

47 A.D.2d 902, 366 N.Y.S.2d 205
(Cite as: 47 A.D.2d 902, 366 N.Y.S.2d 205)


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Supreme Court, Appellate Division, Second Department, New York.
The PEOPLE, etc., Respondent,
v.
Michael PAPA, Appellant.
April 3, 1975.

Defendant was convicted before the Supreme Court, New York County, Central Narcotics Part, of criminal possession of a dangerous drug in the first degree, and he appealed. The Supreme Court, Appellate Division, held that denial of defendant's renewed motions for a severance had effect of depriving him of a fair trial, and that defendant was also deprived of a fair trial by the statements, conduct and inexperience of prosecutor.

Judgment reversed, new trial ordered, and case as against defendant severed from that as against his codefendants.

West Headnotes

[1] Criminal Law 110 622.7(8)

110 Criminal Law

110XX Trial

110XX(A) Preliminary Proceedings

110k622 Joint or Separate Trials of Codefendants


110k622.7 Grounds for Severance or Joinder

110k622.7(8) k. Evidence Admissible Only Against Codefendant; Spillover or Compartmentalization. **Most Cited Cases**

(Formerly 110k622.2(8), 110k622(2))

In view of nature and quantity of evidence received upon defense of entrapment raised by codefendants, in view of failure to specify to jury exactly what evidence had been admitted solely on entrapment defense and as to what evidence or statements were admissible only as against a certain defendant or defendants, and in light of erroneous instruction

that codefendants conceded their guilt by raising defense of entrapment and initial misstatements that this instruction applied to defendant, denial of defendant's renewed motions for a severance had effect of depriving him of a fair trial.

[2] Criminal Law 110 427(2)

110 Criminal Law

110XVII Evidence

110XVII(O) Acts and Declarations of Conspirators and Codefendants

110k427 Preliminary Evidence as to Conspiracy or Common Purpose

110k427(2) k. Necessity in General.

Most Cited Cases

In absence of any charge of conspiracy, or instruction to jury that an extrajudicial statement by one defendant inculcating another was admissible against the other if the jury found the existence of a conspiracy as a matter of fact, the State could not justify admissibility of such statements as against all defendants on a conspiracy theory.

**206 Diller & Schmukler, New York City (Joel A . Brenner, New York City, of counsel), for appellant.

Nicholas Ferraro, Dist. Atty., Kew Gardens (Thomas A. Duffy, Jr., Cornelius J. O'Brien, Kew Gardens, Charles M. Newell, Wood Haven, Alan M. Snyder and Joseph R. Onorato, Kew Gardens, of counsel), for respondent.

Before COHALAN, Acting P.J., and CHRIST, BRENNAN, BENJAMIN and SHAPIRO, JJ.

MEMORANDUM BY THE COURT.

Appeal from a judgment of the Supreme Court, New York County, Central Narcotics Part, in a Queens County case, rendered October 1, 1973, convicting defendant of criminal possession of a dangerous drug in the first degree, upon a jury ver-

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dict, and imposing sentence.

Judgment reversed, on the law and as a matter of discretion in the interest of justice, new trial ordered and the case as against this defendant, Papa, is severed from that as against his codefendants.

Defendant Papa was indicted and tried, along with codefendants George Freed and Wayne Johnston, for the crimes of selling a dangerous drug in the first degree, possession of a dangerous drug in the first degree and possession of a dangerous drug in the fourth degree with intent to sell, all arising out of an alleged sale of about 18 ounces of cocaine to undercover police officers on July 3, 1972 in Queens County. After a jury trial, Papa was convicted of possession of a dangerous drug in the first degree, a class A felony (his codefendants were convicted of fourth degree possession only, a class D felony). Papa did not testify.

[1] The facts underlying this prosecution are fully set forth in [People v. Johnston and Freed](#), 47 A.D.2d 897, 366 N.Y.S.2d 198, **207 decided herewith. A mere perusal thereof suffices to establish that the trial court deprived Papa of a fair trial by denying his renewed motions for a severance.

The prejudice suffered by Papa in this joint trial does not stem from the mere fact that his codefendants raised the defense of entrapment, but rather from the nature and quantity of evidence received upon that defense and from the trial court's rulings or lack of limiting instructions to the jury. Thus, for example, Papa's counsel was repeatedly forced to take a position antagonistic to that of the codefendants' counsel, the former objecting to testimony of events and statements prior to July 3, 1972 (the date of the drug sale), and, frequently, to questions asked by the codefendants' counsel; and mounds upon mounds of evidence in this lengthy trial came in solely with relation to the entrapment defense, some of which was highly prejudicial to Papa (e.g., testimony as to alleged pimping, corruption, bribery, guns, the Bambrick affair and a few refer-

ences to other drug sales). To make matters worse, the trial court never specified to the jury exactly what evidence had been admitted solely on the entrapment defense and, in its main charge, totally failed to instruct the jury as to what evidence or statements were admissible only as against a certain defendant or defendants (it did subsequently give a limiting instruction on certain redacted tape recordings, but this came only upon the jury's request for a playing thereof). In a trial of this length, we cannot assume that the jury properly segregated the evidence on its own (see [People v. Rossi](#), 270 App.Div. 624, 63 N.Y.S.2d 4).

[2] Furthermore, the trial court's erroneous instruction on the issue of entrapment (i.e., that the codefendants conceded their guilt by raising this defense), coupled with its initial misstatements that this instruction applied to defendant Papa, helped to undercut Papa's absolute denial of the prosecution's charges; and, with respect to the admission into evidence of at least one statement by a codefendant inculcating Papa, a statement made by Freed while in police custody on July 5, 1972, there was a violation of Papa's rights as set down in [Bruton v. United States](#), 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476. We also note that the trial court ruled inconsistently, as respects limiting instructions, on a category of statements made by the codefendants at the time of the sale, inculcating Papa, and related upon the trial by the prosecution witnesses Spinelli and Caggiano; and that, in the absence of any charge of conspiracy, or instruction to the jury that an extrajudicial statement by one defendant inculcating another was admissible against the other if the jury found the existence *903 of a conspiracy as a matter of fact, the People may not now justify the admissibility of such statements as against all the defendants**208 on a conspiracy theory (see [People v. Zavarro](#), 26 N.Y.2d 846, 309 N.Y.S.2d 594, 258 N.E.2d 91).

Finally, we note that defendant Papa, too, was deprived of a fair trial by the statements, conduct and inexperience of the prosecutor, which issue is fully

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discussed in *People v. Johnston and Freed* (supra),
and we concur in the decision in that case.

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