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Corroboration of Confessions in a Criminal Case in Virginia

JAMES W. PAYNE, JR.

The purpose of this brief note is to examine the Virginia rules relating to the requirement of corroboration of an extra-judicial confession as a basis for conviction of a criminal offense. The rules discussed herein do not, of course, apply to a plea of guilty in open court, and it might be noted too that the title selected by the author may be misleading in that, as a general rule, the rules discussed do apply to incriminating admissions of fact (except those occurring before the alleged criminal act) as well as full confessions. Annot., 45 A. L. R. 2d 1316, 1323 (1956). "A confession is the admission of guilt by the defendant of all the necessary elements of the crime of which he is charged, including the necessary acts and intent. An admission merely admits some fact which connects or tends to connect the defendant with the offense but not with all the elements of the crime." *State v. Masato Karumai*, 101 Utah 592, 126 P. 2d 1047 (1942). It has also been held that where the admission is revelant merely by virtue of its utterance, without regard to its veracity, the corroboration requirement does not apply. E.g. *People v. Fratiano*, 132 Cal. App. 2d 610, 282 P. 2d 1002 (1955) where the statement amounted to an overt act in a criminal conspiracy. There, of course, the problem of trustworthiness, which is at the heart of the corroboration requirement, does not exist and the decision seems sound.

1. *The Rule and the Policy Behind It.*

Although no exhaustive review of all of the Virginia cases will be attempted here, the Virginia court has long adhered to the proposition that the *corpus delicti* cannot be proved solely by extra-judicial confessions or admissions. E.g.: *Plymale v. Commonwealth*, 195 Va. 582 (1954); *Campbell v. Com-*

monwealth, 194 Va. 825 (1953); *Pepoon v. Commonwealth*, 192 Va. 804 (1951); *Wheeler v. Commonwealth*, 192 Va. 665 (1951); *Newberry v. Commonwealth*, 191 Va. 445 (1950); *Cleek v. Commonwealth*, 165 Va. 697 (1935); *Hamilton v. Commonwealth*, 163 Va. 1089 (1935); *Moore v. Commonwealth*, 132 Va. 741 (1922); *Collins v. Commonwealth*, 123 Va. 815 (1918); *Cochran v. Commonwealth*, 122 Va. 801 (1917); *Brown v. Commonwealth*, 89 Va. 379 (1892).

What is the policy behind such a rule? Something of the reasoning involved is suggested in 4 Blackstone, *Commentaries*, 357 (18th London Ed. 1838), where the author says of confessions:

[T]hey are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favor or menaces; seldom rendered accurately or repeated with due precision; and incapable in their nature of being disproved by negative evidence.

1 Greenleaf on *Evidence* §217 (15th ed. 1892) states

In the United States, the prisoner's confession, when the corpus delicti is not otherwise proved, has been held insufficient for his conviction; and this opinion certainly best accords with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases, and it seems countenanced by approved writers on this branch of the law.

In 3 Wigmore, *Evidence*, §865 (3d ed. 1940), the learned author comments on the extreme caution evidenced by judicial decisions relating to the admissibility in evidence of the extrajudicial confession generally. His comment is directed toward the rule under consideration as well as toward other safeguards surrounding the introduction of such a confession in evidence. Professor Wigmore advances a series of reasons for the development of these precautions described by him "as a weak sentimentalism toward criminals." The first historical

reason advanced by the author is "the character of person usually brought before judges on charges of crime." Such persons, presumably, were largely made up of members of the peasant class who might easily be influenced to confess falsely, by their "landed superiors" who controlled the fortunes of their social and economic subordinates. The second reason suggested was the absence in the early common law of any right of appeal in criminal cases and "the practical creation of the law of confessions by isolated judges at Nisi Pruis without consultation and on independent responsibility," resulting in a tendency to exclude all questionable evidence. The third and perhaps most persuasive reason advanced was the inability at common law of the accused to testify in his own behalf or to have counsel defend him. Professor Wigmore suggests that since these conditions no longer prevail today, the extreme caution existing with regard to the receipt of confessions in evidence should be abandoned.

More specifically, in discussing the corroboration requirement, Wigmore suggests:

The policy of any rule of the sort is questionable. No one doubts that the warning which it conveys is a proper one; but it is a warning which can be given with equal efficacy by counsel or (in a jurisdiction preserving the orthodox function of judges) by the judge in his charge on the facts. Common intelligence and caution, in the jurors' minds, will sufficiently appreciate it, without a laying on of the road in the shape of a rule of law. Moreover, the danger which it is supposed to guard against is greatly exaggerated in common thought. That danger lies wholly in a false confession of guilty. Such confessions, however, so far as handed down to us in the annals of our courts, have been exceedingly rare. . . . Such a rule might ordinarily, if not really needed, at least be merely superfluous. But this rule, and all such rules, are today constantly resorted to by unscrupulous counsel as mere verbal formulas with which to entrap the trial judge into an error of words in his charge to the jury. These capabilities of abuse make it often a positive obstruction to the

course of justice. 3 Wigmore, *Evidence* §2070 (3d ed. 1940).

Wigmore's reasoning here is less than convincing insofar as he bases his rejection of the corroboration requirement on the small number of false confessions of guilt. The only evidence of this fact resorted to in the section quoted is the paucity of reports of such cases in court annals. The cogency of this evidence, though, depends on the doubtful assumption that most, or at least a substantial number, of such cases would crop up in such annals. The courts have reasoned differently. For example, in the leading case of *Forte v. United States*, 68 App. D. C. 111, 94 F. (2d) 236, (1937) the court states:

[T]he conclusions reached by Mr. Wigmore on the one hand, and by Mr. Greenleaf and the greater number of the courts in the United States on the other, differ because they proceed from contrary premises. Mr. Wigmore's premise is that there is little danger of false confessions of guilt. He predicates this upon the proposition above quoted that 'so far as handed down to us in the annals of our courts, [false confessions] have been exceedingly rare.' To support this statement he comments that 'no trustworthy figures of authenticated instances of [false confessions] exist; but they are concededly few.' 2 Wigmore, *Evidence* (2d Ed. 1923) §867, pp. 227-228. He then reviews in footnote a number of 'most notable in English and American annals' including Perry's Case, 14 How. St. Tr. 1312, 1660—where one of two brothers confessed that he, his brother and his mother had murdered his master, and they were executed, and two years after the master returned home explaining that he had been kidnapped and sold to the Turks. The premise of the reasoning of Mr. Greenleaf and the great majority of the courts in the United States is that there is real danger of false confessions, coerced or psychopathic. For this premise there seems now, whatever may have been the state of the data in 1923, the date of Mr. Wigmore's work, substantial foundation, not only in the annals of the

courts in the sense of the reported decisions thereof, but also in dependable reports in criminological investigations.

Similar suggestions were advanced in *State v. Johnson*, 95 Utah 572, 83 P. 2d 1010 (1938). There the court states:

[E]xperience has shown that confessions sometimes turn out unfounded; that persons for the thrill or for publicity, or from mental derangement often confess the commission of crimes never committed, or which investigation shows they did not commit, as illustrated by persons posing as kidnappers in an effort to collect the ransom money. The weak, to avoid apparent impending peril and under the force of surroundings, or imaginary dangers, have been induced to state untruths. So too one often confesses or claims the commission of a crime he did not commit to avoid investigation into his own, or some other person's activities or history, or to avoid the prosecution of some one on another charge.

Confessions are necessarily weak or strong evidence according to the circumstances attending the making and proving of them; and we think the only safe general rule is to require some other evidence corroborative of their truth.

The reasons advanced in *Forte v. United States* and in *State v. Johnson* appeal to this writer as a sufficient basis for the retention of the rule requiring corroboration of the confessions of the accused in a criminal case. The tendency to surround the defendant in a criminal trial with every rational protective principle results from some fundamental notion of fairness that views with abhorrence the possible conviction and punishment of an innocent man. It is submitted that there is a very real danger of false confessions of guilt in criminal cases whether arising from duress, psychological disability, or mistake; and even the possibility that these instances may be rare in number does not appeal as an adequate reason for abandoning a principle specifically designed to protect those few individuals noted above who may need its protection.

It is, however, certainly arguable that the dangers of a false statement arising from mental derangement are substantially lessened in the case of an exculpatory but incriminating admission so that there is less reason for applying the corroboration requirement to such a statement. The Virginia cases have stated the requirement in language that applies both to a confession and an admission. *Hamilton v. Commonwealth*, 163 Va. 1089 (1935).

Should the rule be relaxed into a discretionary principle? Professor McCormick has suggested that any fixed rule requiring corroboration of a confession in a criminal case would be less "effective" in protecting the innocent than discretion of the appellate court to review the facts. McCormick, *Evidence* §110, Note 5 (1954). This suggestion provokes a number of questions. The first is: "Why?" Professor McCormick, in the section quoted, is explicitly concerned with abandoning an inflexible rule which might create an undue impediment to conviction of the guilty. It seems reasonable to suggest that greater protection is afforded the accused in a jurisdiction retaining the corroboration requirement and, at the same time, exercising broad powers of review through its appellate court. The second question is whether or not Professor McCormick would retain the corroboration requirement in some fixed form in those jurisdictions where the appellate court cannot reverse a conviction if there is evidence to support it even though the verdict seems unjust to that court or not supported by evidence establishing guilt beyond a reasonable doubt. A third question is put in Morgan, Maguire and Weinstein, *Cases on Evidence*, 491 (4th ed. 1957): "Would such power place too great a burden on appellate courts by requiring a review of the entire record in most criminal cases?" It does seem reasonable to suggest that, in those jurisdictions in which the appellate court is allowed narrow scope in reversing a criminal conviction, abandonment of the corroboration requirement would work a substantial change in the protection afforded the accused in a criminal case since the confession alone or the confession accompanied

by less corroborative evidence than is now required might well be taken as sufficient evidence to support a conviction. The change might prove less drastic in a jurisdiction where the appellate court exercises a sort of free-wheeling discretion in reversing a criminal conviction on the basis of insufficient evidence. Even here, however, there might well be a substantial increase in the number of convictions and appeals therefrom which would, as a practical matter, increase the already heavy burden of the appellate court.

It can be noted, parenthetically, that the Virginia court apparently exercises liberal or broad discretionary powers in reversing a criminal conviction for lack of sufficient evidence to support the conviction. 5 Michie's *Jurisprudence, Criminal Procedure* §62 (1949) and the many cases cited there. Analytically, it might be urged that a criminal conviction should be reversed for insufficient evidence only when the appellate court feels that reasonable men could not find that the evidence established guilt beyond a reasonable doubt. This test would preclude the appellate court from functioning as a second jury in the case and reversing because the court itself felt that the evidence was insufficient to establish guilt beyond a reasonable doubt. Yet a perusal of the Virginia decisions on the point suggests that the court sometimes functions as a second jury in these cases and Chief Justice Hudgins seemed to be dissenting for this precise reason in the fairly typical case of *Thomas v. Commonwealth*, 187 Va. 265, 273 (1948).

II. *What Is Required via Corroboration?*

Concededly the fairness of the rule requiring corroboration of a confession or admission to establish the *corpus delicti* will depend upon the nature and amount of corroborative evidence required:

(a) *What has to be corroborated?* Professor McCormick notes that the doctrine under discussion "might involve some or all of three elements: first, the harm or injury embraced in the particular crime, such as the death in a murder charge;

second, the criminal origin of the harm or injury; and, third, the criminal participation of the accused himself. Most courts hold that the requirement embraces the first two elements only." McCormick, *Evidence*, §110 (1954). This view is supported in *Cleek v. Commonwealth*, 165 Va. 697 (1935). There the accused confessed to the sheriff that illegal whiskey found on the premises of his father belonged to him (the accused). The court held that the *corpus delicti* was established when the illegal whiskey was found and the confession out of court of the accused was sufficient to connect him with the crime. The court stated at pages 698, 699: "While it may be true that the *corpus delicti* cannot be established by a confession made out of court and uncorroborated by other evidence . . . yet, when the *corpus delicti* has been established as in this case such a confession is competent evidence to connect the accused with the crime." This writer doubts that the Virginia court has departed from this position. There is, however, one relatively recent decision that might be urged as supporting the minority rule that corroborative evidence apart from the confession must tend to connect the accused with the crime. In *Henry v. Commonwealth*, 195 Va. 281 (1953), the court considered the sufficiency of the evidence to establish the *corpus delicti* and seemed to assume that this concept included the identity of the accused as the criminal agent. (195 Va. at 282-288). Professor McCormick points out that "there have been expressions by judges in some opinions which might suggest that even the third element also, namely the connection of the defendant with the crime, must be shown by evidence apart from the confession, but there seems to be no substantial support in the decisions for this view." McCormick, *Evidence*, §110, Note 7, (1954). He adds that such a rule "would relegate the confession, even though satisfactorily proved to have been voluntarily made, to a minor role indeed." *Ibid.* Wigmore's comment is more pungent: "A third view, indeed, too absurd to be argued with, has occasionally been advanced, at least by counsel, namely, that the 'corpus delicti' includes the third element also, i.e., the *accused's identity* or agency as the

criminal. By this view, the term 'corpus delicti' would be synonymous with the whole of the charge, and the rule would require that the whole be evidenced in all three elements independently of the confession, which would be absurd." 3 Wigmore, *Evidence* §2317, p. 402 (3d ed. 1940). This writer is frankly puzzled at the reluctance of courts that embrace the rule that a confession must be corroborated as to the *corpus delicti*—i.e., the commission of the criminal offense—to take the additional step and require some corroborative evidence aside from the confession which would link the accused with the crime. If, as suggested in *Forte v. United States*, *supra*, and *State v. Johnson*, *supra*, the corroboration rule is designed to guard against convictions based on confessions resulting from coercion or mental derangement, this would seem to be the very point on which corroborative evidence might be needed most frequently if any such safeguard at all is to be preserved. This would be true, for example, in those cases where there is evidence of a criminal offense, circumstantial or otherwise, and the crime has received wide publicity—at least if we can assume that such publicity will tempt the deranged to confess for the sake of notoriety or, perhaps, from some sense of guilt or from simple confusion. Or, too, if we can assume that the publicized offense creates pressure on the police to secure confessions by methods that are less than laudable. Nor does such a rule seem to be an arbitrary or undue impediment to the process of securing the convictions of guilty persons.

(b) *How much evidence is required to corroborate the confession?* This query concerns the requirement of probative value or cogency for corroborative evidence. Wigmore has characterized discussions of this topic or statements of governing rules as "mere useless chaff" 7 Wigmore, *Evidence* §2059, p. 334 (3rd ed. 1940) and "a waste of the state's time" (*id.* at §2062 p. 356). This writer is tempted to refrain from dissenting. The Virginia court, in *Campbell v. Commonwealth*, 194 Va. 825 at 833, 834 (1953) combined two statements in an

apparent inconsistency, asserting that "it takes only *slight* evidence to establish the *corpus delicti* when the commission of the crime has been fully confessed by the accused . . . As said by Mr. Justice Eggleston in the *Wheeler* case: ' . . . a confession is competent evidence tending to prove the *corpus delicti*, and all that is required of the Commonwealth in such cases is that there be such *substantial* corroborative circumstances as will, when taken in connection with the confession, establish the *corpus delicti* beyond reasonable doubt.' " (Emphasis added.) Since the second statement is offered as explanatory of the first, perhaps the substantial evidence requirement is controlling.

(c) *Can admissions of the accused serve to corroborate a confession?* In *Pepoon v. Commonwealth*, 192 Va. 804 (1951) the accused made three separate statements in the nature of admissions or confessions to different parties indicating that he had committed the act of sodomy *per os* on the person of a young boy, and it was held that there was no evidence to corroborate his confession as to the *corpus delicti*. Since Virginia is committed to the doctrine that the *corpus delicti* cannot be established by the uncorroborated extra-judicial confession of the accused, and, presumably, to the policy underlying the doctrine, the result seems sound. It is reasonable to assume the probability that the mistake, coercion, or mental disability that prompts one confession would often operate to prompt a series of such confessions. If one confession or admission in such a series could serve as corroboration of another such confession or admission, the policy behind the corroboration doctrine is defeated and the rule itself becomes meaningless in the kind of case under discussion. McCormick disagrees here. He says: "May admissions of the accused serve to corroborate a confession? If made voluntarily and not as a part of the confession itself, they would certainly seem to give persuasive confirmation of the truth of the confession. It is submitted that they should be regarded, where they tend to prove the *corpus delicti* as sufficient." McCormick, *Evidence*, §110, Note 7, (1954). In line with Professor McCormick's

viewpoint, in part at least, it seems possible to draw a line between a statement qualifying as an admission at the time of the trial, but made prior to the occurrence of the alleged criminal offense (where the danger of coercion would be non-existent), and in a case in which the nature of the admission fairly negated any substantial suspicion that it resulted from mistake or mental impairment, and an admission made after the occurrence of the offense where all of the dangers underlying the corroboration requirement would, potentially, be involved. The corroboration rule might well be relaxed to allow admissions of the kind first suggested to operate as corroborative evidence. Here, as indicated, the danger of official coercion disappears and the danger that the admission might be prompted by the kind of mental derangement that is excited by criminal conduct is also non-existent or substantially minimized.