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Erratum

On page 293, footnote 30 which read: 189 N.E. 2d 641 (Ohio Ct. App. 1963) should have read: 189 N.E. 2d 641 (Ohio Ct. App. 1963), *rev'd*, 176 Ohio St. 362, 199 N.E. 2d 742 (Sup. Ct. 1964).

CRIMINAL PROCEDURE

FINDING OF GUILT BEYOND A REASONABLE DOUBT DOES NOT REQUIRE A UNANIMOUS VERDICT

The defendants were convicted of petit larceny by the Criminal Court of the City of New York. That court, a three-judge panel, determined the factual issues without a jury. Two of the judges voted for conviction but the third was not convinced of guilt beyond a reasonable doubt and voted for acquittal. The Appellate Term, Second Department, affirmed the conviction unanimously without opinion. On appeal by permission, the Court of Appeals unanimously affirming, *held*, the rule that the prosecution must prove a defendant's guilt beyond a reasonable doubt can be satisfied without a unanimous decision of a three-judge bench. *People v. DeCillis*, 14 N.Y.2d 203, 250 N.Y.S.2d 288 (1964).

In light of recent decisions involving the due process clause of the fourteenth amendment, one might contend that the right to trial by jury is due to be extended to all criminal prosecutions by the states.[1] However, the case law to date indicates that the right to trial by jury as guaranteed by the sixth amendment of the United States Constitution does not apply to prosecutions by the states.[2] The New York Constitution guarantees the right to trial by jury in criminal matters.[3] However, it provides that the legislature may authorize misdemeanors and lesser offenses to be tried without a jury.[4] In 1962, the legislature enacted the New York City Criminal Court Act.[5] The Act abolished the Court of Special Sessions whose history dates back to 1744 with enactments of the colonial legislature. The first Court of Special Sessions was established to try crimes under the degree of grand larceny when the accused was unable to produce bail so as to await the regular court session, and where imprisonment would be unfair to him or to the economic well-being of his family.[6] It was a jury-less court with three members and agreement of two of them was sufficient to convict.[7] The state of New York continued the court in 1787, maintaining the same majority requirement for conviction.[8] Its jurisdiction was limited to petit larceny and obtaining goods (petit larceny value) by false pretenses.[9] The jurisdiction of the Court varied through the years, but basically the procedural requirement of two votes for conviction was maintained.[10] The 1962 enactment grants the New York City Criminal Court jurisdic-

1. See Mapp v. Ohio, 367 U.S. 643, 646, 657 (1961); see Gideon v. Wainwright, 372 U.S. 335, 340 (1963); see Ker v. California, 374 U.S. 23, 32 (1963).
2. Maxwell v. Dow, 176 U.S. 581, 595, 604 (1900); Palko v. Connecticut, 302 U.S. 319, 324 (1937); Fay v. New York, 332 U.S. 261, 288 (1947).
3. N.Y. Const. art. I, § 2.
4. N.Y. Const. art. VI, § 18.
5. N.Y. Sess. Laws 1962, ch. 697.
6. 3 Colonial Laws of New York, ch. 767 (1744).
7. *Ibid.*
8. N.Y. Sess. Laws 1787, ch. 65.
9. *Ibid.*
10. N.Y. Sess. Laws 1801, ch. 70, § 9; N.Y. Revised Laws 1813, ch. 85, § 13; N.Y.

tion over non-indictable misdemeanors (except libel) and lesser offenses.[11] It provides that the accused is not entitled to a trial by jury.[12] Charges are to be heard before a judge, but in cases of misdemeanors the accused may be tried before a judge or a three-judge panel.[13] The accused or the prosecution may exercise this option.[14] The Act also provides that in matters heard before the three judges, ". . . any determination, order or judgment of two of them shall be the determination, order or judgment of the court . . ."[15] Also significant is the provision that all sections of the Code of Criminal Procedure consistent with the act shall apply.[16] The doctrine of reasonable doubt is expressed in the Code.[17]

The doctrine of reasonable doubt provides that unless the accused is found guilty beyond a reasonable doubt he must be acquitted. The term "beyond a reasonable doubt" has met with many attempts at definition. They have ranged from the elaborate[18] to the simple.[19] One court felt it was a term which needed no definition.[20] In any event, one may safely say that the prosecution must present more than a mere preponderance of evidence. On the other hand, the jurors need not be convinced to an absolute certainty.[21] The origin of the reasonable doubt rule is unclear, but there is support for the contention that it arose late in the eighteenth century,[22] and that prior to that time the expressions "clear belief," or clear "impression" set the standard.[23] To reach a verdict of guilty, jurors in New York must not only find guilt beyond a reasonable doubt,[24] but must do so unanimously.[25] The origin of the unanimity rule for juries is traceable to the early usage of the jury in England.[26] The Supreme Court of the United States has said that unanimity was an essential characteristic of the common law jury as adopted by the Federal Constitution.[27] On the other hand at least four states, Idaho, Montana, Oklahoma and Louisiana, provide for a

Sess. Laws 1895, ch. 601, § 13; N.Y. Sess. Laws 1897, ch. 378, § 1405; N.Y. Sess. Laws 1910, ch. 659, § 34.

11. N.Y. City Crim. Ct. Act, § 31.
12. N.Y. City Crim. Ct. Act, § 40.
13. *Ibid.*
14. N.Y. City Crim. Ct. Act, § 40(2).
15. N.Y. City Crim. Ct. Act, § 42(4).
16. N.Y. City Crim. Ct. Act, § 41.
17. N.Y. Code Crim. Proc. § 389.
18. In Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850), the court defined reasonable doubt as ". . . that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."
19. In People v. Orr, 243 App. Div. 394, 395, 277 N.Y. Supp. 294, 295 (1st Dep't 1935), the court stated that to establish guilt the state must produce ". . . evidence which excluded every other reasonable hypothesis, except that of guilt. . . ."
20. People v. Schuele, 326 Ill. 366, 372, 157 N.E. 215, 217 (1927).
21. State v. Bell, 262 Minn. 545, 548, 115 N.W.2d 468, 471 (1962).
22. 9 Wigmore, Evidence § 2497 (3d ed. 1940).
23. May, *Some Rules of Evidence*, 10 Am. L. Rev. 642, 657 (1876).
24. N.Y. Code Crim. Proc. § 389.
25. N.Y. Code Crim. Proc. § 428; People v. Light, 285 App. Div. 496, 497, 138 N.Y.S.2d 262, 264 (4th Dep't 1955).
26. 3 Blackstone, Commentaries 379 (Lewis Ed. 1902).
27. American Publishing Co. v. Fisher, 166 U.S. 464, 468 (1897).

less than unanimous jury verdict for conviction in criminal cases.[28] Is unanimity necessary to a finding of guilt beyond a reasonable doubt? The four states mentioned above apparently think not since guilt beyond a reasonable doubt is required by each of them in criminal convictions.[29] However, the Court of Appeals of Ohio has taken the opposite position. In *State v. Robbins*,[30] where the court reversed a conviction by a non-unanimous three-judge bench, it stated ". . . the difference of opinion as to guilt among the three trial judges . . . not only suggests but proves more than one conclusion possible."[31] The court reasoned that the dissent of one of three judges, who are all reasonable men, in itself raises a reasonable doubt as to the defendant's guilt.[32] The issue was first presented in New York in *People v. Scifo*.[33] That court, citing the *Robbins* case felt unanimity was required to find guilt beyond a reasonable doubt and expressed doubt as to the constitutionality of the majority provision. However, being the court of original jurisdiction, it was reluctant to declare the provision unconstitutional and left that determination for a higher court.[34]

The New York Court of Appeals, in affirming the conviction in the instant case, did not reach the constitutional issue raised in the *Scifo* case but, took the position that ". . . the reasonable doubt rule is a concept separate and distinct from, and not interwoven with, the requirement of unanimity . . . (It) is a rule of evidence which deals only with the quantum of proof necessary to convict; it has nothing to do with the procedure by which the determination is made. . . ."[35] The Court refers to *Fournier v. Gonzalez*[36] where the defendant had been convicted of murder by a jury verdict of ten to two. He chose the jury, where nine of the twelve agreeing could convict, rather than a judge.[37] His writ of habeas corpus, having been denied by the Supreme Court of Puerto Rico,[38] he appealed to the federal Court of Appeals which affirmed the denial, holding that a less than unanimous verdict could satisfy the standard of guilt beyond a reasonable doubt. That court cited only one case to support its thinking. The case was *Maxwell v. Dow* where the Supreme Court of the United States by way of dictum said the states were free to decide whether grand jury indictment, trial by jury, or unanimous verdict will be required in non-capital cases.[39] The

28. Idaho Code Crim. Proc. tit. 19, § 1902 (1947), Mont. Rev. Code, tit. 94, § 7002 (1947), Okla. Const. art. II, § 19 (applicable to crimes and offenses less than felony); La. Stat. Ann., Rev. Stat. tit. 15, § 338 (1950) (applicable to noncapital felonies and crimes "necessarily punishable by imprisonment at hard labor").

29. Idaho Code Crim. Proc. tit. 19, § 2104 (1947), Mont. Rev. Code, tit. 94, § 7203 (1947), Okla. Stat. Ann. tit. 22, § 836 (1951), La. Stat. Ann., Rev. Stat. tit. 15, § 387 (1950).

30. 189 N.E.2d 641 (Ohio Ct. App. 1963).

31. *Id.* at 643.

32. *Ibid.*

33. 40 Misc. 2d 110, 242 N.Y.S.2d 980 (N.Y. City Crim. Ct. 1963).

34. *Id.* at 116, 242 N.Y.S.2d at 986.

35. Instant case at 205, 250 N.Y.S.2d at 289.

36. 269 F.2d 26 (1st Cir.), *cert. denied*, 359 U.S. 931 (1959).

37. *Id.* at 28.

38. *Id.* at 27.

39. *Supra* note 2, at 604.

Court in the instant case also noted the importance of maintaining one of the inherent characteristics of a court, majority rule. As was stated by a Supreme Court of this state in 1880,

> The court then, in legal contemplation, proceeds as a court, and not as a jury. Were this otherwise, the proceedings might, at any moment, be obstructed and, indeed, summarily stopped. A single magistrate could prevent a ruling upon the admission or rejection of evidence, . . . non-concurrence as to the punishment would be sufficient to block the wheels of justice. It cannot be said that, in these matters of illustration, the magistrates act as judges, while in convicting they act as a jury. Their functions cannot be severed either in theory or practice. They act throughout as a court. What the law requires is, not the concurrence but the presence and deliberation of all three.[40]

The Court in the instant case also pointed out that in reviewing convictions in capital cases it is charged with the duty to ". . . examine the evidence to determine whether in our judgment it has been sufficient to make out a case . . . beyond a reasonable doubt."[41] Unanimity is not required in such a determination.

The reasonable doubt doctrine provides a standard by which each trier of fact determines, in his own mind, whether or not the defendant is guilty. Certainly an accused can be found guilty beyond a reasonable doubt, if there is but one trier of fact. A mistrust of any one individual's judgement might urge the usage of more than one trier of fact. An additional safeguard might be to require unanimous agreement for conviction. The increase in the number of fact finders, and the requirement of unanimity add to the safeguards provided by the reasonable doubt rule. They provide a greater degree of certainty that the truth has been reached. That certainty might be decreased by reducing the number of fact finders or by dropping the unanimity requirement, but these changes would have no effect upon the standard the individual triers of fact apply to reach their verdict. The courts in the *Robbins* and *Scifo* cases failed to recognize the distinction between the two concepts. Yet, even if unanimity were required for a finding of guilt beyond a reasonable doubt, the court in the *Robbins* case goes too far. It concludes that disagreement among the triers of fact proves the existence of a reasonable doubt.[42] To the contrary, the disagreement means only that the dissenter was unable to convince his colleagues that his doubt was reasonable. The deadlock does not unanimously prove either the existence or non-existence of a reasonable doubt as to guilt. To acquit at that point in the proceedings would be an injustice to the state, since the issue of guilt has not been resolved either way. This lack of determination is recognized in jury trials, since a hung jury results in a re-trial.[43] On the other hand, the court in the *Scifo* case, in its attack upon the constitutionality of the majority

40. People *ex rel.* Sammons v. Wandell, 21 Hun 515, 516 (N.Y. Sup. Ct. 1880).
41. Instant case at 206, 250 N.Y.S.2d at 290.
42. *Supra* note 30, at 644.
43. N.Y. Code Crim. Proc. § 430.

procedure, failed to consider the fact that this majority-to-convict precedure originated in New York before the Constitution was adopted, was being used at the time that document was adopted and basically has been used ever since.[44] With that in mind, it would be difficult to argue that the procedure violates due process of law as it was known to the framers of that Constitution. Significant however, is the fact that the procedure was origanally set up for the convenience of the accused,[45] whereas today it is used to expedite the business of the Criminal Court of the City of New York. The convenience of the court has never been a convincing factor when weighed against the rights of an accused in a criminal prosecution..

THOMAS L. DAVID

CORAM NOBIS—NOT AVAILABLE WHERE COUNSEL HAS FAILED TO FILE TIMELY NOTICE OF APPEAL WHEN REQUESTED BY DEFENDANT

In two recent cases, defendants were sentenced to prison terms following their felony convictions. Joseph Marchese and Thomas Kling decided to appeal and so informed their attorneys. Both were assured that notice of appeal would be filed, but neither attorney took the necessary action. Attempting to reinstate the lost right to appeal, defendants applied to their respective trial courts by writ of error coram nobis.[1] From the orders of the trial courts denying hearings, defendants appealed to the Appellate Division, Second Department, where the orders were affirmed. Defendants then appealed to the Court of Appeals which *held*, in both cases, affirmed, without opinion (three judges dissenting,[2] voting to reverse and order hearings). Coram nobis is not available where counsel assigned for trial (*Kling*) or retained by defendant (*Marchese*) had been requested to file notice of appeal, had promised to do so, but failed in that task. *People v. Kling*, 19 A.D.2d 750, 242 N.Y.S.2d 977 (2d Dep't 1963) (one judge dissenting),[3] *aff'd mem.*, 14 N.Y.2d 571, 198 N.E.2d 46, 248 N.Y.S.2d 661 (1964), *motion to amend remittitur granted*, 14 N.Y.2d 687, 198 N.E.2d 913, 249 N.Y.S.2d 884 (1964), *petition for cert. filed*, Misc. Calendar, July 1, 1964 (No. 198); *People v. Marchese*, 19 A.D.2d 728,

44. *Supra* notes 6, 8 and 10.
45. *Supra* note 6.

1. If the trial court found that the excuses were adequate as a matter of law, it would order hearings to determine the factual sufficiency of defendants' assertions. Then, upon a finding that the excuses were supported by facts, the court would vacate the original judgment of conviction and impose a new sentence at that time. This would have the effect of giving defendants a new time in which to appeal.

2. The same three judges dissented in both cases: Desmond, C.J., Fuld and Bergan, JJ.

3. Noted in 15 Syracuse L. Rev. 578 (1964). Previous to this Appellate Division decision the following occurred: *Appeal dismissed*, 11 A.D.2d 917 (2d Dep't 1958) (failure to prosecute); *cert. denied*, 361 U.S. 935 (1960); *petition for writ of habeas corpus denied*, 188 F. Supp. 470 (N.D.N.Y. 1960), *affirmed*, 306 F.2d 199 (2d Cir. 1962) (existing state remedy); *dismissal of appeal vacated*, (App. Div. 2d Dep't) 148 N.Y.L.J. 16 (Oct. 11, 1962).