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Criminal Law—Requirements for Perjury Conviction

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and is directed to answer. Therefore, since a defendant or prospective defendant cannot constitutionally be subpoenaed, the statute does not appear to apply to such person, for his privilege attaches prior to the issuance of the subpoena.

REQUIREMENTS FOR A PERJURY CONVICTION

The defendant in *People v. Carman*⁶⁶ gave false answers under oath concerning her communist affiliation before the Commissioner of Investigation for the City of New York. The investigation was made pursuant to the obligation placed on the City by the New York Security Risk Law to investigate subversives working in security positions in the Department of Welfare.⁶⁷ The defendant's subsequent conviction of second degree perjury was affirmed by both the Appellate Division and the Court of Appeals.⁶⁸

Defendant argued that the information did not satisfy Section 291 of the Code of Criminal Procedure,⁶⁹ in that it did not set forth the subject matter of the investigation in question.⁷⁰ Because it was defective in this matter she claimed that she did not have adequate notice to enable her to prepare a defense of lack of jurisdiction. The Court held that Section 291 was satisfied by the information stating that the "perjury was committed in a hearing and Inquiry being conducted under the New York State Security Risk Law by the City Department of investigation at its office by its authorized Examining Inspector, etc."⁷¹ Defendant relied on *People v. Gillette*,⁷² in which case it was held that the subject matter must be set forth so that the defendant may adequately prepare a defense to show that the false testimony was not materially related to the subject under investigation. The Court rejected her argument because at the time of the *Gillette*⁷³ case there existed only one degree of perjury and materiality was a necessary element. At the time the present defendant perjured herself there were two degrees of perjury and she was charged only with second degree, which crime did not require that the false testimony relate materially to the subject of the investigation.⁷⁴

Defendant's second contention, that the State did not prove the Commission's jurisdiction, was also decided against her. The crux of this contention was that the prosecution must prove that her testimony was relevant and necessary to an investigation which was within the purview of the Commission to

66. 6 N.Y.2d 241, 189 N.Y.S.2d 188 (1959).

67. N.Y. UNCONSOL. LAWS §§ 1101 *et seq.*

68. 7 A.D.2d 633, 180 N.Y.S.2d 246 (1st Dep't 1958).

69. N.Y. CODE CRIM. PROC. § 291. "In an indictment for perjury or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed. . . ."

70. The investigation might have been conducted under §§ 1104, 1105, 1106, 1108 of the New York Security Risk Law.

71. *People v. Carman*, *supra* note 66 at 191, 241.

72. 126 A.D. 665, 111 N.Y. Supp. 133 (1st Dep't 1908).

73. *Ibid.*

74. *People v. Samuel*, 259 A.D. 167, 18 N.Y.S.2d 532 (2d Dep't 1940), *reversed on other grounds*, 284 N.Y. 410, 31 N.E.2d 752 (1940).

conduct and, if not, that she cannot be arbitrarily called and questioned about her political beliefs. The contention in New York is not a new one. In *Karelsen v. Yavner*⁷⁵ the question arose in a contempt proceeding. There the question related to the power to subpoena a past employee of the City. The Court held that the proposed witness subpoenaed by the Commissioner could not challenge the Commissioner's motives or good faith except on a showing of arbitrary, unreasonable, and capricious conduct. In *Hershfield v. Hanley*⁷⁶ the Court pointed out that the investigative power of the Commissioner is indeed broad, and in the wrong hands could readily be used to transcend its express and legitimate purposes. However, it pointed out that such witnesses are entitled to all the privileges and protection afforded to witnesses in judicial proceedings. One of these privileges is to refuse to answer and disprove the jurisdiction colaterally.

In a 1926 United States Supreme Court decision the same contention, that of lack of power of the investigator to call the witness, was raised.⁷⁷ Defendant in that case failed to appear before an investigating committee set up by the Senate to obtain information to aid it in legislating. Defendant there contended that the real purpose was to obtain information concerning the conduct of a past Attorney-General, and hence not a legitimate exercise of investigative powers. The Court held that since the defendant failed to appear and had as yet answered no questions, there was a presumption in favor of the Senate, *i.e.*, that they convened the inquiry to get aid in legislating. Since this was a legitimate purpose the conviction for contempt was upheld. The last mentioned case is similar to the one under consideration, in that there was a presumption of good faith on the part of the Commissioner and the burden of proving a contrary showing was on the defendant.

Had the defendant in the present case answered the question truthfully concerning her communist affiliations the Commissioner might have gone further and shown a relation between her testimony and the information he sought concerning a presently employed person. Since she denied she was or ever had been a Communist he was unable to go further and connect her with someone then employed in the Welfare Department. Defendant's attempt to place the burden of proving good faith of the Investigating Commissioner on the prosecution is not substantiated by the New York cases or the United States Supreme Court case cited above. Although the investigative power is broad and could be misused, it is presumed to be validly exercised until the person challenging it shows that the exercise was arbitrary or capricious.

Although this writer agrees with the Court that the burden of disproving the jurisdiction of the Commissioner is on the defendant, it seems the Court fails to settle the significance of Section 291 of the Code of Criminal Procedure as to giving defendant adequate notice to prepare a defense. Granted that

75. — Misc. —, 59 N.Y.S.2d 683 (Sup. Ct. 1945).

76. 228 N.Y. 346, 127 N.E. 252 (1920).

77. *McGrain v. Daugherty*, 273 U.S. 135 (1927).

materiality is not required to prove second degree perjury, if she must prove lack of jurisdiction she must have notice as to the basis of the jurisdiction.

PEOPLE'S BURDEN OF PROVING DEFENDANT NOT IN THE THROES OF AN EPILEPTIC ATTACK

A majority decision of the Court of Appeals⁷⁸ in *People v. Higgins*⁷⁹ reversed a conviction for first degree murder, since the People had failed to sustain their burden of proving beyond a reasonable doubt that, at the time defendant attacked the deceased, the defendant was not in the throes of an epileptic furor attack,⁸⁰ hence, the verdict of the jury was against the weight of the evidence.⁸¹

The prosecution had attempted to carry its burden by focusing attention on the defendant's motive and co-ordinated movements during and immediately following his alleged seizure, contending that nineteen or more blows to the head of the decedent and successfully operating a car in an alleged post-confusional state, as well as an apparent recollection of the crime, was inconsistent with any theory of having undergone a furor seizure. But the Peoples' experts, as well as the defendant's witnesses, conceded that the post-confusional state could include automatic type behavior, and although substantial recollection does refute any possibility of a seizure,⁸² reconstruction through deduction was possible. Thus, motive became an important consideration.

People v. Barber presented a defendant who had unexplainedly attacked a husband and wife, friends of long standing, then set fire to their home, killing the wife.⁸³ The court reversed the conviction for first degree murder and stated that the motive was important on the issue of insanity. Here the People unsuccessfully attempted to show that the motive was to prevent the girl from relating to mutual acquaintances defendant's amorous adventures with her, but this was more of an unfounded suggestion by the prosecution rather than an inference from evidence adduced at trial.

The apparent lack of motive may well have been the controlling factor in the courts decision, for without some purpose intended by the defendant in committing the crime the equivocal nature of the testimony regarding memory

78. The court split, four to three, on the issue of reversing because the verdict was against the weight of the evidence. The dissenting and concurring opinions did not detail their objections, but merely concluded that the court was invading the province of the jury, and concentrated on the failure of the trial court to charge the jury on intoxication, which was not the basis for decision.

79. 5 N.Y.2d 607, 186 N.Y.S.2d 683 (1959).

80. There are four main types of epilepsy; The grand mal, where the patient is completely helpless; petit mal, prevalent in children; psychomotor, during which the patient is out of contact but has seemingly purposeful movements; thalamic, the furor seizure characterized by strange attacks of rage, often manifested by swinging and hitting.

81. *People v. Kelly*, 302 N.Y. 512, 99 N.E.2d 552 (1951).

82. The post-confusional state is the recovery period of the patient from the clonic reactions of the seizure, during which time he may perform automatically while semi-comatose.

83. 115 N.Y. 475, 22 N.E. 182 (1889).