



J.W. LUVUAL ET UX. v. HENKE & PILLOT

366 S.W.2d 831 (1963) | Cited 12 times | Court of Appeals of Texas | April 18, 1963

On Motion for Rehearing

Appellant insists that we were in error in holding that the trial court did not err in excluding the testimony of Officer Manning concerning what Whitfield told him. The testimony was offered for impeachment and as *res gestae*. We held we could not say the trial court abused his discretion in holding it not to be *res gestae*. It was, therefore, admissible as an admission only against the defendant Whitfield. It was offered generally and not just against Whitfield. Appellant insists that where testimony is admissible against one party and not others it is error to exclude the testimony and the burden is on the objecting party to ask the court for any limiting offer. The cases cited by appellant are all cases where the trial court admitted testimony and it was held that in such case the objecting party must ask for a limiting instruction. The reason is that it was admissible against some of the parties and the burden is not on the court to ferret out who it is not admissible against. However, if the court has excluded the testimony, the rule is the same, that is, the burden is not on the court to examine the general offer and determine who it is admissible against and who it is not admissible against. That burden is on the offeror to make the proper specific offer. In addition to the authorities previously cited, see *Panhandle & S.F. Ry. Co. v. Cowan*, Tex.Civ.App., 243 S.W. 912 (C.C.A.); *Sullivan v. Fant*, Tex.Civ.App., 160 S.W. 612 (C.C.A.); *Magee v. Paul*, Tex.Civ.App., 159 S.W. 325 (C.C.A.).

Appellant points out that we erroneously stated no effort was made to get Officer Manning back to the stand after Whitfield had testified. He is correct to the extent that the statement of facts shows that appellant's counsel at trial stated to the court he rested subject to putting Officer Manning on the stand. Then there appears this statement by the court: "The court is calling right now for procedure of this trial. Call your next witness." The counsel then announced he rested. Nothing is shown of any effort to obtain the presence of Manning.

The motion for rehearing is overruled.

