

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 32

MERLIN G. SAGE,

Appellant.

20 Eagle Street
Albany, New York 12207
February 11, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

DREW R. DUBRIN, ESQ.
MONROE COUNTY PUBLIC DEFENDER'S OFFICE
Attorneys for Appellant
10 North Fitzhugh Street
Rochester, NY 14614

MATTHEW DUNHAM, ADA
MONROE COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
Ebenezer Watts Building
Suite 832
47 South Fitzhugh Street
Rochester, NY 14614

Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 32, People v. Merlin
2 G. Sage.

3 MR. DUBRIN: Two minutes for rebuttal,
4 please.

5 CHIEF JUDGE LIPPMAN: Two minutes, sure,
6 counselor; you got it.

7 MR. DUBRIN: May it please - - -

8 CHIEF JUDGE LIPPMAN: You have it.

9 MR. DUBRIN: Excuse me. May it please the
10 court. My name is Drew DuBrin. I'm with the Monroe
11 County Public Defender's Office, and I represent
12 Merlin Sage.

13 There is no dispute in this case that the
14 People's key witness, Andrew Mogavero, repeatedly
15 punched the victim in this case in the - - - in the
16 course of a beating that ultimately led to the
17 victim's death.

18 CHIEF JUDGE LIPPMAN: Is there any reading
19 where you think he's - - - he - - - that the issue as
20 to whether he's an accomplice - - - do you think,
21 under any reading of the record here, this guy is an
22 accomplice?

23 MR. DUBRIN: I think there's a disputed
24 fact as to the issue, and therefore, Mr. Sage was
25 entitled to have that - - -

1 CHIEF JUDGE LIPPMAN: So you think - - -

2 MR. DUBRIN: - - - issue submitted - - -

3 CHIEF JUDGE LIPPMAN: - - - you could read
4 it that you're not - - - that he's not an accomplice?

5 MR. DUBRIN: I - - - sure, because the
6 witness, Andrew Mogavero, claimed that he was not a
7 participant, claimed that he acted in self-defense.
8 But - - -

9 JUDGE GRAFFEO: So it's an accomplice
10 through a question of fact as opposed to - - -

11 MR. DUBRIN: Question of fact as to the - -
12 -

13 JUDGE GRAFFEO: - - - an accomplice as a
14 matter of law?

15 MR. DUBRIN: That's correct. And that - -
16 -

17 JUDGE PIGOTT: Assuming that to be true,
18 how would this have changed? If they'd had - - - if
19 they had charged that - - - I'm looking at harmless
20 error here.

21 MR. DUBRIN: Um-hum.

22 JUDGE PIGOTT: What do you think the trial
23 - - - how would the jury have looked at it
24 differently or how would the trial turn out
25 differently?

1 MR. DUBRIN: Well, had the - - - had the
2 issue been submitted as a - - - as a question of law,
3 the question of whether or not Mogavero was an
4 accomplice would have been decided already. The jury
5 would not have had to reach that question.

6 JUDGE PIGOTT: You think the judge should
7 have instructed that he was an accomplice as a matter
8 of law?

9 MR. DUBRIN: No, I don't think so. I think
10 it was - - -

11 JUDGE PIGOTT: As a matter of fact?

12 MR. DUBRIN: - - - proper ponder - - -

13 JUDGE PIGOTT: And that would have been a
14 jury question - - -

15 MR. DUBRIN: That would - - -

16 JUDGE PIGOTT: - - - was he - - - was he an
17 accomplice? Is that what they would ask?

18 MR. DUBRIN: That would be the question for
19 the jury to decide.

20 JUDGE SMITH: I think the - - - I think
21 Judge Pigott's question is how would it have affected
22 the jury's deliberation if they had heard the - - -

23 MR. DUBRIN: That's correct.

24 JUDGE SMITH: - - - the accomplice charge.

25 MR. DUBRIN: So the issue would have been

1 put to the jury. I think in these circumstances a
2 jury certainly could have reasonably concluded that
3 Mogavero was an accomplice for a variety of reasons.

4 JUDGE SMITH: But if he was - - -

5 JUDGE GRAFFEO: How does - - -

6 JUDGE SMITH: - - - wasn't there

7 corroboration anyway?

8 MR. DUBRIN: There was legally sufficient
9 corroboration, but as to whether or not a jury could
10 have reasonably concluded there wasn't, certainly a
11 jury in this case could have reasonably concluded
12 there wasn't corroboration. That is to say, there
13 wasn't evidence tending to connect Mr. Moga - - - Mr.
14 Sage to the offense to be - - -

15 CHIEF JUDGE LIPPMAN: The more likely he
16 was an accomplice the more corroboration you need?

17 MR. DUBRIN: The more likely that he's an
18 accomplice, the more difficult - - - it is less
19 likely that a jury would be satisfied that he was
20 telling the truth about whether or not Mr. Sage was
21 involved. So the stronger the proof that he was an
22 accomplice, obviously, the less likely the jury would
23 conclude that he was telling the truth, so - - -

24 JUDGE GRAFFEO: Is your posture that there
25 was no other corroboration other than Mr. Mogavero's

1 - - -

2 MR. DUBRIN: I'm saying the jury - - -

3 JUDGE GRAFFEO: - - - testimony?

4 MR. DUBRIN: - - - could reasonably
5 conclude that there was no other corroboration.

6 JUDGE GRAFFEO: I thought there was some
7 other scientific evidence. Wasn't there - - -

8 MR. DUBRIN: There was scientific evidence.

9 JUDGE GRAFFEO: - - - the mop - - - the
10 blood on the mop that connected them?

11 MR. DUBRIN: That's correct. And whether
12 or not there's corroboration would have been a jury
13 question. So if we're talking about harmless error
14 analysis, the question for this court is not whether
15 there was legally sufficient evidence of
16 corroboration, whether - - - but rather whether the
17 evidence of corroboration was so strong that the jury
18 couldn't have reasonably concluded that - - - that
19 there was no corroboration. And I believe this is -
20 - -

21 CHIEF JUDGE LIPPMAN: As opposed to the
22 evidence that he was an accomplice.

23 MR. DUBRIN: As opposed to the evidence - -
24 - that - - - you know, obviously that would be - - -

25 CHIEF JUDGE LIPPMAN: And one or the other

1 being more overwhelming is how you balance this out?

2 MR. DUBRIN: Well, first of all, I think
3 that a jury - - - there was an overwhelming evidence
4 that Mogavero was not an accomplice. I think we
5 moved onto the question of whether or not a
6 reasonably - - - reasonable jury could conclude that
7 he was an accomplice; surely they could have. All
8 right.

9 Then I think, ultimately, the question here
10 is whether or not there was overwhelming evidence of
11 corroboration. And this is not what a case of
12 overwhelming evidence of corroboration looks like.
13 There - - - there was no eyewitnesses who
14 independently implicated Mr. Sage in the - - - in the
15 beating.

16 JUDGE PIGOTT: Did Clarke testify?

17 MR. DUBRIN: Clarke was the codefendant.

18 JUDGE PIGOTT: Okay.

19 MR. DUBRIN: He was tried separately. He
20 didn't testify. The only eyewitness in this case was
21 the - - - the alleged accomplice in - - -

22 JUDGE GRAFFEO: Is your posture that if the
23 jury finds Mogavero to be an accomplice, then that
24 cancels out all of his testimony?

25 MR. DUBRIN: If - - -

1 JUDGE GRAFFEO: None of his testimony can
2 be viewed through a corroborating lens - - -

3 MR. DUBRIN: No - - -

4 JUDGE GRAFFEO: - - - by the jury?

5 MR. DUBRIN: - - - once the jury determines
6 that he's an accomplice, which I think they - - -
7 they likely would have done under this proof, once
8 they determine that he was a participant, then the
9 question for the jury is whether there was any other
10 evidence that tended to connect Mr. Sage to the crime
11 to - - -

12 JUDGE SMITH: How - - -

13 MR. DUBRIN: - - - to a degree - - -

14 JUDGE SMITH: How could there not be - - -

15 JUDGE GRAFFEO: I'm not - - -

16 JUDGE SMITH: - - - if his fingerprint was
17 on the mop?

18 MR. DUBRIN: Well, first of all, Mr. Sage
19 gave a statement - - - excuse me, Mr. Sage gave a
20 statement that - - - in which he gave an innocent
21 explanation for why that fingerprint might be on it.
22 He said that after - - - after the incident, he
23 grabbed a hold of the - - - the mop and poked at the
24 victim to check on his condition because he did not
25 want to get any blood - - - whether or not that was

1 truthful, or to what degree that issue ought - - -
2 that testimony should be credited, that was for the
3 jury to decide.

4 Furthermore, a jury could reasonably
5 conclude that Mogavero himself was the individual who
6 - - - who struck the victim with the mop. You know,
7 he had this curious testimony as to where he was
8 standing when he observed the mop beating. He - - -
9 in his own statement, he did not implicate Mr. Sage
10 at all - - - in his own written statement - - - at
11 all in - - - in the beating. Mogavero himself had
12 ample opportunity to commit the crime himself. So
13 certainly a jury could conclude, under these
14 circumstances, that - - - that there was no evidence
15 tending to connect Mr. Sage in the crime to a degree
16 that satisfied them that Mogavero was telling the
17 truth about that.

18 JUDGE ABDUS-SALAAM: Well, what about the
19 version that Mogavero told of your client's
20 involvement, urinating on the victim. And he didn't
21 deny that. In fact, I think he corroborated that,
22 that he actually urinated on the victim. So - - -

23 MR. DUBRIN: That's correct. But a jury
24 could reasonably conclude that as awful as that act
25 is, it took place after the beating had taken place

1 in the apartment, and concluded that that act did - -
2 - played no role in - - - in the - - - in the beating
3 death. As a matter of fact, Mr. Mogavero, in his
4 written statement, said that's all Mr. Sage did
5 during the incident, that he, after the fact,
6 urinated on the victim's body. And as despicable as
7 it is, certainly it was a question for the jury
8 whether or not that was evidence that tended to
9 corroborate, tended to connect Mr. Sage in a way that
10 would, you know, lend - - -

11 JUDGE SMITH: It's not murder, is what
12 you're saying.

13 MR. DUBRIN: Pardon?

14 JUDGE SMITH: It may be disgusting, but
15 it's not murder.

16 MR. DUBRIN: Or any crime.

17 JUDGE SMITH: Or - - -

18 MR. DUBRIN: That's correct.

19 JUDGE SMITH: - - - participation in a
20 murder.

21 MR. DUBRIN: And you know, we've moved on
22 to the question of harmless error. I still stand by
23 a position that - - - that this issue - - - there's
24 no reason to treat a failure to charge accomplice as
25 a matter of fact any differently than a failure to

1 charge accomplice as a matter of law in terms of
2 harmless error analysis. I don't believe that this
3 error is amenable to harmless error analysis. It
4 would be utter speculation to conclude that the jury
5 would have assessed testimony, assessed credibility,
6 drawn inferences in a way that we necessarily know
7 that the jury can - - -

8 JUDGE SMITH: Is it part of your argument
9 that it's - - - if the guy might have been an
10 accomplice, it's important for the jury to hear the
11 charge that says the law views an accomplice's
12 testimony with great caution?

13 MR. DUBRIN: I think it's critically
14 important, you know. A matter of fact, had the jury
15 been instructed that - - - that way, it would have
16 importantly - - - critically important here to
17 counter the prosecutor's argument to the jury that
18 never mind the fact that - - - that Mogavero was - -
19 - was - - - might have been involved, it's all a red
20 herring. So I think that's another harmful aspect of
21 it.

22 CHIEF JUDGE LIPPMAN: Okay, counselor.

23 MR. DUBRIN: Thank you.

24 CHIEF JUDGE LIPPMAN: Thanks.

25 MR. DUNHAM: Good afternoon. May it please

1 the court. Matthew Dunham, appearing on behalf of
2 the People.

3 CHIEF JUDGE LIPPMAN: So counsel, was he an
4 accomplice at law?

5 MR. DUNHAM: I think he certainly was not
6 an accomplice at law, Judge.

7 JUDGE PIGOTT: How is he not an accomplice
8 - - - how is that not a fact question for a jury that
9 - - - I mean, he's there, he admits to punching the -
10 - - the - - - the victim. He gives all his - - - the
11 story. How do you reach the conclusion that he's not
12 an accomplice at all?

13 MR. DUNHAM: Well, I think it's - - - his
14 actions have to be viewed in context. And it really
15 begins, in this case, with how this evening started.
16 And Mr. Mogavero had - - - he didn't know these
17 gentlemen. This was the first night he was hanging
18 out with them. Clarke and Sage - - -

19 CHIEF JUDGE LIPPMAN: But there's not
20 enough evidence that they might think he's an
21 accomplice?

22 MR. DUNHAM: Not a reasonable view of the
23 evidence.

24 CHIEF JUDGE LIPPMAN: No reasonable view
25 could find this guy an accomplice?

1 MR. DUNHAM: I don't believe so, Judge.

2 JUDGE PIGOTT: Didn't he punch him?

3 MR. DUNHAM: He did punch him. But the - -

4 -

5 JUDGE PIGOTT: That doesn't make him an
6 accomplice?

7 MR. DUNHAM: Not under the circumstances
8 under which he punched him.

9 JUDGE GRAFFEO: But didn't he help bring
10 the body to the front porch of the next-door
11 building?

12 MR. DUNHAM: He did, yes.

13 JUDGE PIGOTT: When does he become an
14 accomplice? When does punching and dragging, and
15 testifying as to everything that went on at the place
16 get you that step over to being an accomplice?

17 MR. DUNHAM: I think in this case the
18 turning point would have been if he participated in
19 the beating once the victim was brought to the floor,
20 once this - - - this beating - - -

21 JUDGE PIGOTT: But how do you decide that?
22 I mean, so you've got a - - - you've got a judge who
23 says I've decided that even though he beat him up,
24 even though he - - - somebody was holding him and he
25 was hitting him with a stick, until the guy - - - the

1 body hit the floor, he's not an accomplice.

2 MR. DUNHAM: Well, I think the body hitting
3 the floor, in this case, specifically, that's - - -
4 it's significant in this case. I think the
5 difference is when does this - - - this - - - the
6 fight turn from a drunken scuffle into a deadly
7 encounter.

8 CHIEF JUDGE LIPPMAN: Yeah, but I think
9 what we're all saying is it's - - - common sense
10 would tell you he might be an accomplice. I mean, it
11 almost defies reality to say he can't be an
12 accomplice.

13 JUDGE SMITH: Didn't - - - what about the
14 statement that - - - in Sage's statement, he has
15 Clarke saying to Sage and Mogavero, you guys better
16 hide out; that's what I'm going to do. That doesn't
17 sound like the three of them committed the same crime
18 together?

19 MR. DUNHAM: Well, it does, to an extent.
20 But I don't think - - - ultimately, even Moga - - -
21 I'm sorry, even Sage himself says that Mogavero had
22 nothing to do with this. In his statement to the
23 police, which comes in at trial, he says Mogavero had
24 nothing to do with this.

25 JUDGE SMITH: Well, Sage wanted to say it

1 was all Clarke.

2 MR. DUNHAM: He did, which is interesting,
3 because I think that it lends credibility to
4 Mogavero's testimony that he was not involved.

5 JUDGE SMITH: Okay. But isn't - - - isn't
6 that something a jury should be figuring out, what
7 lends credibility and what doesn't?

8 MR. DUNHAM: Well, in the sense that - - -
9 that you're always better safe than sorry with jury
10 instructions, yes, but - - -

11 JUDGE PIGOTT: No, but I got the impression
12 - - - I apologize for cutting you off, but that - - -
13 and maybe this is your argument, that if - - - if
14 we're talking about manslaughter, the issue is
15 whether he's an accomplice to manslaughter.

16 MR. DUNHAM: Yes.

17 JUDGE PIGOTT: Well - - - so if the guy had
18 been charged with assault third, you'd say he was - -
19 - then he's an accomplice, but because it's
20 manslaughter he's not?

21 MR. DUNHAM: I think that would probably be
22 correct. If he was charged with - - -

23 JUDGE PIGOTT: Are we supposed to be doing
24 that, when it comes to - - - comes to telling juries
25 what they ought to be looking at and how they ought

1 to be looking at facts?

2 MR. DUNHAM: Well, I think if you use CPL
3 60.22 as your guideline, and say, okay, the witness
4 can be reasonably considered to have participated in
5 the same conduct that constituted the offense
6 charged. In this case, the offense charged,
7 intentional murder, ultimately a manslaughter. So
8 what conduct constituted the offense charged? And I
9 submit that the conduct that constituted that offense
10 was the severe savage beating that took place.

11 JUDGE PIGOTT: So if the accomplice here -
12 - - if - - - is - - - said, well, I - - - you know, I
13 didn't mean - - - you know, all I wanted to do was
14 inflict serious bodily harm on him. And if the - - -
15 if the defendant is charged with murder, then you'd
16 say he's not an accomplice with respect to the murder
17 because all he - - - all his mens rea was was
18 manslaughter?

19 MR. DUNHAM: No, I think he would be. I
20 don't think the mens rea would be the - - - the key
21 factor. I think it's the actions are the key factor.
22 And if he says I started beating this person up; I
23 just thought we were going to really beat - - - you
24 know, beat him badly; I didn't think he'd die, well,
25 he participated in the facts that constituted the

1 offense that ultimately was charged.

2 JUDGE PIGOTT: Didn't that happen here?

3 MR. DUNHAM: It did not happen here because
4 the - - - what constituted the death, and ultimately
5 the murder charge, was the severe beating, was the -
6 - - the stomping.

7 JUDGE PIGOTT: If - - - if that's to be
8 believed. I mean, if Sage had gotten on the stand
9 and said it was all - - - it was all - - - I forget
10 who we're talking about here - - - then who do you
11 believe? Then who's the accomplice? I mean, why are
12 we trying to tease out actions in terms of the crime?
13 Why not just say he was there, he was participating,
14 he's an accomplice?

15 MR. DUNHAM: Well, I just think - - - I
16 think that, as I was going to say earlier, that's the
17 safer - - - I think it's the safer way to go. But is
18 it the legally required way to go? And I would
19 submit that it's not.

20 JUDGE ABDUS-SALAAM: Assuming that it is -
21 - -

22 CHIEF JUDGE LIPPMAN: If he's - - - go
23 ahead.

24 JUDGE ABDUS-SALAAM: Assuming that it is
25 the way to go, what's your response to your

1 adversary's arguments about no harmless error here?

2 MR. DUNHAM: My argument there is that we
3 have to - - - we have to separate the failure to give
4 the accomplice as a question of fact charge from the
5 accomplice as a matter of law. In the cases in which
6 the witness is an accomplice as a matter of law, the
7 court has found that there cannot be harmless error
8 analysis and that's - - - and I would suspect that
9 it's different because in that case - - - in those
10 cases we know the jury has relied upon an accomplice.

11 JUDGE SMITH: Well, suppose there can be
12 harmless error - - -

13 JUDGE GRAFFEO: That's a per se reversal,
14 right, where there's an accomplice as a matter of
15 law?

16 MR. DUNHAM: That's correct. That's how
17 this court has ruled that - - -

18 JUDGE GRAFFEO: So why is - - - why is this
19 area different? I know the four Appellate Divisions
20 have found it's different. What's the rationale?

21 MR. DUNHAM: I think the rationale is that
22 in these kind of cases the court's well equipped and
23 able to analyze several layers of review, more layers
24 than are available in the accomplice as a matter of
25 law situation. And by that I mean, the first step,

1 what's the evidence that this person is an
2 accomplice? And if that evidence is tenuous - - -
3 and in this case I say it's not even there, and if
4 it's there it's tenuous. Secondly, was the witness -
5 - - did the witness receive anything for his
6 testimony? In this case, Mr. Mogavero received
7 nothing. He was never charged. And the - - - the
8 main reason that accomplice testimony is viewed
9 skeptically is because of the court's concern that
10 juries will rely on - - -

11 JUDGE PIGOTT: Maybe that's what he was
12 given was that he was never charged.

13 MR. DUNHAM: Well, there was no testimony,
14 nothing in the record to that effect.

15 JUDGE PIGOTT: Well, that's because you've
16 got it all. I mean, the People have - - - you have
17 all of that information. And to go from not an
18 accomplice as a matter of law, which could have been
19 close in this case too, I think, but to say not an
20 accomplice at all, and to say the reason is because
21 he was never offered anything, when he walked away
22 from this thing where, you know, somebody died, it's
23 hard to - - - hard to fathom that.

24 JUDGE SMITH: Suppose, though, that - - -

25 Well, I'm sorry; do you have an answer for

1 Judge Pigott or - - -

2 MR. DUNHAM: Well, I think - - -

3 JUDGE PIGOTT: It was more of an editorial
4 comment. You can listen - - -

5 MR. DUNHAM: Okay.

6 JUDGE PIGOTT: - - - to Judge Smith.

7 JUDGE SMITH: Suppose - - - suppose you're
8 right in saying that it's not automatic reversal and
9 that harmless error analysis does apply, do the
10 analysis for us. How is this error harmless?

11 MR. DUNHAM: Okay. So I would take it a
12 couple steps here. First, very tenuous evidence that
13 he's an accomplice. And I won't go back through that
14 - - - that evidence.

15 CHIEF JUDGE LIPPMAN: Yeah, but talk about
16 the corroboration. What - - -

17 MR. DUNHAM: Corrobor - - -

18 CHIEF JUDGE LIPPMAN: What's there? What
19 do you have on the defendant?

20 MR. DUNHAM: Okay. So our best
21 corroborative evidence is the - - - is the mop
22 handle. The victim's DNA, his blood is on the - - -
23 on the end of the mop. The mop is shattered; it's
24 mangled. The defendant's fingerprints are on the mop
25 handle.

1 CHIEF JUDGE LIPPMAN: Yeah, but is that
2 enough - - - is the fingerprints and the fact that he
3 was there enough, in and of itself?

4 MR. DUNHAM: Well, I think we also have the
5 evidence that's basically taken from the victim's
6 body: the footprint on his forehead, the - - - the
7 blood spatters inside the apartment. And - - - and
8 what's needed for corroboration is - - - is not the
9 best evidence; it's not overwhelming evidence in the
10 sense of original - - -

11 JUDGE SMITH: Well, it does - - - but it
12 does have to be evidence that would justify saying
13 that Sage rather than Clarke did it.

14 MR. DUNHAM: Correct. And I think that's
15 - - - that's why the mop handle really is - - - is
16 the best corro - - -

17 JUDGE SMITH: Well, so the fingerprint is
18 your best corroboration, isn't it?

19 MR. DUNHAM: Correct. The fingerprint on
20 the mop handle, combined with the victim's blood in
21 the - - -

22 JUDGE SMITH: But what's wrong with his
23 argument which says, yeah, okay, maybe you've got
24 corroboration, but maybe this jury doesn't see it
25 that way? Maybe the jury isn't shocked that a guy's

1 fingerprint is on a mop handle in his own house. Or
2 maybe it believes the story that it was - - - well, I
3 mean, I'm not sure I believe it, but maybe it
4 believes the story that he was poking him to see how
5 he was doing.

6 MR. DUNHAM: Well, anything's possible, in
7 that sense. But I think what we have to - - - we
8 have to do is we have to look at this and say is that
9 a reasonable view of the evidence. And I submit that
10 it's not in this case. It's - - -

11 JUDGE SMITH: Well, no, the test for
12 harmless error isn't reasonable view; it's
13 overwhelming, isn't it?

14 MR. DUNHAM: It is. I think in this - - -
15 this is an interesting situation because it's not a
16 traditional harmless error analysis. It's not
17 overwhelming evidence of guilt so much as it's
18 overwhelming corroborative evidence. And I would
19 submit that drawing the inferences - - - the
20 inference that this person - - - the defendant just
21 poked the - - - this individual with a mop handle is
22 just completely unreasonable.

23 JUDGE GRAFFEO: What about the boot? Was
24 there anything, scientific evidence about the boot
25 print or on the - - - on the deceased body?

1 MR. DUNHAM: It never came - - -

2 JUDGE GRAFFEO: Was that ever linked to
3 anybody?

4 MR. DUNHAM: No, it was never linked up,
5 and I think the problem was that the boot had been
6 burned, and - - - well, I'd be speculating. It
7 wasn't in the record, and I believe it was probably
8 burned to a point where it couldn't be matched up
9 with the - - - the footprint on the victim's head.

10 JUDGE PIGOTT: Mr. Dunham, what's the - - -
11 if the Appellate Division had said we find that this
12 person was an accomplice as a matter of law,
13 automatically it gets reversed. If they find that it
14 was an accomplice as a matter of fact, it does not.
15 What's the logic of that?

16 MR. DUNHAM: I think that - - - I think
17 that goes back to my analysis that you're able to - -
18 - in a situation where accomplice as a matter of fact
19 has not been charged, we can look at what proof was
20 there - - - was this person really an accomplice? Is
21 there significant proof that he's an accomplice? If
22 that proof is tenuous, as I suggest it is, and then
23 we look at fact that he received nothing for his
24 testimony, which is the - - - the main reason we view
25 that testimony skeptically, then we look at the

1 overwhelming corroborative evidence; I think those -
2 - -

3 JUDGE PIGOTT: But if we found - - - not
4 that we're going to, but I mean, if we found that he
5 was an accomplice as a matter of law, everything else
6 falls away.

7 MR. DUNHAM: Right.

8 JUDGE PIGOTT: It goes back. Why is that -
9 - - why is that such a big deal? I'm just trying to
10 figure out why - - - it's the same person who is
11 going to give the same testimony who is charged to
12 the jury to be an accomplice, and the only difference
13 is that we'd say to the jury, you can decide whether
14 he's an accomplice or not on the fact issue. And
15 because we let them have that - - - that option, you
16 say harmless error now comes in. Is that the way you
17 view the way this law is right now?

18 MR. DUNHAM: I think that's how it works,
19 and I think the - - - with accomplice as a matter of
20 law, we know the jury is relying on accomplice
21 testimony.

22 JUDGE PIGOTT: Must.

23 MR. DUNHAM: They - - - that must be read.
24 And I think if we don't read it, then they're relying
25 on that - - - that accomplice testimony, and they

1 have not been properly instructed, and that's the
2 problem. But I don't think that - - - I think the -
3 - -

4 JUDGE SMITH: But are you also saying that
5 the automatic reversal rule is a kind of a harsh rule
6 and not such a good idea so don't extend it?

7 MR. DUNHAM: I am, and in fact, if we could
8 - - - in fact, if we could repeal that and not have
9 the harmless - - - and allow harmless error analysis
10 in the failure to read accomplice as a matter of law
11 - - -

12 JUDGE SMITH: You would not be distressed
13 if we overruled those cases?

14 MR. DUNHAM: Certainly not.

15 CHIEF JUDGE LIPPMAN: Okay. Thanks,
16 counselor.

17 MR. DUNHAM: Thank you.

18 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

19 MR. DUBRIN: All right. To answer your
20 question, Judge Pigott, there's no logic in
21 distinguishing between the - - - the two errors.
22 They both present essentially the same risk that - -
23 - risk of a - - - of an illegal - - -

24 JUDGE SMITH: Is there any - - -

25 MR. DUNHAM: - - - a conviction based upon

1 - - -

2 JUDGE SMITH: Is there any logic in the
3 original rule to begin with? Is there any logic in
4 saying automatic reversal for an error in giving an
5 accomplice charge and not for a million other errors?

6 MR. DUBRIN: Yes, there is; there is a
7 reason to distinguish the two. In a case like this,
8 the question - - - the quest - - - there is no known
9 result reached by the jury as to the question of
10 corroboration because that issue was never presented
11 to the jury. So the fact that there's - - - we don't
12 know whether or not the jury reached the question of
13 corroboration. We don't - - - therefore, the
14 appellate court has not basis to assess - - -

15 JUDGE SMITH: Yeah, but - - -

16 MR. DUBRIN: - - - which ev - - -

17 JUDGE SMITH: - - - suppose - - - suppose a
18 case where you had twenty eyewitnesses and one of
19 them is an accomplice, it looks from - - - it looks
20 from Diaz, I think, that that's an automatic
21 reversal. Does that make any sense?

22 MR. DUBRIN: That - - - that is correct.
23 That is correct. And the rationale for Diaz - - -
24 and by the way, that's the way the Fourth Department
25 had originally interpreted Diaz in its application to

1 the question of accomplice as a matter of fact. But
2 yes, the rationale being since there's no known
3 result reached by the jury as to a corroboration,
4 it's just speculation on the appellate court's - - -
5 by the appellate court as to which evidence of
6 corroboration the jury might - - -

7 JUDGE SMITH: Well, see, I don't really see
8 how that's different from any other harmless error -
9 - -

10 MR. DUBRIN: Well - - -

11 JUDGE SMITH: - - - case. You don't - - -
12 you never know whether the jury relied on the
13 improperly admitted evidence. But when there's a ton
14 of other evidence, you don't care.

15 MR. DUBRIN: In a typical harmless error
16 case, you're evaluating an error and trying to assess
17 it as to a known result reached by the jury; that
18 known result being a finding of guilt. The finding
19 of guilt gives the appellate court a basis to assess
20 which evidence of guilt the jury actually credited.

21 But here, the question of corroboration was
22 never submitted to the jury, nor was the issue of a -
23 - - you know, participation. And therefore, there's
24 not a basis for this appellate - - - for the
25 appellate court to assess which evidence of

1 corroboration and which evidence of participation the
2 juror - - - jurors might have ultimately credited.
3 So - - - so presented here, it's essentially the same
4 risk as the situation where there is a failure to
5 charge an accomplice as a matter of law - - -

6 CHIEF JUDGE LIPPMAN: Okay, counselor.

7 MR. DUBRIN: - - - the risk that a
8 defendant might be convicted based upon
9 uncorroborated - - -

10 CHIEF JUDGE LIPPMAN: Thanks.

11 MR. DUBRIN: - - - testimony - - -

12 CHIEF JUDGE LIPPMAN: Thank you.

13 MR. DUBRIN: - - - as an accomplice. Thank
14 you.

15 (Court is adjourned)

16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of The People of the State of New York v. Merlin G. Sage, No. 32, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

AAERT Certified Electronic Transcriber (CET**D-492)

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: February 16, 2014