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Criminal Law—Conspiracy to Commit Murder, Established by Circumstantial Evidence, Must Be Proved to a Moral Certainty

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of bets even on one occasion. The conviction in the *Pavia* case, a "typical streetcorner observation case," is justified on the evidence: defendant accepted money for a previous bet and accepted more for nine additional bets which he agreed to place. Such facts constitute a continuity of practice on a professional basis, the degree forbidden by the statute.

Thus, the only time the distinction between casual and common gambler has any significance as far as continuity of action is concerned is when the defendant is charged as a *player*. Likewise, the test of bookmaking is not whether there was only an isolated transaction, but whether or not the facts constitute a professional gambling transaction.

It might be noted further that the Court in the *Guido* case took a most liberal view in determining the sufficiency of the information. Only the words that relator did "aid and abet in the operation of a gambling establishment" characterized the specific acts constituting the crime;[18] however, the Court of Appeals held that such words, as a matter of law, should not be deemed insufficient, since the ultimate facts were set forth in the information. Granted, that, as a general proposition of law, an information does not have to be framed with the same exactness as a grand jury indictment,[19] but the purpose of each remains identical: to inform the accused of what he is being called upon to defend and to prevent his being tried again for the same offense.[20] Surely, an information charging that relator did "aid and abet in the operation of a gambling establishment" does not apprise the defendant of the act the People intend to prove.[21]

It would seem that where a statute sets out, in detail and specificity, certain acts which would constitute a violation of the statute, as does Section 970, an information should, by the same token, state the act defendant is accused of with exactness. Moreover, Section 970 may be violated in any number of ways: by allowing or hiring a room to be used for gambling; by owning or superintending a place used for gambling; by engaging as a player, dealer, gamekeeper; or selling lottery policies or any writing in the nature of a bet. In these and other ways, relator may have committed acts or aided one committing them in violation of the statute, but none is set forth in the information. The nature of the offense, here, demands that the charge state the act constituting the crime without ambiguity.[22]

E. J. S.

CONSPIRACY TO COMMIT MURDER, ESTABLISHED BY CIRCUMSTANTIAL EVIDENCE, MUST BE PROVED TO A MORAL CERTAINTY

On the night of August 30, 1959, Salvatore Agron, Louis Hernandez, and

18. E.g., People v. Goldstein, 295 N.Y. 61, 65 N.E.2d 169 (1947).
19. See People v. Knapp, 152 Misc. 368, 274 N.Y. Supp. 85 (County Ct. 1934), aff'd, 242 App. Div. 811, 275 N.Y. Supp. 637 (1st Dep't 1934).
20. Cf. People v. Zambounis, 251 N.Y. 94, 96, 167 N.E. 183, 184 (1929).
21. Cf. People v. Corbalis, 178 N.Y. 516, 71 N.E. 106 (1904) (case concerning sufficiency of an indictment).
22. Ibid.

about a dozen other Puerto Rican boys gathered at a public playground in New York City to "get even" for the beating of other Puerto Rican youths by a group of Italian boys. But instead of finding a large force ready to repulse their attack, the Puerto Ricans discovered only a small group of innocent teenagers. Though this group had nothing to do with the beatings which had stirred the Puerto Rican boys to action, a fight was soon started by the latter faction which resulted in the death of two of the teenagers and the severe wounding of another.[23]

The Court of Appeals in *People v. Agron* unanimously upheld the trial court's conviction of first degree murder against the defendant Agron who had stabbed all three victims.[24] The evidence of his guilt is overwhelming.

However, the Court in a six to one decision reversed the trial court's conviction of first degree murder against the defendant Hernandez.

Though Hernandez had not directly participated in the killings, the State demanded his conviction on the charge of first degree murder because of his alleged entrance into a conspiracy to commit murder. To prove this charge, it must be shown that the defendants had united with a common premeditated intent to commit murder; or that after the battle had broken out, Hernandez became aware of the fact that Agron was using a deadly weapon to kill and yet continued to fight.[25] If such a conspiracy was shown, all the conspirators could be held guilty of a murder committed under the plan by any one of the group.[26]

To prove the alleged conspiracy, the State relied on several incidents which associated Hernandez with the killings. A meeting of the group had been held at which time they learned of the beatings of the Puerto Rican youths. When the group decided to avenge the attack, Hernandez was present, and he heard Agron comment that he was going to arm himself with a knife and stab anyone who got in his way. Hernandez remarked, "To Ninth Avenue to burn all them guineas." The meeting ended; and when the boys later regathered, Agron was carrying a knife 7¼ inches long. Whether Hernandez knew that Agron was so armed at that time is questionable. Another member of the group, who testified as a prosecution witness, declared before the grand jury that Agron, at that meeting, did not display the weapon. However, at the trial, he gave testimony which conflicted with his statements before the grand jury by stating that Agron showed the knife to Hernandez at that time. Later in the evening, Hernandez, armed with an umbrella, accompanied Agron to the playground.

23. This incident caused a nationwide sensation. The ensuing trial was widely publicized by press, radio, and television. This occurrence was reported as generally typifying teenage gang fights and specifically symbolizing the strife in New York City's west side between Italian and Puerto Rican Youths. Headlines called Hernandez "the Umbrella Man," and Agron, who carried his knife in a cape, was nicknamed "the Cape Man." Since the trial, at least one nationally distributed movie has depicted a Puerto Rican youth who habitually wears a cape, as a leader of a teenage gang.

24. 10 N.Y.2d 130, 218 N.Y.S.2d 625 (1961).

25. People v. May, 9 A.D.2d 508, 195 N.Y.S.2d 792 (1st Dep't 1960).

26. Ibid.

After the fight broke out, Agron savagely stabbed three teenagers; and Hernandez beat others with his umbrella.

However, there is no evidence that Hernandez knew of the stabbings as he carried out his personal vengeance, because the battle raged in the dark. Therefore, if the State was to gain a conviction of first degree murder against Hernandez, it had to prove the defendants had united with a common premeditated intent to commit murder.

Following the slaughter, the group once again met, to hear news accounts of their exploits. Agron showed his technique in stabbing his victims, and Hernandez declared that anyone who called the police would also be killed.

The majority of the Court of Appeals, relying on several New York cases, ruled that a conspiracy to commit a criminal act established by *circumstantial* evidence must be proved *to a moral certainty*.[27] They concluded that a conspiracy to commit *assault* had been proved *to a moral certainty* but not a conspiracy to commit murder. Therefore, the majority reversed the conviction of Hernandez and ordered a new trial.

The dissent, after analyzing Hernandez's acts and statements, concluded that he was a member of a conspiracy to kill, and, therefore, was guilty of first degree murder.

Under the circumstantial evidence rule, the State must meet an extremely high standard in order to gain a conviction. Of course, *direct* evidence of such a conspiracy would help solve the problem, but direct evidence of a conspiracy to commit murder is a rarity. What additional facts the State would have had to adduce to prove a conspiracy to commit murder by *circumstantial* evidence the Court did not indicate.

R. D. S.

PASSIVE PARTY TO SODOMY GUILTY ONLY OF AIDING AND ABETTING

In *People v. Randall*, defendant was convicted of attempted sodomy in the second degree.[28] On appeal, the judgment was modified by the Appellate Division which reduced the conviction to an attempt to commit sodomy, a misdemeanor, and sentenced him to six months in the penitentiary.[29] The People appealed from this judgment, seeking to reinstate the original jury determination.

The defendant herein, a man fifty-nine years of age, was charged with second-degree sodomy in that he engaged in an act of carnal knowledge of the anus with a person under eighteen years of age, and that he aided and abetted a person under the age of eighteen years of age in an act of carnal knowledge of the anus. The testimony was to the effect that the party under the age of eighteen had voluntarily attempted to perform an act of anal intercourse upon

27. People v. Leyra, 1 N.Y.2d 199, 151 N.Y.S.2d 658 (1956); People v. Taddio, 292 N.Y. 488, 55 N.E.2d 749 (1944); People v. Weiss, 290 N.Y. 160, 48 N.E.2d 306 (1943).
28. 9 N.Y.2d 413, 214 N.Y.S.2d 417 (1961).
29. 11 A.D.2d 270, 203 N.Y.S.2d 372 (3d Dep't 1960).