No. 201

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

EUGENE DENNIS, JOHN B. WILLIAMSON, JACOB STACHEL, ROBERT G. THOMPSON, BENJAMIN J. DAVIS, JR., HENRY WINSTON, JOHN GATES, IRVING POTASH, GILBERT GREEN, CARL WINTER and GUS HALL,

Defendants-Appellants.

JOINT APPENDIX

On Appeal from Judgments of Conviction of the United States District Court for the Southern District of New York

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[TRIAL TESTIMONY]

VOLUME XV—PAGES 11359 TO 12158

(Trial Transcript, pp. 14,121 to 15,461)

ROBERT PAGE, INC., 82 Beekman Street, New York City. BEekman 3-2723 110

podge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy (T-15,188) existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

The Court: Unmitigated what?

Mr. Crockett: Fiction. In that connection I have here another quotation which is on page 130 of our brief, and it really reflects the thinking of one of our most outstanding trial attorneys on conspiracy. That was the late Clarence Darrow; he summed it up as follows:

> "If A is indicted and a conspiracy is charged, or even if it is not charged, the State's Attorney is allowed to prove what A said to B and what B said to C while the defendant was not present. Then he can prove what C said to D and what D said to E, and so on, to the end of the alphabet, and after the letters are used up the State's Attorney can resort to figures for so long a stretch as he cares to continue. To make this hearsay or gossip competent, the State's Attorney informs the Court that later he will connect it up by showing that the defendant was informed of the various conversations, or that he otherwise had knowledge of them. Thereupon the complaisant Judge holds that the evidence is admissible, but if it is not connected up it will (T-15,189) be stricken out. A week or a month may pass by"—

The Court: This is the first time I have heard about a complaisant Judge. A complaisant Judge is rather nice.

Mr. Crockett: (Continuing):

> "A week or a month may pass by,"—

in this case we had six of them pass by—

"and then a motion is made to strike it out."

That is in effect the motion I presented this morning.

> "By that time it is of no consequence whether it is stricken or not; it has entered the jurors' consciousness with a mass of other matter, and altogether it had made an impression on his mind. What particular thing made the impression, neither the juror nor anyone else can know."

We submit under those circumstances that the logical and only legal thing that a Court can do is to grant a motion for a mistrial because of the mass of unconnected, unauthorized, prejudicial statements which have been received in evidence here on behalf of the prosecution on the statement that they would be connected up with some one or more of these defendants, and no such connection has been made.

Finally, I should like to make an individual motion for a directed verdict of acquittal with respect (T-15,190) to my client Mr. Stachel and a similar motion with respect to my client Mr. Winter, upon the ground that accepting at its face value all of the testimony introduced by the Government with respect to these two defendants, it fails to measure up to that standard of proof which is required to sustain a conviction under this indictment.

The Court: Now let us see: How many arguments have we left? I take it, Mr. Isserman, you will not desire to get started on any lengthy argument just a few minutes before we adjourn, and I am wondering how long are we likely to go on tomorrow to conclude the arguments by lawyers for the defense. I remember that I have given you all day of tomorrow, and if you desire to use the entire morning and afternoon sessions I will naturally permit you to do it. But I thought perhaps from the character of the arguments here today that it would be possible that you might finish in the morning.

Now if that is so, Mr. McGohey, will you desire to go on in the afternoon or would you prefer to wait until Friday which was your scheduled time?

(T-15,191) Mr. McGohey: No.