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Criminal Law—Sufficiency of Indictment

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be entitled were he to tell the truth is guilty of larceny. The Court cited no authority to substantiate this holding.

A person who wrongfully takes any personal property, by any means whatever, from the possession of the true owner is guilty of larceny. It is no defense that the accused obtained possession with the consent of the owner provided he induced such consent by a false or fraudulent representation.⁷⁴ In the present case the defendant clearly deprived the manufacturer of his property by false representations. It is immaterial that the goods were paid for because the price paid was only a small percentage of the actual market value.⁷⁵

Sufficiency of Indictment

Where an indictment informs the accused of the charge against him in order to enable him to prepare for his trial, protects the accused from double jeopardy, and enables the court to rule on evidence and upon conviction to pronounce just sentence, the indictment is deemed sufficient.⁷⁶ Furthermore, in determining the sufficiency of an indictment, courts should be liberal and not technical.⁷⁷ Reflecting just such a liberal attitude, the Court of Appeals, in *People v. Lieberman*,⁷⁸ reversed the lower court and held the indictment to be sufficient.

The record shows that the defendant, Lieberman, and one Melvin Mittman were indicted upon a charge of second degree manslaughter. The indictment stated that the defendants, acting in concert and each aiding and abetting the others without a design to affect the death, in the heat of passion, struck and beat Rheinhold Peter Ulrickson with their fists causing him to sustain injuries as a result of which he died. The facts show that defendant joined three others for the purpose of beating up tramps; and while in the act of beating up one John Perrett, Ulrickson intervened. Mittman punched him and Ulrickson fell and received fatal injuries.

The lower court dismissed the indictment on the grounds that the evidence before the Grand Jury was insufficient to support the allegations of the indictment within the meaning of §258 of the Code of Criminal Procedure.⁷⁹ They felt

74. N. Y. PENAL LAW §1290.

75. *People v. Yarmish*, 189 Misc. 1241, 68 N.Y.S.2d 618 (Gen.Sess. 1957).

76. N. Y. CODE CRIM. PROC. §284.

77. *People v. Weiss*, 252 App.Div. 463, 300 N.Y.Supp. 249 (2d Dep't. 1937), reversed on other grounds, 276 N.Y. 384, 12 N.E.2d 514 (1938).

78. *People v. Lieberman*, 3 N.Y.2d 649, 171 N.Y.S.2d 73 (1958).

79. N. Y. CODE CRIM. PROC. §258: the grand jury ought to find an indictment, when all the evidence before them taken together is such as in their judgement would, if unexplained or uncontradicted, warrant a conviction by the trial jury.

that a conviction by a trial jury could not be had for the reason that the indictment as drawn charging a crime committed "in the heat of passion" precludes proof of "aiding and abetting the others" which depends on premeditation.

The Court of Appeals held differently. The Grand Jury is under a duty to find an indictment whenever the evidence before it is such as in the grand jurors' judgment would, unexplained and uncontradicted, warrant a conviction by trial jury.⁸⁰ The evidence herein verifies that the defendants acted in concert, that each aided and abetted the others in a plan to beat up vagrants. This plan was still in motion when the death of Ulrickson was effected in a heat of passion without a design to effect death. In addition it was shown that defendant was a willing and active participant from start to finish. It is well settled that one who aids and abets the common purpose is as guilty as the one who strikes the fatal blow.⁸¹ This principle is regularly applied in cases where death is a foreseeable result of the use of force.⁸² Therefore, a jury might reasonably conclude that Lieberman was a party to the act and as such was guilty of second degree manslaughter. An indictment was warranted by the Grand Jury. However, is the form of this indictment fatal? On its face it seems to charge defendants with conspiracy to commit a murder in the heat of passion without an intent to effect death. Conspiracy involves premeditation while the effectuation of homicide without intent necessarily excludes premeditation. The two concepts are mutually exclusive. However, an indictment is not to be rejected for technical inconsistencies, but is to be read in the light of surrounding circumstances.⁸³

Hence, the Court of Appeals reinstated the indictment and further said that the conspiracy here charged is not to commit manslaughter but rather to commit an assault which because death resulted amounts to manslaughter in the second degree. Here the evidence points out that defendant joined in the common purpose to beat up tramps, actively participated in such beatings and made no attempt to withdraw prior to the assault on deceased. The death of the deceased was the natural and probable consequence of the plan to beat up hoboes. Therefore, if the testimony is credited, each person who joined in the conspiracy is chargeable with the consequence of such action, notwithstanding the fact that death to the victim was unexpected and formed no part of the original scheme.

The liberal interpretation of the indictment and its subsequent reinstatement

80. *People v. McGahan*, 155 Misc. 707, 281 N.Y.Supp. 249 (County Ct. 1935); *People v. Nentarz*, 142 Misc. 477, 254 N.Y.Supp. 574 (Sup.Ct. 1931).

81. N. Y. PENAL LAW §2.

82. *People v. Wilson*, 145 N.Y. 628, 40 N.E. 392 (1895); *People v. DeMino*, 305 N.Y. 862, 114 N.E.2d 212 (1953).

83. N. Y. CODE CRIM. PROC. §285; *People v. Fox*, 205 Misc. 258, 128 N.Y.S.2d 9, (County Ct. 1954); *People v. Dacey*, 166 Misc. 827, 3 N.Y.S.2d 156 (Ct. Gen. Sess. 1938); *People v. Spencer*, 27 Misc. 491, 58 N.Y.Supp. 1127 (County Ct. 1899).

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in no way prejudiced the substantial rights of the defendant. The decision is sound and in accord with the weight of authority.

Sufficiency of Indictment — Motion to Inspect

An indictment may be found only on evidence which would "if unexplained or uncontradicted, warrant a conviction by the trial jury."⁸⁴ A motion to dismiss an indictment for insufficiency of evidence before the grand jury is granted only upon a clear showing to that effect and must rebut the presumption that the indictment is based on legal and sufficient evidence.⁸⁵

In *People v. Howell*,⁸⁶ the most damaging testimony given against the defendant was by one Sanders who upon cross-examination revealed that he had not testified before the grand jury. The balance of the proof against the defendant was circumstantial and not sufficient for a conviction. Before the trial the defendant had moved unsuccessfully to inspect the grand jury minutes. At the end of the People's evidence he moved to dismiss the indictment on the ground that the evidence presented to the grand jury was insufficient as a matter of law to support the allegation of the indictment. This motion was also denied. On appeal the question before the Court was whether the absence of Sanders' testimony before the grand jury was sufficient to rebut the presumption that the indictment was based on legally sufficient evidence. The Court held that it was not.

The Court reasoned that there is no presumption that the evidence before the grand jury was the same as that used at the trial and that there was no clear showing at the trial that the evidence before the grand jury was legally insufficient without Sanders' testimony. The Court further held that since the motion to inspect the grand jury minutes was denied the minutes should not be considered as having been before the trial court on the motion to dismiss the indictment. In a dissent, Judge Desmond took the position that since the courts have an inherent right and duty to dismiss an indictment based on insufficient evidence the trial court should be required to examine the grand jury minutes. This position is contrary to the well settled rule requiring the defendant clearly to establish by extrinsic evidence that there was insufficient proof before the grand jury.⁸⁷

In a separate dissent, Judge Fuld argued that since the minutes were actually submitted to the trial judge on the motion to inspect, the Court of Appeals should be allowed to examine the minutes. Such a rule would force the trial judge, knowing that the minutes of the grand jury would be inspected by the

84. N. Y. CODE CRIM. PROC. §251.

85. *People v. Glen*, 173 N.Y. 395, 66 N.E. 112 (1903); *People v. Sweeney*, 213 N.Y. 37, 106 N.E. 913 (1914).

86. 3 N.Y.2d 672, 171 N.Y.S.2d 801 (1958).

87. *People v. Sexton*, 187 N.Y. 495, 80 N.E. 396 (1907).