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Evidence - Admissibility of Photographs of the Corpse in Cases Involving Homicide

Sidney B. Galloway

Notes

EVIDENCE—ADMISSIBILITY OF PHOTOGRAPHS OF THE CORPSE IN CASES INVOLVING HOMICIDE

Defendant shot and killed a police officer. His only defense was that the shooting was accidental. During the investigation of the homicide, the coroner took several Kodachrome slides of the body lying, as he found it, in a pool of blood. At the trial, the court allowed the coroner, at the district attorney's request, to project these color pictures on a screen so that the jury could look at them. The Supreme Court found no error in the admission of the pictures in evidence. *State v. McMullan*, 223 La. 629, 66 So.2d 574 (1953).[1]

In upholding the admission of the pictures, the court stated that they did not "portray a scene so gruesome or revolting as to incite the emotions of the jury against appellant."[2] The court then stated further that "all pictures of death by violence are inelegant and unpleasant but this does not mean that they should be withheld from the jury's view even though they are merely cumulative evidence."[3] This last statement by the court raises the question of when, if ever, should photographs of the corpse in a murder trial be rejected as evidence.

Various authorities have set forth rules by which the admissibility of photographs in evidence may be determined.[4] On certain general points—such as the requirements of proper identi-

1. In the instant case the defendant was convicted of manslaughter. On the night of the crime, his wife returned home and found him lying across the bed, apparently intoxicated and asleep. When she woke him up, he became enraged, got his shotgun and drove her from the house. A police officer, who happened to be in the vicinity, answered her cries for help and returned with her to the house to quiet the defendant. As they entered the house, the defendant, pointing the shotgun directly at the officer, told him not to come any closer. After repeating this command several times, defendant shot and killed the officer.

2. 223 La. 629, 66 So.2d 574, 575 (1953). Although the court was convinced that the pictures did not cause undue prejudice of the jury, it should be noted that the photograph slides were Kodachrome, and when projected on the screen, showed the body and the wounds (made by a shotgun blast at close range) in vivid color. Their effect on the individual jurors, of course, cannot be positively determined.

3. 223 La. 629, 66 So.2d 574, 575.

4. Scott, Photographic Evidence § 602 et seq. (1942); Underhill, Criminal Evidence § 117 (4th ed. 1935); 2 Wharton, Criminal Evidence § 773 (11th ed. 1935); 3 Wigmore, Evidence § 792 et seq. (3d ed. 1940).

fication, accurate photography, and presentation of a clear impression of the subject—the authorities are largely in accord.[5] The chief diversities in the various decisions concern the admission of photographs which the court characterizes as gruesome.[6]

The difficulty in correctly determining the admissibility of a "gruesome or revolting" photograph in a criminal prosecution is caused by the necessity of resolving two conflicting factors—the tendency of the photograph to arouse the passions of the jury against the accused, and the value of the photograph as evidence for the prosecution. In each individual case, the two factors should be weighed, one against the other, in the light of the particular circumstances involved, in order to decide fairly whether or not a particular photograph should be admitted. The statement can be found in many decisions[7] and authoritative texts[8] that the admission of photographs must necessarily be left largely to the discretion of the trial judge. There must be limits to this discretion, and a rule should at least establish broad principles for the guidance of the trial judge. It is in this light that the several rules set forth by the Louisiana Supreme Court must be considered.

In the earlier Louisiana cases,[9] the court relied on the rule, stated by Wharton in his work on evidence,[10] that "photographs are admissible in evidence when they are shown to have been accurately taken and to be clear impressions of the subject in controversy and where they tend to illustrate any material fact in the case or to shed light upon the transaction before the court and jury." This is obviously a general rule which applies to all photographs and does not take into account the prejudicial nature

5. Scott, Photographic Evidence §§ 603, 606 (1942); Underhill, Criminal Evidence 560, § 117 (4th ed. 1935); 2 Wharton, Criminal Evidence 1317, § 773 (1935); 3 Wigmore, Evidence §§ 793, 794 (3d ed. 1940).

6. Photographs should be rejected if gruesome and unnecessary. People v. Burns, 109 Cal.2d 524, 241 P.2d 308 (1952); Lee v. State, 147 Neb. 333, 23 N.W.2d 316 (1946); Commonwealth v. Simmons, 361 Pa. 391, 65 A.2d 353 (1949).

Fact that photographs are cumulative evidence does not affect admissibility. McKee v. State, 33 Ala. App. 171, 31 So.2d 656 (1947); State v. Nelson, 92 P.2d 182 (Ore. 1939).

Fact that photographs are merely cumulative evidence may authorize, but does not require, their rejection. State v. Lantzer, 99 P.2d 73 (Wyo. 1940).

Numerous cases are collected in 159 A.L.R. 1410, 1413 (1945).

7. Higdon v. State, 213 Ark. 881, 213 S.W.2d 621 (1948); People v. Smith, 15 Cal.2d 640, 104 P.2d 510 (1940); Potts v. People, 114 Colo. 253, 158 P.2d 739 (1945); Commonwealth v. Sheppard, 313 Mass. 590, 48 N.E.2d 630 (1943).

8. Scott, Photographic Evidence 482, § 602, n. 27, 28 (1942); 2 Wharton, Criminal Evidence 1323, § 773 (11th ed. 1935).

9. State v. Messer, 194 La. 238, 193 So. 633 (1940); State v. Henry, 197 La. 999, 3 So.2d 104 (1941).

10. 2 Wharton, Criminal Evidence 1317, § 773 (11th ed. 1935).

of highly gruesome pictures.[11] If it is applied literally, any photograph of a corpse would be admitted in a trial involving homicide.

A literal application of this rule may be found in *State v. Messer*.[12] There a bill of exception was reserved to the admission of several photographs of the corpse on the grounds that the pictures were immaterial to the case and that they would simply serve to prejudice the jury.[13] Quoting the rule set forth above, the court sustained the admission of the photographs and did not even mention the possibility of prejudice to the accused. Perhaps the pictures were not so gruesome as to arouse the passions of the jury, but whether or not such was the case cannot be determined from the opinion.

In *State v. Henry*,[14] the court very summarily dismissed a similar bill of exception, again with no mention of possible prejudice, merely citing *State v. Messer*. This complete disregard of the possibility of undue prejudice against the accused indicates that this possibility was considered by the court to be immaterial to the determination of the admissibility of the photograph. Even in *State v. Johnson*,[15] when the court did discuss the possibility of gruesome pictures prejudicing the jury, it implied that the tendency of a photograph to create undue prejudice is relatively unimportant. Again, citing Wharton, the court stated: "Where they are otherwise properly admitted, it is not a valid objection to the admissibility of photographs that they tend to prejudice the jury. Competent and material evidence should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible."[16] A trial judge, relying on this language and the decisions of the two prior

11. Ibid. The sentence quoted in part by the court begins: "Stated generally, the proposition is that photographs are admissible . . . ." The author discusses the subject of gruesome pictures several paragraphs later.

12. 194 La. 238, 193 So. 633 (1940).

13. Defendant shot deceased because he was cutting wood on defendant's land. The defense was a plea of insanity. None of the facts which the photograph tended to prove were disputed. The picture showed the body lying in the woods where the shooting occurred.

14. 197 La. 999, 3 So.2d 104 (1941). The picture showed the body of the victim lying on the ground where the shooting occurred. The trial judge in per curiam stated that he permitted its introduction to show the position of the body, the scene of the crime, and the place of penetration of the bullet. The Supreme Court merely stated that pictures are admissible for these purposes.

15. 198 La. 195, 3 So.2d 556 (1941). Six photographs were introduced in evidence showing the body of the victim (who had been beaten to death during a burglary) and the interior and exterior of his home. The reasons given for their introduction were to show the nature of the crime, and the facts and circumstances surrounding its commission.

16. 198 La. 195, 203, 3 So.2d 556, 559.

cases, would find little to support the rejection of a picture of a corpse because of the highly prejudicial effect it might have on the jury.

In the case of *State v. Morgan*,[17] pictures were introduced in evidence which were highly gruesome and which had little value as evidence.[18] When the case reached the Supreme Court on appeal, several errors were found which required that it be remanded for a new trial. This gave the court the opportunity to hold that the pictures should not have been admitted at the trial without reversing the conviction on this point alone. The court stated that "[i]t is sufficient to say that the introduction of the photographs in evidence was not at all necessary or relevant to any fact at issue at the time when the photographs were offered in evidence. . . . the district attorney stated . . . that he offered them 'for the purpose of proving the corpus delicti . . . and the nature, scope and extent of the wound. . . .' . . . The corpus delicti had been proved already by the testimony. . . . Also the location and the nature and effect of the wounds . . . had been described in detail . . . and there was no dispute on that subject. . . ."[19]

After quoting the rule originally stated in the *Messer* case, the court set forth a rule which it labeled as the "converse" of the *Messer* rule—that "*if a gruesome photograph is not at all necessary or material evidence in a criminal prosecution it should be excluded if it may have a tendency to cause an undue influence upon the jury.* Therefore the objectionable photographs in this case should not be introduced in evidence if and when the case is tried again, unless the State shows some necessary purpose for the introduction of the photographs in evidence."[20] (Italics supplied.)

Is this actually the converse of the earlier rule? The literal converse would be that photographs which do not tend to illustrate a material fact or to shed light on the transaction should not be admitted if they may have a tendency to cause an undue influence upon the jury. Almost any photograph of the victim's body

17. 211 La. 572, 30 So.2d 434 (1947).

18. In the transcript of the trial of the *Morgan* case the following facts are brought out. Two photographs were introduced showing the nude body of a woman who had been killed with a shotgun during the course of a duel between defendant and a third person. The pictures were taken in the morgue the day following the shooting, and after the body had been embalmed. The embalming fluid had distorted the appearance of the wounds and the general appearance of the body.

19. 211 La. 572, 577, 30 So.2d 434, 436.

20. 211 La. 572, 579, 30 So.2d 434, 436.

would tend to illustrate at least one material fact in a murder trial—the corpus delicti. Clearly, the rule of the *Morgan* case was more in the nature of an exception to the general rule than the literal converse of it.

Whether the statements by the court in the *Morgan* case be called a converse, an exception or merely a limitation to Wharton's rule, they go much further than any of the prior Louisiana decisions in serving as a guide for determining the admissibility of photograph in future cases. The precise circumstances under which a gruesome photograph must be excluded, aside from the gruesomeness of the scene portrayed, depend on an interpretation of the phrases, "not at all necessary or relevant to any fact at issue," "not at all necessary or material evidence," and "necessary purpose for the introduction." Regardless of the interpretation that may be given these phrases, the decision makes it clear that the tendency of a photograph to arouse the passions of the jury must be considered along with its value as evidence in determining its admissibility. The rule of the *Morgan* case provides what seems to be a more just approach to the question of admissibility of photographs than do the rules of the prior cases, which apparently call for the blanket admission of all photographs of corpses in trials involving homicide.

The case of *State v. Dowdy*[21] gives added weight to the idea that the value of a photograph as evidence should be an important consideration in the question of its admissibility.[22] There the victim had been killed in an explosion, and the photograph introduced in evidence was used to identify the remains of the victim.[23] In upholding the admission of the photograph, the court stressed its value as evidence in the prosecution's case, stating that "the photograph was material evidence as it developed to be a very important, if not the most important, object by which the identity of the victim was proven and in that respect, the case does not come within any exception that may have been intended by the decision in the case of State v. Morgan."[24]

21. 217 La. 773, 47 So.2d 496 (1950).

22. In the case of State v. Ross, 217 La. 837, 47 So.2d 559 (1950), a very gruesome picture of the victim's body was admitted. The picture showed that the deceased had only a pencil in his right hand, and this fact refuted the defendant's claim that he had acted in self-defense. The court stated that the rule of *State v. Morgan* was inapplicable.

23. Defendants murdered the victim by blowing him up with dynamite. A photograph of the victim's dismembered foot, along with several teeth (all that remained of the body after the explosion), was introduced for the purpose of identifying the victim of the crime.

24. 217 La. 773, 799, 47 So.2d 496, 505 (1950).

The latest decisions of the court on the question of the admissibility of photographs have severely limited the possible application of the *Morgan* decision as a precedent. In *State v. Solomon*,[25] the court said that the admission of the pictures was held to be error in the *Morgan* case because in that case the court was able to conclude that they were *wholly* unnecessary and were offered *solely* for the purpose of prejudicing the jury against the defendant. Is the *Morgan* decision, then, applicable only when the sole reason for the offering of a photograph in evidence is the deliberate intention of the prosecution to prejudice the jury? That the court considers that decision as one of extremely limited application is certainly indicated by the statement in the *Solomon* case that: "State v. Morgan is to be regarded as—indeed it is—a case of most unusual circumstances."[26]

The facts of the principal case show clearly that the purpose served by the photographs was of little value to the prosecution's case. The defendant's only defense was that the shooting was accidental. The fact of the shooting by the defendant, the place where it was done, and the nature and extent of the wounds were undisputed, and there was ample testimony to establish each of these facts beyond any doubt. The language of the court to the effect that pictures should not be "withheld from the jury's view even though they are merely cumulative evidence" goes even farther than the *Solomon* decision in destroying the foundation of the rule set forth in the *Morgan* case. One of the bases of the *Morgan* decision was that the facts which the pictures tended to prove were not in dispute and had already been evidenced by considerable testimony, and that, therefore, the introduction of the pictures in evidence served no real purpose. Despite the limitations on its application, the *Morgan* decision has never been overruled. It is at least authority for the proposition that gruesome photographs should be excluded in cases "of most unusual circumstances."[27]

The manner in which the court has dealt with the question of the admissibility of photographs has left no clear guide as to when gruesome photographs should be rejected as evidence.

25. 222 La. 269, 62 So.2d 481 (1952). Three photographs were introduced—two showing the body in a sack, with only the feet protruding. The third was of the victim's head, showing the gagged mouth and gaping wounds in the head. This picture was important as a means of identifying the victim. It also showed the nature of the wounds and was used in connection with the coroner's testimony as to the cause of death.

26. 222 La. 269, 279, 62 So.2d 481, 484.

27. Ibid.

Perhaps the only accurate statement that can be made, after examination of the decisions, is that, once a photograph has been admitted, it is extremely unlikely that the Supreme Court will declare its admission to be error. It would probably be difficult to phrase a precise rule which is fair to the accused and which does not, at the same time, unnecessarily hamper the prosecution. Nevertheless, by indicating that *only* in cases of most unusual circumstances should photographs of a corpse be rejected in a trial involving homicide, the latest decisions of the Louisiana Supreme Court have undoubtedly encouraged the admission in evidence of gruesome photographs which have no real probative value.

Sidney B. Galloway

EVIDENCE—THE HUSBAND-WIFE TESTIMONY PRIVILEGE

On the day before the trial began, defense counsel informed both the district attorney and the judge that the defendant's wife, who had been summoned as a witness by the state, wished to exercise her privilege of refusing to testify against her husband. In spite of this, the judge required that she appear in open court and assert the privilege in the presence of the jury. On appeal this procedure was sustained by the Supreme Court. *State v. McMullan*, 223 La. 629, 66 So.2d 574 (1953).[1]

Recognition of the husband-wife privilege came about comparatively recently in the law of Louisiana,[2] and the jurisprudence of this state has not clearly settled all the aspects in connection with the exercise of the privilege. Before discussing the effect of the principal case, it will be helpful to review briefly the policy and historical background of the law on the general subject of husband-wife testimony.

In its early stages, the common law recognized numerous

1. In the instant case the defendant was convicted of manslaughter. On the night of the crime, his wife returned home and found him lying across the bed, apparently intoxicated and asleep. When she woke him up, he became enraged, got his shotgun and drove her from the house. A police officer, who happened to be in the vicinity, answered her cries for help and returned with her to the house to quiet the defendant. As they entered the house, the defendant, pointing the shotgun directly at the officer, told him not to come any closer. After repeating this command several times, defendant shot and killed the officer.

2. La. Act 157 of 1916, now La. R.S. 1950, 15:461.