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Criminal Law—Bait Advertising Under Penal Law

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seem that an information will fail if the necessary elements of the crime charged are not included, but the inclusion need not be in the exact words of the statute. In the instant case the necessary element of intent was never even alluded to in the information.

BAIT ADVERTISING UNDER THE PENAL LAW

New York Penal Law Section 421 makes criminal the fraudulent advertising of goods intended for sale.¹⁴ The statute has been liberally construed, in cognizance of the need to halt misleading advertising, and to protect the credulous against themselves.¹⁵ No distinction has been drawn between intentional and unintentional misrepresentations, both being declared unlawful.¹⁶ Nor have the courts required that a person be actually cheated or defrauded.¹⁷

Prior decisions have concerned only those instances where the goods falsely advertised were the same goods intended for sale.¹⁸ *People v. Glubo*¹⁹ posed the unique problem of whether Section 421 includes "bait advertising," where the false representations are as to goods not intended for sale but intended only to bring in prospective customers for other goods. The defendants were indicted for conspiracy in attempting to sell expensive sewing machines by advertising over television a less expensive machine which defendant allegedly had no intention to sell.

The Court held that the defendants' acts violated the statute, and that to hold otherwise would frustrate legislative intent, for the act charged is as much a vice as other acts admittedly criminal under this statute.

The dissent accepted the defendants' contention that Section 421 is to be strictly construed in accordance with various District Attorneys' interpretations, as communicated through ex-Governor Harriman's message to the State Legislature.²⁰ Rejecting this contention, the Court stated the interpretative function is reserved to the judiciary, not the executive.

This decision extends the scope of the statute to effectively include those

14. N.Y. PEN. LAW § 421:

Any person . . . who with intent to sell . . . merchandise, . . . or anything offered by such person . . . directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof . . . places before the public in this state, . . . over any radio station or in any other way, an advertisement, . . . of any sort regarding merchandise . . . or anything so offered, . . . which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor.

15. *People v. Reilly*, 255 App. Div. 109, 6 N.Y.S.2d 161, *aff'd* 280 N.Y. 509, 19 N.E.2d 919 (1939).

16. *People v. Richter's Jewelers*, 291 N.Y. 161, 51 N.E. 690, 691 (1943).

17. *People v. Federated Radio Corp.*, 244 N.Y. 33, 39, 41, 154 N.E. 655, 656 (1926).

18. *Supra* note 3; *People v. Custom Shops*, 267 App. Div. 168, 45 N.Y.S.2d 218 (1st Dep't 1944).

19. 5 N.Y.2d 461, 186 N.Y.S.2d 26 (1959).

20. N.Y. STATE LEGIS. ANNUAL (1958) at 381:

As various district attorneys have indicated publicly, the present Penal Law does not give them adequate authority to prosecute those who cheat consumers by means of various sales promotional practices. One such practice is bait advertising, where products are advertised for sale at a price at which the seller has not intention of selling. . . .

acts which violate the spirit as well as the letter of this law. In so doing it declares that false advertising is no less criminal because it is artful.

DEROGATORY REMARKS OF JUDGE IN IMPOSING INDETERMINATE SENTENCE

In *People v. Gross* the Court held that a defendant can not be sentenced to an indeterminate term if the sentencing judge has clearly stated that the defendant is incapable of reform.²¹

After his conviction the defendant filed notice of appeal. Instead of prosecuting it, he instituted a *habeas corpus* proceeding. The Appellate Division (1st Dep't) dismissed the writ, stating that the imposition of the indeterminate term raised an irrebuttable presumption that the trial court had found the defendant capable of being corrected.²² The Court of Appeals affirmed on the ground that the habeas corpus writ did not lie to review the sentence.²³

The defendant then prosecuted his appeal. The Appellate Division (2nd Dep't) reversed the conviction, and held that since the judge had affirmatively stated that the defendant could not be reformed,²⁴ the imposition of the indeterminate term was erroneous.²⁵ The Court of Appeals affirmed the reversal, and resolved the conflict between the First and Second Departments as to whether the sentence is conclusive or whether the derogatory remarks of the sentencing judge are dispositive.

If the sentencing judge specifically states that he believes a defendant can not be rehabilitated, an indeterminate term can not be imposed.²⁶ However, if the judge does not comment on the defendant's character,²⁷ or if his remarks are ambiguous,²⁸ the indeterminate sentence is conclusive.

This decision restricts the use of the indeterminate sentence as a punitive device, and effectively recognizes that it is a rehabilitative instrument. No longer will a trial judge be permitted to characterize a defendant as incorrigible and at the same time invoke a corrective sentence in order to impose what is actually a longer sentence than would otherwise be meted out.²⁹

21. 5 N.Y.2d 131, 181 N.Y.S.2d 499 (1959). N.Y. CORRECTION LAW, Art. 7-A, provides for an indeterminate term of not more than three years. Section 203(e)3 states that the Article shall not apply to any person who is insane or physically or mentally incapable of being substantially benefited by being committed to a correctional institution.

22. *People v. Silbergliitt*, 3 A.D.2d 996, 163 N.Y.S.2d 435 (1st Dep't 1957).

23. *People v. Silbergliitt*, 4 N.Y.2d 59, 172 N.Y.S.2d 145 (1958), noted 8 BUFFALO L. REV. 108 (1958).

24. The sentencing judge said:

You can no more change him the longest day he lives tha(n) you will take the spots off a leopard. He will never be any different. He cannot be . . . I do not think he will ever change.

5 A.D.2d 878, 172 N.Y.S.2d 432 (2d Dep't 1958).

25. *People v. Gross*, 5 A.D.2d 878, 172 N.Y.S.2d 432 (2d Dep't 1958).

26. *People v. McDonnell*, 198 Misc. 738, 99 N.Y.S.2d 501 (Sup. Ct. 1950).

27. *People v. Tower*, 308 N.Y. 123, 123 N.E.2d 805 (1954); *People v. Warden of N.Y. City Penitentiary*, 171 Misc. 533, 13 N.Y.S.2d 837 (Sup. Ct. 1939).

28. *People v. Thompson*, 251 N.Y. 528, 168 N.E. 415 (1929).

29. In the instant case the maximum punitive sentence could not exceed one year, while under an indeterminate sentence the defendant could be imprisoned for a period of up to three years.