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## Criminal Law—Power of Grand Jury

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Testimony of Accomplice Not Corroborating Evidence for Conspiracy Conviction

If a person is charged with sale of narcotics, the buyer's uncorroborated testimony is sufficient to sustain the conviction.<sup>37</sup> However, in *People v. Malizia*,<sup>38</sup> the defendant, according to the fourth count of his indictment, allegedly conspired with one Calvin Malone to commit the crimes of feloniously selling a narcotics drug, feloniously possessing a narcotic drug with intent to sell, and committing acts injurious to public health and morals. The fourth count of the indictment was sufficiently corroborated. One particular sale between defendant as seller and Malone as buyer made up the first count of the indictment, as well as being set out as a part of the conspiracy under the fourth count. The sale described in the fourth count was corroborated only by Malone who was, under the fourth count, the co-conspirator of the defendant. The defendant was convicted under the first and fourth counts of the indictment. The Appellate Division affirmed the conviction.<sup>39</sup>

The Court of Appeals held that Malone was an accomplice of the defendant as a matter of law under both counts. Therefore, Malone's uncorroborated testimony was not sufficient to sustain defendant's conviction under the first count.

Thus, the Court points out that the principle of the buyer's uncorroborated testimony being sufficient to convict is limited by the statutory provision that an accomplice's testimony alone is not sufficient to convict his "brother in crime."<sup>40</sup>

Power of Grand Jury

In New York State the Grand Jury derives its power from the Constitution and the acts of the legislature.<sup>41</sup> It is sworn to inquire into crimes committed or triable in the county for which it is drawn,<sup>42</sup> and is duty bound to make such inquiries and present them to the court.<sup>43</sup> In the absence of a clear constitutional or legislative restriction, the New York courts have traditionally allowed the Grand Jury a wide discretion in the exercise of these powers.<sup>44</sup> The imposition of these duties and powers has a duality of purpose—one, in the interests of society to see that persons who are justly suspected of crime are held to answer; the other in the interest of the citizen, to insure him from unjust accusations which

37. *People v. Pasquarello*, 282 App.Div. 405, 123 N.Y.S.2d 98 (4th Dep't 1953), *aff'd*, 306 N.Y. 759, 118 N.E.2d 361 (1954).

38. 4 N.Y.2d 22, 171 N.Y.S.2d 844 (1958).

39. 4 A.D.2d 106, 163 N.Y.S.2d 255 (1st Dep't 1957).

40. N. Y. CODE CRIM. PROC. §399.

41. N. Y. CONST. ART. 1 §6; N. Y. CODE CRIM. PROC. §§223, 245, 252, 253.

42. N. Y. CODE CRIM. PROC. §223.

43. *Id.*, §245.

44. *People ex rel. Hirschberg v. Close*, 1 N.Y.2d 258, 152 N.Y.S.2d 1 (1956).

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are motivated by malice.<sup>45</sup> Full power is granted to the Grand Jury, independent of the District Attorney or the court, to conduct investigations upon its own initiative and to present indictments charging persons with crimes regardless whether a preliminary arrest or examination has occurred.<sup>46</sup>

While the Grand Jury, under the broad provision of section 245 of the Code of Criminal Procedure, generally has the power to inquire into all offenses whether felonies or misdemeanors, it is without jurisdiction to indict for offenses within the exclusive jurisdiction of the Courts of Special Sessions unless a certificate issues from a judge of a county court or supreme court, that it is reasonable to prosecute the offense by indictment.<sup>47</sup> This certificate divests the Court of Special Sessions of jurisdiction over such misdemeanors.

A. In a recent decision, *People v. Ryback*,<sup>48</sup> the jurisdictional divestiture effected by such a certificate under the comparable section of the New York City Criminal Courts Act<sup>49</sup> was held not to affect the plenary inquisitorial powers inherent in the Grand Jury.

In this case the original Grand Jury for General Sessions, upon a presentation of the matter to it by the District Attorney, refused to indict for felonious assault, but directed the District Attorney to file an information in Special Sessions charging the defendant with third degree assault—a misdemeanor. Such procedure was followed, whereupon defendants applied to General Sessions for a certificate allowing the charge to be prosecuted by indictment. The subsequent indictment by the Grand Jury included counts for second degree assault, a felony, as well as the misdemeanor charge of third degree assault. Defendants moved unsuccessfully to dismiss the felonious assault charge, contending that the Grand Jury lacked power to so indict. Upon denial of this motion the defendants were tried before a jury which failed to reach a verdict. On retrial they were convicted of third degree assault and prosecuted this appeal.

Defendants' main contention was that the indictment for assault second was invalid, because the court order removing the actions from Special Sessions to General Sessions for prosecution by indictment authorized only an indictment for the charge laid before Special Sessions, third degree assault. A second contention was that the action of the original Grand Jury in directing prosecution by informa-

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45. In re Funston, 133 Misc. 620, 233 N.Y.Supp. 81 (1929).

46. Manning v. Valente, 272 App.Div. 358, 72 N.Y.S.2d 88, *aff'd*, 297 N.Y. 681, 77 N.E.2d 3 (1947).

47. N. Y. CODE CRIM. PROC., §§56, 57.

48. 3 N.Y.2d 467, 168 N.Y.S.2d 945 (1957).

49. §31(1).

tion amounted to a dismissal of the felonious assault charge; thus, the matter could not be submitted to another Grand Jury without leave of the court.<sup>50</sup>

The Court, in a unanimous opinion, rejected both of these contentions as lacking merit. It stated that the statute which divests Special Sessions of jurisdiction over misdemeanors cannot be read as destroying the inherent power of the Grand Jury to find on its own initiative such indictments as are required by the proof before that body. Neither can the court order directing prosecution by indictment be construed as restricting the Grand Jury powers. The Court held that in the absence of an express statutory limitation, the traditional power of the Grand Jury remains unimpaired.

As to defendants' second contention, the Court held that the action of the first Grand Jury did not amount to a dismissal of the felonious assault charge. It is only by clear affirmative action that such a dismissal will result.<sup>51</sup> Under section 269 of the Code of Criminal Procedure a dismissal results if twelve jurors do not concur in finding an indictment. An endorsement to this effect must be placed on the dispositions which are returned to the court, and this endorsement must be signed by the foreman before a dismissal of the charge is effected. If such action is taken, as was not the case here, such dismissal forbids the resubmission of the charge to another Grand Jury without a court order.<sup>52</sup> Thus, it appears, such a dismissal cannot, in the face of this statute, be shown by mere implication.

In the present case, therefore, it is apparent that no court order was required for resubmission to the Grand Jury of the assault charge, that the Grand Jury was entitled to find a true bill for felonious assault as well as for the misdemeanor if the evidence so warranted,<sup>53</sup> that in the absence of express statutory power, neither General Sessions nor any other court has authority to divest the Grand Jury of its inherent powers to hear and indict.

B. The jurisdiction and power of the Grand Jury to find and present indictments have also been discussed in another recent Court of Appeals decision. In *People v. Stern*,<sup>54</sup> defendant sought to have an indictment rendered invalid on the ground that the Grand Jury, which had its term extended by several court orders, had no jurisdiction except over matters pending at the time of extension, and since defendant's case was not before the Grand Jury at that time, the indictment as to him was invalid. The Court, reversing the lower courts, held (5-2) that the indictment was valid and that the jurisdiction of the extended Grand Jury was not restricted to matters before it at the time of the extension.

50. N. Y. CODE CRIM. PROC. §270.

51. *People v. Kelly*, 140 Misc. 377, 250 N.Y.Supp. 610 (1931).

52. *Supra* note 50.

53. *People v. Acritelli*, 57 Misc. 574, 110 N.Y.Supp. 430 (1908).

54. 3 N.Y.2d 658, 171 N.Y.S.2d 265 (1957).

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The Court reiterated that the broad plenary powers of the Grand Jury, referred to above, may not be restricted in the absence of clear legislative expression to that effect. The Court noted *People v. Ryback*<sup>55</sup> as espousing this principle.

The County Court<sup>56</sup> construed section 244 of the Code of Criminal Procedure to mean that a Grand Jury *must* be discharged unless it has business still pending. It held that the apparent purpose of the statute is to provide, with leave of court, a method by which a Grand Jury may conclude any action which it has begun. An ordinary construction of the statute, they felt, would thus limit the scope of the Grand Jury power to such matters. In so construing the statute, the court dismissed the indictment for lack of Grand Jury power to indict for the offense charged.

In affirming this dismissal, the Appellate Division<sup>57</sup> viewed the issue more broadly and considered not only the jurisdiction of the Grand Jury, but also the jurisdiction of the court for which it is drawn. It felt that since the Grand Jury is an adjunct to the court, its jurisdiction may not exceed that of the tribunal for which it is drawn,<sup>58</sup> and thus is limited by the term of court for which it sits.<sup>59</sup> Therefore, if the court by its extension orders in the present case had limited its jurisdiction to matters pending before the Grand Jury, the effect was to impose a similar jurisdictional limitation upon the Grand Jury.

The dissent in the Appellate Division stated that, while the Grand Jury is an arm of the court for some purposes, it is in some respects free from judicial restraint.<sup>60</sup> The Grand Jury may of its own power investigate upon the existence of a crime and may indict on its own initiative.<sup>61</sup> The dissent was of the opinion that, having elected to continue the term of court and its Grand Jury, the county judge could not restrain the Grand Jury from performing the duties or exercising the power granted to that body by statutory law.

The Court, in the instant case, rebutted the Appellate Division's argument, to the effect that the Grand Jury's jurisdiction is limited to the term of court for which it is impaneled, by stating, "It is clear that in this state the Legislature has not limited the broad grant of jurisdiction to the Grand Jury by confining it in all instances to the jurisdiction of the court for which it is impaneled."<sup>62</sup> In support of this contention the Court points to sections 39 and 40 of the Code of Criminal

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55. *Supra* note 48.

56. 3 Misc.2d 268, 154 N.Y.S.2d 673 (1956).

57. 3 A.D.2d 443, 162 N.Y.S.2d 673 (1956).

58. *Spector v. Allen*, 281 N.Y. 251, 22 N.E.2d 360 (1939).

59. *People ex rel. Unger v. Kennedy*, 207 N.Y. 533, 101 N.E. 442 (1913).

60. *Supra* note 41; *People v. Glenn*, 173 N.E. 395, 66 N.E. 112 (1903).

61. *Supra* note 44.

62. *Supra* note 54 at 660.

Procedure. Subdivision 2 of section 39 gives the County Court, with certain exceptions not relevant here, limited power to try and determine indictments. However, under subdivision 1 of that section the County Courts have jurisdiction to inquire, by Grand Jury, into *all* crimes committed or triable in the county. Another indication of the legislative intent that the power of the Grand Jury extend beyond the limited jurisdiction of the County Court is found in the requirement that a County Court must send every indictment there found for a crime not triable therein to the Supreme Court to try and determine the same.<sup>63</sup> Therefore, the Court concluded, it is clear that the Grand Jury is an independent body, as far as its jurisdiction is concerned, and the exercise of its plenary power is not dependent on the court to which it is adjunct. The Grand Jury derives its powers and prerogatives from the Constitution and statutes, not from any court. Since the County Court is not the source of these powers no judge thereof can limit the Grand Jury in exercising them.

The Court also held section 244 of the Code of Criminal Procedure to be inapplicable in this case. The purpose of this section was to insure a speedy trial to alleged violators of the law in counties where only two Grand Juries are convened yearly. Prior to the enactment of this statute, the Grand Jury was automatically discharged at the end of its term. Persons charged with crimes during the period between Grand Juries, whether guilty or not, would have to be incarcerated until the next body was convened. This sometimes involved a period of several months. With the enactment of the statute in question the Grand Jury, rather than being discharged, is adjourned and not finally discharged until the first day of the next term of court for which a Grand Jury is drawn. Such adjourned body may be reconvened upon a court order issuing after an application by the District Attorney or by a person accused of a crime.<sup>64</sup> Since the Grand Jury in the present case had been extended by court orders and never adjourned or reconvened, the Court held the above statute to be inapplicable.

There being no statute in New York which expressly confines or limits an extended Grand Jury to those matters inquired into during its original term, it follows that the indictment in question was valid and the opinion of the Appellate Division must be rejected as being based on the unacceptable postulate that rules and orders of the County Court are superior to the Constitution and statutes conferring power on, and delineating functions of the Grand Jury.

Thus, in *People v. Ryback* and *People v. Stern* the Court of Appeals, in the interests of a strong and independent Grand Jury system, has reaffirmed the stated policy of allowing these bodies the widest latitude in the exercise of their powers.

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63. N. Y. CODE CRIM. PROC. §40.

64. 16th ANNUAL REPORT OF N. Y. JUDICIAL COUNCIL, 1950, pp. 245-251.