Louisiana Law Review

Volume 20 | Number 2
The Work of the Louisiana Supreme Court for the 1958-1959 Term
February 1960

Criminal Procedure - Prescription of Prosecutions - Commencement of the Prescriptive Period

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NOTES

CRIMINAL PROCEDURE—PRESCRIPTION OF PROSECUTIONS—COMMENCEMENT OF THE PRESCRIPTIVE PERIOD

In February 1958 the defendants were indicted for the crime of conspiracy to commit public bribery. The defendants were members of the New Orleans Police Department, a group of gamblers, and intermediaries of the two groups. The conspiracy allegedly occurred between January 1949 and June 1955. There was evidence in the record that all of the defendants were mentioned or referred to in the Special Citizens Investigation Committee Report regarding public bribery, police bribery, and systematic graft, which was submitted to the grand jury in March of 1954. All of the defendants pleaded one year prescription.[1] On the trial of the pleas the previous district attorney testified that the key evidence which made the indictment possible did not come to his attention until August 1957. The district court sustained the pleas of prescription. On appeal the Louisiana Supreme Court, *held,* affirmed. The evidence was sufficient to sustain a finding that the offense charged was made known to several judges, grand juries, and district attorneys more than one year prior to the presentation of the indictment and that prosecution was therefore barred by prescription. *State v. Bagneris*, 237 La. 21, 110 So.2d 123 (1959).

The common law has no prescriptive period for the bringing of a criminal prosecution.[2] In many states, including Louisiana, the most serious crimes are still held to be imprescriptible.[3] How-

1. "No person shall be prosecuted, tried or punished for any offense, murder, aggravated rape, aggravated kidnapping, aggravated arson, aggravated burglary, armed robbey, and treason excepted, unless the indictment, information, or affidavit, for the same be found or filed within one year after the offense shall have been made known to the judge, district attorney or grand jury having jurisdiction. . . ." LA. R.S. 15:8 (1950).

2. CLARK, CRIMINAL PROCEDURE 149-50, § 52 (2d ed. 1918); 15 AM. JUR. —*Criminal Law* § 342 (1938), 22 C.J.S.—*Criminal Law* § 223 (1940), 16 C.J. —*Criminal Law* § 340, n. 50 (1918).

3. In Louisiana the crimes of murder, aggravated rape, aggravated kidnapping, aggravated arson, aggravated burglary, armed robbery, and treason are imprescriptible. LA. R.S. 15:8 (1950). See e.g., GA. CODE ANN. 27:601 (1935); ARIZ. CODE ANN. 44:1121 (1939); IDAHO CODE ANN. 19:401 (1947); MASS. ANN. LAWS 277:63 (1933); MICH. STAT. ANN. 28:964 (1954); 22 OKLA. STAT. ANN. 151 (1937); 19 PA. STAT. 211 (1930); 77 UTAH CODE ANN. 9.1 (1953); WIS. R.S. 939.73 (1958). The generally accepted reason for this is that it is socially undesirable to allow one who has committed one or more of the aggravated types of offenses to escape prosecution merely because he had concealed his crime for the length of the prescriptive period.

ever, time limitations have generally been established by statute for the bringing of charges for most offenses.[4] The imposition of a time limitation poses the problem of determining when that period commences to run. Most state jurisdictions[5] and the federal rules[6] provide that the period begins with the commission of the offense. In the case of prosecutions for fines and forfeitures Louisiana also follows this approach.[7] As to the other offenses, Louisiana originally had a period of limitation which began with the commission of the offense,[8] but in 1844 the legislature provided that the prescriptive period would not begin to run until the offense "shall be discovered or made known to a public officer having power to direct the investigation or prosecution."[9] This provision has remained essentially the same,[10] except that in 1928 the public officers whose knowledge was essential were limited to the judge, district attorney, or grand jury having jurisdiction.[11] Under this "made known" test the state must negative prescription where the indictment shows that the charge was brought more than a year after the crime was committed.[12] The defendant then bears the burden of af-

4. 15 AM. JUR.—*Criminal Law* § 342 (1938); 22 C.J.S.—*Criminal Law* § 224 (1940); 16 C.J.—*Criminal Law* §§ 340, 341, n. 55 (1918). For a comprehensive treatment of the policy considerations behind the imposition of a time limitation, see MODEL PENAL CODE § 1.07(2), comment (Tent. Draft No. 5, 1956).

5. 15 AM. JUR.—*Criminal Law* § 345 (1938); 22 C.J.S.—*Criminal Law* § 226 (1940).

6. 18 U.S.C. § 3282 (1948).

7. "Nor shall any person be prosecuted for any fine or forfeiture unless the prosecution for the same shall be instituted within six months of the time of incurring such fine or forfeiture. . . ." LA. R.S. 15:8 (1950). Louisiana has always followed this approach to fines and forfeitures (Crimes Act of 1805, § 37, ch. 50), except for a short period between 1844 and 1855. See La. Acts 1844, No. 122(3); La. R.S. 14 (1852); La. Acts 1855, No. 121(10).

8. "No person shall be prosecuted, tried or punished for any offense, wilful murder, arson, robbery, forgery and counterfeiting excepted, unless the indictment or presentation for the same be found or exhibited within one year next after the offence shall be done or committed. . . ." Crimes Act of 1805, § 37, ch. 50.

9. La. Acts 1844, No. 122(3). Georgia is the only other state that has the *made known* test. "Nor shall any limitation run so long as the offender or offense is unknown." GA. CODE ANN. 27:601 (1935).

10. La. Acts 1855, No. 121, § 10; La. R.S. 986 (1870); La. Acts 1894, No. 50; La. Acts 1898, No. 73; La. Acts 1926, No. 67; La. Acts 1928, No. 2, § 1, art. 8; La. Acts 1935 (2d E.S.) No. 21, § 1; La. Acts 1942, No. 147, § 1.

11. La. Acts 1928, No. 2, § 1, art. 8.

12. State v. Dooley, 223 La. 980, 67 So.2d 558 (1953); State v. Jones, 209 La. 394, 24 So.2d 627 (1945); State v. Doucet, 205 La. 648, 17 So.2d 907 (1944); State v. Gehlbach, 205 La. 340, 17 So.2d 349 (1944); State v. Guillot, 200 La. 935, 9 So.2d 235 (1942); State v. Oliver, 193 La. 1084, 192 So. 725 (1939); State v. Gendusa, 193 La. 59, 190 So. 332 (1939); State v. Cheatham, 178 La. 366, 151 So. 623 (1933); State v. Sullivan, 159 La. 589, 105 So. 631 (1925); State v. McNeal, 159 La. 386, 105 So. 381 (1925); State v. Drummond, 132 La. 749, 61 So. 778 (1913); State v. Foley, 113 La. 206, 36 So. 940 (1904); State v. Hinton, 49 La. Ann. 1354, 22 So. 617 (1897); State v. Pierre,

firmatively showing that a competent officer had knowledge of the offense more than one year prior to the indictment.[13] This question of determining when an offense is made known is one of fact which has proved most troublesome.

It is well settled that the competent officers must have knowledge, actual or imputed,[14] of the commission of a *crime* or *offense*.[15] The court has held that the crime is "made known" to an officer having jurisdiction when the facts which come to his knowledge reasonably indicate that it is his official duty to act or to see that an investigation of the alleged crime is instituted.[16] It makes no difference that the official did not know the details of the crime, or that the facts actually involved criminal liability.[17] The fact that the state cannot prove the crime does not prevent the commencement of prescription.[18] Nor is prescription affected by the non-action of the official, no matter what his reason may be.[19] However, the official must have informa-

49 La. Ann. 1159, 22 So. 373 (1897); State v. Wren, 48 La. Ann. 803, 19 So. 745 (1896); State v. Davis, 44 La. Ann. 972, 11 So. 580 (1892); State v. Joseph, 40 La. Ann. 5, 3 So. 405 (1888); State v. Victor, 36 La. Ann. 978 (1884); State v. Foster, 7 La. Ann. 255 (1852).

13. State v. Guillot, 200 La. 935, 9 So.2d 235 (1942); State v. Oliver, 196 La. 659, 199 So. 793 (1941); State v. Brown, 185 La. 1023, 171 So. 433 (1936); State v. Perkins, 181 La. 907, 160 So. 789 (1935); State v. Keife, 165 La. 47, 115 So. 363 (1928); State v. Fuller, 164 La. 718, 114 So. 606 (1927); State v. Posey, 157 La. 55, 101 So. 869 (1924); State v. Robinson, 37 La. Ann. 673 (1885); State v. Barfield, 36 La. Ann. 89 (1884); State v. Barrow, 31 La. Ann. 691 (1879). *Contra*: State v. Bischoff, 146 La. 748, 84 So. 41 (1920), followed by State v. Richard, 149 La. 568, 89 So. 697 (1921).

14. The Louisiana Supreme Court has refrained from using a literal interpretation of the words "made known" and has said that proof must meet an objective rather than subjective standard. A literal interpretation of "made known" would mean that which is a realized fact. Instead the court has chosen to interpret the words "made known" as synonymous with the phrase "should have been known." *Cf.* State v. Stanton, 209 La. 457, 24 So.2d 819 (1946); State v. Brocato, 205 La. 1019, 18 So.2d 602 (1944); State v. Oliver, 196 La. 659, 199 So. 793 (1940); State v. Young, 194 La. 1061, 195 So. 539 (1940); State v. Perkins, 181 La. 907, 160 So. 789 (1935); State v. Cooley, 176 La. 448, 146 So. 19 (1933); State v. Hayes, 161 La. 963, 109 So. 778 (1926). By so doing the court has said that prescription begins to run when competent officers have sufficient knowledge to put them on inquiry, the officers then being chargeable with the information and facts that such an inquiry would have revealed. This construction achieves a reasonable and practical result, for to demand proof of actual knowledge would be extremely burdensome on the defendant.

15. *Cf.* State v. Stanton, 209 La. 457, 24 So.2d 819 (1946); State v. Brocato, 205 La. 1019, 18 So.2d 602 (1944); State v. Oliver, 196 La. 659, 199 So. 793 (1940); State v. Young, 194 La. 1061, 195 So. 539 (1940); State v. Perkins, 181 La. 907, 160 So. 789 (1935); State v. Cooley, 176 La. 448, 146 So. 19 (1933); State v. Hayes, 161 La. 963, 109 So. 778 (1926).

16. State v. Stanton, 209 La. 457, 24 So.2d 819 (1946); State v. Brocato, 205 La. 1019, 18 So.2d 602 (1944); State v. Oliver 196 La. 659, 199 So. 793 (1940); State v. Young, 194 La. 1061, 195 So. 539 (1940); State v. Perkins, 181 La. 907, 160 So. 789 (1935).

17. State v. Hayes, 161 La. 963, 109 So. 778 (1926).

18. State v. Perkins, 181 La. 907, 160 So. 789 (1935).

19. State v. Cooley, 176 La. 448, 146 So. 19 (1933).

tion which reasonably indicates that the crime was committed in his jurisdiction.[20]

An unsettled question in the Louisiana jurisprudence is whether knowledge of the identity of the *offender* is necessary to start prescription running. The statute refers only to knowledge of the offense.[21] In all cases decided under the 1928 Code of Criminal Procedure the proper official had either actual or constructive knowledge of the offender.[22] In cases decided under previously existing statutory provisions it would seem that knowledge of the offender was a necessary element.[23] It may logically be assumed that the prior decisions are still controlling since in essence the prior statutes differ from the present law only as to the officers to whom knowledge must be imputed.[24] Because Louisiana has the unusually short prescriptive period of one year, it would seem that knowledge of the offender should be a requisite. If the contrary were held, the criminal could avoid prosecution by concealing his complicity in the offense for a year after the crime was known. However, in such a situation the state might preserve its cause of action by filing a "John Doe" indictment.[25] This in effect would give the state three additional years to ferret out the offender.[26]

In the instant case the court did not discuss whether or not competent officials had knowledge of the offenders. The court seemed to affirm the view of the trial judge that only knowledge of the *offense* was necessary to determine whether or not pre-

20. State v Young, 194 La. 1061, 195 So. 539 (1940).

21. "No person shall be prosecuted, tried or punished . . . unless the indictment, information, or affidavit for the same be found or filed within one year after the *offense* shall have been made known to the judge, district attorney or grand jury having jurisdiction. . . ." (Emphasis added.) LA. R.S. 15:8 (1950).

22. See note 13 *supra*.

23. See State v. Drummond, 132 La. 749, 61 So. 778 (1913); State v. Touchet, 46 La. Ann. 827, 15 So. 390 (1894); State v. Hanks, 38 La. Ann. 468 (1886); State v. Barfield, 36 La. Ann. 89 (1884).

24. State v. Bussa, 176 La. 87, 145 So. 276 (1932), which was followed in State v. Gehlbach, 205 La. 340, 17 So.2d 349 (1944).

25. "In any indictment it is sufficient for the purpose of identifying the accused to state his true name, to state the name, appellation or nickname by which he has been or is known, to state a fictitious name, or to describe him as a person whose name is unknown or to describe him in any other manner. . . ." LA. R.S. 15:241 (1950).

26. "In felony cases when three years elapse from the date of finding an indictment, or filing an information, and in all other cases when two years elapse from the date of finding an indictment, or filing an information or affidavit, it shall be the duty of the district attorney to enter a nolle prosequi if the accused has not been tried, and if the district attorney fail or neglect to do so, the court may on motion of the defendant or his attorney cause such nolle prosequi to be entered the same as if entered by the district attorney. . . ." LA. R.S. 15:8 (1950).

scription had run.[27] The court then applied the objective standard of the "made known" test and found that the proper officials possessed knowledge of the offense more than one year prior to the indictment. The instant case points up another procedural weakness of Louisiana's prescriptive rules. The court has said that the one year prescriptive period is sufficiently long to gather evidence and to decide whether or not to prosecute.[28] In the situation where both the offense and the offender are made known to competent officials this may indeed be true. But this is not because of the reasons advanced by the court. If at the end of the one year period the state had filed an indictment, it would have had the three year period in which trial should be

27. The trial judge in his opinion said: "Therefore, this Court concludes that if this OFFENSE of conspiracy to commit public bribery was known either to the Judge, District Attorney or Grand Jury for more than one year preceding February 12, 1958, then the prosecution of the OFFENSE is prohibited by law. The Court believes this to be the law regardless of the number of individuals involved. Unless this is true there can be practically no prescription for the crime of conspiracy—for this crime could be prosecuted any time in the distant future by the alleged discovery of another conspirator. Thus the Court concludes that if it finds that the OFFENSE here considered was known to any one of the three authorities more than one year prior to February 12, 1958, then all twenty-nine defendants must be freed.

"Also it must necessarily follow if the Court find that any of the authorities knew that even one named conspirator conspired with parties unknown more than one year prior to the finding of this indictment then the prosecution is precluded. This last statement is not to be construed to mean that this Court believes the identity of any conspirator must be known by the proper authorities before prescription begins to run—the law is positive that prescription begins to run when the OFFENSE IS KNOWN—what the Court does mean that evidence of the fact that authorities knew of a single individual engaged in a conspiracy with unidentified parties would be sufficient proof of the inescapable conclusion that the OFFENSE was known as of that time, and that regardless of how many other conspirators were later uncovered, prescription be counted from the time the OFFENSE was known." State v. Bagneris, No. 159-238, Section "B", Criminal District Court for the Parish of Orleans. The Supreme Court in the instant case posed the question to be decided as follows: "Have the defendants successfully shown that the *offense* was made known to the Judge, District Attorney or Grand Jury more than a year before the indictment was presented?" State v. Bagneris, 237 La. 21, 29, 110 So.2d 123, 126 (1959). The court then went on to say: "The word offense may be and is frequently used interchangeably with the word crime." *Id.* at 29, 110 So.2d at 126. Therefore it would seem that the court has impliedly said that knowledge of the offender is not a necessary element to start prescription running.

28. "The obvious purpose of this law was to require the prompt filing of criminal prosecutions and to eliminate the fear by persons of the threat of prosecution by public officials charged with that duty more than one year after the offense had been made known to them." State v. Oliver, 196 La. 659, 670, 199 So. 793, 797 (1940). "The right of an accused person to have the benefit of the law of prescription is a substantial right, founded upon the most obvious of reasons and upon a fundamental principle of justice. A year is a long time to allow the judge or district attorney or a member of the grand jury having jurisdiction—and having knowledge of the commission of a crime—to make up his mind that a prosecution should be instituted against the party *accused* or *suspected*." (Emphasis added.) O'Neill's dissent in State v. Guillot, 200 La. 935, 958, 9 So.2d 235, 242 1942).

brought[29] to continue to gather evidence to sustain a conviction. Since, in this situation, the state, in effect, has four years to secure evidence, there is no real reason to require the state to becloud the reputation of a prospective defendant by filing an early indictment based on inconclusive evidence of guilt. Since an indictment should not be brought until there is sufficient evidence to go to trial, this procedure would seem to be theoretically unsound. If knowledge of the offender is not a necessary prerequisite, then the filing of the indictment against the wrong person would not halt the running of the one year period. Thus if this approach is adopted, the state could preserve its cause of action by filing an indictment against the right person; but would lose its action at the end of one year if brought against the wrong party.

The "made known" test as interpreted in Louisiana has created many problems of application and interpretation. The fact that knowledge in each case must meet the test of an objective standard encourages an endless stream of litigation establishing at best a fine, wavery line. The American Law Institute and the Federal Rules' approach to time limitation provides for a longer period, running from the date of the commission of the crime, for the bringing of the indictment, coupled with a shorter period for bringing the defendant to trial.[30] This rule in effect will eliminate all of the troublesome problems of the "made known" test. The only objection that can be made to the American Law Institute-Federal Rule is that of the possibility of concealment of the crime for the length of the prescriptive period. Since the basic purpose of the "made known" test is to give the state a reasonable time in which to bring prosecutions of crimes which are difficult to detect, it may be better to apply this principle to those crimes that are extremely susceptible of concealment.[31] However, as a general prescriptive concept, the "made known" test is fraught with many difficulties. It is submitted that the Louisiana State Law Institute is taking a step in the

29. See note 25 *supra*. In the instant case the prosecution could have preserved its cause of action in this manner. Knowledge was obtained in March of 1954. If the indictment would have been brought one year later the state would have had until March of 1958 to file its indictment. The key evidence was obtained in August of 1957. The subsequent indictment which was filed on February 12, 1958, would have still been within the prescriptive period.

30. Bennett, *Revision of Louisiana's Code of Criminal Procedure—A Survey of Some of the Problems*, 18 LOUISIANA LAW REVIEW 383, 405 (1958).

31. See MODEL PENAL CODE § 1.07, comment (Tent. Draft No. 5, 1956).

right direction in its present plan to adopt the American Law Institute and Federal Rules' approach to time limitation.[32]

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PLEADING AND PRACTICE — THIRD PARTY PRACTICE — JURISDICTION RATIONE PERSONAE

Plaintiff filed suit in Lafayette Parish against his automobile insurer and the liability insurer of the party driving plaintiff's car at the time it was involved in an accident. Plaintiff's insurer then filed a third party petition against the driver of plaintiff's car, a resident of St. Mary Parish. The third party defendant filed an exception to the jurisdiction of the court ratione personae which was sustained by the trial court. On appeal, *held*, affirmed. "The third party practice act provides no exception to the general rule that a defendant is entitled to be sued in the Court of his domicile." *Cameron v. Reserve Insurance Company*, 237 La. 433, 111 So.2d 336 (1959).

Prior to the adoption of the Third Party Practice Act, the Louisiana equivalent of the Anglo-American third party action was the call in warranty.[1] Article 384 of the Code of Practice, in dealing with the call in warranty, provides an exception to the general rule that a defendant is entitled to be sued in the court of his domicile:[2] "The warrantor thus cited is bound to appear before the court in which the principal demand has been instituted, even when he resides out of its jurisdiction . . . ."[3] The purpose of this exception to the general rule is to avoid a multiplicity of actions. But for this rule the defendant in the initial suit could recover only by filing a second suit in the domicile of the warrantor and try essentially the same case he had just finished defending.

32. *Ibid.*; 18 U.S.C. §§ 3281, 3282, 3288-3290 (1918).

1. LA. CODE OF PRACTICE arts. 379-388 (1870).

2. *Id.* art. 162: "It is a general rule in civil matters that one must be sued before his own judge, that is to say, before the judge having jurisdiction over the place where he has his domicile or residence, and shall not be permitted to elect any other domicile or residence for the purpose of being sued, but this rule is subject to those exceptions expressly provided for by law."

3. *Id.* art. 384. See also *id.* art. 165(4), which provides: "In matters relative to warranty, they must be carried before the court having cognizance of the principal action in which demands in warranty arise."

Jones v. Louisiana Oil Refining Corp., 3 La. App. 85, 89 (1925): "Under this article [384] of the Code the fact that Miller [the warrantor] resides out of the jurisdiction of the court does not relieve him of the duty to appear. He is bound to appear, even though he resides out of the court's jurisdiction."