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Criminal Law—Waiver of Right to Dismissal for Failure to Prosecute

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which killed Sullivan was fired by one of the convicts engaged with the defendants, or some of them, in a common purpose or design to unlawfully and feloniously escape.”³ In the instant case the Court has removed any doubts whatsoever, as to the interpretation of Subdivision 2 of Section 1044 of the New York Penal Code, and laid to rest any possibility that one may be charged with felony murder where the homicide involved has been committed by someone other than the felon, or one acting in concert with him. The words of the statute, “by a person engaged in the commission of a felony” are to be found only in the New York statute and are determinative of the scope of the statute as intended by the Legislature.

It was the Peoples’ contention that the words of the statute “engaged in” may also be defined as “involved in,” thereby making it possible to apply in effect a proximate causation test. Though the application of such a test might not have been patently unjust in the present case, the Court’s decision was undoubtedly correct in light of the original common law concept of felony murder, the unfortunate experience of Pennsylvania with the proximate cause rationale, and the obvious intent of the New York Legislature.

WAIVER OF RIGHT TO DISMISSAL FOR FAILURE TO PROSECUTE

Seventeen months after he was indicted the defendant was arraigned. Then the defendant delayed the trial himself for 6 months requesting adjournments, while the district attorney was ready to prosecute. This was followed by an additional delay of 12 months, caused by adjournments agreed to by the defendant. 35 months after he was indicted, the defendant moved for a dismissal of the indictment pursuant to Section 668 of the Code of Criminal Procedure. Defendant’s motion was denied by the trial court. The Appellate Division affirmed,⁴ but on appeal in *People v. Piscitello*, the Court of Appeals reversed, granting a dismissal.⁵

Section 668 of the Code of Criminal Procedure provides:

If a defendant, indicted for a crime, whose trial has not been postponed upon his own application, be not brought to trial at the next term of the court in which the indictment is triable, after it is found, the court may, on application of the defendant order the indictment dismissed, unless good cause to the contrary be shown.

The issue presented by the instant case was whether or not the defendant waived his right to a dismissal after a 17 months delay, by thereafter requesting adjournments. The court held that the motions made by the defendant after the 17 month period were broad enough to indicate that any rights enjoyed by the defendant, then existing, were being preserved and protected.

This decision seems to mark a change in the attitude of the court in han-

3. *People v. Udwin*, supra note 2 at 262, 172 N.E. 492 (1930).

4. *People v. Piscitello*, 8 A.D.2d 696, 185 N.Y.2d 745 (1st Dep’t 1959).

5. 7 N.Y.2d 387, 198 N.Y.S.2d 273 (1960).

ding motions made pursuant to Section 668. It was well settled in New York, as stated in *People v. Proesser*,⁶ that the defendant's failure to take any affirmative steps toward securing a speedy trial would not constitute a waiver of his rights under Section 668, but any affirmative act of the defendant, which showed his intention not to insist on a speedy trial, would constitute a waiver of his right to dismissal for failure to prosecute. The fact situation in *People v. Godwin*,⁷ was similar to the case under discussion. The defendant spent 21 months in jail after he was indicted before he was brought to trial. The defendant then delayed the trial for 2 additional months after the 21 month delay, by requesting adjournments. The Court of Appeals in a unanimous decision, held that this constituted a waiver of the defendant's right to a dismissal of the indictment.

The decision in the present case,⁸ appears to over-rule the *Godwin* decision.⁹ This change however, appears to be one toward a more just and realistic approach to dealing with motions made pursuant to Section 668. The purpose of this section is to protect accused persons from prolonged imprisonment; relieve them of the anxiety and public suspicion which accompany indictment; and to help insure justice by holding trials when evidence is fresh, and the memory of witnesses strong.¹⁰ Once the trial has been delayed, the damage has been done. At this point the defendant is entitled to a dismissal. It is unjust that the defendant will waive his rights by requesting necessary adjournments. Now the defendant can request an adjournment, in order to insure himself of the best possible defense, without having to waive any rights which may have previously accrued to him under Section 668.

VALIDLY SENTENCED DEFENDANT CANNOT BE RESENTENCED

In May of 1957, defendant Alvich was indicted for first degree sodomy and second degree assault. Alvich pleaded guilty to the assault charge and in June of 1957 he was sentenced, under Section 2189-a of the New York Penal Law,¹¹ to indefinite probation and required to undergo psychiatric treatment during the probationary period.¹² There was no disposition of the sodomy charge.

6. 309 N.Y. 353, 130 N.E.2d 891 (1955).

7. 2 N.Y.2d 891, 161 N.Y.S.2d 145 (1957).

8. *Supra* note 5.

9. *Supra* note 7.

10. *Supra* note 6.

11. N.Y. Penal Law § 2189(a):

Indeterminate sentences of one day to life. No person convicted of a crime punishable in the discretion of the court with imprisonment for an indeterminate term, having a minimum of one day and a maximum of his natural life, shall be sentenced until a psychiatrist examination shall have been made of him and a complete written report thereof shall have been submitted to the court. Such examination shall be made in the manner prescribed by sections [659, 660, 661, & 662(e)] of the code of criminal procedure. Such report shall include all facts and findings necessary to assist the court in imposing sentence.

12. N.Y. Penal Law § 243 provides that if a person commits the crime of assault in the second degree with intent to commit sodomy in the first degree he may be sentenced