Buffalo Law Review

Volume 6 | Number 2 Article 29

1-1-1957

Criminal Law—Trial—Prejudicial Statements by District Attorney

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on two grounds: first, an illegal delay in arraignment and second, an attempt by the prosecutor to act as an unsworn witness in his summation to the jury.

The defendant was arrested on a Saturday night and was not arraigned until Monday morning, notwithstanding the fact that the arresting officers knew there was a court open on Sunday in which he could have been arraigned. The Court of Appeals held that it was error for the trial court to refuse to charge that such delay was unnecessary as a matter of law[57] and erred further by submitting the necessity or reasonableness of the delay to the jury as a question of fact.[58]

Further, defense counsel criticized the prosecutor for his failure to produce stenographic notes of the defendant's alleged police station statements. The prosecutor in his summation, referring to these statements, said:

> "Gentlemen, with all the sincerity at my command, I say to you that if that conversation did not take place, in your judgment, you stop right there. Don't waste another ten seconds on this case. Come back and say that this defendant is not guilty. If that conversation did not take place, then I am an aider and abetter to Omark's (a police officer) perjury."

The prosecutor thereby made himself an unsworn witness and supported his case by his own veracity and position. Such practices have been condemned as error[59] and the Court properly reversed the conviction here.

Trial—Prejudicial Statements by District Attorney

In *People v. Reade*[60] the defendant was tried for first degree murder. At the trial, defense counsel, in his summation to the jury, referred to his brother, who, being found insane, was confined to a mental institution until his death. The purpose thereof was obviously to allay the fears of the jury that this defendant, who had interposed the defense of insanity, would be set free upon the public if

57. N. Y. CODE CRIM. PROC. §165. The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night. N. Y. PENAL LAW §1844. A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.

58. *People v. Snyder*, 297 N. Y. 81, 91, 92, 74 N. E. 2d 657 (1947); *People v. Kozicky*, 275 App. Div. 862, 89 N. Y. S. 2d 286 (1949). The jury may consider an illegal delay in determining the weight to be given to evidence comprising statements made by the defendant during the illegal detention.

59. *Berger v. United States*, 295 U. S. 78, 88 (1935); *People v. Tassiello*, 300 N. Y. 425, 430, 91 N. E. 2d 872, 874 (1949); *People v. Swanson*, 278 App. Div. 846, 847, 104 N. Y. S. 2d 400 (1951).

60. 1 N. Y. 2d 459, 136 N. E. 2d 497 (1956).

he were acquitted by reason of insanity. To counter this, the district attorney in his summation told the jury:

> "Well, if you find him insane, ladies and gentlemen, you will have no assurance whatsoever that he won't be back out again . . . . When he satisfied the Commission that he is sane, as he is, that will be the end, he will be back out. No assurance whatsoever have you that they will keep him out of society. And ladies and gentlemen, that you cannot afford to let happen."

The Court of Appeals held that this was not error, holding that the district attorney was justified in answering the intimation of defense counsel that a finding of insanity was tantamount to confinement for life.

Both the remarks of defense counsel and the district attorney were improper and constituted reversible error. Such remarks put in issue before the jury the question of the disposition of the defendant subsequent to its verdict. The jury functions up to the time of its verdict. Subsequent thereto, the disposition of the defendant rests with the court,[61] and if convicted, after sentence further disposition can be made by the governor and parole board.[62]

Where insanity is interposed as a defense, it is for the jury to determine from the evidence introduced at the trial whether the defendant knew the difference between right and wrong and knew the nature and quality of his act. Here their function ends. They may not weigh the end result of their finding in the context of social repercussions which may follow. The jury may not go beyond its function to consider the adequacy of the legislation which governs disposition of a defendant subsequent to their verdict.

To allow the statements made in the instant case to stand conflicts with New York law which denominates the jury the trier of the facts only[63] and the explicit prohibition against the jury's considering the ultimate disposition of the defendant in arriving at its verdict.[64] This error cannot be resolved by holding that one statement balances the other. The error was in allowing the question of ultimate disposition to be considered by the jury in arriving at its verdict.

Error was also committed by the trial judge's answering the question of the jury as to whether or not, if they recommend life imprisonment, the defendant could be released on parole. While the trial judge is required to answer the questions of the jury,[65] it is obvious that he is not required to answer all questions.

61. N. Y. CODE CRIM. PROC. §482.
62. N. Y. CODE CRIM. PROC. §§692-698, N. Y. CORRECTION LAW Art. 8.
63. N. Y. CODE CRIM. PROC. §419.
64. N. Y. CODE CRIM. PROC. §420.
65. N. Y. CODE CRIM. PROC. §427.

He would be barred from answering questions as to the punishment for various degrees of a crime with which a defendant is charged. This would directly violate the statutory prohibition thereof.[66]

In the instant case answering the question as to parole was likewise improper. Here, life imprisonment must be taken at its face value. If the question of parole is interjected, it once again calls for consideration of matters extraneous to the jury's consideration. From the fact that the jury must agree unanimously upon a recommendation or non-recommendation of life imprisonment,[67] it is apparent that this constitutes an integral part of the verdict. The considerations in determining whether such a recommendation should be made turn primarily upon comparative moral blameworthiness.[68] In no event, however, should the jury be allowed to consider the working of the parole system any more than it should consider the possibility of pardon or commutation of sentence in determining whether the death sentence should be applied. The conviction in this case should have been reversed.

Sentence—Habitual Criminal

New York's habitual criminal statutes[69] have not been looked upon with favor by its judiciary.[70] In a case decided in 1930, the Court of Appeals observed: "If the sentence under review stands, the relator who is twenty-five years of age, because he had previously stolen chickens, certain automobile parts, and a motor cycle, must spend the remainder of his days in a State's prison".[71] Of course, the sentence did not stand.

Although the mandatory life sentence of the Baumes Law[72] has given way

66. N. Y. CODE CRIM. PROC. §420.
67. *People v. Hicks,* 287 N. Y. 165, 169, 38 N. E. 2d 482 (1941).
68. See note 67 *supra.*
69. N. Y. PENAL LAW § 1941. Punishment for second or third offense of felony. 1. (A) person, who after having been once or twice convicted . . . of a felony . . . commits any felony . . . is punishable upon conviction . . . as follows: If the second or third felony is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for an indeterminate term, the minimum of which shall not be less than one-half of the longest term prescribed upon a first conviction, and the maximum of which shall not be longer than twice such longest term. N. Y. PENAL LAW §1942. Punishment for fourth conviction of felony. A person who, after having been three times convicted within this state, of felonies . . . commits any felony other than murder . . . shall be sentenced upon conviction . . . to imprisonment . . . for an indeterminate term the minimum of which shall be not less than the maximum term provided for first offenders . . . but, in any event, . . . not less than fifteen years, and the maximum thereof shall be his natural life. . . .
70. Note, *Court Treatment of General Recidivist Statutes,* 48 COLUM. L. R. 238 (1948).
71. *People ex rel Marclay v. Lawes,* 254, N. Y. 249, 172 N. E. 487 (1930).
72. N. Y. Laws 1926, c. 457.