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## Evidence - Admissibility - Extent to Which Juror's Affidavit May Be Used to Impeach Verdict

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EVIDENCE—ADMISSIBILITY—EXTENT TO WHICH JUROR'S AFFIDAVIT MAY BE USED TO IMPEACH VERDICT—Defendant was convicted of murder in the first degree and made a motion for a new trial on the basis of a juror's affidavit which asserted that the jury had been divided eight to four in favor of life imprisonment over the death sentence, that subsequently several jurors introduced into the deliberations the fact that the defendant had been charged, in another indictment, with assault with intent to kill, that this became a part of the jury's deliberation, and that, as a result, the jury did not recommend life imprisonment and, instead, the death sentence was imposed. On appeal, *held*, motion for new trial granted, three justices dissenting. The affidavit was not admissible to show the effect of the jury's misconduct, but was admissible to show the existence of misconduct. The existence of such misconduct was sufficient grounds for granting the motion. *State v. Kociolek*, (N.J. 1955) 118 A. (2d) 812.

In attempting to formulate rules regarding the admissibility of affidavits to impeach jury verdicts, many distinctions have been drawn.<sup>1</sup> These have been necessary to avoid the harsh consequences of the general rule

<sup>1</sup> See, generally, 8 WIGMORE, EVIDENCE, 3d ed., §§2349-2353 (1940); MCCORMICK, EVIDENCE §68 (1954); 47 MICH. L. REV. 261 (1948); 10 OHIO ST. L. J. 262 (1949).

that a juror's affidavit may not be used to impeach the verdict.<sup>2</sup> The affidavit has been held admissible where the alleged misconduct occurred outside the jury room,<sup>3</sup> where the misconduct was that of a person other than a juror,<sup>4</sup> where the affidavit is in support of the verdict rendered,<sup>5</sup> where it relates to overt acts and not to either the reasoning process by which the verdict is reached or matters that inhere in the verdict,<sup>6</sup> and where it is not used to show the effect of the misconduct upon the verdict.<sup>7</sup> There has not been unanimity of judicial opinion as to what fact situations fit within these rules.<sup>8</sup> Policy considerations have weighed heavily in shaping the rules.<sup>9</sup> It has been suggested that the admission of such affidavits will encourage vacillation by the jurors, post-verdict tampering by the parties and their counsel,<sup>10</sup> and the undermining of the finality of the verdict.<sup>11</sup> Opposed to these factors is the consideration that the jurors are often the only persons who can tell of misconduct which may have influenced the verdict and that by suppressing this information the court fails to do justice in the case involved.<sup>12</sup> The adoption of the view followed by the court in the principal case, which permits affidavits to show the existence of overt misconduct (i.e., misconduct evidenced by words or actions), makes it possible to satisfy substantially all of the above policy considerations. This view does not make judgments as final as they would be if jurors' affidavits were not permitted at all, but such finality is neither

<sup>2</sup> The rule was laid down in *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (1785). Although subject to much criticism, it has received widespread acceptance in the United States. See, e.g.: *People v. Tomczak*, 250 Mich. 679, 231 N.W. 63 (1930); *Chicago Sanitary Dist. v. Cullerton*, 147 Ill. 385, 35 N.E. 723 (1893).

<sup>3</sup> See *Capozzi v. Butterwei*, 2 N.J. Super. 593, 65 A. (2d) 884 (1949), where a visit by a juror to the scene of the accident was sufficient to overturn the verdict.

<sup>4</sup> *State v. Adams*, 141 Ohio St. 423, 48 N.E. (2d) 861 (1943); 146 A.L.R. 514 (1943); *Wilkins v. Abbey*, 168 Misc. 416, 5 N.Y.S. (2d) 826 (1938); *Emmert v. State*, 127 Ohio St. 235, 187 N.E. 862 (1933); 90 A.L.R. 249 (1934).

<sup>5</sup> *State v. James*, 198 Iowa 976, 200 N.W. 577 (1924). *Contra*, *State v. Lindeman*, 64 N.D. 518, 254 N.W. 276 (1934); 93 A.L.R. 1449 (1934).

<sup>6</sup> It is upon this distinction that the greatest deviation from the general rule has occurred. *Perry v. Bailey*, 12 Kan. 539 (1874); *Wright v. Telegraph Co.*, 20 Iowa 195 (1866); *Miami v. Bopp*, 117 Fla. 532, 158 S. 89 (1934); 97 A.L.R. 1038 (1935). A distinction along these lines is also incorporated in the MODEL CODE OF EVIDENCE, rule 301 (1942), and in the UNIFORM RULES OF EVIDENCE, rules 7, 41, 44 (1953).

<sup>7</sup> *State v. McChesney*, 114 Wash. 113, 194 P. 551 (1921); *Taylor v. State*, 18 Ala. App. 466, 93 S. 78 (1922). A question may also arise as to whether the jurors have a privilege as to their statements and acts within the jury room. This is independent of the admissibility question and is beyond the scope of this note. See, generally, 8 WIGMORE, EVIDENCE, 3d ed., §2346 (1940); *Clark v. United States*, 289 U.S. 1, 53 S.Ct. 465 (1933), noted in 31 MICH. L. REV. 857 (1933).

<sup>8</sup> Compare *Miami v. Bopp*, note 6 *supra*, with *State v. Aker*, 54 Wash. 342, 103 P. 420 (1909).

<sup>9</sup> The policy rationale of *Vaise v. Delaval*, note 2 *supra*, was that the jurors should not stultify themselves. In that case, Lord Mansfield thought it permissible for third parties to report on misconduct in the jury room even though this same misconduct could not be revealed by a juror's affidavit.

<sup>10</sup> See *People v. Pizzino*, 313 Mich. 97, 20 N.W. (2d) 824 (1945).

<sup>11</sup> See *Caldwell v. F. E. Spears & Sons*, 186 Ky. 64, 216 S.W. 83 (1919).

<sup>12</sup> *Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50 (1892); *Perry v. Bailey*, note 6 *supra*; *State v. McCormick*, 57 Kan. 440, 46 P. 777 (1896).

necessary nor desirable. Where the affidavit alleges overt misconduct which may have influenced the finding, excluding it achieves stability, but only at the expense of doing justice between the parties.<sup>13</sup> Admitting affidavits to show overt acts does not encourage post-verdict tampering or fraud since the affidavit relates to matters of sight and hearing and can be checked against the observations of the other jurors. Thus, post-verdict tampering would be successful only if the entire jury had been influenced. As suggested in the principal case, the test of the jurors' affidavits should be whether the subject of the affidavit is independently verifiable. This test can and should be applied to every kind of juror's affidavit, thereby cutting away the many rules and distinctions which now clutter the area. Unfortunately, the principal case itself makes an unnecessary distinction between using the affidavit to show misconduct and using it to show the effect of such misconduct. It is true that an affidavit showing the effect of misconduct on a particular juror will often be subjective and not independently verifiable.<sup>14</sup> But if it is independently verifiable, the fact that the affidavit goes to the effect of misconduct or to the juror's reasoning process should not require its exclusion.<sup>15</sup> Thus, an affidavit based upon verifiable evidence indicating that, prior to the misconduct, the jurors were in favor of a result different from the one reached should be received.<sup>16</sup> Of course the court will have the final task of determining the actual effect of any misconduct on the jury's deliberations.<sup>17</sup> In some cases it is possible for the court to find, as in the principal case,<sup>18</sup> that the misconduct *could have* influenced the verdict and to grant a new trial without the aid of any affidavit on the effect of the misconduct. But in cases where there is greater doubt as to the effect of the misconduct on the jury, the court should be able to make a more intelligent finding on this point with the knowledge of independently verifiable facts which can be uncovered only by the aid of a

<sup>13</sup> To argue against this is similar to saying that a new trial should not be given where new evidence reveals that a principal witness was lying about a material issue, since this would destroy the "finality of the verdict."

<sup>14</sup> This is so where the juror attempts to explain what influence the misconduct has had upon his mind. The juror's affidavit in the principal case may have been of a subjective nature in regard to the effect of misconduct on the verdict. But affidavits relating to reasoning and the effect of misconduct will not necessarily be subjective. See notes 15 and 16 *infra*.

<sup>15</sup> Reaching a verdict by a game of chance or by averaging (quotient verdict) may be a part of the jury's reasoning process. But this should be the proper subject of a juror's affidavit since it is independently verifiable. But see *Hoffman v. St. Paul*, 187 Minn. 320, 245 N.W. 373 (1932); *McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 783 (1915); 52 A.L.R. 74 (1928).

<sup>16</sup> Verifiable evidence in this situation would include a poll taken from the jurors prior to the alleged misconduct. It would not include post-verdict affidavits by the jurors stating that they had changed their minds due to the misconduct. As to an affidavit by a juror reporting another juror's expressions prior to the misconduct to show that the other juror had changed his mind, this would be independently verifiable evidence. However, in this situation there is the additional question of privilege for a juror's statements in the jury room which might justify the exclusion of such an affidavit.

<sup>17</sup> The court would not necessarily be bound by the juror's affidavit in making this decision.

<sup>18</sup> Principal case at 818-819.

juror's affidavit. The result reached in the principal case is a desirable one, and a test of admissibility based upon a distinction between misconduct which is evidenced by overt acts which are independently verifiable and that which is not is a sensible solution to the competing policy factors in the area of jurors' affidavits. The problem now remains to clear away the unnecessary distinction between misconduct and the effect of misconduct, thereby leaving only one test to be applied.

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