RECENT DEVELOPMENTS

CRIMINAL LAW: SECOND CIRCUIT HOLDS CAUTIONARY INSTRUCTIONS INSUFFICIENT TO CURE POTENTIAL PREJUDICE RESULTING FROM ADMISSION OF CO-CONSPIRATOR'S CONFESSION

United States v. Bozza[1] has seemingly departed from the heretofore existing rule that a proper cautionary instruction in a multi-defendant trial can cure the prejudicial effect of one defendant's out-of-court confession on co-defendants. The appellants were convicted of various crimes related to the burglary of several post offices and the subsequent receipt and transportation of stolen stamps. The prosecution's case was presented principally by an accomplice, *A*, who was a major participant in each burglary. He testified that the crimes were committed by various combinations of twelve persons, six of whom were defendants in the instant case. To substantiate *A*'s testimony regarding the participation of one defendant, *J*, the Government introduced into evidence *J*'s post-arraignment confession, which was read to the jury with the word "blank" replacing the name of each defendant except that of *A* and the declarant. The jury was carefully instructed to assess the statement only against the declarant and not to speculate how the confession might otherwise be read to implicate any of the other co-defendants. Notwithstanding these "sufficiently clear" instructions,[2] the Second Circuit, with one judge dissenting, reversed the convictions because it found that the co-defendants were prejudicially affected by the admission of the confession.

General rules of evidence, applied in both state and federal courts, have been firmly settled regarding the admissibility of out-of-court statements rendered by co-conspirators. Thus, assertions made prior to the termination of the conspiracy may be used against all the conspirators because the declarations are deemed part of the common purpose for which they all share a collective responsibility.[3]

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[1] 365 F.2d 206 (2d Cir. 1966).

[2] *Id.* at 216.

[3] *E.g.*, Lutwak v. United States, 344 U.S. 604, 618 (1953); Fiswick v. United States, 329 U.S. 211, 217 (1946); see 4 WIGMORE, EVIDENCE § 1079, at 127 (3d ed. 1940); 6

On the other hand, declarations made after the completion of the conspiratorial activity are admissible only against the declarant since the collective responsibility ceased with the conspiracy's termination;[4] such evidence is, therefore, equally excludable under conventional hearsay rules.[5] Yet, these post-conspiracy declarations have generally been used in joint trials under the long-standing theory that any possible prejudicial implication involving non-declarant co-defendants could be overcome by clear cautionary instructions to the effect that the jury should consider such statements only as evidence against the declarant.[6] In the leading case, *Delli Paoli v. United States*,[7] the Supreme Court delineated two tests in order to determine whether non-declarants were afforded sufficient protection against misuse of the confession: The trial court must be satisfied, first, that the instructions were sufficiently clear, and, second, that the jury could reasonably be expected to follow them.[8] In that case several "factors" favored admissibility of the confession: (1) the conspiracy was simple and uncomplicated in character, (2) the separate interests of the defendants were emphasized throughout the trial, (3) introduction of the confession was postponed until the final stage of the Government's case to allow the jury to consider it it apart from other testimony, (4) the confession merely corroborated the Government's otherwise uncontradicted evidence, and (5) nothing indicated that the jury had misunderstood or failed to follow the court's instructions.[9] The delineation of these factors has afforded a useful standard of comparison for subsequent determinations of the proper application of the *Delli Paoli* formula.[10]

id. § 1769, at 184; Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159, 1163 (1954); Annot., 4 A.L.R.3d 671, 676 (1965).

[4] *E.g.*, Wong Sun v. United States, 371 U.S. 471, 490 (1963); Rimmer v. United States, 172 F.2d 954, 959 (5th Cir. 1949); see 4 WIGMORE, EVIDENCE § 1076, at 116 (3d ed. 1940); Navarro, *Admission by Conspirator*, 32 PHIL. L.J. 183, 184-85 (1957); Wessel, *Procedural Safeguards for the Mass Conspiracy Trial*, 48 A.B.A.J. 628 (1962); Annot., 4 A.L.R.3d 671, 676 (1965).

[5] See authorities cited note 4 *supra*.

[6] *E.g.*, Delli Paoli v. United States, 352 U.S. 232, 237-39 (1956); Lutwak v. United States, 344 U.S. 604, 618 (1953). See generally 4 WIGMORE, EVIDENCE § 1076 (3d ed. 1940); Annot., 4 A.L.R.3d 671, 714 (1965).

[7] 352 U.S. 232 (1956).

[8] *Id.* at 239.

[9] *Id.* at 241-42.

[10] *E.g.*, United States v. Casalinuovo, 350 F.2d 207, 212 (2d Cir. 1965); United States v. Castellana, 349 F.2d 264, 275 (2d Cir. 1965), *cert. denied*, 383 U.S. 928 (1966); United States v. Caron, 266 F.2d 49, 51 (2d Cir. 1959).

Since this limited introduction of otherwise inadmissible declarations depends upon the assumption that jurors will follow the cautionary instructions of the court,[11] the major criticism has questioned the mental capacity of the jury to comply with those instructions,[12] to perform what Judge Learned Hand called "a mental gymnastic which is beyond, not only their powers, but anybody's else [*sic*]."[13] Concentration on this issue, however, conceals the underlying conflict among at least three significant policy considerations: first, the administrative convenience and judicial economy of joint trials; second, the evidentiary value of the confessions of less than all the defendants; and third, the preservation of the co-defendants' right to a fair and impartial trial.[14] The limited admissibility rule has on occasion been applied without articulation of the considerations which underlie its application.[15] However, a reading of the principal decisions suggests that the courts, even before the instant case, have reached their ultimate decision after consideration of the foregoing policy factors within the context of the circumstances of the particular case in an attempt to determine if the degree of prejudice is sufficiently great to outweigh the salutary effects produced by the admission of confessions. The opinions are not framed in terms of whether *any* prejudice had been suffered by the non-declarants, but whether on balance sufficient prejudice had been present to deny defendants their rightful protection.[16] In some instances the admission of the confession has been upheld although the court conceded that it was not possible to avoid all prejudice.[17] Indeed, *Delli Paoli* constructed the test to be *"whether, under all the cir-*

[11] *E.g.*, Delli Paoli v. United States, 352 U.S. 232, 242 (1956); Opper v. United States, 348 U.S. 84, 95 (1954); Lutwak v. United States, 344 U.S. 604, 619 (1953); United States v. Castellana, 349 F.2d 264, 275 (2d Cir. 1965), *cert. denied*, 383 U.S. 928 (1966).

[12] Krulewitch v. United States, 336 U.S. 440, 453 (1949); Blumenthal v. United States, 332 U.S. 539, 559 (1947).

[13] Nash v. Untied States, 54 F.2d 1006, 1007 (2d Cir. 1932). See 365 F.2d at 215.

[14] *Compare* Jones v. United States, 342 F.2d 863, 867 (D.C. Cir. 1964), *with id.* at 880 (dissenting opinion).

[15] *E.g.*, United States v. Reincke, 354 F.2d 418, 420-21 (2d Cir. 1965), *cert. denied*, 384 U.S. 993 (1966); United States v. Miller, 340 F.2d 421, 423 (4th Cir. 1965).

[16] See, *e.g.*, Delli Paoli v. United States, 352 U.S. 232, 243 (1956); *id.* at 247 (dissenting opinion); Lutwak v. United States, 344 U.S. 604, 618-19 (1953); United States v. Gorman, 355 F.2d 151, 153 (2d Cir. 1965), *cert. denied*, 384 U.S. 1024 (1966); United States v. Cianchetti, 315 F.2d 584, 590 (2d Cir. 1963); *cf.* United States v. Kelly, 349 F.2d 720, 758 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966).

[17] United States v. Caron, 266 F.2d 49 (2d Cir. 1959); Nash v. United States, 54 F.2d 1006, 1006-07 (2d Cir. 1932).

cumstances, the court's instructions to the jury provided petitioner with sufficient protection . . . ."[18] Explicit in this approach to the question of admissibility was that Court's admonition in the closing paragraph of the opinion that "there may be *practical limitations* to the *circumstances*"[19] under which limiting instructions will be effective.

United States v. Bozza purports to be within this exception to the efficacy of limiting instructions. Accordingly, the opinion is structured in terms of the criteria established in *Delli Paoli.* Although the court expressed no doubt over the adequacy or clarity of the trial judge's instructions, it reversed the convictions by finding that the case differed from *Delli Paoli* in several "significant respects."[20] First, *Bozza* involved circumstances which were "not so simple"[21] as the single conspiracy to sell unlicensed alcohol in *Delli Paoli,* since here there were three conspiracy and seven substantive counts for the jury to consider. Second, the confession "furnished devastating corroboration of the heavily attacked testimony"[22] of the prosecution's chief witness, while in *Delli Paoli* the testimony was "hardly critical"[23] to the Government's case. In addition, the jury's request to see the declarant's confession, which was furnished after the names had been blacked out, "created a real doubt, not present in *Delli Paoli,* that at least some of [the jurors] . . . 'failed to follow the court's instructions.' "[24] In considering these circumstances and the adequacy of the protection afforded by the instruction, the court concluded "that there is a point where credulity as to the efficacy of such instructions . . . is overstrained, and that point was reached here."[25]

By accepting the majority's position that this case represents the exception to the rule's application as anticipated by *Delli Paoli, Bozza* could be lightly dismissed. However, a closer examination discloses a number of significant factors which inhibit such summary disposition. Judge Moore, dissenting, cast considerable doubt on each of the features in the case used by the majority to distinguish

[18] 352 U.S. at 239. (Emphasis added.) See note 9 *supra* and accompanying text.
[19] 352 U.S. at 243. (Emphasis added.)
[20] 365 F.2d at 216.
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*
[25] *Id.* at 217.

Delli Paoli.[26] While these objections may be valid, a more penetrating criticism would appear to result from an objective comparison of the actual protection afforded the defendants in the instant case with that in *Delli Paoli* and its progeny, which the majority took pains to distinguish.[27] Such a comparison yields the surprising result that the co-defendants were afforded *more* protection by the trial court in *Bozza* than that received by the accused in any of the other cases. Thus, unlike the procedure employed in the *Delli Paoli* line of decisions, in the instant case the names of the non-declarants were not read to the jury but rather were substituted with the word "blank"; similarly, the names were blacked out before the statement was given to the jury. These practices are exactly the additional safeguards that the *dissenters* in *Delli Paoli* thought necessary to provide an accused with complete protection.[28]

It might be suggested, therefore, that the instant case has departed from the *Delli Paoli* rule, perhaps in harmony with the current trend of Supreme Court decisions centering on the rights of the accused.[29] This explanation is too superficial, however, for if one avoids focusing on the rhetorical distinctions made between *Delli Paoli* and *Bozza*, the two cases can be understood as consistent within the context of the three-factor balancing process previously suggested. In joint trials the out-of-court confession of one defendant and the policy favoring the admission of such confessions act as a catalyst to bring the policy of judicial economy into direct conflict with the policy favoring protection of the rights of the accused. The resolution of the conflict will only be possible through recourse to the particular factual situation presented by each case, for each factual situation will highlight one or more of the various policies. Thus, for example, if a confession were crucial to the Government's case and strongly implicated a co-defendant, a severance of the trial might be appropriate; on the other hand, if the confession were of peripheral significance, the danger of prejudice would be minimal, and considerations of efficient judicial administration

[26] *Id.* at 228-30.

[27] United States v. Casalinuovo, 350 F.2d 207, 211-12 (2d Cir. 1965); United States v. Castellana, 349 F.2d 264, 272-74 (2d Cir. 1965), *cert. denied*, 383 U.S. 928 (1966); United States v. Caron, 266 F.2d 49 (2d Cir. 1959).

[28] 229 F.2d at 324 (Frank, J., dissenting); see 352 U.S. at 248 (dissenting opinion) (agreement "in substance" with Frank, J.).

[29] *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

would dictate admissibility and a joint trial. After all the factors have been evaluated, instances will be found where one policy seems dominant and the result is a trial severed, a confession held inadmissible, or a defendant considered unprejudiced. The seeming inconsistency is only the inevitable result of the proper function of the balancing process, since different factual contexts will demand different decisions. Thus, *United States v. Bozza* is not to be lamented as summarily discarding a previous approach or as misreading *Delli Paoli*; rather, it is to be embraced as a proper expression of the analysis essential to a just and efficacious resolution of the problems raised by the admission of implicatory confessions during the course of joint trials.