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# Criminal Procedure - New Trial for Newly Discovered Evidence

E. P. C.

CRIMINAL PROCEDURE—NEW TRIAL FOR NEWLY DISCOVERED EVIDENCE—Defendant was convicted of simple kidnapping for picking up and forcibly carrying a negro girl outside the city limits where she was criminally assaulted by defendant and three other white men. Defendant appealed, relying on a bill reserved to the overruling of a motion for a new trial on the basis of newly discovered evidence. The substance of the new evidence was affidavits by two co-workers of defendant's brother, alleging that they were eye witnesses to the crime, that the negro girl had accosted them and asked for a date before defendant stopped to pick her up, that the negro girl went willingly. *Held,* where the trial judge satisfied himself that the statements set forth in the attached affidavits were untrustworthy and suspicious, denial of motion was not an abuse of discretion. *State v. Saba,* 14 So. (2d) 751 (La. 1943).

Article 511 of the Code of Criminal Procedure says:

> "To entitle the accused to a new trial on the ground of newly discovered evidence, it must affirmatively appear that notwithstanding the exercise of reasonable diligence, the evidence was not known before or during the trial, but has been discovered since; that said evidence is not merely cumulative; that it does not merely corroborate or impeach the credibility or testimony of any witness examined on the trial; that it is so material that it ought to produce a different result than the verdict reached. . . ."

Evidence to warrant a new trial must be newly discovered. If such evidence were obtainable from public records it is not newly discovered evidence warranting a new trial.[1] Facts disclosed to accused a month prior to the trial cannot be treated as newly discovered;[2] the testimony of a witness who was at the first trial but was not questioned was not newly discovered;[3] nor was the affidavit of a person jointly charged with accused of larceny and under arrest at the same time.[4] Where doctors had been unwilling to swear defendant was insane at the time of the murder, subsequent letters that they thought the defendant was insane were not considered as newly discovered evidence.[5] Then, too, a new trial will not be granted where accused must almost certainly have known of the new witness before trial.[6]

1. Green, Moore and Co. v. United States, 19 F.(2d) 130 (1927), cert. denied 275 U.S. 549, 48 S.Ct. 86, 72 L.Ed. 420 (1927).
2. State v. Hemler, 157 La. 902, 103 So. 257 (1925).
3. State v. Dorsey, 42 La. Ann. 224, 7 So. 327 (1890).
4. State v. Jones, 112 La. 980, 36 So. 825 (1904).
5. State v. Schmidt, 163 La. 512, 112 So. 400 (1927).
6. State v. Hanks, 39 La. Ann. 234, 1 So. 458 (1887); State v. Martin, 149 La. 673, 90 So. 19 (1921).

Evidence must not only be newly discovered, but it must also be such as was not discoverable by reasonable diligence before verdict, in order to justify granting of a new trial.[7] Where witness had not told defendant or defendant's counsel the facts he knew but had made no secret of them, the court held that there was a lack of diligence in not fully ascertaining what the witness knew before the trial.[8] There was a lack of due diligence where defendant knew of witnesses but failed to subpoena them.[9] The testimony of close relatives and friends is generally obtainable before trial by the exercise of reasonable diligence. In one case, defendant alleged that his father-in-law would not let him interview his wife before the trial and that therefore he did not know of the facts to which she could testify; but the court held that he could have obtained his wife's attendance in court by compelling process of court.[10] Again, a new trial has been refused where the new witnesses were defendant's sons who lived with him.[11] Because of the intimacy between defendant and co-defendant any new evidence from the co-defendant could have been discovered before the verdict. Also, "new facts" so discovered are usually considered weak and improbable.[12]

It is not sufficient to allege reasonable diligence in the words of the statute, but the facts showing such diligence must affirmatively appear in the motion for a new trial.[13] Defendant's motion must state that he was not aware of the facts he seeks to use and that he exercised due diligence.[14] It must also state the nature of the newly discovered evidence and the names of the witnesses.[15] Where the affidavit for the new trial was based on a rumor and the newly discovered evidence was not brought forth for the hearing, the motion was properly overruled.[16] Thus in a prosecution for shooting with intent to kill, a motion for a new trial alleging that a waiter in a restaurant told the attorney for the defendant after the trial that a person told him that defendant did not shoot the deceased, which was unsupported by affidavits or proof that the witness would so testify, was overruled.[17] One

7. State v. Johnson, 170 La. 1050, 129 So. 633 (1930); State v. Raney, 181 La. 638, 160 So. 124 (1935).
8. State v. Bradley, 166 La. 1010, 118 So. 116 (1928).
9. State v. Davis, 178 La. 203, 151 So. 78 (1933).
10. State v. Bourgeois, 158 La. 713, 104 So. 627 (1925).
11. State v. Skipper, 163 La. 18, 111 So. 481 (1927).
12. State v. Johnson, 170 La. 1050, 129 So. 633 (1930).
13. State v. Washington, 36 La. Ann. 341 (1884).
14. State v. Burke, 152 La. 255, 92 So. 888 (1922).
15. State v. Kahn, 154 La. 683, 98 So. 86 (1923).
16. State v. Adam, 31 La. Ann. 717 (1879).
17. State v. Martin, 151 La. 780, 92 So. 334 (1922).

case goes so far as to rule that the motion for a new trial must be supported by the affidavits of each newly discovered witness, and that the omission of such affidavits must be explained; and that if such absence is not explained the court may very properly refuse a new trial, even though witnesses were in court ready to testify.[18] The principal case discussed this procedural point. Defendant had set forth in general terms the essentials set out in Article 511 of the Code of Criminal Procedure. The court said that the particular circumstances surrounding the discovery of new evidence must be shown. Due diligence is a matter of fact upon which the judge's opinion is presumably correct.[19]

The trial judge is vested with a wide discretion in granting or refusing a new trial on grounds of newly discovered evidence.[20] He should receive applications for new trials with great caution.[21] He will not be reversed in his refusal unless it is manifestly erroneous.[22] A trial judge is justified in refusing to grant a new trial because he disbelieves the suspicious and incredible testimony of the newly discovered witness.[23] In a prosecution for robbery where new witnesses took the stand in support of the motion, the trial judge could properly refuse a new trial assigning as one reason that he did not believe their testimony.[24] Testimony as to good character of accused is useless against clear evidence of guilt and is not a sufficient basis for a new trial.[25] Affidavits by one defendant exonerating the other from any complicity in crime are looked upon with suspicion.[26] On a motion for a new trial when new witnesses would testify that they had seen the robbery and that accused was not the person who committed the offense it was held proper to deny the motion, when, in the judge's opinion, the witnesses could not have seen and identified the robber from where they were supposed to have stood.[27] One decision points out that even if the judge's discretion has been extended to its full limit

18. State v. Handy, 183 La. 653, 164 So. 616 (1935).
19. State v. Spooner, 41 La. Ann. 780, 6 So. 879 (1889).
20. State v. Long, 4 La. Ann. 441 (1849); State v. Hunt, 4 La. Ann. 438 (1849); State v. Washington, 36 La. Ann. 341 (1884); State v. Pouncey, 182 La. 511, 162 So. 60 (1935).
21. State v. Brandle, 187 La. 945, 175 So. 628 (1937); State v. Gray, 192 La. 1081, 190 So. 224 (1939).
22. State v. Wilburn, 196 La. 113, 198 So. 765 (1940).
23. State v. Gardner, 157 La. 116, 102 So. 89 (1924).
24. State v. Stovall, 154 La. 544, 97 So. 854 (1923).
25. State v. Gardner, 157 La. 116, 102 So. 89 (1924).
26. State v. Charles, 130 La. 683, 58 So. 509 (1912).
27. State v. Barton, 181 La. 262, 159 So. 383 (1935).

refusal of a new trial will not be reversed.[28] Sometimes, however, the trial judge has been held to have abused his discretion.[29]

In the instant case, *State v. Saba,* the trial judge did not believe the affidavits of the allegedly new witnesses. On review the supreme court said that when it clearly appears from the record that the judge was justified in viewing the evidence as suspicious, his ruling will not be disturbed. But Chief Justice O'Niell, in an impressive dissent, urges that the case should be remanded to the district court for a further hearing of the motion for a new trial on its merits and with a full preservation of testimony, in order to determine whether the judge's suspicion that the witnesses committed perjury was actually well founded. There is authority in law for the method of procedure which he suggests. In *State v. Wynne*[30] the verdict was first annulled and remanded for a new trial, but on the rehearing the case was remanded to the district court for a hearing on the merits of the defendant's motion for a new trial, and particularly to determine whether the alleged newly discovered evidence was in fact newly discovered. This procedure, according to Chief Justice O'Niell is especially applicable where there are affidavits of the newly discovered witnesses, which would clearly exonerate the defendant if true. According to the dissenting opinion there is no middle ground. Either the defendant should be granted a new trial, or if the affidavits are not true, the newly discovered witnesses should be punished for perjury. However, the majority of the court does not accept these as the two exclusive alternatives, and definitely holds that whether there has been a reasonable amount of diligence affirmatively shown before the trial, and whether the evidence is credible, are matters within the sound discretion of the trial judge.

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28. State v. Simpson, 184 La. 190, 165 So. 708 (1936).

29. State v. Gardner, 198 La. 861, 5 So.(2d) 132 (1941). After conviction of illegal sale of intoxicating liquor defendant found he had sold for authorized medicinal purposes whiskey to prosecuting witness's companion. Prosecuting witness was so vague under cross examination as to date of sale that it was an abuse of discretion not to grant a new trial on newly discovered evidence on a point in doubt.

30. 153 La. 414, 96 So. 15 (1923). The same procedure was followed in State v. Hyland, 36 La. Ann. 709 (1884). This case was remanded with instructions to the lower judge to hear and preserve the testimony of the witness offered by the defendant in support of his affidavit on his motion for a new trial and to consider the same and act thereon. And in State v. Seipel, 104 La. 67, 28 So. 880 (1900), the cause was remanded with instructions to the trial judge to examine and decide the motion for a new trial.