Louisiana Law Review

Volume 16 | Number 2
The Work of the Louisiana Supreme Court for the 1954-1955 Term
February 1956

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Repository Citation
Thomas D. Hardeman, *Evidence - Privilege Against Disclosure of Identities of Informers*, 16 La. L. Rev. (1956)
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does pass a law on the subject, it then becomes the duty of the court to determine whether that law is in harmony with or repugnant to the constitutional provision.[13] It is suggested that the real issue in the instant case was whether or not the constitutional mandate that the Legislature shall pass laws suppressing gambling carries with it the negative implication that they shall not pass laws permitting it. In their dissenting opinions Justices Hawthorne[14] and Hamiter[15] took the latter position in contending that any law permitting, licensing, or legalizing gambling is unconstitutional as violative of the mandate. However, the majority of the court was unwilling to decide this issue, and delegated to the Legislature the right of determining the effect of the mandate.[16] It is submitted that this abdication to the Legislature of the court's function of determining the meaning and scope of the Constitution is a refusal on the part of the Supreme Court to accept its duty of determining the validity of statutes by comparing them with the applicable provisions of the Constitution.

Edwin L. Blewer, Jr.

EVIDENCE — PRIVILEGE AGAINST DISCLOSURE OF IDENTITIES OF INFORMERS

Defendant, chief investigator of a committee created by the New Orleans Commission Council to investigate the police department of that city, was asked by a grand jury to disclose the names of certain informers whom he had identified by numbers and fictitious names in a report to it. Defendant refused to reveal the names, claiming that since the information was given to him contingent on full assurance to the informers that their names would not be disclosed, he was privileged to refuse to name them. He relied in part on a policy memorandum of the committee which authorized the withholding of names of informers where to do so would not critically hamper the committee's work. Upon direction by the trial court to identify the informers, he was adjudged guilty of contempt for refusal to do

13. State v. Mustachia, 152 La. 821, 94 So. 408 (1922), held that La. Acts 1920, No. 127, p. 185, defining what betting on horse races was criminal, was not a special law in violation of LA. CONST. art. IV, § 4.

14. Gandolfo v. Louisiana State Racing Commission, 227 La. 45, 80, 78 So.2d 504, 514 (1954).

15. *Id.* at 74, 78 So.2d at 517.

16. *Id.* at 71, 78 So.2d at 515.

so. On appeal, *held,* affirmed. The ordinance creating the committee specifically requires that reports be made to the grand jury and full compliance with the ordinance requires the disclosure of the names of the informers. Furthermore, privileges are usually granted by the Legislature and any grant to persons not provided for by law should be rejected. In re *Kohn,* 227 La. 245, 79 So.2d 81 (1955).[1]

The instant decision represents the first time that the Louisiana court has ruled on the applicability in this state of the privilege against disclosure of the identities of informers. At common law it is well settled that certain governmental officials cannot be compelled to disclose the identity of an informer unless it appears essential to a proper disposition of justice.[2] The privilege runs in favor of the government and may be invoked on its behalf by governmental officials who are called upon as witnesses to disclose the information given by the informers.[3] It may also be claimed by the person charged with being the informer.[4] The rationale of the privilege is that persons should be encouraged to communicate to the proper officials any information they may have regarding the commission of a crime or the identity of a criminal.[5] One authority has appropriately noted that "informers are shy and timorous folk, and if their names are subject to be readily revealed, this source of information would be almost cut off."[6] The privilege is usually restricted to cases in which the governmental official who receives the information is one engaged in the detection of crime or the prose-

1. Certiorari was denied by the United States Supreme Court, 76 Sup. Ct. 196 (1955).

2. Scher v. United States, 305 U.S. 251 (1938); Cannon v. United States, 158 F.2d 952 (5th Cir. 1946); United States v. Li Fat Tong, 152 F.2d 650 (2d Cir. 1945); United States v. Brotlik, 119 F. Supp. 425 (M.D. Pa. 1954); People v. Aste, 337 Mich. 590, 60 N.W.2d 472 (1953). See Annots., 9 A.L.R. 1099, 1112 (1920), 59 A.L.R. 1555, 1559 (1929); UNDERHILL, CRIMINAL EVIDENCE 633, § 332 (4th ed. 1935); 8 WIGMORE, EVIDENCE 752, § 2374 (3d ed. 1940). It is generally held that the privilege relates only to the identify of the informer and not to the content of the information which he divulges. Granger v. Warrington, 8 Ill. 299 (1846); State v. Wilcox, 90 Kan. 80, 132 Pac. 982, 9 A.L.R. 1091 (1913); Commonwealth v. Congdon, 265 Mass. 166, 165 N.E. 467 (1928); 8 WIGMORE, EVIDENCE 753, § 2374 (3d ed. 1940). *But see* Vogel v. Gruoz, 110 U.S. 311 (1884); Worthington v. Scribner, 109 Mass. 487 (1872).

3. *In re* Quarles, 158 U.S. 532 (1895); Wilson v. United States, 59 F.2d 390 (3d Cir. 1932); State v. Hoben, 36 Utah 36, 102 Pac. 1000 (1909).

4. Worthington v. Scribner, 109 Mass. 487 (1872); Welk v. Toogood, 165 Mich. 677, 131 N.W. 124 (1911).

5. *In re* Quarles, 158 U.S. 532 (1895); Webb v. Commonwealth, 137 Va. 833, 120 S.E. 155 (1923); UNDERHILL, CRIMINAL EVIDENCE 633, § 332 (4th ed. 1935); 8 WIGMORE, EVIDENCE 752, § 2374 (3d ed. 1940).

6. MCCORMICK, EVIDENCE 309, § 148 (1954).

cution of criminals.[7] However, it may also be granted to administrative officials having an investigative duty.[8] It applies in fact, "*wherever* the situation is one which without this encouragement the citizens who have special information of a violation of law might be deterred otherwise from voluntarily reporting it to the *appropriate* official."[9] (Emphasis added.) No authority has been found concerning the applicability of the privilege in grand jury proceedings.

In the instant case the court in the majority opinion, in denying defendant's assertion of the privilege, stated that it would not permit the memorandum authorizing the use of the privilege before the committee to serve as a basis for asserting the privilege before the grand jury; to do so would be to recognize the committee as being superior to the grand jury. The court relied upon a section of the ordinance which created the committee, providing that reports would be made to the Orleans Parish Grand Jury. It found that an exclusion of the identities of the informers would render the reports incomprehensible or useless and thereby violate the terms of the ordinance. It further found that the promises made by defendant to his informers could not serve as a basis for the privilege, because to permit such would give third persons the power to grant privileges. The court stated that privileges are "usually provided for by the Legislature,"[10] thereby implying that since the Legislature has granted no privilege against disclosure of the names of informers, none exists. It is submitted that the court did not give proper treatment to the accepted theory underlying the privilege.

As indicated, the privilege at common law exists solely on the basis of a "public policy"[11] that informers should remain anonymous unless the proper administration of justice demands otherwise. It is not dependent upon statutory authority or promises made to informers, but is part of the common law of evidence.[12] In Louisiana, in the absence of express law on the subject, the common law rules of evidence apply in criminal pro-

7. 8 WIGMORE, EVIDENCE 756, § 2374 (3d ed. 1940).
8. *Ibid.*
9. *Ibid.*
10. *In re* Kohn, 227 La. 245, 256, 79 So.2d 81, 85 (1955).
11. Scher v. United States, 305 U.S. 251 (1938); Cannon v. United States, 158 F.2d 952 (5th Cir. 1946).
12. People v. Mooney, 269 N.Y. 291, 199 N.E. 415 (1936).

ceedings.[13] There is no apparent reason why the privilege against disclosure of the names of informers should not receive similar treatment.[14] That the situation presented in the instant case was a proper one for application of the privilege appears evident from the facts of the case. Defendant was a municipal official engaged in the detection of crime and was the appropriate official to whom the informers should have related their confidential information.[15] The fact that defendant was appearing before a grand jury, and not before a court, should have made no difference, because the privilege should be held applicable "wherever"[16] the situation demands it. If the court did not believe that the identities of the informers should have remained anonymous, it could have denied defendant the right to exercise the privilege without denying its general application. As already stated, the privilege is applicable unless the proper administration of justice demands otherwise. As such the trial judge is granted discretionary powers to determine whether or not he will sustain a plea of privilege. If in his estimation obtaining the names of the informers is vital to a proper disposition of justice, his course of action should be the denial of the privilege.

The role of the appellate court in such instances is to determine whether or not these discretionary powers were exercised arbitrarily. It is submitted that the court's holding should be restricted to the facts of the instant case and that the result should not be to exclude the privilege against disclosure in this state. Legislation specifically providing for the privilege in Louisiana appears desirable.

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13. LA. R.S. 15:2 (1950): "In matters of criminal procedure where there is no express law the common law rules of procedure shall prevail." See State v. Batson, 108 La. 479, 32 So. 478 (1902), holding that in criminal proceedings, in the absence of Louisiana law, the common law rules of evidence should be applied.

14. Although apparently not intending the statement to have application in the instant case, the court's view as to the desirability of the privilege was expressed as follows: "We do believe, as a matter of universal experience, that a shielded informer or witness will not make men more honest nor more likely to tell the truth, but will sometimes make them resort to dishonest means to accomplish what they pretend to be their honest objectives." *In re* Kohn, 227 La. 245, 250, 79 So.2d 81, 83 (1955). *But see* quotation page 441 *supra*. See also Original Brief on Behalf of Aaron M. Kohn, Applicant and Relator in Support of Application, pp. 6, 21, where reference is made to the testimony of veteran policemen that the privilege has been used in actual practice.

15. See Justice Hamiter's dissent in the instant case in which he stated that defendant was the proper official and that the privilege should have been sustained. *In re* Kohn, 227 La. 245, 258, 79 So.2d 81, 86 (1955).

16. See page 442 *supra*.