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Criminal Law—Passive Party to Sodomy Guilty Only of Aiding and Abetting

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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).

the defendant at the defendant's request. The question then posed for the Court was whether or not this constituted sodomy in the second degree within the language of the statutes then and now in effect.

From 1886 to 1950, Section 690 of the Penal Law provided that one who "carnally knows . . . or voluntarily submits . . . is guilty of sodomy."[30] Thus, the meaning of the clause "one who carnally knows" has been restricted by usage to the perpetrator. The 1950 recodification, classifying the crime by degrees, omitted reference to the "voluntarily submits" clause.[31] The Court of Appeals therefore held that although the act had been committed at the behest of the defendant, he still could not be considered the perpetrator of the act and, therefore, was not guilty of sodomy in either the first or second degree. However, this defendant was a voluntary participant in the act and as such, aided or abetted in a carnal act of unnatural fashion; and hence was guilty of a misdemeanor.

Bd.

MISCELLANEOUS CRIMINAL LAW CASES

The remaining cases which came before the Court and which can be considered within the category of Criminal Law concern:

1. A constitutional question; and
2. An interpretation of a New York statute.

1. *Constitutional Issue*:

(a) A defendant is entitled to counsel at his arraignment and trial.[32] He is further entitled to be notified of his right to counsel immediately upon being brought before the magistrate,[33] and he must be granted reasonable time to secure counsel. In *People v. Shenandoah*,[34] the defendant was a seventeen-year-old boy who had never been arrested before. He was taken into custody at four o'clock in the morning and brought before the Justice of the Peace, where a confession was taken prior to arraignment, a guilty plea was entered and he was sentenced to the penitentiary. The Court of Appeals unanimously held that this was such a violation of the defendant's constitutional right as to require a reversal.

(b) It is provided that if a defendant is indicted for a felony, he must be personally present during the trial.[35] A denial of this right at any stage of the proceeding would be a denial of a substantial right of the defendant and may be grounds for the reversal of a conviction. In the case of *People v. Murphy*,[36] defendant had been convicted of murder in the first degree in 1953; and in 1959 he

30. N.Y. Sess. Laws 1886, ch. 31, § 6.
31. N.Y. Sess. Laws 1950, ch. 525, § 15.
32. N.Y. Code Crim. Proc. § 188.
33. N.Y. Code Crim. Proc. § 190.
34. 9 N.Y.2d 75, 211 N.Y.S.2d 165 (1961).
35. N.Y. Code Crim. Proc. § 356.
36. 9 N.Y.2d 550, 215 N.Y.S.2d 753 (1961).