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Criminal Law—Miscellaneous Criminal Law Cases

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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).

instituted a habeas corpus proceeding upon the ground that he had been illegally convicted, inasmuch as neither he nor his attorney were present in the courtroom when the jury, prior to conviction, returned for further instructions. Upon learning of the availability of the writ, defendant appeared without counsel and merely offered the trial record to substantiate his claim. The lower court then denied the writ on the basis that the minutes albeit irregularly kept, were not enough to rebut the presumption of regularity. The Court of Appeals found that because the right to be present at all stages of the trial involves the defendant's opportunity to defend against the charge, a denial of this right is a denial of due process.[37] The Court of Appeals remanded for a hearing on the issue because such a hearing as he was given,[38] was not sufficient to afford him the protection to which he was entitled.

(c) The right of a defendant to be advised of his right to counsel when brought before a magistrate in the New York City Magistrate's Court, was the question presented to the Court of Appeals in *People v. Fellenbaum*.[39] Here the defendant had been brought before a City Magistrate for arraignment upon a violation of the City Traffic Regulations. He was not informed that he was entitled to counsel and after pleading guilty was convicted on two counts. He then appealed the conviction on the ground that he had not been informed of his constitutional rights; *viz.*, to be informed of his right to counsel when brought before a magistrate. The conviction was reversed below.[40] However the Court of Appeals, reinstating the conviction, ruled that the right to be notified of the right to counsel as provided by Section 699 of the New York Code of Criminal Procedure, applies only to counties other than those within New York City; and that this Section had not been extended by virtue of Section 741 of the Code of Criminal Procedure because that Section only referred to Special Sessions Court. The Court further held that there had been no denial of equal protection provided for in the Fourteenth Amendment because the statute applied to all cities with a population of more than 100,000.[41] The Court of Appeals recognized that the distinction between the Special Sessions Court and the City Magistrates Court is a very tenuous one. Still, since the Legislature has spoken the matter is not one for the Court's determination.

2. *Statutory Interpretation*:

(a) In the case of *People v. Bloeth*,[42] the trial judge, in charging the jury as to the statutory defense of insanity, used the words "and/or." Rather

37. Snyder v. Commonwealth of Mass., 291 U.S. 97 (1933).
38. At the hearing, defendant was not represented by counsel, was not informed of his right to counsel in the proceeding, and no sworn testimony was taken.
39. 9 N.Y.2d 213, 213 N.Y.S.2d 53 (1961).
40. People v. Fellenbaum, 22 Misc. 2d 695, 199 N.Y.S.2d 326 (Ct. Spec. Sess. 1960).
41. N.Y. Vehicle and Traffic Law § 155.
42. 9 N.Y.2d 211, 213 N.Y.S.2d 51 (1961).

than "or."[43] The defendant was convicted of murder in the first degree, and he appealed upon the basis that the erroneous wording of the statute in the charge was prejudicial. The Court of Appeals found that the incorrect wording was a technical, and not a prejudicial, error, and that the subject was properly covered in other portions of the charge. The court must, after hearing the appeal, give judgment without regard to technical errors or defects which do not effect the substantial rights of the parties.[44]

(b) An information may be sworn to before certain officers who are not notaries public where a traffic summons has been served.[45] However where it is established that no traffic summons has been served, then this authority does not exist. In *People v. Polle*,[46] the defendant had been convicted of a violation of the Vehicle and Traffic Law upon an information which was sworn to before a sergeant of the Sheriff's Office who was not a notary public. It was testified to that at the time no traffic summons had been issued and the defendant immediately moved to dismiss the information. The Court of Appeals, applying a very strict interpretation of the law, found that the dismissal should have been granted because Section 208 of the Vehicle and Traffic Law would not apply, and the court, therefore, had no jurisdiction.

(c) The case of *Fisher v. State* was an action against the State of New York for damages suffered as a result of the tortious actions of a County Assistant District Attorney.[47] The action was brought upon a respondeat superior theory under which the State would be held liable for the actions of the county officer. The action was dismissed below for failure to state a cause of action.[48] Local county officers are either elected to their posts or appointed from the county in which they reside. They are paid by the county and although they operate within the framework of the law of New York State, their responsibility is to their own country. The Court of Appeals found that the officer in the present case could not be considered a state officer within the meaning of present New York Statutes[49] and case law.[50]

Bd.

CRIMINAL PROCEDURE

STATE TRENDS IN CRIMINAL DISCOVERY

While civil discovery has undergone rapid change, its criminal counterpart has remained relatively dormant. There has been a great resistance to any

43. N.Y. Penal Law § 1120.
44. N.Y. Code Crim. Proc. § 542.
45. N.Y. Vehicle and Traffic Law § 208.
46. 9 N.Y.2d 349, 214 N.Y.S.2d 369 (1961).
47. 10 N.Y.2d 60, 217 N.Y.S.2d 52 (1961).
48. Fisher v. State of New York, 23 Misc. 2d 935, 203 N.Y.S.2d 363 (Ct. Cl. 1959).
49. N.Y. Public Officers Law § 2.
50. Ritter v. State of New York, 283 App. Div. 833, 128 N.Y.S.2d 830 (3d Dep't 1954).