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Criminal Law—Privilege Against Self-Incrimination

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certainly damaging. Secondly, the unprecedented use of the waiver of self-incrimination as a waiver of the protection of the rules of evidence is so dangerous to our basic policy of a fair trial for everydefendant that it is wise to put aside all other considerations in striking down this principle before it gains any momentum.

Privilege Against Self-Incrimination

In New York it has consistently been held that when a Grand Jury subpoenaed a witness without apprizing him of his privilege against self-incrimination, and it could reasonably be said that he was the target of the investigation, then his status as a prospective defendant would be sufficient to confer automatic immunity upon him with regard to testimony which might tend to incriminate him.[13] It would appear that the resulting conferral, perhaps unwittingly,[14] of an "immunity bath" prompted the enactment of Penal Law §2447,[15] which holds that to obtain any immunity the witness must 1) claim his privilege, 2) be directed to answer, and 3) testify.

In *People v. De Feo*,[16] the prospective defendant was subpoenaed three times before the Grand Jury without being informed of his privilege, and was interrogated in regard to the alleged bribery of union officials. Before his fourth appearance he was informed of the privilege and invoked it, and the Grand Jury attempted to confer upon him a qualified immunity for "crimes of conspiracy and bribing labor officials." In a subsequent trial for contempt, defendant's evasive answers[17] were held to amount to contumacious conduct by the trial court; the Court of Appeals reversed, holding that under these circumstances it would be a violation of defendant's Constitutional privilege against self incrimination[18] to base any indictment on his testimony.

The Court felt that requiring the witness to invoke the privilege when he had not been put on notice that he was likely to be the target of the investigation was in itself unconstitutional, and that the attempted conferal of a qualified immunity at his fourth appearance did not meet the requirement that the immun-

13. *People ex rel. Coyle v. Truesdell*, 259 App. Div. 282, 18 N. Y. S. 2d 947 (2d Dep't 1940); *People v. Cahill*, 193 N. Y. 239, 86 N. E. 39 (1908); *People v. Sharp*, 107 N. Y. 427,14 N. E. 319 (1887).

14. NEW YORK STATE LEGISLATIVE ANNUAL 1953, at 480.

15. ". . . if a person refuses to answer a question . . . and . . . an order is made that . . . (he) answer the question . . . (he) shall comply with the order. If . . . (he) complies . . . and if, but for this section, he would have been privileged to withhold the answer . . ., then immunity shall be conferred upon him . . ."

16. 308 N. Y. 595, 127 N. E. 2d 592 (1954).

17. *Finkel v. Mc Cook*, 247 App. Div. 52, 286 N. Y. Supp. 755 (1st Dep't), *aff'd*, 271 N. Y. 636, 3 N. E. 2d 460 (1936).

18. N. Y. CONST. art. I §6.

ity granted must be as broad as the privilege. Hence, his testimony could not be grounds for either citation or indictment. Although the Court did not specifically hold §2447 unconstitutional, this decision will virtually vitiate any possible effect of the statute.

Amendment of Indictment

There are two methods of indictment procedure in New York; the first and older is a long form indictment,[19] which has been in use since 1881. The second method, authorizing a simplified indictment,[20] was enacted in 1929. Included in the chapter outlining the simplified indictment is a section permitting the indictment to be amended according to the proof, if the defendant cannot thereby be prejudiced.[21] The amendment may even add new counts to the indictment where it appears that the new crimes to be charged relate to the transactions which form the basis for the indictment.[22]

In *People v. Ercole,*[23] a long form indictment for larceny was returned which failed to allege false or fraudulent representations as required by statute.[24] On trial, and before proof of the larceny, an amendment of the indictment was permitted, to add new counts which were in conformity with the larceny statute.[25] The majority of the Court of Appeals felt that the chapter on simplified indictments was meant to relate only to indictments found under that chapter and could not be used to amend a long form indictment such as was used in the instant case. Only the amendment sections existing independently of the simplified indictment chapter[26] may be used to affect a long form indictment.

The dissent maintains that § 295-j is independent of the simplified indictment chapter and applies to any indictment, basing this argument largely on dicta found in previous rulings of the court.[27] The stautory scheme does not seem to support this contention.

Automobiles: Junior Operator

In *People v. Harms,*[28] defendant, a holder of a junior operator's license, was

19. N. Y. CODE CRIM. PROC. §§273-292-a.
20. *Id.*, §§295 (b)-295 (k).
21. *Id.*, §295 (j).
22. *Ibid.*
23. 308 N. Y. 425, 126 N. E. 2d 543 (1955).
24. N. Y. PENAL LAW §1290-a.
25. *Id.*, §1290.
26. N. Y. CODE CRIM. PROC. §§285, 293, 542.
27. *People ex rel. Prince v. Brophy,* 273 N. Y. 90, 6 N. E. 2d 109 (1937); *People v. Miles,* 289 N. Y. 360, 45 N. E. 2d 910 (1942); *People ex rel. Poulos v. Mc Donnell,* 302 N.Y. 89, 96 N. E. 2d 614 (1951).
28. 308 N. Y. 35, 123 N. E. 2d 627 (1954).