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Accomplices To Abortions

a continuance, but the court should have discretion to determine from evidence before it whether cause exists in a particular case.

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ACCOMPLICES TO ABORTIONS

Many jurisdictions, either because of statutes or the result of judicial decisions, will not sustain the conviction of the actual perpetrator of a crime solely on the basis of the uncorroborated testimony of an accomplice.[1] In these jurisdictions, therefore, it is important to determine who is legally an accomplice.[2]

Richmond v. Commonwealth,[3] decided by the Kentucky Court of Appeals, raises the question in an abortion case. The girl's paramour was the only witness possessing any knowledge of the abortion, aside from the accused abortionist who did not testify. The boyfriend admitted responsibility for the girl's pregnancy. At the girl's request, he arranged for a meeting with the abortionist and took her to the designated meeting place. Following a brief private conversation between the accused and the boyfriend, they all drove to the accused's trailer for the operation. The boyfriend remained in an adjoining room during the operation, after which the girl paid the accused. This operation proved unsuccessful, so a week later a second operation was performed under similar circumstances. The girl, never regaining consciousness, died as a result of the second operation.

The trial court left to the jury the question of whether the boyfriend was an accomplice of the abortionist so that the uncorroborated testimony of the accomplice would not support a verdict of guilty. The jury convicted. Upon appeal, a majority of the Court of Appeals held that the boyfriend was an accomplice as a matter of law. Two judges dissented, being of the opinion that the rule requiring

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[1]Biegun v. State, 206 Ga. 618, 58 S.E.2d 149 (1950); Fitch v. Commonwealth, 291 Ky. 748, 165 S.W.2d 558 (1942); State v. Sweeny, 180 Minn. 450, 231 N.W. 225 (1930); see generally, 7 Wigmore, Evidence § 2056 n.10 (3d ed. 1940); Note, 54 Colum. L. Rev. 219, 233-237 (1954).

[2]If the famous Rosenberg treason case had been tried in a New York state court, where corroboration is required, a conviction would have been unlikely. Note, 54 Colum. L. Rev. 219, 234 (1954).

Where only a single witness is available to testify, the corroboration rule presents the court with an unfortunate dilemma of choosing between what may appear to be justice on one hand and the the state's legislative policy on the other.

[3]370 S.W.2d 399, 401 (Ky. 1963).

corroboration should be abolished in favor of a rule simply requiring the giving of "cautionary instructions" to the jury with respect to the credibility of the accomplice's testimony.

There is no single satisfactory definition of an accomplice,[4] and there is a conflict of authority as to whether a distinction should be made between an accomplice who is only a witness and an accomplice who is also a defendant. Where the term "accomplice" is specifically applied to witnesses as by statute, some courts hold that there is no distinction between the two,[5] thus laying down an identical offense test. This test to determine who is an accomplice is used in the majority of states[6] and involves determining whether the accused defendant and witnesses can be indicted for the same offense. Other courts apply a criminal corruption test[7] under which a person may be an accomplice even though he could not be indicted as a defendant for the same crime.[8] The criminal corruption test is used in only a small minority of states, and only requires determining whether the witness has played a corrupt part in the unlawful act. Both the identical offense test and the criminal corruption test can be applied to the abortee and the third party witness in determining whether they are accomplices.

Under the identical offense test the pregnant woman soliciting an abortion is not held to be an accomplice, because abortion statutes are directed at persons other than the woman upon whom the act is committed.[9] The woman incurs no criminal liability, even for performing the abortion upon herself.[10]

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[4]State v. Walters, 105 Ore. 662, 209 Pac. 349, 352 (1922); 1 R.C.L. Accomplices § 2, at 156 (1914).

[5]People v. Blank, 283 N.Y. 526, 29 N.E.2d 73 (1940); State v. Case, 61 Ore. 265, 122 Pac. 304 (1912); State v. Weston, 109 Ore. 19, 219 Pac. 180 (1923).

[6]People v. Raven, 44 Cal. 2d 523, 282 P.2d 866 (1955); Elmendorf v. Commonwealth, 171 Ky. 410, 188 S.W. 483 (1916); State v. Tennyson, 212 Minn. 158, 2 N.W.2d 833 (1942); Dunn v. People, 29 N.Y. 523 (1864); State v. Coffey, 157 Ore. 457, 72 P.2d 35 (1937); Mayes v. State, 11 Okla. Crim. 61, 142 Pac. 1049 (1914); Annot., 53 A.L.R.2d 817, 822 (1957); 9 U.C.L.A. L. Rev. 190, 191-92 (1962). In California this test was adopted by statute in 1915. Cal. Pen. Code § 1111.

[7]People v. Coffey, 161 Cal. 433, 119 Pac. 901, 903 (1911); People v. King, 30 Cal. App. 2d 185, 85 P.2d 928 (1938); Fitzgerald v. State, 85 Okla. Crim. 376, 188 P.2d 396, 409 (1947); Annot., 19 A.L.R.2d 1352 (1951).

[8]Chandler v. State, 89 Tex. Crim. 309, 230 S.W. 1002, 1003 (1921); People v. Coffey, supra note 7.

[9]State v. Smith, 99 Iowa 26, 68 N.W. 428 (1896); Commonwealth v. Sierakowski, 154 Pa. Super. 321, 35 A.2d 790 (1944); Smartt v. State, 112 Tenn. 539, 80 S.W. 586 (1904); Miller v. Bennett, 190 Va. 162, 56 S.E.2d 217 (1949).

[10]State v. Carey, 76 Conn. 342, 56 Atl. 632 (1904); State v. Tennyson, supra note 6; State v. Hyer, 39 N.J.L. 598 (1877); People v. Blank, supra note 5; People v. Ved-

Several reasons are given by the courts for excluding the abortee under the identical offense test. Some courts say the woman is guilty of the separate crime of soliciting an abortion.[11] If any other approach were followed, the woman would be guilty of two crimes, first in submitting to or soliciting an abortion and second by acting as an accomplice.[12] The fact the woman might be convicted of two offenses is not entirely convincing, at least if she can be subjected to only a single punishment.[13] Even in jurisdictions in which the woman is not guilty of a separate crime, she is usually excluded from the definition of an accomplice on the theory she is the "victim" rather than the perpetrator.[14]

The more difficult problem is determining whether a third party witness, i.e., a person other than the abortee or perpetrator, is an accomplice. Some jurisdictions use a literal or narrow interpretation of the identical offense test, while other jurisdictions use a broad interpretation.

The primary allegiance of the third party who has participated and has knowledge[15] of the abortionist's intent to perform an abortion,[16]

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der, 98 N.Y. 630 (1885); Dunn v. People, supra note 6; Smartt v. State, supra note 10; Watson v. State, 9 Tex. App. 237 (1880); Annot., 139 A.L.R. 983 (1942).

In jurisdictions which make no distinction between co-conspirators and accomplices, the woman involved may be convicted of a conspiracy with others to commit the abortion upon her person, even though she could not be convicted alone. Regina v. Whitechurch, [1890] 24 Q.B.D. 420.

[11]People v. Clapp, 24 Cal. 2d 835, 151 P.2d 237 (1944); People v. Wilson, 25 Cal. 2d 341, 153 P.2d 720 (1944).

The abortee is liable under N.Y. Pen. Law § 80, and the woman has committed the crime of submitting to an abortion under N.Y. Pen. Law § 81. Under Cal. Pen. Code § 275 the crime is that of soliciting an abortion.

The true effect of providing separate statutory offenses for the abortee should not be to obliterate her status as an accomplice, but to punish her for the specific crime attributable to her.

[12]People v. Tennyson, supra note 6.

[13]N.Y. Const. art. I, § 5; N.Y. Pen. Law § 1938.

[14]People v. Blank, supra note 5; People v. McGonegal, 136 N.Y. 62, 32 N.E. 616 (1892); People v. Vedder, supra note 10; Dunn v. People, supra note 6.

The judicial decisions giving rise to this view probably arose from sympathy for the female's unfortunate plight.

[15]Some courts take a liberal view regarding the sufficiency of evidence required to bring the guilty knowledge home to the third party. For example, in the case of Adams v. State, 200 Md. 133, 88 A.2d 556 (1952), an abortionist's hired secretary and nurse, third party witnesses, were convicted of aiding and abetting their employer. Upon affirming their convictions the Court of Appeals held that knowledge and intent could be inferred from their overall conduct. A stricter view is found in State v. Payne, 25 Wash. 2d 407, 171 P.2d 227 (1946), where the evidence showed a nurse had knowledge of the unlawful purpose behind the vic-

is considered by the courts that broadly interpret the identical offense test. As a means of escaping the adverse results of a broad definition of an accomplice, some courts draw a distinction between the witness who acts in behalf of the victim and the witness who acts in behalf of the abortionist. Where the entire evidence relates solely to the relationship between the witness and the victim, the courts hold there is an absence of criminal concert of action, and the witness is not an accomplice. In the Delaware case of *Scott v. State*,[17] which is indistinguishable from the *Richmond* case, a friend at the victim's request contacted an abortionist, made the arrangements, accompanied the victim to the abortionist's residence, and remained in an adjoining room during the operation. The Supreme Court held that with the exception of the telephone call and a private conversation prior to the operation, the evidence showed only the relationship between the friend and the victim and did not indicate any connection between the friend and the abortionist.

The statutes requiring corroboration of an accomplice's testimony have generally met with a hostile reception by courts and writers alike. While some courts have concealed their hostility by drawing a distinction between aiding the victim and aiding the perpetrator, others have done so by taking a narrow approach in applying the

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tim's visit. The Supreme Court held the evidence was purely circumstantial and did not prove beyond a reasonable doubt that the nurse also had knowledge of her employer's unlawful intent.

[16]Adams v. State, supra note 15; State v. Payne, supra note 15. With regards to intent of the abortionist, see Polly v. People, 107 Colo. 6, 108 P.2d 220 (1940); State v. Sturchio, 131 N.J.L. 256, 36 A.2d 301 (1944).

[17]49 Del. 251, 113 A.2d 880 (1955).

Upon rehearing, this case was remanded to the trial court in order to make specific findings of fact in regard to the alleged meeting between the friend and the abortionist. If the meeting was private in nature it would show the relationship was between the friend and the abortionist. Scott v. State, 49 Del. 401, 117 A.2d 831 (1955).

Where the facts were similar to those in the Richmond case, the Supreme Court of California affirmed the trial court's refusal to charge the jury that the boyfriend was an accomplice as a matter of law. The victim's boyfriend took her to an abortionist, paid for the operation, and assisted in administering the anesthetic. The trial court held that such evidence did not conclusively prove that the relationship of the boyfriend to the accused abortionist was that of an accomplice. People v. Darrow, 212 Cal. 167, 298 Pac. 1 (1931).

Under similar reasoning employed in the Scott case, a court quashed an indictment drawn from the state's abortion statute which makes it a crime to "aid, assist or counsel any person with intent to cause an abortion." The court held that the term "any person" did not apply to the pregnant woman. Thus a third party counseling her was not criminally liable. State v. Parm, 21 Del. (5 Pen.) 556, 60 Atl. 977 (Ct. Gen. Sess. Del. 1905). See also People v. Lovell, 40 Misc. 2d 458, 242 N.Y.S.2d 958 (Oneida County Ct. 1963).

identical offense test. California uses a very narrow statutory definition to describe an accomplice.[18] In the California case of *People v. Alvarez*,[19] the District Court of Appeals affirmed the trial court's determination that the sister and sister-in-law of the victim, third party witnesses, were not accomplices under the identical offense test. The sister-in-law had purchased the instrument and was present when it was used by the abortionist. The sister admitted she had buried the fetus and was also present during the abortion. Since neither the sister nor the sister-in-law actually used the instrument, they were not held to be accomplices because they were not guilty of the exact identical offense for which the abortionist was on trial.

While California uses a narrow approach in applying the identical offense test, Kentucky uses a broad approach.[20] In the *Richmond* case the court found that the boyfriend had aided and abetted the abortionist and was an accomplice under the identical offense test even though the boyfriend had not used the abortion instruments. In sharp contrast is the *Alverez* case where the participants, who clearly aided and abetted the abortionist, were held not to be accomplices because they did not actually use the abortion instruments.

Under the criminal corruption test, which is the minority view, the abortee and third party witnesses may be accomplices.[21] The criminal corruption test represents the common law view and was succinctly stated by Judge Henshaw in *People v. Coffey*,[22] saying, "This, then, is the true test and rule: If in any crime the participation of an individual has been criminally corrupt, he is an accomplice."[23] Those who favor using the criminal corruption test argue that it is the part

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[18]"An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Cal. Pen. Code § 1111.

Prior to 1915 California used the very broad common law concept of participes-criminis in defining an accomplice. Because of the sweeping nature of such a definition, exceptions were often made out of necessity, rather than from reason, in order to prevent obvious injustices. As a result of inadequacies of the common law definition, the California legislature enacted a statute narrowly defining an accomplice. See State v. Coffey, supra note 6.

[19]73 Cal. App. 2d 528, 166 P.2d 896 (1946).

[20]Head v. Commonwealth, 310 S.W.2d 285 (Ky. 1958). A person is guilty of the identical offense under Kentucky law, if the evidence showing participation in or connection with the same offense is sufficient to convict that person either as a principal or as an aider and abettor.

[21]Trent v. State, 15 Ala. App. 485, 73 So. 834 (1916); see also People v. Murphy, 101 N.Y. 126, 130, 4 N.E. 326 (1886) (dictum); State v. McCoy, 52 Ohio St. 157, 39 N.E. 316 (1894); Wells v. New Eng. Mut. L. Ins. Co., 191 Pa. 207, 43 Atl. 126 (1899), involving civil liability.

[22]Supra note 7.

[23]Id. at 907.