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Criminal Law - Multiple Trials for a Single Transaction Involving Several Offenses Held Not Violative of Due Process - Hoag v. State of New Jersey, 356 U.S. 464 (1958), and Ciucci v. State of Illinois, 356 U.S. 571 (1958)

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The Virginia court in *Morris v. Bragg*[13] held that the broker could collect a commission where the owner promised to pay the commission if the property was sold by the broker or any other, where the owner sold the property himself. On the other hand, the Illinois court in *Wozniak v. Siegle*,[14] in an exclusive agency contract, held that substantially similar language was inadequate to give the broker a right to a commission.

In summary, it can be said that, while some courts automatically allow the broker a commission under an exclusive right to sell contract where the owner effects the sale himself, many courts require strong, positive language indicating such an intention. The language of the provision in the *Brown* case was sufficient to manifest this intention.

[13] 155 Va. 912, 156 S.E. 381 (1931).

[14] 226 Ill. App. 619 (1922).

CRIMINAL LAW—MULTIPLE TRIALS FOR A SINGLE TRANSACTION INVOLVING SEVERAL OFFENSES HELD NOT VIOLATIVE OF DUE PROCESS

In several recent United States Supreme Court decisions, the issue was raised as to whether an accused's right to due process as guaranteed under the Fourteenth Amendment is violated where he is subjected to multiple trials for a single transaction involving several different offenses. In *Hoag v. State of New Jersey*, 356 U.S. 464 (1958), three armed men entered a tavern, lined up five persons against a wall and robbed each of them. Hoag was arrested and indicted for the robbery of three of the victims. At the trial only one of the victims was able to identify Hoag as one of the robbers. Although several of the other victims had previously identified Hoag from a photograph, they could not identify him at the trial. Hoag's defense was that he was not present within the state at the time the robbery took place. He was acquitted, but shortly thereafter was indicted and tried for the robbery of another of the victims and was convicted. The Court ruled that the State's decision to try the defendant a second time was not so unreasonable or oppressive as to deprive him of due process of law.

In *Ciucci v. State of Illinois*, 356 U.S. 571 (1958), the defendant was charged in four separate indictments with murdering his wife and three children, all of whom, with bullet wounds in their heads, were found dead in a burning building. In three successive trials, Ciucci was found guilty of the first degree murder of his wife and two of his children. The horrid details of the four deaths were introduced into evidence at each trial. In the first and second trials, the punishment was fixed at 20 and 45 years imprisonment respectively. At the third trial, involving the death of another child, the penalty was fixed at death. The Court here held that the State

Prosecutor's determination to try Ciucci separately for each murder, massing in each trial the gruesome details of each of the four deaths, until a death sentence was obtained, was not so lacking in fundamental fairness as to deprive him of his right of due process of law.

As authority for its decisions, the Court referred to its opinion in *Palko v. Connecticut*,[1] wherein a defendant was convicted of second degree murder and sentenced to life imprisonment. Pursuant to a statute,[2] the state appealed the verdict. Upon appeal, the conviction was reversed and a new trial ordered which resulted in a conviction for first degree murder and a death sentence. The Court, in upholding the conviction, said:

> Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"?[3]

That the states have a wide latitude in the administration of their own systems of criminal justice is well settled.[4] But how far may a state go in "getting its man"? May it harass him until he is old and weary? Is the criterion set out in *Palko* so general and discretionary as to afford a criminal defendant little protection from the wrath and vengeance of the prosecuting attorney? In *Brock v. North Carolina*,[5] the Supreme Court held that a state court properly terminated a trial, at the request of the prosecution, when several of the state's key witnesses refused to testify, and then properly retried the case when the state was better prepared. Justice Frankfurter, in a concurring opinion, criticized the state's procedure but found that it was not in violation of the Fourteenth Amendment. He said:

> A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time.[6]

In addition to resolving the issue of due process in the instant cases, the Court held that the defendants, Hoag and Ciucci, were not put in double

[1] 302 U.S. 319 (1937).

[2] Conn. Gen. Stat. (1949) § 8812: "Appeals by the state in criminal cases. Appeals from the rulings and decisions of the superior court or of the court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused."

[3] 302 U.S. 319, 328 (1937).

[4] Twining v. New Jersey, 211 U.S. 78 (1908); West v. Louisiana, 194 U.S. 258 (1904); Maxwell v. Dow, 176 U.S. 581 (1900); Hurtado v. California, 110 U.S. 516 (1884).

[5] 344 U.S. 424 (1953).

[6] Ibid., at 351.

jeopardy.[7] That neither the double jeopardy clause of the Fifth Amendment[8] nor the Fourteenth Amendment of the Constitution prohibits the states from prosecuting a defendant more than once is well settled.[9] Every state, however, either by adoption of the common law or by constitutional amendment, follows the rule against double jeopardy.

If in a single criminal act more than one person is killed or robbed, does the death of each person or the theft of each person constitute a separate offense so as to warrant more than one prosecution?[10] Most courts adhere to an "act offense dichotomy" permitting the state to prosecute the accused as many times as there are deaths or thefts.[11] However, a few states have followed the "same transaction rule" whereby the state is limited to one trial.[12]

The doctrine of double jeopardy is recognized as having had its origin in *Rex v. Duchess of Kingston.*[13] Twenty years later in *Rex v. Vandercomb and Abbot,*[14] the "same evidence test" was established. Under this test, an acquittal under the first indictment will not be a bar to a second indictment unless the facts contained in the second indictment, if proved, could have brought a conviction under the first indictment.[15] Both New Jersey and Illinois (where the *Hoag* and *Ciucci* cases were tried) follow the "same evidence test" thereby equating the number of offenses with the number of victims.[16]

[7] U.S. Const. Amend. 5; Rex v. Duchess of Kingston, 20 How. St. Tr. 355 (1776).

[8] United States v. Lanza, 260 U.S. 377 (1922).

[9] Palko v. Connecticut, 302 U.S. 319 (1937); Armine v. Tines, 131 F.2d 827 (C.A. 10th, 1942).

[10] This subject is discussed in: Lugar, Criminal Law, Double Jeopardy and Res Judicata, 39 Iowa L. Rev. 317 (1954); Kirchheimer, The Act, the Offense and Double Jeopardy, 58 Yale L. J. 513 (1949); Horack, The Multiple Consequences of a Single Criminal Act, 21 Minn. L. Rev. 805 (1937).

[11] Ebeling v. Morgan, 237 U.S. 625 (1915); State v. Corbett, 117 S.C. 356, 109 S.E. 133 (1921); In re Allison, 13 Colo. 525, 22 Pac. 820 (1889); Nichols v. Commonwealth, 78 Ky. 180 (1879).

[12] State v. Wheelock, 216 Iowa 1428, 250 N.W. 617 (1933); People v. Barr, 259 N.Y. 104, 181 N.E. 64 (1932); State v. Roberts, 170 La. 727, 129 So. 144 (1930); Spannell v. State, 83 Tex. Crim. 418, 203 S.W. 357 (1918).

[13] 20 How. St. Tr. 355 (1776).

[14] 2 Leach 708, 168 Eng. Rep. 455 (1796).

[15] E.g., Medlock v. Commonwealth, 216 Ky. 718, 288 S.W. 670 (1926).

[16] State v. Labato, 7 N.J. 137, 80 A.2d 617 (1951); State v. Di Giosis, 3 N.J. 413, 70 A.2d 756 (1950); People v. Allen, 368 Ill. 368, 14 N.E.2d 397 (1937). It is interesting to note that after several years of study, the American Law Institute has proposed that there be a single prosecution for persons charged with perpetrating several different offenses where the offenses arise out of a single act or from a single motive. Model Penal Code § 108(2) (tent. draft no. 5, 1956).

Another important issue in the *Hoag* case was whether Hoag was deprived of due process where the question of his identity was litigated twice. In other words, did the determination in the first trial that Hoag did not commit the crime estop the prosecution from indicting him a second time, since the only real issue in the first trial was his identity? Collateral estoppel, as an aspect of the broader doctrine of res judicata, bars a redetermination of a question of fact which was essential to a judgment in a prior suit. A majority of the court held that it was unnecessary to rule on the constitutionality of collateral estoppel since there was no way of determining from the verdict in the first trial upon what question the verdict turned.

A similar view was taken in *People v. Rodgers*[17] where a criminal defendant was found "not guilty" of robbing one of the prosecuting witnesses. This same defendant was then brought to trial for the robbery of another of the witnesses and was convicted. Both robberies occurred at the same time and place. Rodgers alleged that he was elsewhere at the time the crime was supposed to have been committed. The court ruled that the general acquittal in the first trial did not necessarily mean that the jury believed the defendant's alibi, for they could have believed that the prosecution had failed to prove the essential allegations of the crime of robbery.[18]

However, other courts of review have examined the record more carefully than did the court in the *Rodgers case,* and have found that only one issue was litigated.[19] For example, in *Harris v. State,*[20] the accused was arrested for the murder and robbery of a young merchant. He was acquitted of the murder charge and then later brought to trial on the robbery charge. The guilt or innocence of the defendant in the first trial hinged on whether he had participated with another in the murder and robbery of the merchant. The court said:

> Since it indisputably appears that the defendant could not be guilty of the present charge without also being guilty of the crime of which he has been tried and acquitted, he cannot now be put in jeopardy for the purpose of again adjudicating the issue which has already been determined in his favor.[21]

[17] 102 N.Y. Misc. 437, 170 N.Y. Supp. 86 (1918); aff'd 226 N.Y. 671, 123 N.E. 882 (1919).

[18] Cf. United States v. Adams, 281 U.S. 202 (1930); United States v. Dockery, 49 F. Supp. 907 (E.D.N.Y., 1943); United States v. Halbrook, 36 F. Supp. 345 (E.D. Mo., 1941); State v. Erwin, 101 Utah 365, 120 P.2d 285 (1941).

[19] United States v. De Angelo, 138 F.2d 466 (C.A. 3d, 1943); People v. Grzesczak, 77 N.Y. Misc. 202, 137 N.Y. Supp. 538 (1912); cf. Emich Motors Corporation v. General Motors Corporation, 340 U.S. 558 (1951); Sealfon v. United States, 332 U.S. 575 (1948); United States v. Oppenheimer, 242 U.S. 85 (1916).

[20] 193 Ga. 109, 17 S.E.2d 573 (1941).

[21] Ibid., at 581.

Similarly, for the Supreme Court to find that Hoag was properly tried a second time although the facts indisputably showed that he could not have been guilty of the second charge without also being guilty of the first is apparently inconsistent with concepts of fair criminal procedure. If there had been ten victims, could the state have prosecuted Hoag ten times? The Court found that the state's determination to try Hoag again after the prosecuting witnesses' unexpected failure to identify him was neither arbitrary nor lacking in justification. The Court is apparently placing a premium on "unpreparedness."

In the *Ciucci* case, the state tried Ciucci three times and undoubtedly would have tried him a fourth if the death penalty had not already been obtained. Ostensibly there was no justification for not trying all four murders at one time except the prosecutor's desire to obtain a death sentence. The problem of whether the possible benefits to society from multiple trials outweigh the suppression of individual liberty was fairly summarized in the case of *In re Spier*, where the court said:

> In this case, the guilt or innocence of the prisoner is as little the subject of inquiry, as the merits of any case can be, when it is brought before this Court on a collateral question of law. Although the prisoner, if unfortunately guilty, may escape punishment, in consequence of the decision this day made in his favor, yet it should be the bulwark of safety to those, who more innocent, may become the subjects of persecution, and whose conviction, if not procured on one trial, might be secured on a second or third, whether they were guilty or not.[22]

[22] 12 N.C. 329, 331 (1828). In this case, after the jury had been sworn in and evidence presented, the court adjourned for the summer. The defendant was again brought to trial at the beginning of the new term.

DOMESTIC RELATIONS–WIFE NOT ALLOWED TO RECOVER FOR LOSS OF CONSORTIUM CAUSED BY NEGLIGENT INJURY TO HER HUSBAND

Plaintiff's husband was seriously injured when a taxicab in which he was a passenger collided with a train. He brought an action against the railway company, the taxicab company, the train engineer, and the cab driver, obtaining a judgment which was affirmed on appeal. During the pendency of that action his wife brought suit against these same defendants for loss of consortium[1] allegedly resulting from their negligence. The Superior Court sustained a general demurrer by the railroad and the engineer[2] without leave to amend, and the wife appealed. The Supreme

[1] This court defines consortium as "the non-economic aspects of marriage, including conjugal society, comfort, affection, and companionship."

[2] The taxicab company and its driver are not mentioned in the judgment or the notice of appeal, and the record does not disclose the status of this case with respect to them.