EVIDENCE—CROSS EXAMINATION—PARTY'S RIGHT UNDER CODE § 38-1712 AND CODE § 38-1705

In *Smith v. State*,[1] in which the defendant was convicted of murder, the only eyewitness for the state, who was under indictment for the same crime, testified on direct examination that she had seen her husband kill the deceased. On cross-examination the defense sought to elicit from her testimony in the nature of admissions concerning improper relations, not only with the deceased, but with several other men, both before and after her marriage to the defendant. This testimony was apparently sought in order to establish her interest in the outcome of the case, and therefore the possibility that her testimony was not credible. Although admitting having had sexual relations with at least *one other man prior* to her marriage to the defendant, she refused to answer, on the grounds that it might tend to incriminate her,[2] defense counsel's questions as to whether she had had any such relations with the *deceased prior* to the marriage. The defense moved to have her entire testimony stricken from the record, apparently relying on the fact that his right of cross-examination had been violated.[3] The motion was denied.

The supreme court affirmed, stating that in determining whether the direct testimony of a witness, who invokes the privilege against self incrimination during cross-examination, may be used against the defendant, a distinction must be drawn between cases in which the assertation of the privilege merely precludes inquiry into collateral matters bearing only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. Where the privilege has been invoked as to purely collateral matters, the witness' direct testimony may be used against the defendant, but if the witness by invoking the privilege precludes inquiry into details of direct testimony, the witness' direct testimony should be stricken in whole or in part. Having drawn this distinction, the court went on to note that there had been no testimony on direct examination concerning the witness' relations with the victim or other men, nor was there anything brought out on cross-examination which would indicate that the

1. 225 Ga. 328, 168 S.E.2d 587 (1969).

2. U.S. CONST. amend. V "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

3. GA. CODE ANN. § 38-1705 (Rev. 1954). "The right of cross-examination, thorough and sifting, shall belong to every party as to the witnesses called against him."

questions propounded, or any possible answers thereto, would have been relevant to the issue being tried. Therefore, there was no requirement that the direct testimony be stricken.

GA. CODE ANN. § 38-1712 (Rev. 1954) requires that a party always be permitted to prove the state of a witness' feelings to the parties and also the relationships between a witness and a party,[4] presumably to show the witness' interest[5] in the case, and therefore, put in issue the credibility of the witness.[6] A previous Georgia case held that any evidence which would tend to destroy a witness' credibility by showing an intimate relationship between the witness and a defendant is relevant, material, and provable on cross-examination.[7] Also, evidence which would show a relationship between a witness and a deceased, such as is the case in *Smith*, has been held to be relevant and material, and exclusion of it by the court to be violative of the right[8] given under GA. CODE ANN. § 38-1712 (Rev. 1954).[9]

Applying these principles to *Smith*, it would appear that the defendant's right under § 38-1712 was violated, and further that the

4. GA. CODE ANN. § 38-1712 (Rev. 1954). "The state of the witness' feelings to the parties, and his relationships may always be proved for the consideration of the jury." As to the fact that the state of a witness' feelings to one other than a party can be proved, *see* Carlyle v. State, 85 Ga. App. 223, 68 S.E.2d 605 (1952). The wording of the statute also is significant. The phrase "may *always* be proved" seems to negate any situation in which the relationship cannot be proved without violating this section's right.

5. Atlantic Coast Line R.R. Co. v. Powell, 127 Ga. 805, 56 S.E. 1006 (1906). The defendant's counsel asked a witness for the plaintiff if he had advised her to bring suit. The witness was a doctor and was treating plaintiff for injures. The court held the question relevant to show his interest in the case.

6. It has been stated that this section impliedly lays down one method of impeachment in Georgia. *See* T. GREEN, JR., GEORGIA LAW OF EVIDENCE § 132 (1957).

7. Kimbrough v. State, 9 Ga. App. 301, 70 S.E. 1127 (1911). This case is authority for the fact that evidence of the type which was sought in *Smith* is relevant and can be offered on cross-examination, even though it relates to collateral matters not testified about on direct examination. Defendant was convicted of assault with the intent to murder. He set up justification as a defense and his stepdaughter testified to this effect. On cross-examination the Solicitor General brought out the fact of illicit relations between the witness and defendant and that the defendant was the father of his stepdaughter's child. The court said, "Ordinarily it would have been improper for the court to allow testimony going to show that the accused had been guilty of another offense than that for which he was then on trial. The general rule is that such testimony is not relevant; but any matter which goes to show the bias, prejudice, or interest of the witness . . . is relevant, and may be of such relevancy as to form an exception to the general rule just mentioned . . . . It was permissible, therefore, for the State's counsel to show by her what the relation was that existed between her and the accused . . . ."

8. That this statute gives to a party the *right* to so prove, *see* Walker v. State, 74 Ga. App. 48, 39 S.E.2d 75 (1946).

9. *See* Dennis v. State, 216 Ga. 206, 115 S.E.2d 527 (1960). This case would be authority for the fact that exclusion by the court of evidence of a nature similar to that sought in *Smith* is violative of GA. CODE ANN. § 38-1712 (Rev. 1954).

answers to the questions would have been relevant to the issue being tried, particularly since the witness was under indictment for the same crime. Since exclusion by the court of evidence tending to prove a relationship between a witness and the deceased was held to be violative of a party's right in *Dennis v. State*,[10] it seems inconsistent to say it was not violative of his right in *Smith* merely because accomplished by another *means*, i.e. the witness' refusal to answer. The means should be of little significance when the effect is the same: the exclusion of crucial evidence from consideration by the jury. Thus, although the witness in *Smith* could not be compelled to answer,[11] the court should have stricken the direct testimony as the only logical method of protecting the defendant's right.

Since it appears that defendant's right under GA. CODE ANN. § 38-1712 was violated, it is probable that his right to a thorough and sifting examination under GA. CODE ANN. § 38-1705[12] was also violated in that the right to prove the existence of such a relationship is a necessary element of the right to a thorough and sifting cross-examination.[13]

Even though the result in *Smith* is arguably inconsistent with previous cases, the rule[14] itself apparently can be considered consistent when applied to cases with different factual situations.[15] If the questions were irrelevant to the issue being tried, then the direct testimony should be allowed to stand.[16] But on the basis of the precedent

10. 216 Ga. 206, 115 S.E.2d 527 (1960).

11. U.S. CONST. amend. V.

12. GA. CODE ANN. § 38-1705 (Rev. 1954). "The right of cross-examination, thorough and sifting, shall belong to every party as to the witnesses called against him."

13. In Lightfoot v. Applewhite, 212 Ga. 186, 91 S.E.2d 37 (1956) the court held that the refusal to allow cross-examination of a witness as to his feelings, interest, and attitude was violative of both GA. CODE ANN. § 38-1712 (Rev. 1954) and GA. CODE ANN. § 38-1705 (Rev. 1954).

14. The court took its rule from federal cases where it had been stated and applied. *See* Coil v. U.S., 343 F.2d 573 (8th Cir. 1965); Smith v. U.S., 331 F.2d 265 (8th Cir. 1964); U.S. v. Toner, 173 F.2d 140 (3rd Cir. 1949); U.S. v. Cardillo, 316 F.2d 606 (2nd Cir. 1963).

15. In Granison v. State, 49 Ga. App. 216, 174 S.E.636 (1934), the witness testified that he was robbed by the defendant. On cross-examination counsel for the defense asked the witness if he were bonded, presumably to show his interest in the case which would in turn affect his credibility. The question was held to be irrelevant. In Pulliam v. State, 196 Ga. 782, 28 S.E.2d 139 (1943) the witness for the state had testified on direct examination that he had a policy of insurance with a certain company. This company was the same one with which the defendant had a policy on his children whom he had allegedly murdered. On cross-examination defense counsel asked him if he had paid his premium in order to show his interest in the case. This question was held to be irrelevant.

16. GA. CODE ANN. § 38-201 (Rev. 1954). "The evidence must relate to the quesions being tried by the jury and bear upon them either directly or indirectly. Irrelevant matter should be excluded." *See* Westbrook v. Saylors, 56 Ga. App. 587, 193 S.E. 371 (1937); State Housecraft, Inc. v. Jones, 96 Ga. App. 182, 99 S.E.2d 701 (1957).

beforementioned,[17] the testimony sought in *Smith* appears relevant, despite the contrary opinion taken by the court.[18] In *Smith* the defendant tried to prove a relationship in order to show the witness' interest. In similar cases,[19] the defendants sought to prove the same thing and for the same reason. Yet the court, in *Smith*, stated that such evidence as was being sought was irrelevant.

However, the effect of the *Smith* ruling should not be too sweeping, for there are many questions delving into relevant collateral matters which are not incriminating and which will therefore have to be answered.[20] But hereafter, the right given a party under GA. CODE ANN. § 38-1712 to prove the relationship of a witness to a party will not be considered abridged, notwithstanding the fact that the defendant cannot prove the relationship, if two criteria are met: (1) The witness refuses on cross-examination to answer questions which would prove the relationship and (2) it is determined that these questions relate to collateral matters not testified to on direct examination.

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17. Kimbrough v. State, *supra* note 7; Dennis v. State, *supra* note 9.

18. The court stated, "Furthermore, there was nothing brought out in this witness' testimony on direct or cross examination which would indicate that the questions propounded or any possible answers thereto would have been relevant to the issue being tried." Smith v. State, *supra* note 1 at 333, 168 S.E.2d at 591.

19. Kimbrough v. State, *supra* note 7; Dennis v. State, *supra* note 9.

20. For an interesting discussion of the privilege of the witness, the subject matter of the privilege, and how such privilege may be lost, *see* B. JAMES GEORGE, JR., CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 69-78 (1966).