

Memorandum 64-14

Subject: Study No. 34(L) - Uniform Rules of Evidence (Article VIII.
Hearsay Evidence)

Senator Grunsky has indicated that his subcommittee wishes to hold hearings on the tentative recommendation on Hearsay Evidence in March. Accordingly, we suggest that consideration be given to revisions of this tentative recommendation at the February meeting. This memorandum presents one problem for resolution by the Commission.

The following is an extract from the Minutes of the September 22-24, 1963, meeting:

The Commission approved a revision to its recommendation in regard to hearsay evidence. Under the revision, if a person who made a prior identification can no longer remember the person identified but is available and testifies that the prior identification was accurate, a witness who saw the prior identification may testify as to who was identified on the prior occasion. This revision will codify in part the decision in People v. Gould, 54 Cal.2d 621 (1960). The Gould case required corroborating evidence; but the requirement of corroboration will not be stated in the revised rules of evidence because the rules state only the conditions for the admission of evidence--they do not concern the question of what is sufficient evidence to support a verdict.

Exhibits I (pink sheets) and II (yellow sheets) present two alternative drafts of a proposed subdivision (1.1) of Rule 63 for Commission consideration. In connection with these drafts, the following policy matters should be considered:

1. Should evidence of an extrajudicial identification be restricted to an identification of the defendant or should it be extended to cover the identification of any person who participated in the crime for which the defendant is charged? The comments in Exhibits I and II give a reason why the broader hearsay exception should be provided.

2. Should evidence of an extrajudicial identification be admissible only when the evidence of the identification is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time as to the identity of the person who participated in the crime?

It should be noted that under subdivision (1)(b) evidence of a prior identification would be admissible as a prior inconsistent statement if the witness denies having made the identification or states that the person he identified in the extrajudicial identification is not the person who participated in the crime. Thus, no foundational showing by the witness that he made the identification and that it was accurate is required where the witness denies having made the identification or states that it was not accurate.

Subdivision (1.1)(Exhibit I) would admit evidence of an extrajudicial identification if the witness testifies that he made the identification and it was accurate.

Subdivisions (1)(b) and (1.1)(Exhibit I) would change the rule of the Gould case in the case where the witness does not recall whether he made the extrajudicial identification. It would seem that this would be a rare case and that the evidence of the extrajudicial identification would be as probative and as reliable in this case as in the case where the witness denies having made the extrajudicial identification or testifies that it was not accurate.

The staff believes that subdivision (1.1)(Exhibit II) is the better alternative. We see no justification for keeping out evidence of the extrajudicial identification merely because the witness does not recall

making it and admitting evidence of the extrajudicial identification when the witness denies having made it.

See the comments to the two alternatives set out in Exhibits I and II for the reasons (taken from the Gould case) for admitting evidence of the extrajudicial identification. These reasons seem applicable whether or not the witness remembers making the extrajudicial identification.

3. Both alternatives set out in Exhibits I and II are drafted to state that evidence of the extrajudicial identification "is admissible." This language is used on the assumption that the Commission will approve the scheme to be proposed by the staff for redrafting the Hearsay Evidence Article in the form of a statute. See Memorandum 64-13 for a discussion of the problem. We will consider this problem in connection with Memorandum 64-13 and will redraft the extrajudicial identification exception if the staff's suggestion on redrafting the Hearsay Evidence Article is not acceptable to the Commission.

4. If the alternative set out in Exhibit I is approved by the Commission, the question of whether the evidence should be admissible only if the witness no longer remembers the person he identified should be considered. The Supreme Court's justification for this exception to the hearsay rule suggests that this requirement should not be included in the hearsay exception. If the Commission desires to include it, the following language should be added at the end of subdivision (2) of the proposed subdivision: "and that he is not now able to identify such person."

Respectfully submitted,

John H. DeMouilly,
Executive Secretary

SUBDIVISION (1.1): PREVIOUS IDENTIFICATION BY TRIAL WITNESS

In a criminal action or proceeding, evidence of an identification made prior to the hearing by a person who is a witness at the hearing is admissible if:

(1) The witness identified the defendant or another as a person who participated in the crime and such identification would have been admissible if made by the witness while testifying at the hearing; and

(2) The evidence of the identification is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time as to the identity of the person who participated in the crime.

COMMENT

This subdivision codifies to a limited extent an exception to the hearsay rule that was recognized in People v. Gould, 54 Cal.2d 621, 354 P.2d 684, 7 Cal. Rptr. 273 (1960). See Study at 433-436. Although the Gould case involved the identification of the defendant, subdivision (1.1) makes the same principle applicable where the identification was of a person other than the defendant. Thus, the prosecution might use evidence admissible under this subdivision to help to establish the identity of a co-conspirator, and the defendant might use such evidence to create a reasonable doubt as to his guilt by showing that a person who observed the crime being committed identified another as the person who committed the crime.

Under existing law and under subdivision (1.1), evidence of an extrajudicial identification is admissible in a criminal case not only to corroborate an identification made at the trial but also as independent evidence of identity. The witness' earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in his mind. The failure of the witness to repeat the earlier identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extrajudicial identification tends to connect the person identified with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available for cross-examination. People v. Gould, supra, 54 Cal.2d at 626, 354 P.2d at 367, 7 Cal. Rptr. at 275.

Evidence of the extrajudicial identification is admissible under subdivision (1.1) only if the witness testifies that he made the identification and that it was a true reflection of his opinion at that time as to the identity of the person who participated in the crime. The Gould case did not impose this requirement and, apparently, evidence of the extrajudicial identification is admissible under the Gould case even where the witness denies making the identification or has forgotten whether he made it. If the witness denies having made the identification or claims that the identification was not accurate, evidence of the extrajudicial identification is not admissible under this subdivision but would be admissible as a prior inconsistent statement under subdivision (1)(b). Where the witness testifies that he does not remember making

the extrajudicial identification, evidence of such identification would not be admissible under subdivision (1)(b) or under subdivision (1.1). The evidence is excluded in this case because the witness cannot be effectively cross-examined concerning the identification.

Subdivision (1.1) does not determine what constitutes evidence sufficient to uphold a conviction. Thus, it has no effect on the holding in the Gould case that evidence of an extrajudicial identification of an accused will not sustain a conviction unless confirmed either by identification at the trial or by other evidence tending to connect the accused with the crime.

EXHIBIT II

SUBDIVISION (1.1): PREVIOUS IDENTIFICATION BY TRIAL WITNESS

In a criminal action or proceeding, evidence of an identification made prior to the hearing by a person who is a witness at the hearing is admissible if the witness identified the defendant or another as a person who participated in the crime and such identification would have been admissible if made by the witness while testifying at the hearing.

COMMENT

This subdivision codifies an exception to the hearsay rule that was recognized in People v. Gould, 54 Cal.2d 621, 354 P.2d 684, 7 Cal. Rptr. 273 (1960). See Study at 433-436. Although the Gould case involved the identification of the defendant, subdivision (1.1) makes the same principle applicable where the identification was of a person other than the defendant. Thus, the prosecution might use evidence admissible under this subdivision to help to establish the identity of a co-conspirator, and the defendant might use such evidence to create a reasonable doubt as to his guilt by showing that a person who observed the crime being committed identified another as the person who committed the crime.

Under existing law and under subdivision (1.1), evidence of an extra-judicial identification is admissible in a criminal case not only to corroborate an identification made at the trial but also as independent evidence of identity. The witness' earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in his mind. The failure of the

witness to repeat the earlier identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extrajudicial identification tends to connect the person identified with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available for cross-examination. People v. Gould, supra, 54 Cal.2d at 626, 354 P.2d at 867, 7 Cal. Rptr. at 275.

Subdivision (1.1) does not determine what constitutes evidence sufficient to uphold a conviction. Thus, it has no effect on the holding in the Gould case that evidence of an extrajudicial identification of an accused will not sustain a conviction unless confirmed either by identification at the trial or by other evidence tending to connect the accused with the crime.