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Criminal Law—Sufficiency of Indictment Based Upon Coerced Confession

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appellate court, to take them into consideration. Thus, a defendant, by the device of a preliminary motion to inspect, could require the trial court to determine the sufficiency of the evidence before the grand jury without the necessary independent showing of insufficiency.

Sufficiency of Indictment Based upon Coerced Confession

The grand jury is required to find an indictment when all the evidence before it would, if unexplained or uncontradicted, warrant a conviction by the trial jury.⁸⁸ In *People v. Caminito*,⁸⁹ the evidence presented to the grand jury consisted of confessions by the defendant and proof of the corpus delicti. After conviction and unsuccessful appeals the defendant sought redress in the federal courts by way of habeas corpus. The United States Court of Appeals sustained the writ on the ground that the defendant's confessions had been coerced and remanded the case to the county court for further proceedings.⁹⁰ The defendant then moved to set aside the indictment on the ground that it was based on insufficient evidence.

The question before the Court was whether the indictment could stand after the confessions upon which it was based were found by a federal court to have been coerced. Relying upon *People v. Donahue*⁹¹ the Court held that any taint a defendant may be able to show with respect to evidence adduced, not apparent in the grand jury minutes, must be offered at the trial for the appraisal and decision of the trial jury. The evidence which was before the grand jury, if unexplained or uncontradicted, would warrant a conviction. Therefore, the Court reasoned, the indictment must stand.

The Court refused to consider developments subsequent to the grand jury's presentment of the indictment, but considered the evidence only in the light of what had been then known to the grand jury. This approach appears rather rigid since the evidence having been conclusively held to be inadmissible,⁹² could no longer warrant a conviction if unexplained or uncontradicted. The *Donahue* case can be easily distinguished. The objection to the indictment in that case was a contention that the defendant had no criminal intent. In the present case the objection was not a mere contention by the defendant but a conclusive holding of a federal court rendering the confession inadmissible as evidence. The purpose of the rule in the *Donahue* case was to leave questions arising from conflicting evidence to be determined at the trial. But here the federal court's holding barred

88. N. Y. CODE CRIM. PROC. §251.

89. 3 N.Y.2d 596, 170 N.Y.S.2d 799 (1958).

90. 222 F.2d 698 (2d Cir. 1955).

91. 309 N.Y. 6, 127 N.E.2d 275 (1955).

92. *People v. Bonino*, 1 N.Y.2d 752, 152 N.Y.S.2d 298 (1956).

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the possibility that any such question might arise. The Court, however, has shown a general reluctance to dismiss indictments.⁹³

Effect of Omission of Essential Element of Burglary First Degree from Long Form Indictment — Per Curiam

A long form indictment for first degree burglary was insufficient since it did not allege that the crime occurred at night⁹⁴ and could not be amended nor the deficiency provided by a bill of particulars.⁹⁵ However, the indictment did not have to be dismissed since it spelled out essential requirements of fact for burglary second degree and the misnomer was not fatal error.⁹⁶

Unlawful Advertising

Defendant was convicted of violation of section 421 of the Penal Law which makes it a misdemeanor to put before the public with intent to sell merchandise an advertisement containing any assertion which is untrue, deceptive, or misleading. The allegedly misleading advertising consisted of three signs reading "Toys 20% to 40% off. Come in and Browse around," "Largest Selection of standard brand toys, 20% to 40% off," and "Toy Discount, Westchester First Supermarket. 20% to 40%."

Defendant's appeal from affirmance of conviction by the County Court was based mainly upon three contentions: (1) that it was error to admit evidence to prove a standard price for such toys and games; (2) that while the signs referred to toys the evidence concerned the prices of games and not toys; (3) that the People failed to prove beyond a reasonable doubt that the meaning of the signs was that all, rather than a substantial number of the toys, could be purchased at the discount and that evidence which indicated only that three games were sold at or above the standard retail price thus failed to establish guilt.

The Court of Appeals by a 4-3 majority found the conviction to be "not completely unsupportable" and affirmed the courts below.⁹⁷ As to defendant's first contention, the Court held that although defendant was entitled to place its own price upon the toys and then discount that price as it wished, it would not be allowed to give the impression that it was giving 20% to 40% off the ordinary, established, or prevailing price in the community. The existence of such a prevailing price was found properly proven by expert testimony.

93. See *People v. Howell*, 3 N.Y.2d 672, 171 N.Y.S.2d 801 (1958).

94. N. Y. PENAL LAW §402(4).

95. *People v. Ercole*, 308 N.Y. 425, 126 N.E.2d 543 (1955).

96. *People v. Oliver*, 3 N.Y.S.2d 684, 171 N.Y.S.2d 811 (1958).

97. *People v. Minjac Corp.*, 4 N.Y.2d 320, 175 N.Y.S.2d 16 (1958).