RUSHIN v. STATE.

No. 28447.

Court of Appeals of Georgia, Division No. 1.

Nov. 19, 1940.

1. Criminal law ⚷398(2), 419(1), 698(1)

The distinction between "hearsay" and "secondary evidence" is that hearsay has no probative force whatever, while secondary evidence, if admitted without objection, is nevertheless competent, for by allowing such evidence without objecting at the time it is sought to be introduced, a party "waives" his right to have the best evidence of such fact sought to be proved, and cannot subsequently insist that the court should withdraw such secondary evidence from the jury's consideration.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay", "Secondary Evidence" and "Waives".

2. Criminal law ⚷696(6)

Where it appeared from special ground of motion for new trial that motion to exclude evidence in question was made before court's charge to jury, motion was not subject to be overruled on ground that objection came too late, since, if the evidence was illegal, a motion could be made to exclude it at any time before the case was finally submitted to the jury.

3. Larceny ⚷49

In prosecution for larceny of a hog, testimony of a witness that a negro came to his home on certain date and sold him a hog, and gave as his last name a name which was the same as the last name of the defendant, was admissible, though witness could not identify defendant as the negro.

4. Criminal law ⚷674

If the admissibility of evidence is doubtful, the practice is to admit the evidence.

5. Larceny ⚷55

Evidence sustained conviction for simple larceny of a hog.

Syllabus by the Court.

1. Where it appears from the special ground of the motion for a new trial that the motion to exclude the evidence in question was made "before the court's charge to the jury", the motion is not subject to be overruled for the reason that the objection came too late, for if the evidence sought to be excluded is illegal (which includes hearsay), a motion may be made to exclude such evidence at any time before the case is finally submitted to the jury.

2. The evidence objected to was admissible because it tended to establish the identity of the defendant as the man who sold the stolen hog to the witness although not of itself sufficient for that purpose. The evidence in question was properly admitted.

3. The evidence authorized the verdict finding the defendant guilty of hog stealing and the judge did not err in overruling the motion for new trial.

Error from Superior Court, Sumter County; W. M. Harper, Judge.

Leonard Rushin, Jr., was convicted of simple larceny, and he brings error.

Judgment affirmed.

R. L. LeSueur, of Americus, for plaintiff in error.

E. L. Forrester, Sol. Gen., of Leesburg, for defendant in error.

MacINTYRE, Judge.

Leonard Rushin, Jr., was convicted of simple larceny (hog stealing). His motion for new trial as amended was overruled and he excepted.

[1, 2] 1. The special ground of the motion for a new trial is not subject to be overruled and a new trial refused for the reason, as urged by the State, that the objection to the testimony complained of came too late, objection not having been made at the time it was given. It appears that "counsel for movant made the following timely motion to the court, to exclude said testimony after quoted, said motion being in the following language; and *made after all evidence had been introduced and defendant's statement made and before the court's charge to the jury:* 'I move the court to exclude all testimony of Mr. Gleaton Johnson to the effect that a negro came to his place on this date and sold him a hog and told him his name was Rushin, but he would not attempt to identify the negro, but would not say this was the negro and would not say what his first name was. Unless there was an identification by Mr. Johnson as positively being this defendant, that statement that anybody else named Rushin told Mr. Johnson would

be hearsay testimony and should be excluded. I move that all conversations and transactions regarding the transactions between Mr. Johnson and this person that Mr. Johnson can not identify be excluded from the record.'" (Italics ours.) This recital is approved by the trial judge as being true and correct, that is, that the motion to exclude the evidence was made "before the court's charge to the jury." Our Supreme Court, in Blount v. Beall, 95 Ga. 182, 22 S.E. 52, held that a motion to rule out testimony *illegally* admitted even without objection is never too late until the cause is *finally* submitted to the jury. And in McCalman v. State, 121 Ga. 491, 49 S.E. 609, it was held that a motion to rule out illegal testimony is not too late if made before the case is *finally* submitted to the jury. There is a distinction between illegal testimony and secondary evidence. Hearsay testimony (illegal testimony) has no probative force whatsoever, and its only effect is to prejudice the minds of the jury against the party against whom such hearsay evidence is introduced. The only objection to secondary evidence is that it is received without first laying the preliminary foundation; such evidence stands on a different footing, and if admitted without objection it is nevertheless competent, for by allowing such evidence without objecting at the time it is sought to be introduced the party waives his right to have the best evidence of such fact sought to be proved, and can not subsequently insist that the court should withdraw such secondary evidence from the consideration of the jury. Patton v. Bank of LaFayette, 124 Ga. 965, 974(7), 53 S.E. 664, 5 L.R.A.,N.S., 592, 4 Ann.Cas. 639; Goodwyn v. Goodwyn, 20 Ga. 600, 622(10). We therefore conclude that the judge properly entertained the motion to exclude the evidence in question, it being alleged that the evidence was hearsay (illegal) and should have been excluded, but whether or not, after entertaining it, he properly overruled the motion and refused to exclude the evidence presents another question.

[3, 4] 2. The evidence sought to be excluded was admissible and the judge properly overruled the special ground of the motion for a new trial. It is true Gleaton Johnson (the person who bought the stolen hog and the witness whose testimony is complained of) did not know the negro from whom he bought the hog and who told him his name was Rushin. However, Arthur Boone, another witness for the State, testified that he saw the defendant sell the hog to Johnson, heard the defendant tell Johnson his name was Rushin and that he knew the defendant to be Leonard Rushin, Jr., the defendant on trial, having known him for 10 or 12 years before. This evidence which was alleged to be hearsay, although it was not itself sufficient for that purpose, was a relevant circumstance along with the testimony of other witnesses which tended to establish the issue (identity of the defendant as the man who sold Johnson the stolen hog) and was admissible. Columbus Omnibus Co. v. Semmes, 27 Ga. 283, 286; Lundy v. Tucker, 34 Ga.App. 721(1), 130 S.E. 924. Furthermore, if evidence is doubtful, the practice is to admit it. McClelland v. State, 27 Ga. App. 783, 784(3), 110 S.E. 245. The judge properly admitted this evidence.

[5] 3. The evidence amply authorized the verdict, and the judge did not err in overruling the motion for new trial.

Judgment affirmed.

BROYLES, C. J., and GARDNER, J., concur.

HULSEY v. CHAPMAN.

No. 28520.

Court of Appeals of Georgia, Division No. 1.

Nov. 20, 1940.

Logs and logging ⟹8(5)

In action for work performed in cutting lumber under contract, evidence *held* to authorize directed verdict for plaintiff.

Error from City Court of Hall County; Boyd Sloan, Judge.

Action by P. H. Chapman, administrator, against Luther Hulsey for work performed under contract. To review a judgment on directed verdict for plaintiff, defendant brings error.

Affirmed.

H. T. Oliver, of Gainesville, for plaintiff in error.