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C. A. King II

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Admissibility of Evidence of Prior Arrests in Louisiana Criminal Trials

The Louisiana Code of Criminal Procedure expressly provides four ways in which a witness' credibility may be attacked for the purpose of impeachment. The witness' credibility may be attacked as to the case on trial by evidence of his bias, interest, or corruption,¹ or his prior contradictory statements.² His credibility in general may be attacked by evidence of his bad general reputation for truth and veracity or bad general moral character³ or by evidence of his prior convictions.⁴ Prior to amendment in 1952 Article 495 of the Code of Criminal Procedure of 1928,⁵ which allows evidence of prior convictions, also provided that a witness whether he be defendant or not could be compelled to answer questions concerning his prior arrests. The amendment to this article specifically prohibited asking the witness, whether he be defendant or not, questions concerning his prior arrests or indictments.⁶ The purpose of this Comment is to dis-

1. LA. R.S. 15:492 (1950): "Bias, interest, or corruption of witness; questions concerning particular acts

"When the purpose is to show that in the special case on trial the witness is biased, has an interest, or has been corrupted, it is competent to question him as to any particular fact showing or tending to show such bias, interest or corruption, and unless he distinctly admit such fact, any other witness may be examined to establish the same."

2. *Id.* 15:493: "Foundation for proof of contradictory statement

"When ever the credibility of a witness is to be impeached by proof of any statement made by him contradictory to his testimony, he must first be asked whether he has made such statement, and his attention must be called to the time, place and circumstances, and to the person to whom the alleged statement was made, in order that the witness may have an opportunity of explaining that which is prima facie contradictory. If the witness does not distinctly admit making such statement, evidence that he did make it is admissible."

3. *Id.* 15:490: "Method of attacking credibility of witness

"The credibility of a witness may be attacked generally, by showing that his general reputation for truth or for moral character is bad, or it may be attacked only in so far as his credibility in the case on trial is concerned."

Id. 15:491: "General credibility; limitation of inquiry. When the general credibility is attacked, the inquiry must be limited to general reputation, and can not go into particular acts, vices, or courses of conduct."

4. *Id.* 15:495: "Impeachment by evidence of conviction; condition precedent to proof by others; duty to answer as to indictment and arrest

"Evidence of conviction of crime, but not of arrest, indictment or prosecution, is admissible for the purpose of impeaching the credibility of the witness. . . ."

5. *Id.* 15:495: "Provided, always, that a witness, whether he be the defendant or not, may be compelled to answer on cross-examination whether or not he has ever been indicted or arrested and how many times." See also Oppenheim, *The Admissibility of Character Evidence For The Purpose of Impeaching Witnesses in Criminal Prosecutions*, 12 TUL. L. REV. 628 (1938).

6. La. Acts 1952, No. 180, § 1: ". . . no witness, whether he be defendant or not, can be asked on cross-examination whether or not he has ever been indicted or arrested, and can only be questioned as to conviction, and as provided herein."

cuss the jurisprudence preceding this amendment and the effect of the amendment on the admissibility of evidence of prior arrests in the light of its background and subsequent cases.

Even before Article 495 was adopted in 1928, the jurisprudence of Louisiana allowed questions on cross-examination of the defendant concerning his prior arrests. Act 29 of 1886⁷ provided that an accused could take the stand in his own behalf, and he would be subject to all the rules applied to other witnesses. In *State v. Murphy*,⁸ decided in 1893, the accused on trial for larceny took the stand and was asked by the prosecution whether he had ever been arrested for stealing. The defense objected to this question on the ground that he had not put his character at issue, but the trial court overruled the objection. On rehearing the Supreme Court stated:

"Counsel's argument is that the objection urged is general, and would be equally applicable to any other witness than the accused; his insistence here being that want of credibility must be proved by general reputation, and not by particular incriminating facts. That proposition is true when the evidence is offered for the purpose of impeaching the witness' credit for veracity. Such is the purport of the authorities cited. But in this case the trial judge had before him a person accused of and on trial for the commission of a larceny. Accepting the grace of a special statute entitling him to be heard as a witness in his own favor, the veracity and credibility of the witness, generally, was proper subject-matter of investigation, because of the cloud that surrounded him, and necessitated closer scrutiny into his veracity than that of an ordinary witness. Being under charge of larceny, what more damaging fact could have been elicited on the trial of such charge than that he had been previously arrested for similar offenses?"⁹

Evidently this court was guided by the old policy of the law

7. La. Acts 1886, No. 29, § 2: "*Be it further enacted, etc.*, That the circumstance of the witness being a party accused, shall in no wise disqualify him from testifying; *provided*, that no one shall be compelled to give evidence against himself; and *provided*, that if the person accused avails himself of this privilege, he shall be subject to all the rules that apply to other witnesses, and may be cross-examined as to all matters concerning which he gives his testimony; *and provided further*, that his failure to testify shall not be construed for or against him; but all testimony shall be weighed and considered according to the general rules of evidence; and the trial judge shall so charge the jury."

8. 45 La. Ann. 958, 13 So. 229 (1893).

9. *Id.* at 961, 13 So. at 230.

which until 1886 had prohibited the accused from taking the stand. The *Murphy* case was cited as authority in later decisions which allowed the state to ask the accused on the stand questions such as how many times he had been before the court,¹⁰ how many times he had been in trouble,¹¹ and if there were any bills of information pending against him.¹² In all of these cases the Supreme Court stated that these questions were permitted only as an attack on the credibility of the accused as a witness. The character of the accused can be attacked only after he has offered evidence tending to show his good character.¹³ When the witness takes the stand, however, whether he has offered evidence of his good character or not, his credibility as a witness is subject to the same attacks allowed on any other witness.¹⁴

Some cases decided after 1900 would indicate a move away from the rule in the *Murphy* case. The court allowed the prosecution to ask the accused the question, "You went up for cutting a man?";¹⁵ not on the basis of the *Murphy* case, but because time spent in a penitentiary presupposes a conviction. This move away from the *Murphy* case became more evident in the decision of *State v. Barrett*¹⁶ in 1906. The lower court allowed the ques-

10. *State v. Callian*, 109 La. 346, 347, 33 So. 363, 363 (1903) allowed the question "How many times have you been before this court?"; did not cite the *Murphy* case, but stated that since the accused answered in effect that he had never been before the court and was not contradicted, he was not harmed.

11. *State v. Casey*, 110 La. 712, 713, 34 So. 746, 747 (1903) cited *Murphy* case as authority for overruling the objection to the question "How many times have you been in trouble?". The accused in this case had objected to the question solely on the ground that it was an attempt to prove bad character when he had not put his good character at issue. The court stated that the question was merely to affect the credibility of the witness.

12. *State v. Southern*, 48 La. Ann. 628, 630, 19 So. 668, 668 (1896). The questions asked were: "Are you charged with another offence at this time, and are there any other bills pending against you?"; this case seems broader than the *Murphy* case as in this case he was asked if there were any bills pending against him.

13. La. R.S. 15:480, 481 (1950).

14. La. Acts 1886, No. 29, § 2, quoted note 7 *supra*.

15. *State v. Robinson*, 52 La. Ann. 541, 547, 27 So. 129, 132 (1900). The objection made in this case was that the question was not a fair one, as the record was the best evidence. The court relied on a case in Michigan (*Clemens v. Conrad*, 19 Mich. 170 (1869)) for the proposition that such questions are allowable as time spent in a penitentiary presupposes a conviction, therefore was proper. The court went further to cite the *Murphy* case for the proposition that the record was not necessary.

16. 117 La. 1086, 42 So. 513 (1906) (After the jurisprudence had developed and R.S. 15:495 had been passed, the court in *State v. Dumas*, 168 La. 95, 121 So. 586 (1929), stated that the *Barrett* case was merely "obiter" and was never followed); *State v. Waldron*, 128 La. 559, 54 So. 1009, 34 L.R.A. (N.S.) 809 (1911) (this case might seem to have been a return to the rule in the *Murphy* case, as that case was cited; but the question here referred to time spent in a prison and common law authorities were also cited which allowed such questions on the ground that they presuppose a conviction).

tion, "Have you ever been prosecuted before?", citing the *Murphy* case and those following it. On appeal the Supreme Court in explaining the *Murphy* case and those following stated that in all the previous cases the defense had objected to the state's question on the ground that the character of the accused was being attacked although he had not put it at issue. This had been the wrong objection, stated the court, since the state's questions had been directed to the witness' credibility, not his character. Since the same erroneous objection had been made in this case, the lower court's decision was affirmed. However, the court went on to say that had the objection been directed at the fact that the questions concerned prior arrests or prosecutions, instead of prior convictions, it would be sustained.

In 1915 a witness testifying for the prosecution was asked, "Did you leave Mississippi because you were being charged with murder in that state?"¹⁷ The prosecution objected that a witness may not be questioned about prior arrests — the very objection which the Supreme Court had suggested in the *Barrett* case. The trial court sustained the objection; but the Supreme Court reversed, reasoning that the purpose of the question was to contradict the witness' statement in his direct examination that he had come to Louisiana to find a job. For this reason the court stated that the validity of the objection to the question on the ground that only prior convictions should be allowed, because of the presumption of innocence, would not be decided. Later in the same year this case was cited as authority for allowing a witness to be asked questions concerning an indictment pending against him in another state.¹⁸ However, since the wit-

17. *State v. Barnes*, 136 La. 512, 513, 67 So. 349, 349 (1915). The court did not find it necessary to cite the *Murphy* case as authority for overruling the objection to the first question. However, a second question was also subjected to: "Did you not assault a man about two months ago in the city of Shreveport with a pistol and attempt to shoot him in the house of Carrie Davis, and were you not prevented from doing so by bystanders?" *Id.* at 514, 67 So. at 350. The court affirmed the ruling of the trial court in overruling the objection. It cited the cases following the *Murphy* case, although it did not cite the *Murphy* case itself. The court also stated that the second question was not objected to, as was the first, on the ground that the witness might be compelled to incriminate himself.

18. *State v. Joseph*, 137 La. 53, 68 So. 211 (1915). This case stated that the rule in the *Barnes* case (see note 17 *supra*) was that "for the purpose of discrediting a state witness who is a stranger in the community, defendant's counsel may, on cross-examination, ask him if there is a charge of murder pending against him in another state from which he has fled." *Id.* at 58, 68 So. at 212. The court also cited those cases which followed the *Murphy* case; although again did not cite the *Murphy* case. This case seems to be an extension of the *Barnes* case, as in this case the witness had said nothing of his reasons for coming to Louisiana in his direct examination.

ness had said nothing on direct examination concerning his reasons for coming to Louisiana, it appears that the purpose of the question was not the same as in the earlier case. The question was permitted in this case merely to show that the witness was a fugitive from justice.

This area became even more confused in 1917 when *State v. Hughes*¹⁹ was decided. In that case the Supreme Court affirmed a decision allowing the question, "Have you not been accused of stealing many times?" as a test of the accused's credibility. In support of the decision the court cited *State v. Barrett*²⁰ and *State v. Waldron*.²¹ Both of these cases would seem to be doubtful authority in support of the decision.

Finally in the case of *State v. Foster*²² the accused on the stand was questioned on various charges of which he had been convicted. The court allowed these questions, then stated the general proposition that the defendant may be asked about prior arrests, citing the line of cases which followed and relied on the *Murphy* case,²³ although it did not cite the *Murphy* case itself. Until the enactment of Article 495 of the Code of Criminal Pro-

19. *State v. Hughes*, 141 La. 578, 579, 75 So. 416, 417 (1917). The court stated in this case: "A prior conviction or prosecution necessarily implies an accusation. . . . If it is permissible to [prove the fact of] prosecution, there is no good reason in law or logic for excluding proof of the fact of accusation." *Id.* at 580, 75 So. at 417.

20. See note 16 *supra*.

21. *State v. Waldron*, 128 La. 559, 560, 54 So. 1009, 1009 (1911). The question allowed in this case was: "Are you an escaped convict?" Allowing this question seems consistent with a rule which would exclude everything but prior convictions, as it implies that there had been a conviction.

22. *State v. Foster*, 153 La. 154, 95 So. 536 (1923).

23. Though it did not seem necessary for the decision in the case, the court stated: "Defendant may be asked . . . if he is charged with another offense at this time, and if other bills are pending against him." *Id.* at 158, 95 So. at 538. As authority for this proposition the court cited the following: *State v. Joseph*, 137 La. 53, 68 So. 211 (1915); *State v. Manuel*, 133 La. 571, 63 So. 174 (1913) (this case allowed a prior conviction stating that there would be no distinction between a felony and misdemeanor in Louisiana); *State v. Southern*, 48 La. Ann. 628, 19 So. 668 (1896); *State v. Accardo*, 129 La. 666, 671, 56 So. 631, 633 (1911) (defendant was asked on cross-examination, "Ain't it a fact that they ran you out of Baton Rouge?"; the court stated that this question was permissible, but the case was reversed on other grounds); *State v. Quinn*, 131 La. 1090, 59 So. 913 (1912) (this case let in evidence of a conviction); *State v. Waldron*, 128 La. 559, 54 So. 1009 (1911); *State v. Barnes*, 136 La. 512, 67 So. 349 (1915); *State v. Posey*, 137 La. 871, 873, 69 So. 494, 495 (1915) (questions which were asked the defendant on cross-examination were "if he had not killed a man, in Arkansas" and "how many men he had killed before." The objection was sustained and the counsel for the state was reprimanded for asking them. The Supreme Court affirmed, but stated that "evidence of the commission of other offenses is admissible as affecting the credibility of a defendant who becomes a witness in his own behalf"); *Id.* at 873, 69 So. at 495. *State v. Hughes*, 141 La. 578, 75 So. 416 (1917); *State v. Werner*, 144 La. 380, 80 So. 596 (1919) (defendant was convicted of murder. He stated on direct that he had gone into the deceased's

cedure in subsequent cases the court cited only the *Foster* case as authority for allowing questions concerning prior arrests to attack the credibility of a witness for the purpose of impeachment.²⁴ Article 495 stated:

"Evidence of conviction of crime, but not of arrest, indictment or prosecution, is admissible for the purpose of impeaching the credibility of a witness . . . ; provided always, that a witness, whether he be the defendant or not, may be compelled to answer on cross-examination whether or not he has ever been indicted or arrested and how many times."²⁵

This article reflected the view taken by the minority of jurisdictions of the common law.²⁶ In 1952 Louisiana amended the article to provide that a witness whether he be defendant or not *could not* be asked questions concerning his prior arrests or indictments.²⁷ There have been extremely few cases decided in Louisiana interpreting the amendment. The amendment seems to put Louisiana more in line with the majority view of the common law; therefore a discussion of the common law position should prove helpful to an interpretation of the possible effect of our amendment.

In general, the methods of attacking a witness' credibility at common law are the same as in Louisiana.²⁸ Thus in common law jurisdictions a witness may be impeached by evidence of a

store only to rob him. The question on cross-examination was "had you not held up another man and woman in another place of business at the point of a pistol and robbed them?" The question was allowed as it "clearly discredited defendant's testimony to the effect that he only intended to rob, and not to kill if he was resisted." *Id.* at 386, 80 So. at 598).

24. *State v. Brown*, 154 La. 11, 13, 97 So. 265, 265 (1923). Defendant was asked on cross-examination: "How many times have you been arrested?" Objection was made that only convictions could be inquired into. The objection was overruled and *State v. Foster*, 153 La. 154, 95 So. 536 (1923) was given as authority. See also *State v. Thompson*, 161 La. 296, 108 So. 296 (1926); *State v. Toliver*, 163 La. 1000, 113 So. 222 (1927).

25. LA. R.S. 15:495 (1950).

26. The reasons given in these jurisdictions for allowing evidence of prior arrest are: the jury should know all the facts; the evidence in question should not affect the parties to the litigation (this would seem not to be true when the accused has taken the stand as a witness); and general reputation often comes from biased sources. The admissibility is usually limited by the witness' privilege not to answer, and his answer if given cannot be contradicted. JONES, EVIDENCE § 923, n. 3 (5th ed. 1958). See also Annot., 20 A.L.R.2d 1421 (1952).

27. La. Acts 1952, No. 180, § 1, quoted note 6 *supra*.

28. In the majority of common law jurisdictions a witness may be impeached by evidence of general reputation for truth and veracity. 3 WIGMORE, EVIDENCE 922 (3d ed. 1940). No specific acts are admissible. 3 *id.* §§ 924, 924b, 982, 987. Evidence of bias or interest, prior contradictory statements, and prior convictions are also admissible to impeach a witness. 3 *id.* §§ 967, 980, 1018.

prior conviction.²⁹ Impeachment by the showing of prior convictions may be said to be a carryover from the old common law rule that a person convicted of crime is incompetent to testify. Aside from this, however, there seems to be good reason for the rule. The fact of a prior conviction would seem to be sufficient to ground the inference that a person so convicted is less worthy of belief than one not so convicted. If a witness has been convicted of a violation of the rules of criminal law it is deemed proper to permit the trier of fact to consider this circumstance in weighing his credibility. Admitting this evidence presents the danger of an undue prejudicial effect on the mind of the trier of fact, i.e., that too much weight will be given to the fact of conviction. This would be true whether the witness was the accused or an ordinary witness.³⁰ Possibly for this reason the majority has excluded evidence of prior arrests,³¹ which are clearly less indicative of untrustworthiness. Admittedly the fact of arrest may have some relevance on the issue of a witness' credibility, but the relevance is comparatively small and the risk of undue prejudice rather great, particularly where the witness is the defendant.

What is the effect of the 1952 amendment? Should it be interpreted to exclude all evidence of prior arrests? It is clear that where the only relevance of the arrest is to tend to show that the witness' credibility is questionable because of the mere fact of prior arrest the evidence should be excluded. However, the evidence may be relevant for other reasons. In cases where there is a strong independent relevance it would seem that Article 495 should not be held applicable. An area of the law which might be compared to this one is the admissibility of evidence of prior criminal conduct.³² Generally, evidence of prior criminal conduct is inadmissible, but evidence which would otherwise be admissible because of some other relevance to the issues of the case will not be excluded merely because incidentally it tends to show that the accused is guilty of some prior criminal conduct. Thus it is admissible if some independent relevance is found.

29. 3 *id.* §§ 980, 987.

30. If the witness is the accused testifying in his own behalf, the trier of fact may be influenced by such evidence in determining his guilt or innocence. If the witness is an ordinary witness, the trier of fact may be unduly influenced by such evidence and ascribe too much weight to it in evaluating the witness' testimony. Certainly, however, the harm is greater when the witness is the accused.

31. 3 WIGMORE, EVIDENCE § 980a (3d ed. 1940); Annot., 20 A.L.R.2d 1421 (1951).

32. LA. R.S. 15:445, 446 (1950).

Two cases decided since the amendment to Article 495 seem to indicate a rule similar to that admitting evidence of prior criminal conduct will be followed in admitting evidence of prior arrests.

The first case since the amendment in which evidence of a prior arrest was admitted was decided in 1956.³³ The defendant was on trial for operation of a lottery. The state introduced papers which were taken from the lottery establishment. Allegedly the accused wrote the names of the persons who bought lottery tickets and the number of the tickets which they bought. The state, in attempting to prove that the records taken from the lottery establishment were written by the defendant, was allowed to introduce an appearance bond signed by the defendant on a prior arrest. The state's witness was allowed to testify that he arrested the accused and witnessed the signing of the bond. The accused had not taken the stand nor had he offered evidence tending to establish his good character. The accused objected to the admissibility of the above evidence. The court found and stressed the fact that the bond was the only known and provable sample of the handwriting of the accused. The court stated that the evidence was admissible as it tended "to identify the accused as the perpetrator of the crime." This case did not mention Article 495 but it can be reconciled with the article as the prior arrest had an independent relevance beyond the mere issue of credibility. It was the only known and provable sample of the accused's handwriting.

In the only other case decided since the amendment in which evidence of a prior arrest was admitted another independent relevance was found.³⁴ The accused, a policeman, was convicted of the crime of attempted public bribery. The defense counsel was not allowed to bring out the fact that a witness for the state had been arrested and indicted with the defendant as an accomplice in a burglary. The defense counsel's purpose was to show that since the witness had not yet been brought to trial, his testimony might well be affected by a promise of leniency from the state. The Supreme Court ordered a new trial, holding that the defense counsel should be permitted to bring out facts relative to the bias or interest of the witness. The court stressed the fact that the state's witness had been an alleged accomplice

33. *State v. Reinhardt*, 229 La. 673, 86 So.2d 530 (1956).

34. *State v. Lewis*, 108 So.2d 93 (La. 1959).

of the defendant and emphasized the rule that generally great latitude is allowed the defendant in cross-examination of an accomplice who is testifying for the state. It is probable that this same result would have been reached in the majority of common law jurisdictions.³⁵

Although there has been no case in point since the amendment, there is at least one more situation in which questions concerning prior arrests of the defendant may be held to be admissible as having an independent relevance. On cross-examination of the defendant's character witness the state is allowed to ask questions to challenge the knowledge which the character witness has of the defendant's reputation and also to show the standards with which the witness judged the reputation. Prior to 1952, to accomplish these objectives the state was allowed to ask the witness if he had ever heard of a prior arrest of the defendant.³⁶ Although apparently there is no case on the point, it would seem that the same rules would apply if the witness were testifying not as to the character of the defendant but to his reputation as to credibility. Thus if a witness' credibility has been attacked by witnesses testifying to reputation and he calls another witness to support his reputation in this regard, the supporting witness may be asked if he has ever heard of a prior arrest of the defendant. The leading case in common law in this area is *Michelson v. United States*.³⁷ The state was allowed in this case to ask the defendant's character witness if he had heard that the defendant had been arrested. The court stated, however, that regardless of the legal explanations for allowing this testimony, the prior arrest of a defendant is brought to the attention of the triers of fact. This fact may lead to a conviction of the accused because of his prior arrests; and although the character witness may deny having heard of

35. 3 WIGMORE, EVIDENCE §§ 967, 949 (3d ed. 1940).

36. *State v. Oteri*, 128 La. 939, 55 So. 582 (1911) (defendant's character witness was asked: "Have you heard that the defendant has been arrested?"); *State v. Thornhill*, 188 La. 762, 178 So. 343 (1937) (allowed asking defendant's character witness questions concerning particular facts in order to test the soundness of his opinion); *State v. Jacobs*, 195 La. 281, 196 So. 347 (1940) (allowed the question: "Did you know that he [defendant] was arrested in Shreveport for hot checks?"; notice that the common law jurisdictions allow only "Have you heard"; in this case the Louisiana court allowed "Do you know," which seems contrary to the theory underlying this line of inquiry); *State v. Powell*, 213 La. 811, 35 So.2d 741 (1948) (allowed the question: "Did you hear that the defendant had been arrested, charged, and indicted. . .?").

37. *Michelson v. United States*, 335 U.S. 469 (1948). See also Annot., 47 A.L.R.2d 1258 (1956); 3 WIGMORE, EVIDENCE § 988 (3d ed. 1940).

the prior arrests and the opposing counsel is bound by his answer, the innuendo of an actual arrest has been suggested in the mind of the trier of fact. The defendant is protected only by the fact that he alone can introduce the issue of his good character; if he does not do this, he will be immune from the possible prejudice that might result from the line of questioning permitted in the *Michelson* case.

As previously discussed, the only case citing the 1952 amendment to Article 495 and holding it not to apply was the case in which a prior arrest and indictment was offered to prove bias or interest. The case which allowed evidence of a prior arrest to prove identification of the accused's handwriting may in the future be limited to its facts in view of the court's stressing that the appearance bond was the only known and provable sample of the accused's handwriting. Finally, an independent relevance probably will be found where the question is designed to test the character witness' knowledge of reputation. While there may be other instances in which evidence of prior arrests will be allowed, in view of the risk of undue prejudice it is submitted that such evidence should be admitted only when there is a strong independent relevance.

C. A. King, II