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CORROBORATION OF ACCOMPLICES IN CRIMINAL CASES

I. MAURICE WORMSER*

EARLY in the 19th Century, Lord Abinger, C. B., in *Regina v. Farler*, wisely said:

"It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance. . . . The danger is, that when a man is fixed, and knows that his own guilt is detected, *he purchases impunity, by falsely accusing others.*"¹

This rule, that an accomplice must be corroborated, is not only law but good common sense. It is based upon an analysis of human nature and the motives which actuate an accomplice who expects to save his own skin by procuring the downfall of others. Judge Crane, with sound insight, writing for the Court of Appeals, said in *People v. Crum*,

"Experience has taught the courts to be chary of an accomplice's testimony, as there are so many reasons which may lead one to shift to or share the crime with another."²

At the common law, this doctrine did not constitute a rule of evidence, but was simply a cautionary admonition given by the judge to the jury.³ However, at a comparatively early date, statutes converted this "cautionary practice" into a definite rule of the law of evidence.⁴

In this state, until a comparatively recent date, a jury could convict solely on the uncorroborated testimony of an accomplice, if the jury was convinced of the truthfulness of the assertions of the accomplice,⁵ though in some very early New York cases, the courts had ruled that the testimony of accomplices had to be corroborated in order to warrant a judgment of conviction.⁶ However, it is safe to say that, under the common law rule in this state, the custom was to charge the jury to scrutinize carefully and cautiously the testimony of an accomplice, although a conviction might be based upon uncorroborated accomplice

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1. 8 C. & P. 106, 108, 173 Eng. Rep. R. 418, 419 (1837).

2. 272 N. Y. 348, 353, 6 N. E. (2d) 51, 53 (1936).

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

4. *Id.* at § 2056, and statutes cited in n. 10.

5. *People v. Costello*, 1 Denio 83 (N. Y. 1845); *People v. Doyle*, 21 N. Y. 578 (1860).

6. *In re Rouget*, 2 City H. Rec. 61 (1817); *In re Canton*, 2 City H. Rec. 149 (1817).

testimony if the jury was convinced of its truth. As was said by Earl, J., writing for the Court of Appeals, in *People v. Everhardt*:

"Prior to the enactment of this section [referring to sec. 399 of the Code of Criminal Procedure], it was customary for judges to instruct jurors that they should not convict a defendant of crime upon the evidence of an accomplice unless such evidence was corroborated; and yet it was the law in this State that a defendant could be convicted upon the uncorroborated evidence of an accomplice if the jury believed it."⁷

In 1882, the Legislature altered the law of the State and converted into a rule of law the general common law practice which was based upon custom and usage.⁸ This was accomplished by the enactment of sec. 399 of the Code of Criminal Procedure, which is headed: "Conviction cannot be had on testimony of accomplice, unless corroborated", and which reads as follows:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

This section, it has been said, introduced a new rule of evidence.⁹ In *People v. Everhardt*, Earl, J., in the opinion of the court, said:

"This section has changed that rule of law [the common law doctrine in this State] and requires that there should be simply corroborative evidence, which tends to connect the defendant with the commission of the crime."¹⁰

The provisions of this section have been held applicable not only to trials but to proceedings before and investigations by the Grand Jury.¹¹

The various judicial interpretations of the meaning of "corroboration" need not be restated in detail here. Suffice it to say that the requirement of the statute is only satisfied by "evidence from an *independent source* of some *material* fact tending to show . . . that the defendant was implicated . . . [in the crime]".¹² Of equal importance is the requirement that the independent and material evidence must be such as "tends to connect the defendant with the commission of the crime in such a way as may *reasonably* satisfy the jury that the accomplice is

7. 104 N. Y. 591, 594, 11 N. E. 62 (1887).

8. N. Y. Laws 1882, c. 360, § 1, effective June 21, 1882.

9. *People v. Mayhew*, 150 N. Y. 346, 44 N. E. 971 (1896).

10. 104 N. Y. 591, 594, 11 N. E. 62 (1887).

11. *People v. Bursleson*, 119 Misc. 107, 195 N. Y. Supp. 284 (1921); *People v. Vollero*, 108 Misc. 635, 178 N. Y. Supp. 787 (1919), *aff'd*, 226 N. Y. 587, 123 N. E. 883 (1919); *People v. Acritelli*, 57 Misc. 574, 110 N. Y. Supp. 430 (1908); *People v. Sweeney*, 213 N. Y. 37, 106 N. E. 913 (1914).

12. *People v. Hooghkerk*, 96 N. Y. 149, 162 (1884).

telling the truth".¹³ The independent proof must be "other evidence *fairly* tending to connect the defendant".¹⁴

These guides, at best, are but generalities upon which limitations have been grafted. The matters of seeming indifference or light trifles, referred to in the opinion in *People v. Dixon*,¹⁵ must be read in the light of the explicit warning that such facts may be "so inherently weak and inconclusive as to furnish no reasonable ground for a finding" that the accomplice was telling the truth.¹⁶ Where the independent proof is such that it could point to *any* person with equal force or where it has no *real* tendency to connect the defendant with the crime, such proof fails of its purpose.¹⁷ Moreover, the association forged by the independent proof must tend to connect defendant with the commission of the crime and *it will not suffice if it merely connects defendant with the accomplice*.¹⁸ "The word '*commission*' is the important word".¹⁹

The question of whether there is any proof tending to connect the accused with the commission of the crime, where the main evidence is that of an accomplice, is a question of law for the court, and its sufficiency is a question of fact for the jury.²⁰ The serious issue of whether the accomplice is telling the truth—whether the independent proof harmonizes with the tale of the accomplice—must be weighed with particular caution where the accomplice is of a debased character and his testimony is being given for a price. As was said by Rippey, J., in *People v. Kress*,²¹ the required corroborative testimony clearly is insufficient if it tends only to establish the credibility of the accomplice. To have any probative value, the corroborative evidence must be proof from an independent source of some material fact or facts reasonably tending to show that the accused was implicated in the crime.²² This rule was clearly expressed in *People v. Kress*, as follows:

"The *independent* evidence must be material evidence *other* than that of

13. *People v. Dixon*, 231 N. Y. 111, 116, 131 N. E. 752 (1921).

14. *People v. Everhardt*, 104 N. Y. 591, 594, 11 N. E. 62 (1887).

15. 231 N. Y. 111, 116, 131 N. E. 752 (1921).

16. *People v. Reddy*, 261 N. Y. 479, 488, 185 N. E. 705 (1933).

17. *Id.* at 486; *People v. Taleisnik*, 225 N. Y. 489, 493, 122 N. E. 615 (1919).

18. *People v. Lashkowitz*, 257 App. Div. 518, 13 N. Y. S. (2d) 663 (3d Dep't 1939); *People v. Josephs*, 143 App. Div. 534, 128 N. Y. Supp. 257 (2d Dep't 1911)

19. *People v. McPorland*, 191 App. Div. 795, 182 N. Y. Supp. 117 (2d Dep't 1920).

20. Carr, J., in *People v. Josephs*, *supra*, note 18, collecting the cases; see also *People v. Kathan*, 136 App. Div. 303, 120 N. Y. Supp. 1096 (2d Dep't 1910).

21. 284 N. Y. 452, 459, 31 N. E. (2d) 898, 901 (Dec. 1940).

22. *People v. Hooghkerk*, 96 N. Y. 149, 162 (1884).

the accomplice and must fairly and reasonably *tend to connect the defendant with the commission of the crime.*"²³

In the case quoted from, the defendant was tried for participation in a hold-up of an armored truck and the robbery of \$427,950 in cash contained in bags which were being transported in it. The People relied upon the testimony of an accomplice who had a long criminal record and was testifying under a promise of immunity from prosecution. This accomplice asserted that the defendant provided the automobiles which were used after the robbery in transporting the perpetrators of the crime from the scene of the robbery to certain speed boats used in making the get-away. He also testified as to the defendant's alleged promise to repay certain monies advanced by the accomplice to cover the sickness and burial expenses of a participant in the robbery, and as to defendant's presence with other participants when one of the boats was taken for an alleged test run by a mechanic prior to the robbery. The Court of Appeals held, one judge dissenting, that the conviction must be reversed since the corroborative evidence was insufficient to connect defendant with the crime. There was no evidence that the payment of money by the defendant's family to the accomplice's family, pursuant to the accomplice's demand for reimbursement of the monies advanced, was authorized by the defendant. These unauthorized acts of third persons, the Court held, could not be used to connect the defendant with the commission of the crime. The only basis for connection between the *fact* of payment and the alleged *reason* for payment was the uncorroborated evidence of the accomplice. The fact of payment, in and of itself, did not show implication of the defendant in the robbery, nor did it tend to connect the defendant therewith. The sole link which supplied the connection was the word of the accomplice. In reality, therefore, it constituted an effort on the part of the accomplice witness to support himself by his own boot-straps. Nor did the mechanic's testimony as to the alleged presence of the defendant in the speed boat about ten days before the date of the crime connect defendant with the crime, since evidence of mere association of the defendant with the perpetrators of the crime at a time considerably antecedent to its commission is insufficient, as contrasted with testimony of such association with the participants at or immediately before the time of the robbery.²⁴

23. 284 N. Y. 452, 460, 31 N. E. (2d) 898, 902 (1940). Italics are Judge Rippey's.

24. *People v. Mayhew*, 150 N. Y. 346, 353, 44 N. E. 971, 973 (1896); *People v. Dixon*, 231 N. Y. 111, 117, 131 N. E. 752 (1921); *People v. Crum*, 272 N. Y. 348, 6 N. E. (2d) 51 (1936).

In *People v. Maione*,²⁵ decided on the same day as the *Kress* case, the defendants were convicted of murder in the first degree. The principal witness for the People was one Reles, a confessed principal who, by his own admissions, had participated in at least eleven murders. His tale was, in many particulars, in agreement with the undisputed testimony in respect of the condition of the body of the decedent and the circumstances under which the body was found. Of course, these external physical facts had no tendency to connect the defendant (or, for that matter, any identifiable person) with the homicide. In his charge to the jury, the Trial Court's instruction included fifteen items of evidence in agreement with the testimony of the accomplice with respect to the aforesaid external physical facts that had no tendency to connect any identifiable person with the crime. The instruction informed the jury that it could accept these fifteen items as corroboration of the accomplice Reles. The Court of Appeals held that the court's charge constituted reversible error since it, in effect, instructed the jury that corroborating evidence need not extend beyond the *corpus delicti*. In other words, the items of evidence with reference to the physical facts of the crime, as to the existence of which there was no real controversy, and all of which were of an undisputed character, constituted no corroboration whatever of the accomplice. Their inclusion in the charge as items of corroboration was tantamount to an instruction to the jury that no corroboration at all was necessary. Loughran, J., writing for the Court, said:

"In effect, the jury were told by the court that evidence in corroboration of an accomplice need not extend beyond the *corpus delicti*. Approval of that proposition would virtually cancel section 399 of the Code of Criminal Procedure. Section 399 requires that an accomplice must in some degree be corroborated in his testimony that an accused was implicated in the commission of the crime. Evidence which merely shows that the crime was committed in the fashion described by an accomplice is not such corroboration. See *People v. Feolo*, 284 N. Y. 381, 31 N. E. (2d) 496, decided herewith."²⁶

The policy underlying this decision is indisputably sound. Suppose an accomplice tells the harrowing tale of a murder. The accomplice says, in the course of his tale, "I had ham and eggs for breakfast that morning at Childs Restaurant at Broadway near Fulton Street". Thereupon, the prosecutor brings the waitress to court, and she testifies: "Yes, indeed, I waited on Mr. Accomplice that morning, and I distinctly remem-

25. 284 N. Y. 423, 425, 31 N. E. (2d) 759, 759-760 (Dec. 1940).

26. *Ibid.*

ber that I served him with ham and eggs because he complimented me on their excellence and gave me a liberal tip". Granted the truth of all of this, how does it tend in any way to connect the defendant with the crime? It is simply an item of external fact as to which there is no controversy. Such testimony in no way tends to corroborate the accomplice's accusation of the defendant. Yet such proof is poisonous because the jury naturally gleans the impression that it shows the truthfulness of the entire tale of the accomplice and thus establishes his complete credibility. In truth and in fact, it shows nothing at all. It has about as much value as evidence as a diamond at the bottom of the sea. It reminds one of the story of the pioneer who said he threw a stone *around* a tree and killed an Indian standing behind the tree, and that he could prove it by pointing out the *very tree!*

Viewed realistically, however, the introduction of a long array of witnesses before a jury, testifying to the truth of such uncontroverted external facts, with which the defendant has no connection, inevitably tends to mislead the jury,—though, in truth, the entire line of such proof does not in the least corroborate the tale of the accomplice so far as it implicates and accuses the defendant. Or, as the matter was tersely put by Loughran, J., in *People v. Maione*:

"Evidence which merely shows that the crime was committed in the fashion described by an accomplice is not such corroboration."²⁷

In the case of *People v. Feolo*,²⁸ decided on the same day as the *Maione* and *Kress* cases, the Court of Appeals stressed the necessity of proving sufficient and adequate corroborative evidence, both qualitatively and quantitatively, and indicated the grave danger of upholding a judgment of conviction in the absence of such definite corroboration, saying:

"If Funicello was himself a participant in the robbery at the speakeasy, he knew the facts of its commission and could readily enough have stated them in the form of the admissions he variously imputed to the several defendants. 'A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the person, there is really no corroboration at all.' (Lord Abinger, in *Regina v. Farler*, 8 Car. & P. 106; quoted in Wigmore on Evidence, [3d Ed.], vol. VII, sec. 2059, p. 327. See 2 Bishop's New Criminal Procedure, Sec. 117.) This test of the sufficiency of corroborative evidence—that it shall tend to connect an identifiable person with the crime—has been criticized as a fallacy. (See Wigmore, *supra*.) Our statute, however, has adopted that test (Code Crim. Proc. Sec. 399; *People v. Plath*, 100 N. Y. 590,

27. *Ibid.*

28. 284 N. Y. 381, 31 N. E. (2d) 496 (Dec. 1940).

3 N. E. 790; *People v. Reddy*, 261 N. Y. 479, 185 N. E. 705) and the Legislature has not been persuaded by arguments for its repeal. (N. Y. Leg. Doc. [1937] No. 77.)”²⁹

In the language quoted, it will be observed that the Court of Appeals was fully aware that the New York test of the sufficiency of corroborative evidence, enunciated in our local statute, has been criticized by Professor Wigmore³⁰ and other law writers.³¹

The most recent in this line of decisions is *People v. Nitzberg*.³² In that case, in which the defendant was convicted of murder in the first degree, the Court of Appeals, in reversing the judgment and ordering a new trial, held that an accomplice witness—again, Reles—cannot be supported at large by independent evidence that he told the truth in matters having no necessary connection with the defendant and known to everybody and not in any wise in dispute.

To furnish an instance: Reles, the accomplice, testified that the original plan to kill the decedent in the hallway of an apartment building near the intersection of Eastern Parkway and Buffalo Avenue in Brooklyn, was altered “when I recalled that a traffic policeman was usually on duty at that street intersection”. He went on to say that he told this fact to the defendant and then gave him another plan, namely, to kill the decedent by luring him into an automobile and taking him “for a ride”. One Bang, a member of the Police Force assigned to traffic patrol on Eastern Parkway at that period, testified that he in fact spent a considerable amount of time at the corner of Eastern Parkway and Buffalo Avenue, because accidents often happened there as it is a bad intersection. The Court of Appeals held that the testimony of Officer Bang not only was no corroboration of the accomplice-witness, but was clearly irrelevant and of no logical or probative value. The majority of the Court said:

“The testimony of Officer Bang has a somewhat different aspect. The location of his post of duty was a fact that had no necessary connection with Reles. Indeed, it was a fact that was known to everybody. But if an accomplice-witness could be supported at large by independent evidence that he told the truth in matters of that sort, then every accomplice (not incompetent for want of understanding) could always rake into his story materials for such confirmation of it. (See *Commonwealth v. Bosworth*, 22 Pick., [Mass.], 397, 399.) It has been a long time since an accomplice-witness has been suffered so to lift himself by his own boot-straps. (*Cf. People v. Katz*, 209 N. Y. 311, 342, 103

29. *Id.* at 498-499.

30. 7 WIGMORE, EVIDENCE (3d ed.) § 2059.

31. N. Y. LEGIS. DOC. (1937) No. 77.

32. 287 N. Y. 183, 38 N. E. (2d) 490 (Dec. 1941).

N. E. 305.) We are not persuaded that the location of the post of Officer Bang on Eastern parkway made it highly probable in point of reason that Reles was truthful in his testimony that he told the defendant an officer was usually on duty there."³³

A number of similar items of so-called corroborative "proof" were likewise held inadmissible under the rules of relevancy which wisely govern our law of evidence.³⁴

There can be no doubt of the soundness and good policy of this conclusion. Otherwise, the salutary requirement of Code of Criminal Procedure, sec. 399, which requires corroboration of accomplice witnesses, would in effect be nullified. The fact that there was a patrolman on duty at the corner of Buffalo Avenue and Eastern Parkway had no relevancy and no probative bearing on the defendant's guilt. Suppose that Reles had stated that he purchased a necktie from a haberdasher on the day before the murder. Suppose the haberdasher is brought into Court and "corroborates" Reles, testifying that Reles had in fact purchased the necktie, and that he remembered it definitely because the tie was a bright red one. What possible relevancy or bearing would this testimony have upon the issue of the guilt of the defendant? How, in any respect, does it reasonably tend to tie in the defendant as implicated in the commission of the crime? True, it bolsters the testimony of Reles—but with regard only to immaterial and collateral matters which are of no juridical significance. Or, as the Court put it,—accomplices cannot lift themselves by "their own boot-straps".³⁵

The whole matter was well versed by the Supreme Judicial Court of Massachusetts in the leading case of *Commonwealth v. Bosworth*:

"To prove that an accomplice had told the truth in relation to irrelevant and immaterial matters which were *known to everybody*, would have no tendency to confirm his testimony involving the guilt of the party on trial. If this were the case, every witness, not incompetent for the want of understanding, *could always furnish materials for the corroboration of his own testimony*. If he could state where he was born, where he had resided, in whose custody he had been, or in what jail or what room in the jail he had been confined, he might easily get confirmation of all these particulars. *But these circumstances having no necessary connexion with the guilt of the defendant, the proof of*

33. *Id.* at 189.

34. 1 GREENLEAF, LAW OF EVIDENCE (Wigmore's 16th ed.) § 14.

35. *People v. Nitzberg*, 287 N. Y. 183, 188, 38 N. E. (2d) 490, 493; see also, *Marler v. State*, 68 Ala. 580, 585-586 (1880); *Childers v. State*, 52 Ga. 106, 110 (1874); *Commonwealth v. Bosworth*, 39 Mass. 397, 399-400 (1839); *Commonwealth v. Holmes*, 127 Mass. 424, 436, 34 Am. Rep. 391 (1879); cf. *People v. Goldstein and Strauss*, 285 N. Y. 376, 382, 34 N. E. (2d) 362 (1941).

the correctness of the statement in relation to them, would not conduce to prove that a statement of the guilt of the defendant was true."³⁶

On sound principle, the law should require that all evidence corroborative of accomplice-witnesses be confined strictly to matters which relate to the actual commission of the crime, or to the circumstances thereof, or to such portions of the tale of the accomplice as reasonably may tend to show that the defendant had some complicity or connection with the offense; in other words, to circumstances with which the defendant is in some way linked or which affect his identity. Unless the accomplice's statement as to collateral matters is directly disputed, it surely requires no corroboration. The introduction of a mass of witnesses before the jury, testifying one after another to the truth of undisputed facts, with which the defendant has no connection whatever, tends only to bewilder and confuse the jury in proportion *pari passu* to the volume introduced. To sum it up: the test of relevancy is furnished by logic and common sense. Testimony should be held inadmissible if it merely corroborates the story of an accomplice as to undisputed and irrelevant matters not connecting the defendant with the crime, and which, at best, are merely of slight, remote and conjectural significance in respect to the issue of guilt or innocence.

The error in admitting irrelevant evidence of the type which has been discussed readily can be dramatized as follows: Suppose the accomplice-witness, out of spite, had named another alleged henchman instead of the defendant, Nitzberg. Suppose he had named Mr. "X", a well-known citizen with an unblemished record. None-the-less, the evidence of Bang and the other witnesses who testified to irrelevant matters not connecting defendant with the crime, would remain *unchanged*, and we would find these numerous witnesses "corroborating" the story of the accomplice-witness against Mr. "X". Thus, purely upon the whim of the accomplice-witness, and whom he spitefully chooses to name, the stories of the so-called supporting witnesses are offered as "corroboration". Yet, clearly, they are no real corroboration at all. They do not corroborate a relevant, ultimate fact susceptible of *independent* ascertainment. Thus, with such irrelevant and improper testimony admitted (which does not tie in the defendant with the commission of the crime), the most worthy of our citizens may be convicted, especially if the accomplice has bought his freedom from prosecution by a promise to give testimony against the defendant or is himself a disreputable and criminal character.³⁷ The law does not hold human life or liberty as cheaply as that.

36. Commonwealth v. Bosworth, 39 Mass. 397, 399-400 (1839). Italics added.

37. Rippey, J., in People v. Kress, 284 N. Y. 452, 459, 31 N. E. (2d) 898, 901 (Dec. 1940).

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