EVIDENCE—CROSS-EXAMINATION OF ACCUSED—INQUIRY REGARDING HOMOSEXUAL ABERRATIONS

United States v. Provoo, 215 F.2d 531 (2d Cir. 1954)

In a trial before a federal district court, the defendant, a former army staff sergeant charged with committing treason while a World War II prisoner of the Japanese, testified on direct examination that he had been confined in various United States army hospitals and stockades for lengthy periods after his release as a prisoner of war, and that, on several occasions during his confinements, he had been interrogated regarding his activities while a prisoner of war. On cross-examination the prosecution was permitted to question defendant extensively to determine whether the reason for his confinements was suspected homosexuality. On appeal from a conviction of treason, the court of appeals reversed the judgment, holding that the direct examination had not "opened the door" to this line of cross-examination, and that such information was inadmissible to impeach defendant's credibility as a witness.[1]

In the federal courts, and in a substantial majority of state courts, the scope of cross-examination, except for impeachment purposes,[2] is restricted to the subject matter of the witness' direct testimony.[3] Under the usual application of this restrictive rule, however, cross-examination is not confined to a mere reiteration of the facts testified to on direct examination,[4] but extends to the qualification or rebuttal of facts and circumstances disclosed on direct,[5] and to the rebuttal of

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1. United States v. Provoo, 215 F.2d 531 (2d Cir. 1954). The court found as an additional ground for reversal that the defendant was not tried in the district in which he was first found, as required by 18 U.S.C. § 3238 (1952) when the offense is committeed out of the jurisdiction of any state or federal judicial district. The court held that defendant was first found in Maryland and not in New York where his trial was held. Subsequently, the United States District Court for Maryland dismissed a treason indictment against defendant on the ground that he had been denied a speedy trial within the meaning of the Sixth Amendment because of the delay occasioned by the Government's improper choice of venue. United States v. Provoo, 23 U.S.L. Week 2463 (D. Md. March 14, 1955).

2. See text supported by notes 13-20 *infra*.

3. Philadelphia & T.R.R. v. Stimpson, 14 Pet. 448 (U.S. 1840); United States v. Bender, 218 F.2d 869 (7th Cir. 1955); MCCORMICK, EVIDENCE § 21 (1954); 6 WIGMORE, EVIDENCE § 1885 (2) (3d ed. 1940). It is to be noted that neither the Federal Rules of Criminal Procedure nor the Federal Rules of Civil Procedure have changed the rule in the federal courts. See Bell v. United States, 185 F.2d 302, 311 (4th Cir. 1950).

In contrast to the majority view, in England and a few of the states a party may be questioned upon any issue in the case. Moody v. Rowell, 34 Mass. (17 Pick.) 490 (1835); Mask v. State, 32 Miss. 405 (1856); Sands v. Southern Ry., 108 Tenn. 1, 64 S.W. 478 (1901); Morgan v. Bridges, 2 Stark. 314, 171 Eng. Rep. 657 (N.P. 1818).

4. Heard v. United States, 255 Fed. 829 (8th Cir. 1919); Stewart v. United States, 211 Fed. 41 (9th Cir. 1914).

5. Powers v. United States, 223 U.S. 303 (1912); Commerical State Bank v. Moore, 227 Fed. 19 (8th Cir. 1915).

inferences supporting the existence of facts and circumstances other than those directly related in the testimony in chief.[6]

In the principal case the court considered that defendant's testimony, being entirely neutral as to the reason for his confinements, had created no inference adverse to the prosecution,[7] and thus had not "opened the door" to the course of cross-examination pursued. The basis for the court's opinion was its prior decision in *United States v. Corrigan*,[8] where the doctrine of "opening the door" was defined as an application of the rule of completeness, which permits a party against whom part of a document, correspondence or conversation is introduced to bring in the remainder to rebut any adverse inference created by the partial disclosure.[9] The rule of completeness is not applicable in the instant case, however, since the rule relates only to a particular type of proof, consisting of *verbal utterances*, either written or oral; here, defendant's testimony consisted merely of a narration of a *series of events*.[10] The court in the instant case appears to have imposed its requirement that there be an adverse inference, before the rule of completeness is applicable, as a limitation upon the scope of cross-examination. By thus requiring that inferences arising on direct examination be adverse before cross-examination into them is permitted, the court seems to have limited unduly the usual rule which permits cross-examination into the subject matter of the direct and into any inferences created as to matters other than those directly related in the testimony in chief.[11] It is doubtful, however, whether the requirement of an adverse inference was intended by the court as a *general* limitation on the scope of cross-examination. In future decisions the view adopted in the principal case is likely to be confined to its particular facts. Since the cross-examination herein dealt with a highly prejudicial collateral matter, clearly irrelevant to the issues in the case, the court quite properly felt that the inquiry should only have been permitted, as a matter of fairness, if the de-

6. United States v. Kendall, 165 F.2d 117 (7th Cir. 1947); Banning v. United States, 130 F.2d 330 (6th Cir. 1942). See Conley v. Mervis, 324 Pa. 577, 188 Atl. 350 (1936); Note, 108 A.L.R. 167 (1937).

7. United States v. Provoo, 215 F.2d 531, 535 (2d Cir. 1954). The trial judge permitted the cross-examination in the belief that the testimony on direct examination had created the inference that the defendant's confinements were a result of investigations by government authorities into his activities while a prisoner of war.

8. 168 F.2d 641 (2d Cir. 1948).

9. *Id.* at 645. See Hayden v. Hoadley, 94 Vt. 345, 111 Atl. 343 (1920). The limitation on the application of the rule of completeness which the court adopted in *United States v. Corrigan, i.e.*, that the partial disclosure of the document, correspondence or conversation must create an adverse inference, is questionable. The general rule which conditions the admission of the remainder is that it must be relevant and explanatory of the part received on direct examination. McCORMICK, EVIDENCE § 56 (1954); 7 WIGMORE, EVIDENCE § 2113 (3d ed. 1940).

10. The distinction is clearly indicated in 7 WIGMORE, EVIDENCE § 2094 (3d ed. 1940).

11. See text supported by notes 3-6 *supra*.

fendant's testimony had placed the prosecution in an unfavorable position in the eyes of the jury.[12]

The prosecution in the principal case argued alternatively that, assuming that inquiry into the defendant's suspected sexual aberrations was not opened up by the testimony on direct examination, such inquiry was permissible to impeach his credibility. It is well established that when the defendant in a criminal trial takes the stand his credibility may be impeached in the same manner as the credibility of any other witness,[13] and that cross-examination to impeach credibility is, of necessity, not restricted to the scope of the subject matter testified to on direct examination.[14] There is considerable confusion among the courts, however, with regard to the permissibility of cross-examination into previous acts of misconduct by the witness for the purpose of impeaching his credibility.[15] The majority of courts permit cross-examination of the witness as to specific acts of misconduct, even though not resulting in a criminal conviction, subject to the discretion of the trial judge.[16] The federal courts, however, have adopted a different attitude. The prevailing view among them is that specific acts of misconduct which have not resulted in a conviction for a felony or crime of moral turpitude are not the proper subject of cross-examination for impeachment purposes.[17] The court in the second circuit, however, previously had been rather liberal in permitting cross-examination of a witness about prior misconduct.[18] By exclud-

12. It would seem that the court, even if it had considered the inquiry to be within the permissible scope of cross-examination, could have properly reversed the conviction because of the trial judge's failure to limit the *extent* of the cross-examination. The trial judge had permitted the prosecution to pursue its inquiry into the defendant's sexual deviations for an extremely extended period, covering over 200 pages in the record. United States v. Provoo, 215 F.2d 531, 533-534 (2d Cir. 1954). *See* Alford v. United States, 282 U.S. 687, 694 (1931), which recognizes the trial judge's discretion to curb the extent of cross-examination.

13. 3 WIGMORE, EVIDENCE § 890 (3d ed. 1940). The statement is frequently made that cross-examination into character may be used to show the defendant's *credibility*, but not to show the *probability* that he committed the crime for which he was charged. See State v. Williams, 337 Mo. 884, 87 S.W.2d 175 (1935), where the court criticizes the impracticality of this type of distinction.

14. See, *e.g.*, Dickey v. Wagoner, 160 Kan. 216, 160 P.2d 698 (1945); Beck v. Hood, 185 Pa. 32, 39 Atl. 842 (1898).

15. For an exhaustive analysis of the views adopted in the various jurisdictions, see 3 WIGMORE, EVIDENCE § 987 (3d ed. 1940). It is well recognized that extrinsic evidence regarding prior misconduct is inadmissible. See MCCORMICK, EVIDENCE § 42 (1954). While most courts are agreed that a witness may be cross-examined as to a prior conviction, there is considerable difference of opinion, at least in the state courts, as to what kind of convictions constitute sufficient grounds for impeachment. See MCCORMICK, EVIDENCE § 43 (1954).

16. People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950); State v. Neal, 222 N.C. 546, 23 S.E.2d 911 (1943); Dungan v. State, 135 Wis. 151, 115 N.W. 350 (1908).

17. Echert v. United States, 188 F.2d 336 (8th Cir. 1951); United States v. Klass, 166 F.2d 373 (3d Cir. 1948); Campion v. Brooks Transportation Co., 135 F.2d 652 (D.C. Cir. 1943); Ingram v. United States, 106 F.2d 683 (9th Cir. 1939). *See* Walters v. United States, 63 F.2d 299, 301 (5th Cir. 1933).

18. See, *e.g.*, United States v. Minkoff, 137 F.2d 402 (2d Cir. 1943); United States v. Sager, 49 F.2d 725 (2d Cir. 1931) (witness may be cross-examined on any previous vicious or criminal act).

ing the inquiry into defendant's sexual misconduct the court has added the support of an important federal circuit to the prevailing federal view. Although no definitive statement is made, the opinion indicates that the rule adopted is not to be an absolute rule which excludes all inquiry into acts of misconduct not resulting in a criminal conviction, but that cross-examination might be permissible for impeachment purposes if the misconduct involved were related to the witness' veracity,[19] a view adopted by at least two other circuits.[20]

On its facts the result of the principal case appears to be clearly correct. While the rather cursory treatment of the doctrine of "opening the door" may prove to be more confusing than enlightening, the court's limitation on cross-examination to impeach credibility is a view supported by considerations of fairness.[21] It would seem that any probative value on the issue of credibility which evidence of defendant's past misconduct might possess would be far outweighed by the danger of so prejudicing the jury as to produce the conviction of an accused, not because the evidence establishes his commission of the crime charged, but because of his general unsavory character. To avoid the risks of obtaining a conviction in this manner, it is submitted that cross-examination to impeach credibility should be limited to an inquiry into past misconduct which pertains to veracity, since only this type of evidence has probative value on the issue of credibility.

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19. *See* United States v. Provoo, 215 F.2d 531, 536 (2d Cir. 1954).

20. Simon v. United States, 123 F.2d 80 (4th Cir. 1941), *cert. denied*, 314 U.S. 694 (1941); Coulston v. United States, 51 F.2d 178 (10th Cir. 1931). *See* Banning v. United States, 130 F.2d 330, 337 (6th Cir. 1942).

21. It is to be noted that the leading authorities advocate a narrower scope of cross-examination into specific acts of misconduct than any of the federal courts apply. Professor Wigmore apparently would limit the acts inquired into to those relating to veracity, regardless of whether a conviction had resulted. 3 WIGMORE, EVIDENCE § 982 (3d ed. 1940). The UNIFORM RULES OF EVIDENCE, Rules 21 and 22(d) (1953), take the position that only conviction of a crime involving "dishonesty or false statement" should be admissible to impeach an accused's credibility, and then only after he has introduced evidence supporting his credibility. The *Proposed Missouri Evidence Code* takes a position of compromise between these two views: specific acts of misconduct relating to veracity may be inquired into, but if the acts resulted in a criminal conviction they may not be the proper subject of cross-examination until the accused has brought in evidence to support his credibility, and then only if they relate to untruth or false statement. PROPOSED MISSOURI EVIDENCE CODE § 5.10 (1948).