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CRIMINAL LAW AND PROCEDURE - APPEAL - REVERSAL OF CONVICTION DESPITE GUILT AS REBUKE TO THE ADMINISTRATION OF JUSTICE

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CRIMINAL LAW AND PROCEDURE — APPEAL — REVERSAL OF CONVICTION DESPITE GUILT AS REBUKE TO THE ADMINISTRATION OF JUSTICE — In a prosecution for murder the prosecuting attorney, in his opening address, improperly stated that the evidence would show that both defendants had previous records for burglary and robbery, had served time in penitentiaries, and that the state would ask that the two men be hanged on the basis of this and other evidence. No objection or move for a mistrial was made at the time by the defendants, nor was the court requested to instruct the jury to disregard the remarks. Defendants were unquestionably guilty of murder, the evidence for the state being conclusive, while that of the defendants was weak and ineffective. The trial jury found the defendants guilty as charged. *Held*, on appeal by a five-to-four decision, that the case be remanded for retrial because of prejudicial remarks of the prosecuting attorney by reason of which defendants were deprived of the fair and impartial trial guaranteed them by law. *State v. O'Donnell*, (Wash. 1937) 71 P. (2d) 571.

The majority decision of the principal case seems to contain language to the effect that the defendants were guilty as charged.[1] But even if not, it is difficult to imagine a case where the evidence for the state would more conclusively overwhelm that of the defense. It is generally held that where the evidence is sufficient to have convinced the jury of defendant's guilt without the aid of the complained of impropriety,[2] then such action, since not affecting

[1] The court said, 71 P. (2d) 575: "Finally, considering the point made by the state, that, however flagrantly the prosecutor's remarks may have violated the established rules of criminal procedure, the appellants could not have been prejudiced because they were proven to be guilty by evidence properly before the jury. This may be so, but the appellants are not alone involved here. The integrity of our system of administering criminal justice is also involved." Both dissenting opinions (Justice Robinson's after an exhaustive review of the evidence) come to the conclusion that the defendants are obviously guilty of murder.

[2] See language of Campbell v. State, 19 Ala. App. 349, 97 So. 783 (1923); Hemmingway v. State, 68 Miss. 371, 8 So. 317 (1890), quoted infra, note 3; People v. Conley, 106 Mich. 424, 64 N. W. 325 (1895), quoted infra, note 6.

the verdict, is not so prejudicial as to require reversal of the conviction.[3] It would therefore seem, especially since no timely objection was made,[4] that

[3] In no case will a conviction be reversed unless the improper conduct is so prejudicial as to deprive the accused of a fair and impartial trial by the jury on the evidence. State v. Vogel, 183 Wash. 664, 49 P. (2d) 473 (1935); People v. O'Connor, 82 App. Div. 55, 81 N. Y. S. 555 (1903); Lee v. State, 124 Miss. 398, 86 So. 856 (1920); State v. Thomas, 135 Iowa 717, 109 N. W. 900 (1907); White v. State, 127 Ga. 273, 56 S. E. 425 (1906).

"But where the sweep of an irresistible tide of evidence would, despite all immaterial errors of court, or reprehensible lapses from propriety of counsel, bear an enlightened mind and conscience to a fixed conclusion of guilt, the appellate court may not properly reverse." Hemmingway v. State, 68 Miss. 371 at 422, 8 So. 317 (1890); People v. Conley, 106 Mich. 424, 64 N. W. 325 (1895); State v. Ahern, 54 Minn. 195, 55 N. W. 959 (1893); State v. Phillips, 160 Mo. 503, 60 S. W. 1050 (1901); Price v. Commonwealth, 15 Ky. L. Rep. 43, 22 S. W. 157 (1893); 46 L. R. A. 641 (1900). But see, *contra:* Cooper v. State, 120 Neb. 598, 234 N. W. 406 (1931); People v. Michor, 226 App. Div. 569, 235 N. Y. S. 386 (1929) (where the court granted a new trial though it found competent evidence enough to justify conviction).

See also the strong language used to deny reversal in Campbell v. State, 19 Ala. App. 349 at 352, 97 So. 783 (1923): "This [alleged prejudicial misconduct] is primarily a question for the trial court, who has the advantage of having heard and seen everything incident to the trial, and unless it appears that the conclusions are clearly erroneous they will not be disturbed on appeal." And People v. Stover, 317 Ill. 191, 148 N. E. 67 (1925).

But the court would seem to be passing on the conclusion the jury drew from the facts. And is this not entering the province of the jury by deciding for it that its conclusion would have been the same had not the impropriety taken place, that the improper action did not influence the conclusion to which it arrived? See People v. Mull, 167 N. Y. 247 at 255, 60 N. E. 629 (1901), where though found to be amply justified, the conviction was reversed, the court saying, "If it be said that in the case before us there is no reasonable doubt of the defendant's guilt, it should be remembered that it is not for the courts but for the jury to say by their free and impartial verdict, and we can not know that they have said it when we do know that they were told by the district attorney . . . that their own good repute was in jeopardy and could only be saved by convicting the defendant."

[4] In general, error committed on trial is not reviewable on appeal unless objection is made in the trial court. People v. O'Connor, 82 App. Div. 55, 81 N. Y. S. 555 (1903); People v. Mendez, 193 Cal. 39, 223 P. 65 (1924); State v. Leopold, 110 Conn. 55, 147 A. 118 (1929); 46 L. R. A. 641 at 642 ff. (1900); Commonwealth v. Weber, 167 Pa. 153, 31 A. 481 (1895).

But "if the improper remarks are of such character that neither rebuke nor retraction may entirely destroy their sinister influence . . . a new trial should be awarded regardless of want of objection or exception." Akin v. State, 86 Fla. 564 at 573, 98 So. 609 (1923); Miller v. People, 70 Colo. 313, 201 P. 41 (1921); 46 L. R. A. 641 at 642 ff. (1900).

It is sometimes held that imputation of bad character or previous criminal record is of that type of impropriety not to be corrected by proper instruction or reprimand of the court. See People v. Robinson, 273 N. Y. 438 at 446, 8 N. E. (2d) 25 (1937). But many courts hold that rebuke would "cure" such improper argument, Anderson v. State, 209 Ala. 36, 95 So. 171 (1922), and if this line is followed the court in the principal case should have refused consideration of the improper remarks as no timely objection had been made.

the court should have found the improper argument to be non-prejudicial.[5] Instead, it reversed the conviction as a reprimand to the administration of justice. This is apparently contrary to the modern tendency to deny to the accused on appeal the benefit of technical errors made in the trial court which do not affect the question of his guilt or conviction.[6] It is advanced that the line taken by this court would appear to be socially unwise in the respect that it affords a basis of relieving most defendants, since few trials ever proceed to conclusion without some errors.[7] In such cases where guilt is conclusively established, the desired goal of diminution of errors in the trial of criminal suits could be as readily achieved, without jeopardizing the defendant's right to a fair and impartial trial by the jury, by reprimand to the trial judge as by reversal of the conviction.[8] And it is suggested that such procedure would result in a much more effective administration of criminal justice than would remanding for retrial for what appear on the facts to be non-prejudicial errors.

[5] See discussion and cases cited supra, note 3, as to the majority view that there is no undue prejudice when the guilt of the accused is evident.

[6] See supra, note 3; 4 TULANE L. REV. 464 (1930); 46 L. R. A. 641 at 650 ff. (1901); Rev. Stat., § 726 (1878), as amended; 28 U. S. C., § 391 (1935). In People v. Conley, 106 Mich. 424 at 427, 64 N. W. 325 (1895), it is held, "Courts of last resort will interfere by granting a new trial only in a case where the prosecuting attorney has so clearly departed from the evidence and the line of legitimate argument that any reasonable person will conclude that the jury were prejudiced by it."

[7] But it can be seen that to hold otherwise is to open the door to the appellate court deciding from the admissible evidence whether or not a reasonable doubt exists as to defendant's guilt, and thus enter on appeal the sphere of the jury and in effect deny to the accused the right of trial by jury. See discussion on this question, supra, note 3. But all courts agree that the appellate court has the right and power to decide whether defendant has been prejudiced, the split coming on the factual decision as to *when* the impropriety is prejudicial. See cases cited, supra, note 3.

[8] State v. Spear, 178 Wash. 57, 33 P. (2d) 905 (1934); State v. Blackman, 108 La. 121, 32 So. 334 (1902); Bainum v. State, 45 Okla. Cr. 330, 282 P. 903 (1929); Campbell v. State, 19 Ala. App. 349, 97 So. 783 (1923). In these cases and those cited supra, note 3, the courts refused reversals of conviction despite non-prejudicial improprieties and errors which the trial judge had allowed to take place. All these cases would undoubtedly have been remanded if the appellate court had thought failure to reverse the conviction would deprive the defendant of his right to a fair and impartial trial or, in spite of criticism of the trial judge, encourage laxity in the trial court in allowing such improprieties to go unrebuked.