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CRIMINAL LAW AND PROCEDURE — NEW TRIAL — MOTION FOR NEW TRIAL FOR NEWLY DISCOVERED EVIDENCE — RECANTATION BY IMPORTANT WITNESS FOR THE STATE — After conviction of rape allegedly committed upon defendant's thirteen year old daughter, defendant, on motion for new trial, produced an affidavit of the daughter recanting the testimony against defendant which the daughter had given at the trial. *Held*, the trial court did not abuse its discretion in refusing to grant a new trial. *Sutton v. State*, (Ark. 1938) 122 S. W. (2d) 617.

The granting or denial of new trial is generally said to rest in the sound discretion of the trial court, and the exercise of this discretion will not be disturbed except in the case of manifest abuse.[1] It is generally recognized that recantation by a witness of testimony previously given on the trial is newly discovered evidence,[2] and, as such, it is a ground for new trial. However,

[1] See cases cited in 16 C. J. 1119 (1918); 20 R. C. L. 289 (1918); 9 THIRD DEC. DIGEST 492 ff. (1927), and 10 FOURTH DEC. DIGEST 538 ff. (1937), "Criminal Law," no. 938.

[2] People v. Shilitano, 218 N. Y. 161, 112 N. E. 733 (1916). It is not the

courts are distrustful of applications for new trial on the ground of newly discovered evidence and such applications are subjected to the closest scrutiny, because they are too often the last resort of a defendant to escape the consequences of an adverse verdict.[3] This distrust is especially evident where the newly discovered evidence is a recantation of prior testimony.[4] If upon proof of a recantation a new trial was granted as of course, then the power to grant a new trial would no longer rest in the sound discretion of the court, but on the witness who had testified against the defendant on the trial.[5] Furthermore, the effect of automatic new trial in such cases would be to make litigation endless, and the courts have deemed the failure of justice in a particular case a lesser evil than endless litigation.[6] Faced with a host of applications for new trial on the basis of recantation, the courts, while seeking to expedite the proper administration of the criminal law on the one hand and to avoid injustice on the other, have looked first to see whether the conviction has evidentiary support exclusive of the recanted testimony. The general rule is, if, eliminating the recanted testimony, there is still other evidence sufficient to support the verdict, a new trial

witness that is newly discovered, but the fact of recantation makes the evidence newly discovered.

[3] 16 C. J. 1182 (1918); 20 R. C. L. 289 (1918).

[4] Justice Seabury in People v. Shilitano, 218 N. Y. 161 at 170, 112 N. E. 733 (1916). Though laymen are apt to regard a recantation as of great importance, those experienced in the administration of criminal law look upon recantations with great suspicion. People v. Marquis, 344 Ill. 261, 176 N. E. 314 (1931), noted 22 J. CRIM. L. 599 (1932). "It is safe to assert that in a vast majority of cases, where witnesses of low character and bad associations have testified against former friends and associates, almost the first thing they do after leaving the stand is to endeavor to rehabilitate themselves in the eyes of their associates from the stigma of having proven false to their friends, by asserting that they gave their testimony under pressure and by expressing sorrow for that necessity." Judge Nott in People v. Giordano, 106 Misc. 235 at 239, 175 N. Y. S. 715 (1919).

[5] Blass v. People, 79 Colo. 555, 247 P. 177 (1926); People v. Shilitano, 218 N. Y. 161, 112 N. E. 733 (1916); State v. Wynn, 178 Wash. 287, 34 P. (2d) 900 (1934). So great a percentage of the recantations are false and collusive that the proper administration of justice would be imperiled if a new trial were granted automatically upon recantation. People v. Shilitano, supra; Blass v. People, supra; People v. Tallmadge, 114 Cal. 427, 46 P. 282 (1896); Martin v. State, 34 Okla. Cr. 274, 246 P. 647 (1926). "Justice would not be served by a rule of law that a verdict must go for naught whenever a necessary witness can be induced, or for some reason decides, to repudiate his sworn testimony." Commonwealth v. Gwizdoski, 284 Mass. 578 at 581, 188 N. E. 383 (1933). In his dissenting opinion in the Shilitano case, Justice Hogan, 218 N. Y. 161 at 195, suggested that the experience of witnesses who falsely recant "is apt to prove sad and expensive" by prosecution for perjury. To this suggestion Judge Nott, in People v. Giordano, 106 Misc. 235 at 239, 175 N. Y. S. 715 (1919), replied: "I fear that the record of such cases is against this assertion. I do not recall in my seventeen years' experience in the criminal courts a single case where a recanting witness has been convicted of perjury committed either at the trial or by his recanting testimony."

[6] State v. Chadwell, 94 Kan. 302, 146 P. 420 (1915); Powell v. Commonwealth, 133 Va. 741, 112 S. E. 657 (1922).

will be denied.[7] It would seem that where the recantation is by the sole or principal witness for the state or by the prosecuting witness, that the strongest case is made out for saying that a new trial should be granted automatically; because in most of the situations where such a witness recanted, no conviction could be had without the testimony that was recanted. There are cases which say that when the principal witness for the state recants, a new trial should be granted.[8] According to this view, one who recants cannot be believed, and a judgment is shaky if it rests on a recantor's testimony.[9] Some of these cases say that "it is the duty of a trial court to grant a new trial" in such a situation.[10] Furthermore, there are a few cases to the effect that when it is doubtful whether the testimony or the recantation is true, a new trial should be granted in order to preserve the right to have a jury pass upon the evidence, especially in the light of these new disclosures.[11] But certainly the cases which *require* a new trial to be granted upon recantation by an important witness for the state are contrary to the overwhelming preponderance of authority. The rule applied almost universally is that recantation by an important witness for the state does not necessarily warrant the granting of a new trial.[12] Unless there are unusual or

[7] Cases cited 16 C. J. 1199 (1918); 51 L. R. A. (N. S.) 286 at 291 (1914). See also, Cooper v. State, 106 Tex. Cr. 118, 290 S. W. 537 (1927); Little v. State, 161 Ark. 245, 255 S. W. 892 (1923), noted 22 MICH. L. REV. 737 (1924); Ryal v. State, 16 Okla. Cr. 266, 182 P. 253 (1919); Winsley v. State, 69 Fla. 391, 68 So. 376 (1915); State v. Sheltrey, 100 Minn. 107, 110 N. W. 353 (1907); and State v. Johnson, 30 La. Ann. 305 (1878).

[8] These cases are cited in notes 9, 10 and 11, infra.

[9] The reason for granting a new trial "rests on the proposition that a citizen should not be punished or deprived of his life or liberty upon the testimony of one whose veracity is thus shown to be wanting." Green v. State, 94 Tex. Cr. 637 at 639, 252 S. W. 499 (1923). New trial for recantation by the principal witness for the state is granted more liberally in Texas than in any other jurisdiction. See Hines v. State, 37 Tex. Cr. 339, 39 S. W. 935 (1897); McConnell v. State, 82 Tex. Cr. 634, 200 S. W. 842 (1918); Atkinson v. State, 93 Tex. Cr. 305, 247 S. W. 286 (1923); Wadkins v. State, 102 Tex. Cr. 292, 277 S. W. 684 (1925); and Douglas v. State, 122 Tex. Cr. 171, 54 S. W. (2d) 515 (1932).

[10] Martin v. United States, (C. C. A. 5th, 1927) 17 F. (2d) 973 at 976.

[11] State v. Myers, 154 Minn. 242, 191 N. W. 597 (1923); State v. Powell, 51 Wash. 372, 98 P. 741 (1909); Martin v. United States, (C. C. A. 5th, 1927) 17 F. (2d) 973 at 976 ("There is no way for a court to determine that the perjured testimony did not have controlling weight with the jury. . . ."); Pettine v. Territory of New Mexico, (C. C. A. 8th, 1912) 201 F. 489 (the recanted testimony may have been the very evidence which removed the reasonable doubt and prevented acquittal). "To determine the credibility of witnesses and all the facts, including the final conclusion of guilt or innocence, are the especial provinces of a jury and not of a court. . . . A jury should have the opportunity to hear all of this testimony and to determine what should be believed." State v. Keheler, 74 Kan. 631 at 643, 87 P. 738 (1906). But see State v. Birzer, 126 Kan. 414 at 418, 268 P. 842 (1928), where the Keheler case is termed "exceptional." The court said: "Under our present code of procedure the court, rather than the jury, passes on the evidence offered by affidavit, or otherwise, in support of a motion for a new trial."

[12] See annotations in 33 A. L. R. 550 (1924); 74 A. L. R. 757 (1931).

extraordinary circumstances a new trial will be denied.[13] Whether or not a new trial should be granted depends upon all the circumstances of the case, including the testimony of the recanting witnesses on hearing of the motion for new trial.[14] This rule applies even in the cases where without the recanted testimony no conviction could be had.[15] The essential question is whether or not the recantation is probably true, and this question must be determined by the one person who is best qualified to determine it—the trial judge.[16] In the words of Justice Cardozo in the *Shilitano* case: "It became his [the trial judge's] duty to say whether they [the recantors] were conscience-stricken penitents, or criminal conspirators to defeat the ends of justice." [17] The trial judge must determine whether the evidence is of such character and weight as to justify the court in setting aside the judgment, and even where the recanted testimony is essential to conviction, a new trial will not be granted unless the trial judge believes, from all the facts and circumstances, that the recantation is true. If the facts and circumstances tend to show that the recantation is false, unreliable, collusive, involuntary, or made solely to supply a ground for new trial, then the motion for new trial will be denied.[18] The decision in the principal case is in accord with generally accepted principles. The recantor was a minor and the daughter of the defendant,[19] and such circumstances tend to detract from the

[13] 74 A. L. R. 757 (1931).

[14] 16 C. J. 1189 (1918); People v. Shilitano, 218 N. Y. 161, 112 N. E. 733 (1916); Clayton v. State, 186 Ark. 713, 55 S. W. (2d) 88 (1932).

[15] Cf. Commonwealth v. Gwizdoski, 284 Mass. 578, 188 N. E. 383 (1933), where a new trial was denied when the recantation was by the only person who could possibly connect defendant with the crime.

[16] People v. Shilitano, 218 N. Y. 161, 112 N. E. 733 (1916); People v. Giordano, 106 Misc. 235, 175 N. Y. S. 715 (1919); Ryal v. State, 16 Okla. Cr. 266, 182 P. 253 (1919); Brown v. State, 143 Ark. 523, 222 S. W. 377 (1920); State v. Wheat, 166 Minn. 300, 207 N. W. 632 (1926); Blass v. People, 79 Colo. 555, 247 P. 177 (1926); State v. Buton, 124 Kan. 509, 260 P. 634 (1927); State v. Birzer, 126 Kan. 414, 268 P. 842 (1928); Shepherd v. State, 51 Okla. Cr. 209, 300 P. 421 (1931); Commonwealth v. Gwizdoski, 284 Mass. 578, 188 N. E. 383 (1933); and People v. Lee, 9 Cal. App. (2d) 99, 48 P. (2d) 1003 (1935). "The trial judge is in a peculiarly advantageous position, under the prevailing circumstances, to pass upon the showing made for a new trial. He has the benefit of observing the witnesses at the time of the trial, is able to appraise the variable weight to be given to the subsequent affidavits, and can often discern and assay the incidents, the influences, and the motives, that prompted the recantation. He is, therefore, best qualified to determine what credence or consideration should be given to the retraction, and his opinion is accordingly entitled to great weight. . . . When the trial court, after careful consideration, has rejected such testimony, or has determined that it is of doubtful or insignificant value, its action will not be lightly set aside by an appellate court." Justice Steinert in State v. Wynn, 178 Wash. 287 at 288-289, 34 P. (2d) 900 (1934).

[17] People v. Shilitano, 218 N. Y. 161 at 180, 112 N. E. 733 (1916) (concurring opinion).

[18] See annotations in 33 A. L. R. 550 (1924) and 74 A. L. R. 757 (1931) for the factors and circumstances which enter into the determination of the granting or denial of new trial.

[19] People v. Van Den Dreissche, 233 Mich. 38, 206 N. W. 339 (1925); State

credibility of the recantation by raising suspicions that the recantation was consummated through the influence of the defendant upon the recantor. Furthermore, the defendant failed to make as good a showing as he might have made. He relied upon an affidavit which was obviously prepared and dictated by his attorney and merely signed by the affiant.[20] In addition to this, if the witness was at all available, there was no excuse for failing to produce her in court upon the hearing of the motion for new trial,[21] where she could have been cross-examined and where the judge who had heard her testify and who had observed her demeanor on the trial could have had a better opportunity to determine whether the recantation was true or false.

v. Zeilinger, 147 Kan. 707, 78 P. (2d) 845 (1938); People v. Marquis, 344 Ill. 261, 176 N. E. 314 (1931). In each of these cases a new trial was denied where, among other circumstances surrounding the recantation, the recantor was the daughter of the defendant and a minor.

[20] "This writing bears upon its face the conclusive evidence that Dorothy herself did not write this statement, although she signed it. Quite obviously it was dictated by some other person." Principal case, 122 S. W. (2d) 617 at 618. See State v. Zeilinger, 147 Kan. 707, 78 P. (2d) 845 (1938), where the defendant, himself, conveyed the witness to the office of defendant's attorney where the affidavit was signed.

[21] "In view of the fact that the recanting witness was not brought into court for an examination as to the circumstances relating to her recantation, and that no showing was made that this action was voluntary on her part, we are unable to say that the trial judge so far abused his discretion that the judgment must be reversed on that account." Principal case, 122 S. W. (2d) 617 at 619. The best means of determining that the motives actuating the recantation are not subversive of the proper administration of justice is by oral examination of the recantor upon the hearing of the motion. People v. Farini, 125 Misc. 300, 209 N. Y. S. 532 (1925). Also cf. New York Code of Criminal Procedure, § 465, subd. 7, whereby the personal appearance of the affiants can be compelled for purposes of cross-examination, under oath, upon the contents of the affidavit.