AILLON v. STATE

168 Conn. 541 (1975) | Cited 64 times | Supreme Court of Connecticut | June 3, 1975

The plaintiff, Guillermo Aillon,was found guilty of three counts of murder after ajury trial. In November of 1973, the plaintifflearned from certain newspaper articles that thejudge who presided at his trial had engaged in anex parte conversation with a juror after the casehad been submitted to the jury. The plaintiffthereupon filed a petition for a new trialpursuant to 52-270 of the General Statutes. Aftera hearing on that petition, the court concludedthat a new trial should be granted and from thejudgment rendered the state has appealed to thiscourt. The state has assigned error in the court'srefusal to find material facts claimed to beadmitted or undisputed, in finding certain factswithout evidence, in finding facts of doubtfulmeaning, in the conclusions reached, in rulings onevidence, and in the overruling of its claims oflaw.

The finding[1] discloses that the voir dire ofprospective jurors for the plaintiff's trial beganon May 18, 1973. On June 26, 1973, the selectionof twelve jurors and two alternates was completed.The actual trial commenced on July 5, 1973, andthe presentation of evidence, including the testimonyof sixty witnesses, lasted until August 22,

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1973. On August 27, 1973, the jury heard theclosing arguments and, the next day, the courtcharged the jury. The two alternates were thendismissed and the jury began its deliberations.Those deliberations lasted until 8:20 p.m. onAugust 28, 1973, and continued on the next twodays from 10:00 a.m. until 10:10 p.m. and from10:00 a.m. until 10:55 p.m., respectively. OnFriday, August 31, the jury again resumed theirdeliberations at 10:00 a.m. and at 7:45 p.m. wererecalled to the courtroom after the jury foremanhad written a note to the trial judge which statedthat the jury was unable to "come to a unanimousdecision."

The trial court then gave the jury supplemental"Chip Smith" instructions; see State v. Smith,49 Conn. 376, 386; concluding with the followingcharge: "Ladies and gentlemen of the jury, I nowask you to return to the jury room and to return averdict if at all possible, whether tonight,tomorrow or the next day, but to continue yourhonest deliberations, as you have in the past andtry to arrive at a conclusion." Counsel for theplaintiff objected to the giving of the "ChipSmith" charge, but he raised no objection to theresumption of deliberations by the jury.

Two hours later, there was a discussion in thejury room concerning whether the jurors shouldremain and continue their deliberations or whetherthey should adjourn and return the next day. Theprocedure used by the jury on previous evenings todetermine when they would adjourn was to

reach aninformal consensus, rather than to take a formal,written vote. One of the jurors, Kathleen Read,who had moved to Massachusetts during the courseof the trial, wished to continue deliberations thatevening in the hope of reaching a verdict so that

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she might return home to her family. At 10:00 p.m.she asked to see the judge and the jury foremanwrote a note stating that one of the jurors wishedto speak with him "with regard to a personalmatter." A short time later, the trial judge,accompanied by the sheriff, appeared at thedoorway of the jury room, and juror Read startedto relate her problem to the judge. The judge,however, requested that she step out and heescorted her to the back of the jury box. Theensuing conversation lasted only a few minutes.Juror Read, who appeared nervous and upset,explained that she wanted to go home toMassachusetts but that some of the jurors wantedto adjourn for the evening although she and otherswanted to continue deliberating. She then askedthe judge, "Can we stay?" The judge responded,"Yes, you can stay."

The other jurors could not hear theconversation, although one juror testified that hethought he heard the trial judge say, "You have tostay." What juror Read said on her return to thejury room is disputed, but some jurors felt thatshe said the judge had told them to remain; othersfelt that the judge merely indicated that theycould stay. At any rate, when the foreman askedwhat the trial judge had said, juror Readresponded, in the presence and hearing of theother jurors, "We can stay or we can go home butif we go home we come back tomorrow, the next dayand the next day." The jury thereupon continueddeliberating. Six hours later, at 4:25 a.m. onSaturday, September 1, 1973, the jury reachedtheir verdict of guilty on each of the threecounts of murder.

Although the plaintiff and his counsel were presentin the courthouse at all times on the evening in

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question, the trial judge did not inform them ofeither the note or the ensuing conversation withjuror Read.

On the basis of the foregoing, the courtconcluded that any communication between a trialjudge and members of a jury in the absence of anaccused and his counsel is an extraneous influencewhich is presumptively prejudicial to the accusedunless the state can overcome the presumption byshowing that the communication was "harmlessbeyond a reasonable doubt." In determining thatthe state had failed to meet its burden of proof,the court stated its ultimate conclusion asfollows: "Considering the length of time the juryhad been deliberating, the reference todeliberating the following day and the next in thesupplemental instructions, the lateness of thehour and the obvious weariness and strain some ofthe jurors must have felt, the court was notsatisfied beyond a reasonable doubt that theconduct of the judge did not lead the jury tofollow a course which was prejudicial to theplaintiff."

The state has assigned error in thoseconclusions, claiming that not all communicationsbetween the trial judge and the jury in theabsence of the accused are presumptivelyprejudicial. The state argues that the judgemerely repeated his previous instructions to thejury that they should continue their deliberations,and that any error in so doing was harmless.

It has long been the law of this state that jurorsshall not converse with any person, not a member ofthe jury, regarding the cause under consideration;Bennett v. Howard, 3 Day 219, 223; Tomlinson v.Derby, 41 Conn. 268, 274; and that no person may

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be present with or speak to the jurors when theyare assembled for deliberation; Cook v. Miller,103 Conn. 267, 273, 130 A. 571. General Statutes51-245. Those rules are of vital importance toassure that the jury will decide the case freefrom external influences that might interfere withthe exercise of deliberate and unbiased judgment."Nor can any ground of suspicion that theadministration of justice has been interfered withbe tolerated." Mattox v. United States, 146 U.S. 140,149, 13 S.Ct. 50, 36 L.Ed. 917.

It has thus become a universally accepted principlethat communications between a judge and ajury, especially after the jury have begundeliberations, should be made only in open courtin the presence of the parties. See 75 Am.Jur.2d,Trial, 1001; annot., 41 A.L.R.2d 227. In acriminal trial this rule takes on constitutionaldimensions since the accused has a right to bepresent at every stage of the trial and to havethe assistance of counsel for his defense. U.S.Const., amend. VI, XIV; Illinois v. Allen,397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353;United States v. Wade, 388 U.S. 218, 226, 87 S.Ct.1926, 18 L.Ed.2d 1149; State v. Ralls, 167 Conn. 408,419, 356 A.2d 147; see Shields v. UnitedStates, 273 U.S. 583, 588, 47 S.Ct. 478, 71 L.Ed.787. Moreover, the accused's right to a fair trialin a fair tribunal is the very foundation of dueprocess. "[T]he requirement of due process of lawin judicial procedure is not satisfied by theargument that men of the highest honor and thegreatest self-sacrifice could carry it on withoutdanger of injustice. Every procedure which wouldoffer a possible temptation to the average man . . .to forget the burden of proof required toconvict the defendant, or which might lead him

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not to hold the balance nice, clear and truebetween the State and the accused, denies thelatter due process of law." Tumey v. Ohio,273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749; Estesv. Texas, 381 U.S. 532, 543, 85 S.Ct. 1628, 14L.Ed.2d 543.

To preserve those rights of the accused, somejurisdictions have held that any communicationbetween the trial judge and a deliberating juryin the absence of the accused and his counselrequires a new trial, whether or not thecommunication was prejudicial. See, e.g., Hobergv.

State, 3 Minn. 262, 269-70, 3 Gil. 181,overruled, Oswald v. Minneapolis & N.W. Ry. Co.,29 Minn. 5, 11 N.W. 112; State v. Murphy, 17 N.D. 48,61, 115 N.W. 84; 58 Am.Jur.2d 316, New Trial,110, and cases cited therein. See also State v.Werring, 111 Ariz. 68, 523 P.2d 499; State v.Cowman, 212 N.W.2d 420, 424 (Iowa). In otherjurisdictions the accused must show that he wasprejudiced in order to obtain a new trial. See,e.g., People v. Lee, 38 Cal.App.3d 749, 755, 113Cal.Rptr. 641; People v. Davis, 516 P.2d 120, 121(Colo.); People ex rel. Walker v. Pate, 53 Ill.2d 485,505, 292 N.E.2d 387; State v. Schifsky,243 Minn. 533, 543, 69 N.W.2d 89.

In this state, an improper act of a judge doesnot automatically justify a new trial unless therehas been prejudice to the unsuccessful party; Woodv. Holah, 80 Conn. 314, 316, 68 A. 323; andordinarily the burden of establishing that an errorof the trial court is harmful rests on the appellant.State v. L'Heureux, 166 Conn. 312, 323, 348 A.2d 578;State v. Vennard, 159 Conn. 385, 393, 270 A.2d 837,cert. denied, 400 U.S. 1011, 91 S.Ct. 576, 27 L.Ed.2d625. In this case, however, we are dealing with anintrusion into the constitutional rights of an

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accused. Thus, the accused is not required to showthat the constitutional error was harmful;rather, the state must show that it was harmlessbeyond a reasonable doubt. Chapman v. California,386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.

We conclude that the court applied the properrule of law, and that it was incumbent upon thestate to rebut the presumption of prejudicecreated by the trial judge's ex partecommunication with the jury. See United States exrel. Tobe v. Bensinger, 492 F.2d 232, 238 (7thCir.); Bustamante v. Eyman, 456 F.2d 269, 273 (9thCir.); State v. Pokini, 526 P.2d 94, 105, 107(Hawaii); State v. Saul, 258 Md. 100, 108,265 A.2d 178; State v. White, 191 Neb. 772, 774,217 N.W.2d 916; State v. Brugger, 84 N.M. 135, 137,500 P.2d 420; Badgwell v. State, 418 P.2d 114, 118(Okla. Cr.). Whether the state met itsburden of showing that the communication washarmless beyond a reasonable doubt is a closequestion on the facts of this case.[2] We neednot, however, decide whether the court properlyexercised its discretion in ordering a new trialfor the plaintiff, since certain rulings onevidence, assigned as error by the state, excludedtestimony that had a direct bearing on the state'sburden of proof.

At the beginning of the hearing on the plaintiff'spetition for a new trial, the state objected to any

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testimony being received from the jurors as towhat had transpired in the jury room on the groundthat such testimony was inadmissible to upset theverdict. The state's objection was based on thiscourt's early approval of the rule adopted by LordMansfield in Vaise v. Deleval, 1 T.R. 11 (K.B.1785), that evidence of juror misconduct ormistake could not be received from a juror to setaside his own verdict. State v. Freeman, 5 Conn. 348,350, 352. Accord, Valentine v. Pollak,95 Conn. 556,

558-59, 111 A. 869; Haight v. Turner,21 Conn. 593, 596; Meade v. Smith, 16 Conn. 346,356. After reviewing briefs submitted by theparties on that issue, the court stated that it"agrees with the State that there is a long lineof early Connecticut cases holding the testimonyof jurors cannot be received to set aside averdict on the ground of mistake or misconduct onthe part of the jurors. However, the court feelsthat that line of cases should be and isdistinguished from taking testimony as to the factof extraneous influences, although not evidence asto the effect on the deliberations or influence onthe mental process of the jurors. . . . The courtwill accept testimony from the jurors as to thefacts of extraneous influence but it will notreceive evidence as to the effect that thisinfluence may have had on the deliberations or onthe mental process of any individual juror orgroup of jurors. The court feels that it mustapply an objective test, assessing for itself,whether or not, there is a likelihood that thatinfluence would affect a jury outcome. On thatbasis the objection of the State is overruled."

Insofar as that ruling abandoned the extensionof Lord Mansfield's rule that a juror is alwaysincompetent to testify in impeachment of his verdict,it was correct. As noted in State v. Freeman,

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supra, 351-52, the various policies behind therule were to give stability to the verdicts ofjurors, to minimize the temptation for jury-tampering,and to prevent inquisition into thearguments and reasoning of the jurors that go intotheir ultimate verdict. Those policies are servedequally as well by a narrower rule "whichexcludes, as immaterial, evidence as to theexpressions and arguments of the jurors in theirdeliberations and evidence as to their ownmotives, beliefs, mistakes and mental operationsgenerally, in arriving at their verdict."McCormick, Evidence (2d Ed.) 68, p. 148. That rulehas been aptly described as applying the parolevidence rule to a jury's verdict, so that theiroutward verdict as finally and formally made, andnot their prior and private intentions, is takenas exclusively constituting the act.[3] 8 Wigmore(McNaughton Rev.), Evidence 2348, 2349.

On the other hand, the rule does not prohibitjuror testimony regarding the failure to obeycertain essential formalities of juror conduct,i.e., irregularities and misconduct extraneous to themental operations of the jury. See, generally, Wigmore,

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op. cit., 2352, 2353, 2354; 76 Am.Jur.2d, Trial,1219-1229. See, also, Mattox v. United States,146 U.S. 140, 149, 13 S.Ct. 50, 36 L.Ed. 917. Thus,any conduct in violation of 51-245 of the GeneralStatutes may be established by the testimony of ajuror. As early as 1866 it was recognized "[t]hataffidavits of jurors may be received for thepurpose of avoiding a verdict, to show any matteroccurring during the trial or in the jury room,which does not essentially inhere in the verdictitself, as that a juror was improperly approachedby a party, his agent, or attorney; that witnessesor others conversed as to the facts or merits ofthe cause, out of court and in the presence ofjurors; that the verdict was determined

byaggregation and average or by lot, or game ofchance or other artifice or improper manner."Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195,210. And, as Justice William J. Brennan, Jr.,stated: "Evidence of the actual effect of theextraneous matter upon jurors' minds can andshould be excluded, as such evidence implicatestheir mental processes, but receiving theirevidence as to the existence of the condition orthe happening of the event . . . supplies evidencewhich can be put to the test of other testimony(and thus sound policy is satisfied) and at thesame time the evidence can serve to avert . . . agrave miscarriage of justice, which it iscertainly the first duty of a court of conscienceto prevent if at all possible." State v. Kociolek,20 N.J. 92, 100, 118 A.2d 812; see Perry v.Bailey, 12 Kan. 539, 544.

There was, then, no error in receiving jurortestimony regarding the ex parte conversationbetween the trial judge and juror Read and jurorRead's statements upon her return to the jury room.That testimony did not implicate the mental processes

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of the jurors as long as they were prevented fromgiving evidence of the actual effect that it hadon their minds.

Subsequent to the court's ruling on thereception of juror testimony, the stateestablished, during cross-examination of jurorGeorge Kudasch, that the procedure used by thejury to determine whether they would adjourn theirdeliberations was to reach an Informal consensus,and that no formal vote was taken. The courtaccepted that statement in its findings of fact.The state then asked juror Kudasch whether therehad been a consensus among the jurors regardingadjournment at the time juror Read went to speakto the trial judge. Juror Kudasch answered, "Wewere talking about that, whether we should adjournand come back the next day, but the generalfeeling was to finish it - finish the job thatnight - or that morning." The state then asked ifit was the general feeling of the jurors to remain,to which juror Kudasch responded, "Yes." Theplaintiff's counsel then objected and moved tostrike the answer as "incompetent within theframework of your Honor's ruling." The courtagreed, ruling that the question and answer wentto the mental processes of the jurors. The statetook no exception to that ruling.

Later in the hearing, during direct examinationof juror Gerard Roy, the attorney for the state askedif the conversation between juror Read and the judgecould be heard inside the jury room. Juror Royresponded, "No, sir, because, of course, everybodywas mumbling and talking and we were still discussingwhat we were talking about before, whether we shouldstay or go home." The plaintiff's counsel thenobjected; the court sustained the objection

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because the answer was "getting into thedeliberations of the jury"; the answer wasstricken; and the state took exception to theruling.

Since the state took no exception to theexclusion of juror Kudasch's testimony, it hasnot assigned that ruling as error. The state has,however, assigned error in the restriction ofjuror Roy's testimony. The state claims thatonce the court ruled that juror testimony waspermissible to show the occurrence of anirregularity, it should have permitted the stateto show the existence of a condition that wouldmitigate the prejudicial effect of thatirregularity. As that claim relates to theevidence excluded in this case, we must agree.

The excluded testimony dealt only with whetherthe jurors had reached a consensus to remain oradjourn before juror Read returned from her exparte conversation with the trial judge. Thedecision to continue deliberations, if it had beenmade, is one that does not "inhere" in the verdictor implicate the arguments of the jurors. It doesnot in any way bring forth the motives, beliefs ormental operations of the jurors in arriving attheir verdict. Rather, one juror's testimony thata consensus had been reached to remain or toadjourn is an objective, controvertible fact thatcan be put to the test of the other jurors'testimony.

The harmfulness of the ruling is apparent. Inits ultimate conclusion the court stated that itwas "not satisfied beyond a reasonable doubt thatthe conduct of the judge did not lead the jury tofollow a course which was prejudicial to theplaintiff." The court was concerned with thelateness of the hour, the length of jurydeliberations and, implicitly, with thecoercive effect that the ex parte conversation

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may have had on the jurors. See Rice v.United States, 356 F.2d 709, 717 (8th Cir.).That concern might well have been reduced if thestate had been able to establish that the jurorshad reached a consensus to continue theirdeliberations before juror Read returned from herconversation with the judge. Whether the evidencewould show that a consensus had been reached, orwhether such a showing would have led the court toa different conclusion, is not for this court todecide. It is enough that the evidence sought tobe elicited by the state was improperly excludedand that that evidence had a direct bearing on thestate's burden of proof. Because of that erroneousruling on evidence, we are constrained to order anew hearing on the plaintiff's petition for a newtrial.

There is error, the judgment is set aside andthe case is remanded for further proceedings inaccordance with this opinion.

In this opinion the other judges concurred.

1. While the state has taken great care topreserve for our review most of its assignments oferror directed at the finding of facts, a thoroughexamination of the appendix to its brief leads usto conclude that no additions or corrections arewarranted. The requested corrections are directedat findings that are both supported by theevidence and clearly understandable; and therequested additions to the finding are not"admitted or undisputed" facts or are not materialin that they will not affect the result. SeePractice Book 628; Anderson v. Pension & RetirementBoard, 167 Conn. 352, 353 n.1,

355 A.2d 283.

2. It is true that the trial judge did littlemore than repeat his earlier instructions that thejury should continue deliberations, but it is notso clear how juror Read repeated those instructions.See Ah Fook Chang v. United States, 91 F.2d 805,808 (9th Cir.). Nor is it so clear what course ofaction would have been taken if the plaintiff andhis counsel had been advised that juror Read hadraised a question about the length of deliberations.See United States v. Dellinger, 472 F.2d 340,377-80 (7th Cir.), cert. denied, 410 U.S. 970,93 S.Ct. 1443, 35 L.Ed.2d 706.

3. "Accordingly, it is today universallyagreed that on a motion to set aside a verdict andgrant a new trial the verdict cannot be affected,either favorably or unfavorably, by the circumstances:that one or more jurors misunderstood the judge'sinstruction; or were influenced by an illegal paperor by an improper remark of a fellow juror; orassented because of weariness or illness or importunities;or assented under an erroneous belief that the judgewould use clemency or have the legal right to vary thesentence; or had been influenced by inadmissibleevidence; or had decided upon grounds which renderednewly discovered evidence immaterial; or had omittedto consider important evidence or issues; or hadmiscalculated accounts by errors of fact or of law;or had by any other motive or belief been led to theirdecision." (Emphasis omitted.) 8 Wigmore (McNaughtonRev.), Evidence 2349, and cases cited therein.