KeyCite Yellow Flag - Negative Treatment
Distinguished by Sherer v. James, S.C.App., April 15, 1985

136 S.C. 506
Supreme Court of South Carolina.

LUMPKIN
v.
MANKIN.

No. 12064.
|
Sept. 10, 1926.

Appeal from Richland County Court; M. S. Whaley, Judge.

Action by Madison Lumpkin against Louisa Mankin. Judgment for plaintiff, and defendant appeals. Affirmed.

West Headnotes (7)

[1] **Damages**
⇦ Extent of Damage in General

Evidence held to sustain verdict for actual damages to mule injured by automobile.

Cases that cite this headnote

[2] **Pleading**
⇦ Actions Ex Contractu

Defendant, desiring that acts of negligence be specified, should make motion that plaintiff be required to make complaint more definite and certain.

Cases that cite this headnote

[3] **Appeal and Error**
⇦ Refusal to Permit Argument

That counsel, by reason of court's withdrawal of issue of punitive damages, made no argument thereon to jury, though court later decided to submit such issue, held not ground for reversal, in absence of request for leave to make further argument.

1 Cases that cite this headnote

[4] **Automobiles**
⇦ Questions for Jury

Evidence held sufficient to go to jury on question of punitive damages for injury to mule by automobile.

Cases that cite this headnote

[5] **Automobiles**
⇦ Speed and Control

Question whether driver of automobile injuring mule was driving at greater speed than was reasonable, in violation of Act March 26, 1924, 33 St. at Large, p. 1182, held for jury.

Cases that cite this headnote

[6] **Automobiles**
⇦ Willful, Wanton, or Reckless Acts or Conduct

Evidence of conscious failure by automobile driver to observe due care, or of willfulness or recklessness or violation of Act March 26, 1924, 33 St. at Large, p. 1182, will warrant submission of issue of punitive damages.

8 Cases that cite this headnote

[7] **Appeal and Error**
⇦ Necessity of Objections in General

The party cannot take his chances of successful issue and thereafter assert vices in trial, of which he had notice as ground for reversal.

3 Cases that cite this headnote

Attorneys and Law Firms

*503 De Pass & De Pass, of Columbia, for appellant.

Cooper & Winter, of Columbia, for respondent.

Opinion

BLEASE, J.

Action between the plaintiff, a colored man, who owned a mule, and the defendant, a colored woman, who owned a Ford automobile. The mule and the automobile mixed up in Arthur town, on the Bluff road, in Richland county. One of the important issues was which got hurt the worst, the Ford or the mule. Plaintiff, on account of the conduct of the automobile and driver, claimed $500, actual and punitive damages, "either or both." The defendant denied plaintiff's claim, and demanded by counterclaim $500 damages, actual and punitive, on account of the conduct of the mule and the plaintiff.

The trial was before Judge Whaley, in the county court of Richland county, and resulted in a verdict in plaintiff's favor for $150 actual damages, and $100 punitive damages. The defendant was not satisfied with the result, and has asked this court to review the trial.

At the conclusion of the plaintiff's testimony, the defendant asked for a nonsuit, for the reason "that no acts of negligence were alleged in the complaint or proven by the testimony." This motion was refused, and such refusal is made the basis of the first exception.

[1] The allegations of the complaint as to negligence were in the most general terms. But, if the defendant wished the acts of negligence specified, she should have made a motion that the plaintiff be required to make his complaint more definite and certain. Sutton v. Railway, 82 S. C. 345, 64 S. E. 401; Prescott v. Railway, 99 S. C. 422, 83 S. E. 781.

There was some evidence as to negligence on part of the defendant. Plaintiff testified that he was trying to get the mule out of the road; that he saw the car "about a half acre before it struck mule," and the defendant did not try to stop the car, and made no effort to slow up, until after she had struck the mule, although one traveling in the road could have seen the mule "about a mile up the road." He also swore that the defendant told him that "she was just learning to drive car." One of plaintiff's witnesses testified that the defendant and the mule could both see each other some time before the collision. Another witness of plaintiff testified that the road was much traveled, that the automobile was running between 15 and 20 miles an hour, and that the mule was coming across the road "in a kind of a mule gait." And ***504** there was testimony that the defendant was not driving on the right side of the highway, but was in the middle of the road.

Act No. 721 of 1924, which regulates traffic upon highways of the state, contains a provision that no passenger vehicle shall exceed 35 miles per hour on rural roads, but it also has this provision:

> "No person shall operate any vehicle on the public roads of this state at a rate of speed greater than is reasonable and proper at the time and place, having regard to the traffic and use of the highway, and its condition, or so as to endanger the life, limb, or property of any person."

[2] The trial judge was right in submitting to the jury the question if the defendant was operating her Ford at a rate of speed greater than was reasonable and proper at the time and place, and under the circumstances surrounding her. The motion for nonsuit was properly refused.

At the conclusion of all testimony, the defendant moved for a directed verdict in her favor as to punitive damages, which was granted by the court. After argument of counsel, the trial judge became reminded of the act of the General Assembly, referred to above, and he then submitted the issue of punitive damages, as well as the question of actual damages, to the jury, and made a clear charge as to the two classes of damages. The defendant has two exceptions pertaining to this action on the part of the court. The first of these exceptions complains because the jury was allowed to consider the question of punitive damages. The second charges error because the attorneys for the defendant were deprived of the right to argue the question of punitive damages to the jury.

[3] [4] If there was evidence of a conscious failure to observe due care on the part of the defendant, or if there was evidence tending to show a violation of the act of 1924, by the defendant, or if there was any evidence of willfulness or recklessness on the part of the defendant, then the county judge was right in submitting the issue of punitive damages to the jury. In addition to the testimony already mentioned, there was some evidence that, at the time of the accident, the defendant commanded her

daughter, who was in the car with her, to put the car in motion, and that the defendant hastened away from the place of the accident; and there was some testimony that the defendant refused to give the number of her car, when requested to do so by the plaintiff. We think the jury should have passed upon the question of punitive damages.

[5] After the trial judge decided that he had erred in his first holding, and decided to submit to the jury the question of punitive damages, there was no request on the part of counsel for defendant to be allowed to make further argument to the jury. It appears also that attorneys for the plaintiff in their arguments to the jury did not touch upon the question of punitive damages. Usually the last argument to the jury, especially when punitive damages is discussed, is considered a great advantage to the plaintiff; and ordinarily we would think that it was in defendant's favor if none of the attorneys, who made speeches, referred to the right of a party to punitive damages. It appears, too, that there was no withdrawal from the jury as to the punitive damages claimed by the defendant. No doubt the judge would have granted request for further argument, if such request had been made.

[6] In State v. Ballew, 83 S. C. 82, 63 S. E. 688, 64 S. E. 1019, 18 Ann. Cas. 569, it was held that, generally, a party cannot take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment in the result.

We do not think there was error on the part of the trial judge in changing his ruling as to the matter of directing a verdict in favor of the defendant on the ground of punitive damages. To the contrary, when a judge has overlooked a statute, or act of the General Assembly, and during the trial he discovers his error, we think it is proper for him to change his holding.

[7] Error is charged in the refusal of the trial judge to grant a motion for a new trial, on the ground that the evidence was insufficient to sustain a verdict of either actual or punitive damages. What we have already stated disposes of the exception, as we have found that there was sufficient evidence to sustain the verdict of the jury. While the defendant contended that the mule was a "plug," the plaintiff insists that his animal was a splendid one. Whether or not the mule was a "plug" was a question for the jury. The trial judge must have also thought well of the mule. We are not prepared, since we have not seen the animal, to say that the verdict was excessive, as contended by the defendant.

All the exceptions are overruled, and the judgment of the county court of Richland county is hereby affirmed.

WATTS, COTHRAN, and STABLER, JJ., and RAMAGE, A. A. J., concur.

GARY, C. J., did not participate.

All Citations

136 S.C. 506, 134 S.E. 503

End of Document

43 S.C. 114
Supreme Court of South Carolina.

STATE
v.
LIGHTSEY et al.

Feb. 16, 1895.

Appeal from general sessions circuit court of Barnwell county; D. A. Townsend, Judge.

M. M. Lightsey and M. S. Lightsey were convicted of aggravated assault, and appeal. Affirmed.

West Headnotes (3)

[1] **Criminal Law**
⇦ Withdrawal of instructions or remarks
Error in a charge is cured by recalling the jury and correcting the defect.

3 Cases that cite this headnote

[2] **Assault and Battery**
⇦ Use of weapons
An assault may be committed by pointing an unloaded gun at another.

1 Cases that cite this headnote

[3] **Assault and Battery**
⇦ Defense of property
One is not justified in using force to expel a mere trespasser on his land.

2 Cases that cite this headnote

Attorneys and Law Firms

*975 Davis & Holman, for appellants.

Solicitor Bellinger, for the State.

Opinion

GARY, J.

The above-named defendants were indicted for an assault with intent to kill. They were tried at the summer term (1894) of the court of general sessions for Barnwell county, before his honor, Judge D. A. Townsend. Under the charge of the presiding judge, the jury found them guilty of an assault of a high and aggravated nature on the second count in the indictment, and they were sentenced to pay a fine or be imprisoned in the state penitentiary. The testimony is not set out in the case, nor is there any statement of the facts upon which they were convicted. The charge of his honor, the presiding judge, cannot properly be construed except in the light of the testimony in the case, or upon an agreed statement of the facts. Where neither the testimony nor an agreed statement of the facts appears in the case, the exceptions only present abstract questions of law. But, waiving such objection, the exceptions cannot be sustained.

The first exception is as follows: "Because his honor erred in charging the jury that an assault may be committed by simply pointing a gun at another." The charge of the presiding judge on this point was as follows: "A simple assault is an attempt to do bodily harm, but fails,—falls short of doing the harm, touching the body, doing the battery. For instance, the example usually used in striking at another within striking distance, but not striking him; pointing a gun at another within shooting distance, but not shooting. These are the examples usually used to illustrate what an assault is, but assaults may be committed, however, in a great many other ways. For instance, striking with a stick without hitting, within striking distance; pointing a gun within shooting distance. Those are the examples usually used, but I say an assault may be committed in a great many other ways." In this we see no error.

The second exception is as follows: "Because his honor erred in charging the jury that, before any one can excuse himself from murder, he must be able to show beyond a reasonable doubt that he did it from necessity." His honor recalled the jury, and corrected that part of his charge referred to in this exception. This exception cannot therefore be sustained.

The third exception is as follows: "Because his honor erred in recalling the jury from their room after they had retired

to deliberate upon the case, and recharging them as to the law of the case, there being no request for such action on the part of the jury." The ***976** principle governing such cases is found in the case of Hopt v. People, 7 Sup. Ct. 614, in which the court says: "But, independently of this consideration, as to the admissibility of the evidence, if it was erroneously admitted, its subsequent withdrawal from the case, with the accompanying instructions, cured the error. It is true in some instances there may be such strong impressions made upon the minds of a jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by the admission; and in that case the original objection may avail on appeal or writ of error. But such instances are exceptional. The trial of a cause is not to be suspended, the jury discharged, a new one summoned, and the evidence retaken, when an error in the admission of testimony can be corrected by its withdrawal, with proper instructions from the court to disregard it. We think the present case one of that kind. State v. May, 4 Dev. 330; Goodnow v. Hill, 125 Mass. 589; Smith v. Whitman, 6 Allen, 562; Hawes v. Gustin, 2 Allen, 402; Dillin v. People, 8 Mich. 369; Specht v. Howard, 16 Wall. 564." The third exception is overruled.

The fourth exception is as follows: "Because his honor erred in charging the jury that a man has not the same right to repel force by force out on his lands away from his castle that he has in his home." His honor charged the jury that "out on the land, away from his castle, he has not the same right there that he has in his home. *** If a man warns another off his place, and that man comes on it, he is guilty of a crime,—a misdemeanor; and for that misdemeanor he may be tried in court. Of course, the law prescribes the same in regard to his home, but he has an additional right to put him out; and use sufficient force and put him out, but the force must not be disproportionate." In this there was no error.

The fifth exception is as follows: "Because his honor erred in charging the jury that M. M. Lightsey had no right to carry his gun on his own premises." After his honor had charged the jury as stated, in reviewing the fourth exception he added: "But I charge you, a man has no right to take his gun and run a man off his place. That is simply taking the law into his own hands." In this there was no error.

It is the judgment of this court that the judgment of the circuit court be affirmed.

All Citations

43 S.C. 114, 20 S.E. 975

End of Document

89 S.C. 97
Supreme Court of South Carolina.

HARRELL et al.
v.
COLUMBIA ELECTRIC ST. RY., LIGHT & POWER CO.

May 24, 1911.

Appeal from Common Pleas Circuit Court of Richland County; J. W. De Vore, Judge.

"To be officially reported."

Action by R. E. Harrell and another against the Columbia Electric Street Railway, Light & Power Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

West Headnotes (4)

[1] **Carriers**
⇦ As to Negligence in Taking Up or Setting Down Passengers

Evidence held to sustain a finding that injury to a boarding street car passenger caused by suddenly starting the car resulted from wanton negligence.

Cases that cite this headnote

[2] **Carriers**
⇦ Willful Injury by Carrier's Employees

Contributory negligence was no defense to suit for wanton negligent injury to a street railway passenger.

Cases that cite this headnote

[3] **Trial**
⇦ Cumulative or Corroborative Evidence

It was not an abuse of discretion to permit plaintiffs to introduce cumulative testimony at the close of defendant's case, though it did not reply to defendant's evidence.

1 Cases that cite this headnote

[4] **Trial**
⇦ Authority and Duty to Instruct

After submission of a case, the court may, either at the request of the jury or on its own motion, give further instructions.

Cases that cite this headnote

Attorneys and Law Firms

*359 Elliott & Herbert, for appellant. Weston & Aycock and E. J. Best, for respondents.

Opinion

JONES, C. J.

The plaintiff Mattie Harrell, joining her husband, R. E. Harrell, in this suit, recovered of the defendant company a judgment of $5,000 for personal injuries *360 alleged to have been sustained by her on October 30, 1907, in the city of Columbia, S. C., at the intersection of Main and Taylor streets, by being thrown from the running board of defendant's car, through the negligence and wanton conduct of defendant (1) in failing to have the guard rail down on the west side of its car going north up Main street, at that time unusually crowded because the State Fair was being held in the city; (2) in suddenly and recklessly and without warning starting said car before plaintiff had sufficient time to get into the car and be seated.

[1] The first and second exceptions of defendant appellant assign error in permitting the plaintiff Mrs. Harrell and a witness, Harry Olstein, to testify after the close of defendant's testimony as to matters not in reply to any testimony brought out by defendant. The testimony was merely cumulative, and its admission was within the discretion of the trial court, which does not appear to have been improperly exercised. Wilson v. Moss, 79 S. C. 120, 60 S. E. 313.

[2] After the jury had been charged and had retired to their room, Judge De Vore discovered that he had inadvertently failed to instruct them as to punitive damages, and called the jury back and charged them on that subject. This is made the basis of the fourth exception. There was no error.

On the contrary, it is a proper exercise of the judicial function to cure an omission to give proper instruction, as well as to withdraw an improper instruction, as was done in State v. Lightsey, 43 S. C. 114, 20 S. E. 975.

[3] The third exception alleges error in refusing defendant's request to charge that there was no evidence in the case to support a verdict for punitive damages, and the fifth exception, in part, alleges error in the refusal of motion for new trial made on the same ground. We are unable to say that there was no testimony whatever tending to show wantonness, since there was testimony that the car was moved suddenly with a violent jerk without warning, while plaintiff was upon the running board of the car and before she had time to take her seat. Whether the conductor or motorman knew, or should have known, of plaintiff's exposed position at the time, whether due warning was given, or whether the sudden jerk was due to some peculiar or unpreventable action of the electric power, were matters of explanation for the jury.

[4] The fifth exception also contends there was error in refusing new trial because the evidence showed contributory negligence of plaintiff. After a careful reading of the testimony, we cannot say that the cause of action for mere negligence was conclusively overthrown by the testimony tending to show negligence on the part of plaintiff, and, as to the cause of action based on willfulness, the matter of contributory negligence is inapplicable.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

All Citations

89 S.C. 97, 71 S.E. 359

End of Document

171 S.C. 8
Supreme Court of South Carolina.

STATE
v.
HOLMES.

No. 13705.
|
Oct. 27, 1933.

Appeal from General Sessions Circuit Court of Sumter County; Philip H. Stoll, Judge.

James Holmes was convicted of murder, and he appeals.

Affirmed.

West Headnotes (11)

[1] **Homicide**
⇦ Previous Hostile Acts or Conduct of Accused

In murder prosecution based on killing by strangulation, evidence of defendant's previous attempt to poison deceased held admissible to show malice.

1 Cases that cite this headnote

[2] **Criminal Law**
⇦ Proof of Execution of Instruments

In prosecution of beneficiary for murder of insured, introduction of policy without formal proof of execution held not error, where witness identified policy as that which defendant had identified in making confession.

Cases that cite this headnote

[3] **Criminal Law**
⇦ Limiting Effect of Evidence Competent Only as Against One of Several Defendants

Statements of one of defendants in nature of confession held properly admitted as made, notwithstanding statements in part implicated codefendant, where judge repeatedly warned jury not to consider confession by defendant as evidence of codefendants' guilt.

2 Cases that cite this headnote

[4] **Criminal Law**
⇦ Accomplices

Where one of several defendants tried together voluntarily testifies, jury are judges of credibility and weight of his testimony for or against codefendants. Code 1942, § 1011.

Cases that cite this headnote

[5] **Criminal Law**
⇦ Instructions Correcting Previous Erroneous Instructions and Omissions

Trial judge, on discovering error in instructions, should make necessary corrections.

Cases that cite this headnote

[6] **Criminal Law**
⇦ Error in Instructions Cured by Withdrawal or Giving Other Instructions

Criminal Law
⇦ Errors Favorable to Defendant

Error in instruction that testimony of some defendants could not be considered as against others held not to require reversal, where error was favorable to appellant and court thereafter corrected charge by leaving credibility of defendants to jury's determination. Code 1942, § 1011.

2 Cases that cite this headnote

[7] **Criminal Law**
⇦ Further or More Specific Instructions

Counsel requesting correction in instructions should ask for further instructions if correction is not sufficiently clear.

Cases that cite this headnote

[8] **Witnesses**
⇦ Cross-Examination of Accused in Criminal Prosecutions

Defendant who voluntarily testifies in criminal prosecution may be cross-examined like any other witness. Code 1942, § 1011.

1 Cases that cite this headnote

[9] **Witnesses**
⇦ Cross-Examination of Accomplices and Codefendants in Criminal Prosecutions

Cross-examination of one of defendants in murder prosecution as to prior attempt of codefendant to poison deceased held not improper.

Cases that cite this headnote

[10] **Witnesses**
⇦ Cross-Examination of Accomplices and Codefendants in Criminal Prosecutions

In prosecution of several defendants, defendant has right to cross-examine codefendant who testifies.

Cases that cite this headnote

[11] **Witnesses**
⇦ Right to Contradict Testimony in General

In prosecution of several defendants, defendant has right to cross-examine codefendant who testifies and to contradict testimony of codefendant.

1 Cases that cite this headnote

Attorneys and Law Firms

*441 C. M. Edmunds and L. D. Jennings, both of Sumter, for appellant.

Frank A. McLeod, of Sumter, for the State.

Opinion

BLEASE, Chief Justice.

James Holmes, Willie Evans, and Esther Robinson, all colored, were indicted and tried together, in the court of general sessions for Sumter county, for the crime of murder, growing out of the alleged killing by the defendants of Nora Franklin, by strangulation.

The defendant, Holmes, was usually called "Donnie" Holmes; Evans very often went by the name of "Mottie" Evans; and the woman, Esther Robinson, bore the nickname of "Queenie."

Neither of the defendants engaged counsel. The court assigned counsel for each of them. L. D. Jennings, Esq., and C. M. Edmunds, Esq., appeared for Holmes; W. M. Levi, Esq., and George D. Levy, Esq., represented Evans; and Messrs. Epps & Epps defended Esther Robinson. The record discloses clearly and fully that all these attorneys, who received no compensation for their services, ably and efficiently performed their duties, and endeavored at every stage of the trial to see that their respective clients received the fair and impartial trial guaranteed to them by the Constitution of this state and of the United States.

Under the theory of the state, all of the defendants were principals in the murder, it being claimed that all of them were present at the time of the alleged homicide, and participated therein. And the prosecution sought to show that the motive for the crime was to enable Holmes to collect $125 on account of an insurance policy on the life of the deceased, wherein Holmes, her nephew, was named as the beneficiary. Alleged oral statements, in the nature of confessions, on the part of all three of the defendants were introduced by the state.

Each of the defendants pleaded not guilty. All of them testified in the trial. Willie Evans and Esther Robinson gave damaging testimony against their codefendant, Holmes.

The result of the trial, before his honor, Judge Stoll, and a jury, was the acquittal of Esther Robinson; a verdict of guilty of murder with recommendation to mercy as to Willie Evans, and his sentence to life imprisonment; and

a verdict of guilty of murder as to James Holmes, and his sentence to death by electrocution.

The appeal to this court is on the part of James Holmes alone. Since he was not financially able to have printed the record in the case, on motion of his counsel, this court has permitted typewritten records to be presented, and has acceded to the request that the appellant be not held to a strict compliance with the rules of the court.

The appellant has presented four exceptions. The first, second, and third of these relate to the admission of testimony. The fourth challenges certain instructions of the trial judge to the jury. Since the complaint as to the charge has some bearing upon the correctness of the rulings as to the admission of the testimony, which the appellant says was erroneously received, we consider first the fourth exception.

In the main charge, before the jury were directed to retire for the purpose of the consideration of the case, the circuit judge gave them the following instructions: "Now, I charge you, where two or more persons are being tried for the same offense, they are known as what we call co-defendants, and if one of them takes the stand, which he has a right under the law to do, to testify, he can testify only to such things as relate to the case under trial. But if his testimony relates to one of his co-defendants, you cannot consider the testimony as against them. You only consider it as against the defendant who is testifying. For instance, Mr. Foreman, A, B and C are tried together. A takes the stand and admits his part, and says things that incriminate himself, and also incriminate B and C, the jury could consider it as to A, but could not consider it as to B and C, because they are co-defendants."

Near the conclusion of the charge, Mr. R. D. Epps, of counsel for Esther Robinson, took the position that the charge as to the testimony of codefendants, above quoted, was erroneous. After some argument of the law on the subject, the presiding judge decided to let the instructions stand as they had been given. Mr. Jennings, of counsel for the appellant, then announced that he agreed with the position taken by Mr. Epps. After the jury had retired, Mr. Epps presented to the judge some authorities which he thought sustained his position, apparently being among them the case of State v. Blue, 118 S. C. 127, 110 S. E. 111. The jury, desiring to have some of the testimony in the case read to them, were brought into the courtroom. After the reading of that testimony, the trial judge charged them further as follows: "Mr. Foreman and Gentlemen, before you retire, after thinking over the matter, I am afraid I committed an error in my general charge to you relative to the testimony of the defendants. I want to strike out that part where I stated ***442** testimony of the defendants could not be considered as evidence against a co-defendant, and I instruct you this, that the testimony of the defendants-you are to be the judges of the credibility of the defendants as any other witnesses and you are the sole judges of what weight you give to the testimony of the defendants, as you are the judges of the weight you give the testimony of any other witness. I think that makes it clear what I am trying to correct. You may retire if that is all you want."

The appellant now says that the instructions first quoted were erroneous. He says, also, that the last instructions did not correct the previous error, and that thereby the law on the subject was left "in a confused state," and that the effect of the instructions was a declaration that the testimony of a codefendant could not be considered for or against another codefendant, and he was prejudiced in his trial by the failure of the judge to adequately correct the error into which he had first fallen.

[1] The instructions first given by the trial judge were erroneous. While there may have been an indication in the opinion of the court in the case of State v. Franks, 51 S. C. 259, 28 S. E. 908, that a defendant, in the trial of a criminal case, could not testify in behalf of a codefendant, jointly tried with him, it is entirely clear from the able opinion of Mr. Justice Hydrick, for this court, in the later case of State v. Kennedy, 85 S. C. 146, 67 E. E. 152, 155, that such is not now the law in this state. The court said in the Kennedy Case that the decision in the Franks Case "was rested upon other grounds" than the holding there indicated as to the testimony of a codefendant.

In the Kennedy Case, Mr. Justice Hydrick construed the effect of the provisions of section 64 of the Criminal Code of 1902 (now contained in section 1011 of the Code). The language of the statute is this: "In the trial of all criminal cases, the defendant shall be allowed to testify (if he desires to do so, and not otherwise) as to the facts and circumstances of the case." The distinguished jurist said: "The common-law doctrine [as to the testimony of co-defendants] has been abrogated by statute in this state." He further said: "Under the terms of the statute, any

of a number of defendants jointly indicted and jointly tried would have the right 'to testify as to the facts and circumstances of the case,' and the language of the statute does not certainly in express terms limit his competency to testify only in his own behalf. We think the intention of the Legislature was to remove the common-law disability of incompetency of defendants in criminal cases by reason of being parties to the record, or of being interested in the result, and put them upon the same footing as other witnesses. Hence it has been held that, when a defendant goes upon the witness stand, he 'thereby subjects himself to all the incidents of a regular witness, and his general reputation for veracity may be impeached; that he is subject to the usual duties, liabilities, and limitations of witnesses.' State v. Peterson, supra [35 S. C. 279, 14 S. E. 617]."

While the Kennedy Case was not expressly referred to in the later case of State v. Cooler, 112 S. C. 95, 98 S. E. 845, 846, it is evident the principles announced by Mr. Justice Hydrick in the former case were followed in the latter. In that case, Cooler and Davis were indicted and tried together for the crime of murder. In the appeal, Cooler complained of the admission of statements made by his codefendant, Davis, in the testimony of the latter, which statements, evidently, were damaging to Cooler. Judge Fraser, in speaking for this court, used this language: "We say Davis was a witness, and had the right to make his statement, even if it included a statement that his codefendant had done the killing."

In State v. Blue, supra, the appellant and others had been indicted and tried together on a charge of the crime of grand larceny. In passing upon exceptions as to the admission of statements of one of the defendants made out of the court, Mr. Justice Watts, for this court, said: "In addition to this he [the co-defendant whose statements were objected to] testified in his own behalf; and his evidence, wherein he implicated the other defendants, was certainly competent to go to the jury for their consideration as to the guilt or innocence of all of the defendants."

In addition to the authorities cited, the case of State v. Peterson, supra, and the case of State v. Adams, 49 S. C. 414, 27 S. E. 451, tend to sustain the declarations of Mr. Justice Hydrick.

While the learned circuit judge committed error in the instructions he first gave to the jury as to the testimony of codefendants, that error was likely very beneficial to the appellant. As stated before, the testimony given by his two codefendants was very damaging to the appellant. His testimony had little, if any, effect as to the charges against the other two defendants, for the appellant, apparently claiming that he was drunk and insane at the time of the commission of the crime charged against him, testified that he had no recollection of the occurrence, if he had any part in the killing of the deceased, his aunt.

[2] [3] [4] The later instructions, to our mind, were entirely sufficient to clear up the error committed in the main charge, and they were in accord with the law as has been seen from our references to the cited cases. The law is, when two or more persons are indicted and tried together for the commission of the *443 same crime, and one of the defendants voluntarily testifies in the trial, as he has the right to do, then the jury are to be the judges of the credibility of that defendant as a witness, and of the weight and effect of his testimony, not only for or against himself, but for or against all, or either of his codefendants in the case. The charge of the trial judge, as corrected, clearly declared that law. It was not only his right, but it was the duty of the trial judge, when he discovered that he had committed an error in his instructions, to make the necessary correction. See Lumpkin v. Mankin, 136 S. C. 506, 134 S. E. 503. It is not to be overlooked, too, that the correction in the instructions was given at the request of the appellant's counsel. If the correction, in the mind of that counsel, was not sufficiently clear, he should have asked for further instructions.

[5] The first exception relates to the testimony of Officer J. D. Chandler, a witness for the state, as to statements, in the nature of a confession as to his part in the crime, made by the defendant Willie Evans, referred to in the testimony by the officer as "Mottie" Evans. In detailing the statements made to him by Evans, the officer was allowed to repeat what that defendant had told him of the part taken by the appellant, Holmes, in the alleged murder. It is contended that it was improper to admit the statements, or confessions, of Evans, made in the absence of the appellant, in which acts and words of the appellant, implicating him in the crime, were included, since the appellant could not, under the law, be affected or bound thereby.

The exact point has been decided against the position taken, for in the case of State v. Jeffords, 121 S. C. 443, 114 S. E. 415, the court, through Mr. Justice Fraser, had this to say: "The next assignment of error is in allowing confessions of Harrison and Treece to be introduced in evidence, in so far as they contained accusations of Jeffords. *The rule is very clear that the confessions must be given as made.* If we strike out any part, then the confession ceases to be the confession as made. The rule in such cases is clearly to let all the defendant said be given, and the jury cautioned not to consider it against any one, except the man who makes it." (Italics ours.)

In the case at bar, several times during the taking of the testimony, the trial judge repeatedly told the jury that they were to consider any statement, or confession, made out of the court by either of the defendants only as to the defendant making it, and not against any other defendant. In his charge, he likewise fully instructed the jury.

[6] [7] [8] The third exception complains of error in permitting the solicitor, on his cross-examination of the defendant Willie Evans, to ask that defendant, generally, of acts and words of the appellant, having some bearing upon the killing of the deceased, and particularly as to the alleged attempt of the appellant, as testified to by Evans, to poison the deceased, by giving her whisky containing Paris green, upon an occasion some weeks before the death of the deceased occurred from strangulation. The cross-examination complained of was entirely proper. When a defendant voluntarily elects to be a witness in his own behalf, he thereby assumes the position of any ordinary witness, and he may be cross-examined as any other witness. See numerous cases, so holding, cited in the annotation to section 1011 of the Code of 1932. The defendant Evans elected to go upon the witness stand. When he did so, he subjected himself to the right of cross-examination on the part of the solicitor. The appellant had the right, also, to cross-examine Evans, and his counsel exercised that right. The appellant had the right, too, by his testimony, or the testimony of any other witness, to contradict, in the proper manner, the testimony of Evans, given either on his direct examination, or on his cross-examination. See State v. Adams, supra.

[9] The specific objection made in the argument of the appellant that it was error to admit the testimony of Evans, as to the previous attempt on the part of the appellant to poison the deceased, on the ground that it was error for the prosecution to endeavor to show the commission of another and distinct crime by the appellant, cannot be sustained. If the appellant attempted to poison the deceased, as testified to by Evans, proof of that act by him was clearly competent to go to the jury as evidence of the malice, as known to the law, of the appellant toward the deceased, and of his desire to take her life.

[10] The appellant's second exception charges error in the court permitting the introduction of the insurance policy on the life of the deceased, in which the appellant was named as beneficiary, without formal proof of the execution by the insurance company of the policy, and allowing the witness for the state, Officer Chandler, to testify regarding some of the contents of that policy, as related to him by the appellant. The record shows that when Mr. Chandler was testifying he related what the appellant had told him as to the part he had in the killing of the deceased. The witness testified as to statements of the appellant, tending to show that he had strangled to death his aunt that he, as the beneficiary of a life insurance policy on her life, might collect the insurance provided to be paid therein. The insurance policy, having been procured, was in the hands of Mr. Chandler at the time of one of his conversations with the appellant. The appellant identified the policy to Mr. Chandler, and he identified it in the court as having ***444** been identified by the appellant. The appellant, in his testimony, practically admitted the identification of the policy formerly made by him. The statements of the appellant to Mr. Chandler, as to certain terms of the policy, related by Mr. Chandler in his testimony, corresponded with the terms of the policy produced in the court. The policy and the testimony of Mr. Chandler, as to what the appellant had told him regarding it, were clearly admissible. There was never any question as to the execution and delivery of the policy by the insurance company; no issue in the case required any formal proof of its execution, and none was necessary.

In addition to giving special attention to the exceptions of the appellant, and the parts of the record relating to those exceptions, we have read carefully the entire record in the case. We have not found anywhere any error which calls for a reversal of the judgment against the appellant. The charge of the trial judge has especially impressed us. He instructed the jury fully on all phases of the law, which could have had any possible bearing in the case. The appellant certainly had a fair and impartial trial. Not only have his own attorneys and the trial judge seen to that, but

the solicitor and the officers of the law have contributed to that end. The evidence against the appellant was strong. The terrible situation confronting him is the result of his own conduct.

The judgment of this court is that the judgment below be, and the same is hereby, affirmed.

STABLER, CARTER, and BONHAM, JJ., and W. C. COTHRAN, A. A. J., concur.

All Citations

171 S.C. 8, 171 S.E. 440

End of Document

ALAN WILSON
ATTORNEY GENERAL

April 6, 2017

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *The State v. Lester Devaria Mosley, Jr.*
Appeal from Pickens County
Appellate Case No. 2014-002064

Dear Ms. Kitchings:

This is to advise the Court, pursuant to Rule 208(b)(7), SCACR, that the Respondent intends to reply upon the following additional cases that are not cited in the Brief of Respondent: cases: *Lumpkin v. Mankin*, 136 S.C. 506, 134 S.E. 503 (1926); *State vs. Lightsey, et al*, 43 S.C. 114, 20 S.E. 975 (1895); *Harrell, et al. vs. Columbia Electric St. Ry., Light & Power Company*, 89 S.C. 97, 71 S.E. 359 (1911); and *State v. Holmes,* 171 S.C. 8, 171 S.E. 440 (1933). Each case is relevant to whether a trial judge may give a supplemental jury instruction following the parties' closing arguments. Lumpkin also addressed whether a trial judge may grant further argument after such a supplemental charge.

Please be advised that the State intends to rely upon these authorities at oral argument and in any subsequent proceedings. A copy of these decisions are attached to this letter. Also, Respondent is providing opposing counsel with a copy of those opinions, along with a copy of this letter.

Thank you for your assistance in this matter.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

WES:dmd
Enclosures
cc: Katherine H. Hudgins, Esquire (with enclosures)
William G. Yarborough, III, Esquire (with enclosures)
The Honorable W. Walter Wilkins, III, Solicitor, Thirteenth Judicial Circuit (with enclosure)
Trisha Allen, Victim Services (with enclosure)

04/06/2017
US POSTAGE $01.40

OFFICE OF THE ATTORNEY GENERAL
State of South Carolina
P. O. Box 11549 - Columbia SC 29211-1549

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED
APR 10 2017
SC Court of Appeals