**Buffalo Law Review**

Volume 7 | Number 1 Article 57

10-1-1957

# Criminal Law—Recantation

Joel Brownstein

in directing that a person charged with a crime shall be free from shackles during his trial except to the extent deemed necessary by the trial court.

In *People v. Mendola*,[22] the Court of Appeals unanimously reversed the Appellate Division[23] and held that the trial court had not committed an abuse of discretion, as a matter of law, in permitting the defendant to be handcuffed during his trial for a previous escape from prison. Defendant was admittedly desperate and had said that he would have escaped even if he "had one day to go." The Court pointed out that it might have been a better practice for the trial court to have heard testimony bearing on the necessity of the handcuffs, but held that in any event the record contained sufficient evidence to justify that court's action in refusing to order the handcuffs removed.

The case was remanded to the Appellate Division to give them an opportunity to exercise their discretion under section 527 of the Code of Criminal Procedure.[24] On subsequent determination[25] it was held that a new trial was necessary in the interest of justice. It would seem that much of the procedural difficulty involved in this type of case could be eliminated if the appellate court, in the first instance, would, whenever possible, rest its reversal both on the law and on the ground that it was necessary in the interest of justice, as was done in *People v. Strewl*.[26]

## Recantation

Recantation, as applied within the scope of the law of perjury, is the renunciation or withdrawal of a prior statement made before a tribunal.[27] It has been recognized for centuries as a defense to the crime of perjury.[28]

*People v. Ezaugi*,[29] sets forth the criterion which the defendant must meet to apply this defense. The defendant in the instant case had intentionally testified falsely before a grand jury. After having left the witness stand, he discovered that the truth regarding his testimony was, and had been known all during the proceeding to the officials conducting the grand jury hearing. The defendant

22. 2 N.Y.2d 270, 159 N.Y.S.2d 473 (1957).
23. 1 A.D.2d 413, 151 N.Y.S.2d 278 (4th Dep't 1956).
24. N.Y. CODE CRIM. PROC. §527 provides:
> . . . And the appellate court may order a new trial if it be satisfied that . . . justice requires a new trial . . . .
25. 3 A.D.2d 811, 160 N.Y.S.2d 232 (4th Dep't 1957).
26. 246 App. Div. 400, 287 N.Y. Supp. 585 (3rd Dep't 1936), *appeal dismissed* 271 N.Y. 607, 3 N.E.2d 207 (1936).
27. Llanos-Senarillos v. United States, 177 F.2d 164 (9th Cir. 1949).
28. King v. Jones, 1 Peake's Rep. 51 (N.P. 1791); King v. Carr, 1 Sid. 418 (K. B. 1669).
29. 2 N.Y.2d 439, 161 N.Y.S.2d 75 (1957).

reappeared before the grand jury on the next day, repudiated his previous testimony, and related the events as they actually transpired.

The Court of Appeals, uponweighing all the facts in this case, concluded that such a recantation was but a calculated effort to escape the consequences of perjury prosecution, and refused to apply the recantation doctrine to cover this type of situation. The Court established the criterion that a recantation to be an effective defense against perjury, must be prompt, committed before harm is done to the inquiry, and before the recanter has reason to believe the truth has been discovered. The defendant failed to meet the last requirement, and the majority of the Court affirmed his conviction.

The dissent stated that a grand jury investigation, has for its sole purpose, the discovery of the truth, and every inducement should be made to the witness to aid in its elicitation.[30] The inducement would be destroyed if a witness could not correct a false statement except by running the risk of a perjury prosecution.

This decision does not, as the dissenters hold, almost eliminate the practical usage of the recantation rule. The defendant, by his actions, made unavailable the recantation defense. His recanting was not prompt, and although obviously lying, he refused to change his testimony during this initial appearance on the witness stand, while given every opportunity to do so. In *People v. Gillette,*[31] upon which the dissent strongly relies, the alleged incorrect statements were immediately corrected in the succeeding interrogation. This defense has also been upheld when then erroneous statements were made on direct examination and corrected on cross examination.[32] The majority in affirmance has sensibly refused to stretch the recantation defense to cover a defendant in cases where he waits too long in presenting his recantation to the court.

## Sentence—Multiple Punishment

In view of N.Y. Penal Law section 1938,[33] it has frequently been held that a court may not impose consecutive sentences where the same act is the basis for convictions obtained on a multiple count indictment.[34] However, in *People*

30. People v. Gillette, 126 App. Div. 665, 111 N.Y. Supp. 133 (1st Dep't 1908).
31. Note 30 *supra.*
32. People v. Brill, 100 Misc. 92, 165 N.Y. Supp. 65 (Sup. Ct. 1917); People v. Glass, 191 App. Div. 483, 181 N.Y. Supp. 547 (2d Dep't 1920).
33. N.Y. PENAL LAW §1938 provides:
> An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of these provisions, but not under more than one; and a conviction or acquital under any one bars a prosecution for the same act or omission under any other provision.
34. People v. Repola, 280 App. Div. 735, 117 N.Y.S.2d 283 (1st Dep't 1952), *aff'd without opinion* 305 N.Y. 740, 113 N.E.2d 42 (1953).