MATTOX v. UNITED STATES

SUPREME COURT OF THE UNITED STATES
156 U.S. 237
February 4, 1895

Plaintiff in error was convicted on January 16, 1894, in the district court of the United States for the district of Kansas, of the murder of one John Mullen, which was alleged to have been committed on December 12, 1889…The indictment was returned to the September term, 1891, of the district court at Wichita, at which term defendant was first tried and convicted. From this conviction he sued out a writ of error from this court, which reversed the judgment of the district court, and remanded the case for a new trial. The case was continued until the December term, 1893, at which term plaintiff was again put upon his trial, and again convicted, whereupon he sued out this writ of error.

OPINION: Mr. Justice BROWN…Error is assigned to the action of the court below (1) in assuming jurisdiction of the case; (2) in not remitting the indictment to the circuit court for trial; **(3) in admitting to the jury the reporter's notes of the testimony of two witnesses at the former trial, who had since died;** (4) in refusing to permit the defendant to introduce the testimony of two witnesses, to impeach the testimony of one of the deceased witnesses, upon the ground that the proper foundation had not been laid. We proceed to the consideration of these assignments in their order:

[As issues (1), (2) and (4) are not relevant to our study, they are not provided.]

3. Upon the trial it was shown by the government that two of its witnesses on the former trial, namely, Thomas Whitman and George Thornton, had since died, whereupon a transcribed copy of the reporter's stenographic notes of their testimony upon such trial, supported by his testimony that it was correct, was admitted to be read in evidence, and constituted the strongest proof against the accused. Both these witnesses were present and were fully examined and cross-examined on the former trial. It is claimed, however, that the constitutional provision that the accused shall 'be confronted with the witnesses against him' was infringed by permitting the testimony of witnesses sworn upon the former trial to be read against him…

The idea that this cannot be done seems to have arisen from a misinterpretation of a ruling in the Case of Sir John Fenwick, which was a proceeding in parliament in 1696 by bill of attainder

upon a charge of high treason. It appeared that Lady Fenwick had spirited away a material witness, who had sworn against one Cook on his trial for the same treason. His testimony having been ruled out, obviously because it was not the case of a deceased witness, nor one where there had been an opportunity for cross-examination on a former trial between the same parties, the case is nevertheless cited by Peake in his work on Evidence as authority for the proposition that the testimony of a deceased witness cannot be used in a criminal prosecution. The rule in England, however, is clearly the other way. As to the practice in this country, we know of none of the states in which such testimony is now held to be inadmissible. In the cases of *Finn v. Com.*, *Mendum v. Com.* and *Brogy v. Com.*, the witnesses who had testified on the former trial were not dead, but were out of the state, and the testimony was held by the court of appeals of Virginia to be inadmissible, though the argument of the court indicated that the result would have been the same if they had been dead. In the case of *State v. Atkins*, the former testimony of a witness since deceased was rejected by the supreme court of Tennessee, but this case was subsequently overruled in *Kendrick v. State* and testimony of a deceased witness, taken before a committing magistrate, was held to be admissible. The rule in California was formerly against the admission of such testimony, but it is now admitted under a special provision of the Code applicable to absent and deceased witnesses, which is held to be constitutional [by the State court.] In the case of *State v. Campbell*, the testimony of a deceased witness had been taken before a coroner, but in the absence of the accused, and of course it was held to be inadmissible.

Upon the other hand, the authority in favor of the admissibility of such testimony, where the defendant was present either at the examination of the deceased witness before a committing magistrate, or upon a former trial of the same case, is overwhelming. The question was carefully considered in its constitutional aspect by the supreme judicial court of Massachusetts in *Com. v. Richards*, in which it was said that 'that provision was made to exclude any evidence by deposition, which could be given orally in the presence of the accused, but was not intended to affect the question as to what was or was not competent evidence to be given face to face according to the settled rules of the common law.' The subject was also treated at great length by Judge Drummond in *United States v. Macomb* and the substance of a deceased witness' testimony given at a preliminary examination held to be admissible. **All the cases up to that time were cited in the opinion, and the decision put upon the ground that, <u>the right of cross-examination having once been exercised, it was no hardship upon the defendant to allow the testimony of the deceased witness to be read</u>…**The same doctrine prevails in more than a dozen states. While the precise question has never arisen in this court, we held in *Reynolds v. U. S.* that if the witness is absent by the procurement or connivance of the defendant himself he is in no condition to assert his constitutional immunity.

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which **<u>the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief</u>.**

Ex parte : "for one party only". In this context, a written statement under oath by one party without the benefit of "cross-examination" by the other party.

There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. **To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.**

We are bound to interpret the constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a bill of rights are subject to exceptions, recognized long before the adoption of the constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried further than is necessary to the just protection of the accused, and further than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of **dying declarations**. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination, nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted, not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice. As was said by the chief justice when this case was here upon the first writ of error, the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath.

A **dying declaration**, then, is an exception to the hearsay rule of non-admissibility. The lengthy list of exceptions are those that have been found to make the hearsay more reliable – more trustworthy. The justification is that a person who believes he is dying is likely to tell the truth, or more so than the same statement made when not in fear of dying. The problem I have always had with this is that someone other than the deceased is the one providing the substance of what was said. Is that reliable? No more so than any other hearsay statement in my book.

If such declarations are admitted, because made by a person then dead, under circumstances which give his statements the same weight as if made under oath, there is equal, if not greater, reason for admitting testimony of his statements which were made under oath. The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of, and many of the very cases which hold testimony such as this to be admissible also hold that not the substance of his testimony only, but the very words of the witness, shall be proven. We do not wish to be understood as expressing an opinion upon this point, but all the authorities hold that a copy of the stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness—such as was produced in this case—is competent evidence of what he said…

I understand the practical necessity of this ruling. However, as a trial lawyer, I can tell you firsthand that reading the printed word from prior transcribed testimony **<u>can be</u>** a far cry from the actual message conveyed by the witness, wittingly or otherwise. A court reporter does not commit the sweating brow or frayed nerves to paper.

There was no error in the action of the court below, and its judgment is therefore affirmed.

DISSENT: Mr. Justice SHIRAS/GRAY/WHITE…[Not provided as not relevant to issue #3.]