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The Admission Into Evidence Of Extra-Judicial Confession Of Guilt Made By Third Parties - Brady v. State

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The Admission Into Evidence Of Extra-Judicial Confession Of Guilt Made By Third Parties

Brady v. State[1]

Brady and Boblit were each convicted of first degree murder in separate trials for the killing of one Brooks in the course of a robbery. At the trial of Boblit, the court

[1] 226 Md. 422, 174 A. 2d 167 (1961).

excluded, because it was unsigned, a written statement of Boblit in which he admitted to the strangling of Brooks.[2] At Brady's trial, which preceded Boblit's, this statement was neither made available to the defense nor offered in evidence by the State. Brady, in an application for post-conviction relief, contended that the unsigned statement of Boblit would have corroborated his testimony that Boblit did the actual killing and that the failure of the State to produce the statement or to inform defense counsel of its existence amounted to a denial of due process.[3] In answering this contention, the State argued that the statement of Boblit admitting the actual killing of Brooks would have been inadmissible at the trial of Brady; thus its failure to produce the statement could not have prejudiced the rights of Brady. In reversing the trial court's denial of post-conviction relief, the Court of Appeals held that the State was under a duty to disclose the confession of Boblit and that the statement could be used by Brady in support of his defense.[4] To substantiate its decision, the Court quoted from its opinion in *Thomas v. State:*

> "[w]e hold that where a witness has made a written confession that he committed the crime with which the defendant is charged, the defendant should be allowed to introduce the confession in evidence and question him in regard to the confession and the circumstances under which he made it. We further hold that where in a criminal case an officer has secured contradictory confessions from two different persons, the defense should be permitted to question him about both confessions and we further hold that such a confession by a third party is admissible unless it appears that there was some collusion in obtaining it."[5]

The Court reasoned that if Boblit had testified at the trial of Brady, the defense could have cross-examined him

[2] Boblit v. State, 220 Md. 454, 154 A. 2d 434 (1939). But see 2 WHARTON'S CRIMINAL EVIDENCE (12th ed. 1955) § 340, "A written confession is not made inadmissible by the fact that it is not signed by the accused." See also Carey v. State, 155 Md. 474, 142 A. 497 (1928); State v. Foulds, 127 N.J. 336, 23 A. 2d 895 (1941); 23 A.L.R. 2d 919 (1952); 2 JONES, THE LAW OF EVIDENCE (5th ed. 1958) 742.

[3] Since the murder was committed during the course of a robbery, Brady would be guilty of first degree murder no matter who did the actual strangling, but, the defense hoped that the jury would find Brady guilty of first degree murder without capital punishment if it believed that Boblit did the killing. See Day v. State, 196 Md. 384, 391, 76 A. 2d 729 (1950).

[4] The scope of this note is limited to the evidentiary point.

[5] 186 Md. 446, 452, 47 A. 2d 43, 167 A.L.R. 390 (1946).

about the confession. If Boblit had refused to testify, the defense could have examined the police officer who had taken Boblit's confession.

Boblit's confession was made out-of-court and while he was not under oath. Brady contended that he should have been able to use this confession as evidence of the fact that Boblit did the actual strangling. If the confession was offered for this purpose it was offered as evidence of the truth of the matter contained in the statement and was clearly hearsay. As such, the confession was inadmissible unless it came within one of the exceptions to the hearsay rule, and the exception for declarations against interest is the only one available.

Declarations against interest generally are admitted in evidence as an exception to the hearsay rule because of their reliability even though they are not made under oath and the declarant is not subject to cross-examination. Their reliability stems from the belief that a person would not make a statement against his own interest unless he believed it to be true. It should be noted however that it is required that the declarant be unavailable to testify at the time of the trial.[6]

The *Sussex Peerage* case,[7] in 1844, formulated the rule that an extra-judicial statement, in order to constitute a declaration against interest within the purview of that exception to the hearsay rule, must be a statement against a pecuniary or a proprietary interest; therefore an extra-judicial confession of guilt does not fall within this exception. In spite of severe criticism by treatise writers,[8] the majority of United States courts have adhered to this position.[9] The proponents of excluding third party extra judicial confessions reason that if such confessions were to be admitted, the courts would be flooded with perjured testimony offered to free the real criminal.[10] It is believed that third persons could make statements that would be advantageous to the position of the accused, but at the same time not adversely affect their own interest. For example, in the case of *Commonwealth v. Wakelin*,[11] the

[6] MCCORMICK, EVIDENCE (1954) § 257 states that if for any reason the declarant is unavailable to testify at the trial, including his successful claim of privilege, he should be considered unavailable for the purposes of this exception. The cases are conflicting on this point.

[7] 11 Cl. & F. 85, 8 Eng. Rep. 1034 [1844].

[8] 5 WIGMORE, EVIDENCE (3d ed. 1940) §§ 1476, 1477; MCCORMICK, *op. cit. supra*, n. 6, § 255.

[9] WIGMORE, *id.*, § 1476.

[10] See e.g., Munshower v. State, 55 Md. 11 (1880).

[11] 230 Mass. 567, 120 N.E. 209 (1918). The confession was received in this case because no objection was offered to it, probably because the

defendant offered into evidence the statement of one Ducharme that he had committed the murder with which the defendant was charged. This statement was offered through a witness who testified that he was in a jail cell with Ducharme when the statement was made. Ducharme had since been executed at the state prison. In *McCoslin v. State*,[12] the defendant offered a declaration of one alleged to be his accomplice, in which the accomplice stated that he alone committed the crime with which the defendant was charged. The declaration was not reliable because the accomplice was liable to the same amount of punishment whether he committed the crime alone or in conjunction with the defendant.

In the case of *Donnelly v. United States*,[13] decided in 1913, the Supreme Court followed the weight of authority in the State courts and refused to admit the confession of a third party that he had committed the murder with which the defendant was charged, even though the third party was deceased at the time of the trial. But in this case, Justice Holmes, joined by two other Justices, wrote a landmark dissent which opened the door for the admission of this type of evidence. In his dissent, Holmes urged the Court to follow experience, common sense, and logic rather than be hampered by history.[14] He stated, in reference to declarations against penal interest, that "no other statement is so much against interest as a confession of murder . . . ."[15] Wigmore states that the majority rule is a "barbarous doctrine" and he does not consider the danger of perjured testimony to be a valid basis for it.[16] Neither Wigmore nor Holmes would assert that there is absolutely no danger of perjury if declarations against penal interest were to be admitted as evidence. As can be seen from the *Wakelin* case, it would be dangerous to admit all such declarations; therefore it would be necessary for the courts to adopt safeguards in order to minimize this danger. The courts could require evidence of the circumstances surrounding the declaration which would tend to show its reliability. If the declaration in question is a confession of the crime with which the defendant is charged, the courts could require other evidence tending to implicate

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prosecution had convincing evidence that the confessor could not have committed the crime, and this evidence may have cast doubt on the defense generally.

[12] 96 Tex. Cr. R. 175, 256 S.W. 294 (1923).

[13] 228 U.S. 243 (1913).

[14] *Id.*, 277, 278.

[15] *Id.*, 278.

[16] WIGMORE, *op. cit. supra*, n. 8, § 1477.

the declarant with the crime. The courts also could look to see if there appears to be any collusion involved. This would be a part of reaching an initial determination that the statement was against interest.

Ten years after *Donnelly*, in the case of *Hines v. Commonwealth*,[17] the Virginia Court in following Holmes' dissent, admitted evidence of a confession of homicide by a third party who had the motive and opportunity to commit the crime confessed. A number of courts, although still a minority, have retreated from the *Sussex Peerage*[18] decision. Some seem to reject the rule completely,[19] while others limit its application and find circumstances under which extra-judicial confessions of guilt are admissible.[20] Both the Model Code of Evidence and the Uniform Rules of Evidence specifically state that a declaration that will subject the declarant to criminal liability is a declaration against interest within the purview of the exception to the hearsay rule.[21]

The Maryland Court of Appeals, as attested by the instant case, seems to be favoring the minority position of those who reject the rule of exclusion completely. Originally, however, Maryland followed the strict doctrine against the admissibility of extra-judicial confessions of third parties. In *Munshower v. State*,[22] the Court of Appeals followed the reasoning and the rule of the majority of the American courts, and in *Baehr v. State*,[23] a bastardy case, it held an extra-judicial admission by a third party that he was the father of the child, to be inadmissible. The exclusionary rule appeared to be firmly established in Maryland, but in 1920 the Court paved the way for liberalization of this strict doctrine. In another bastardy case,[24] while expressly recognizing the majority rule of the *Baehr* case, the Court held an extra-judicial admission of paternity made by a third party not under oath to be

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[17] 136 Va. 728, 117 S.E. 843, 35 A.L.R. 431 (1923).

[18] *Supra*, n. 7.

[19] See Osbourne v. Purdom, 250 S.W. 2d 159, 163 (Mo. 1952) where the court stated, "It is clear that, by making these declarations, Matt Jones was subjecting himself to criminal liability. . . . We, therefore, hold this was sufficient to make his statements admissible as declarations against interest."

[20] See *e.g.*, Morgan, *Declarations Against Interest in Texas*, 10 Tex. L. Rev. 399, 409 (1932).

[21] A.L.I. MODEL CODE OF EVIDENCE (1942) Rule 509(1); UNIFORM RULES OF EVIDENCE (1953) Rule b3 (10).

[22] 55 Md. 11 (1880).

[23] 136 Md. 128, 110 A. 103 (1920).

[24] Brennan v. State, 151 Md. 265, 134 A. 148, 48 A.L.R. 342 (1926).

admissible, reasoning that the special circumstances of the case practically assured the reliability of the extra-judicial confession and therefore justified making an exception to the rule.[25]

In the above discussed *Thomas*[26] case, the Court again refused to overturn the rule of the *Baehr* case. Although it stated rules to govern the admissibility of extra-judicial admissions of guilt, the Court pointed out that the declarants were before the Court, and the value of their declarations depended on their reliability as witnesses.[27] The rules laid down in the *Thomas* case therefore were merely dicta until they were specifically applied in the principal case. To date the Maryland Court of Appeals has not expressly overruled the majority position, but has recognized the possibility of admitting this evidence if certain conditions tending to show reliability are met.

In adopting the minority position in circumstances where reliability is supported by special circumstances, Maryland is taking an enlightened and progressive view. The reasoning of the majority position is difficult to defend. As pointed out by Wigmore, there is a danger of perjury *whenever* oral testimony is relied upon;[28] and, as stated in the *Thomas* case, extra-judicial admissions of guilt should be admissible into evidence only if they appear to be free of collusion. Certainly the courts would carefully scrutinize all such declarations, and frivolous or collusive declarations would be excluded. This was done in the instant case, no collusion or bad faith having been found.

Apparent reliability is not a requirement peculiar to the admissibility of penal declarations against interest. This requirement is imposed both on declarations of a presently existing mental state[29] and also on declarations against pecuniary or proprietary interests.[30] If this requirement makes admissible the out-of-court declarations

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[25] The accused claimed that the actual father of the child had committed suicide and left a letter disclosing that he was responsible for the bastardy. There was evidence to show that this letter was found on the body of the suicidal victim. The suicide was committed on the day of the child's birth and supposedly resulted from the victim's conviction that he was the father of the child. Unlike the circumstances surrounding this declaration, in the Baehr case there was little evidence that would tend to show the reliability of the declarant's statement.

[26] *Supra*, n. 5.

[27] *Ibid.*

[28] WIGMORE, *loc. cit. supra*, n. 8.

[29] MCCORMICK, *op. cit. supra*, n. 6, § 268.

[30] *Id.*, § 256.

in these areas, it should impel a similar result in the area under consideration.[31]

In admitting declarations against penal interest the court might possibly be preserving for an innocent defendant the only evidence available to assure his acquittal. It is submitted that the admission of such statements, under the safeguards set forth in the *Brady* case, will more often result in justice than their exclusion has prevented fraud on the court.

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[31] Declarations against penal interest have occasionally been admitted in civil cases on the theory that the crime also subjected the declarant to tort liability and was therefore against his pecuniary interest. See *e.g.*, Weber v. Chicago R.I. & Pac. R. Co., 175 Iowa 358, 151 N.W. 852 (1915); Sutter v. Easterly, 354 Mo. 282, 189 S.W. 2d 284, 162 A.L.R. 437 (1945). If this is a basis for admissibility in civil cases, the same should also hold true in criminal cases. The reliability factor is the same, and the necessity would be even greater since the life of the criminal defendant could very possibly be dependent on the admission of this type of evidence.