. Crim. 373, 377, 378, 99 P. 2d 170, 172, 173 (1940). The court said, "The statutes of this state provide that a conviction cannot be had upon the uncorroborated testimony of accomplices. . . . The statute was adopted for the purpose of protecting the accused. Its purpose being to prevent one guilty of a crime from implicating another falsely, for hope of clemency, motives of revenge, or for any other reason. . . ."

¹⁰ ALABAMA, ALA. CODE, tit. 15 § 307 (1940); ARIZONA, ARIZ. CODE, 44-1819 (1939); ARKANSAS, POPES DIGEST § 4017; CALIFORNIA, CALIF. PEN. CODE, § 31, 1111 (1954); GEORGIA, GA. CODE § 38-121 (1933); IDAHO, IDAHO CODE 19-2117 (1947); IOWA, IOWA CODE § 782.5 (1950); KENTUCKY, KY. CR. CODE PRAC. § 241; MONTANA, MONT. REV. CODE § 94-7220 (1947); NEVADA, COMP. LAWS, § 10978 (1929); NEW YORK, CODE CR. PROC. § 399; NORTH DAKOTA, REV. CODE § 29-2114 (1943); OKLAHOMA, OKLA. STATS. tit. 22 § 742 (1941); SOUTH DAKOTA, SO. DAK. CODE § 34.3636 (1939). UTAH, UTAH CODE ANN. § 77-31 (1953).

The common law rule still prevails in Federal jurisdictions. *Caminetti v. United States*, 242 U.S. 470, 495 (1917), *Johns v. United States*, 227 F.2d 374 (10th Cir. 1955), *Nilva v. United States*, 212 F.2d 115 (8th Cir. 1954).

¹¹ *Coleman v. State*, 121 A.2d 254 (1956), *Watson v. State*, 208 Md. 210, 117 A.2d 549 (1955), *Lansa v. State*, 109 Md. 602, 71 Atl. 1058 (1909).

¹² *Witham v. State*, 191 Tenn. 115, 232 S.W.2d 3 (1950), *Clapp v. State*, 94 Tenn. 186, 30 S.W. 214 (1895).

¹³ 208 Md. 210, 117 A.2d 549 (1955).

¹⁴ *People v. Alward*, 354 Ill. 357, 188 N.E. 425 (1933).

¹⁵ *Creed v. State*, 179 Miss. 700, 176 So. 596 (1937), *White v. State*, 146 Miss. 815, 112 So. 27 (1924), *Hunter v. State*, 137 Miss. 276, 102 So. 282 (1924).

¹⁶ *Ruzicka v. State* 137 Neb. 473, 289 N.W. 852 (1940), *Jahnke v. State*, 68 Neb. 154, 94 N.W. 158 (1903).

¹⁷ *State v. O'Donnell*, 195 Wash. 471, 81 P.2d 509 (1938).

to time urge the courts to reconsider their position. Invariably their contentions are without success. Generally the rule is retained upon the theory that the law of evidence today tends to admit as much evidence as possible leaving it to the jury to ascertain its probative value. Technical exclusionary rules are looked upon with disfavor.¹⁸

It is submitted that when courts consider the problem of rejecting or retaining the common law rule that convictions can be sustained on an accomplice's uncorroborated testimony, two considerations are of paramount importance: the innocent should be protected; yet the guilty should be punished. Rules of criminal law must be such that the innocent have reasonable security from unjust convictions; yet, in the interest of social order and justice, criminals must not be allowed to escape on mere technical rules of law.

The states that have rejected the common law rule by statute or judicial decision manifestly create just such a situation where the defendant many times can escape prosecution and conviction simply because there is no evidence other than that of an accomplice. Let us take for example the typical gangland slaying—a crime that is executed with the greatest of secrecy. Evidence in this type of crime will frequently consist solely in the testimony of one who has participated in the crime. In a state where corroborative evidence is required, a conviction will be impossible. Recognizing this result, and in order to avoid technical acquittals, states that have changed the common law strain to hold wherever possible that the witness is not in fact an accomplice.¹⁹ Findings that the alleged accomplice was only a spectator or “merely present” at the scene of the crime are readily upheld.²⁰

It is seen, then, that a rule of law which makes corroborating evidence the *sine qua non* of conviction has the serious defect of allowing the guilty to escape on a mere technicality. Proponents of the rule contend that such a situation is regrettable but necessary in order to protect the innocent from the possibility of an unjust conviction. The cases are legion with statements urging the courts not to place faith in testimony which may possibly be founded upon corrupt motives.

¹⁸ Collins v. People, 98 Ill. 594, 590 (1881). In this case the court remarked, “The tendency with us, at present, is to arbitrarily exclude as little as possible, but to listen and give credence to whatever tends to establish the truth. The innocent should not be convicted, nor should the guilty escape punishment, by reason of any merely arbitrary rule preventing the free and full exercise of the judgment as to the truthfulness or untruthfulness of testimony, and the reliance to be placed upon it in the trial of cases. In many, probably in most cases, the evidence of an accomplice, uncorroborated in material matters, will not satisfy the honest judgment beyond a reasonable doubt—and then it is clearly insufficient to authorize a verdict of guilty. But there may frequently occur other cases, where, from all the circumstances, the honest judgment will be as thoroughly satisfied from the evidence of the accomplice of the guilt of the defendant, as it is possible it could be satisfied from human testimony—and in such case it would be an outrage upon the administration of justice to acquit.”

¹⁹ See Galloway v. Commonwealth, 301 Ky. 613, 191 S.W.2d 821 (1945).

²⁰ A mere presence, or presence combined with a refusal to interfere or with concealing the fact, or a mere knowledge that a crime is about to be committed or a mental approbation of what is done while the will contributes nothing to the doing will not create guilt. 1 BISHOP CRIMINAL LAW § 633 (9th ed. (1923)).

It is the opinion of the writer that such testimony can be accepted without unduly prejudicing the rights of the innocent. Conceded: human nature is such that many times one who is about to be punished for a crime will implicate others in order to escape or reduce his own punishment. But this is not always the case. Even though a witness is contaminated with guilt, his testimony can be as truthful as that of one who is not; it does not necessarily have to be false. The problem is to safeguard the defendant in the event the witness is lying or acting from corrupt motives. This can be done in one of two ways. First, the court should remain keenly alert to the debility of this type of testimony. If it appears to the court that the testimony of the accomplice is not to be believed, that it is contradictory, inconsistent, weak, or if the accomplice has been impeached or sworn falsely, the court should without hesitation direct a verdict for the defendant. In that way there is little possibility that a jury will be misled by a clever witness. Secondly, if the court feels that the witness is worthy of belief, a proper charge should be given to the jury which sufficiently warns that the testimony must be received with great caution. The court should warn the jury that they should hesitate to convict on this type of testimony alone, that it is tainted, and that it may be based on corrupt motives. A failure to so instruct, or an improper instruction should constitute reversible error.²¹

The administration of justice is many times frustrated by technical rules which preclude a decision on the merits. This has long been recognized by the legal writers and the tendency has been more and more to liberalize these technical rules.²² The adoption of the common law rule that a defendant can be convicted on the uncorroborated testimony of an accomplice applied in the cautionary manner as suggested above is in accord with this tendency toward liberalization. Its adoption would contribute to the ends of justice by eliminating an instance where a technical rule of law could preclude a decision on the merits of the case. Such a rule would also give due consideration to the innocent and their rights would not be unduly prejudiced by its application.

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²¹ Generally under the law today a failure to give such an instruction is not reversible error. 23 C.J.S., *Criminal Law* § 1228 (1940). However, in the District of Columbia, it has been held that it is the duty of the court to so instruct. *Egan v. United States*, 287 Fed. 958 (D.C. Cir. 1923), *Freed v. United States*, 266 Fed. 1012 (D.C. Cir. 1920).

²² See MODEL CODE OF EVIDENCE, Foreword at 11 (1942). Professor Edmund M. Morgan in his introductory remarks to the Code stated, "[A code of evidence] should begin with a sweeping declaration that all relevant evidence is admissible, that no person is incompetent as a witness and that there is no privilege to refuse to be a witness or to disclose relevant matter or to prevent another from disclosing it. Then it should set up specific exceptions to this fundamental rule."