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Criminal Law—Evidence

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is not so sacrosanct that it cannot yield when there is danger of impairment of public morals in allowing free entrance and reporting of filthy sexual episodes.

Heavy criticism might be leveled at the majority for its dogmatic invocation of the *unius expressio, alterius exclusio* canon decried by modern writers.⁸⁰ The concept of statutory analogy⁸¹ would have induced an opposite result, for the unbridled publicity given this case is an example of the precise evil which the legislature intended to correct by section four of the Judiciary Law. This is especially clear in that the trend, as evinced by the legislative history of that section,⁸² has been to allow the trial judge greater latitude in excluding the prurient from attempting to view and report salacious testimony in the courts.

The connected case of *United Press Association v. Valente*⁸³ tested the right of the press to object to an exclusion order. The Court held that the applicable language of the Judiciary Law, "The sitting of every court within this state shall be public, and every citizen may freely attend the same,"⁸⁴ is to be historically construed⁸⁵ as affording freedom of access and protection from arrest to those whose presence was *essential* to the work of the court, and affords no rights to mere spectators. Hence an accused may waive *his* right to a public trial if the trial judge permits.

Judge Desmond, in a separate opinion, concurs with the result on the ground of his dissent in the *Jelke* case, citing the majority's ratio decidendi as specious. The dissent joins issue on the ground that common law tradition,⁸⁶ as embodied in section four of the Judiciary Law, guarantees the public an enforceable right to view and report judicial proceedings. The dissenters also feared that justice might be subverted if the judge and the accused could combine to bar the press and public from certain trials.

Evidence

In *People v. Dales*,⁸⁷ defendant was convicted of forgery in the second degree

80. See LENHOFF, CASES AND COMMENTS ON LEGISLATION, 692 (1949); Beutel, *Problems of Interpretation Under the Negotiable Instruments Law*, 27 NEB. L. REV. 485, 491 (1948).

81. LENHOFF, *op. cit. supra*, note 80, at 945.

82. Section 4 was amended in 1945 to include sodomy and filiation proceedings.

83. 308 N. Y. 71, 123 N. E. 2d 777 (1954).

84. N. Y. JUDICIARY LAW §4 (3).

85. The court referred to 1 COLONIAL LAWS OF NEW YORK 159-160 (1894), respecting freedom from arrest of all persons *voluntarily* attending court on court business.

86. "These words are of great importance, for *all causes* ought to be heard, ordered, and determined before the judges of the kings courts *openly* in the kings courts, whither all persons may resort." COKE'S SECOND INSTITUTES, v. I, p. 703 (1797); (emphasis supplied).

87. 309 N. Y. 97, 127 N. E. 2d 829 (1955).

for uttering, with intent to defraud, a promissory note; the maker's name, purportedly that of the defendant's employee, had actually been attached by the defendant, and the note described a nonexistent truck as collateral. In the Court of Appeals, defendant argued that three other conditional sales contracts, each involving either a spurious signature or a fictitious vehicle described as collateral, should not have been admitted in evidence. Furthermore, defendant contended that the trial court should have ordered production both of the Grand Jury minutes and of a written statement given by the employee to police before trial. The Court of Appeals affirmed the conviction, finding that the three tainted conditional sales contracts were admissible to show "intent to defraud" even though their admission proved independent crimes; the defendant claimed inadmissibility because of his alleged authority to sign in the instant case. The court further decided that both the Grand Jury minutes and the written statement were properly withheld from the defendant.

"The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged."⁸⁸ But this rule applies "only when proof of another crime can have no purpose, except to show that the accused is a criminal who having committed one offense would be likely to commit another, and, therefore, was guilty of the one charged."⁸⁹ The rule generally does not apply in forgery cases where proof of similar forgeries passed within a reasonable time of the indictment are considered admissible for the purpose of showing intent,⁹⁰ guilty knowledge,⁹¹ motive,⁹² common scheme, or freedom from mistake,⁹³ which are all elements of the crime charged.

Public policy dictates that "the secrecy of the proceedings before the grand jury must be preserved inviolate."⁹⁴ A grand juror who wilfully discloses grand jury secrets or a stenographer, appointed to take testimony before a grand jury, who permits any person other than the district attorney to read such testimony is guilty of a misdemeanor unless such disclosure is made pursuant to a lawful court directive.⁹⁵ If the district attorney makes use of such minutes at the trial, however, the defendant is entitled to examine them.⁹⁶ If the prosecution fails to make use

88. *People v. Molineux*, 168 N. Y. 264, 291, 61 N. E. 286, 293 (1901).

89. *People v. Gaffey*, 182 N. Y. 257, 262, 74 N. E. 836, 838 (1905).

90. *People v. Everhardt*, 104 N. Y. 591, 11 N. E. 62 (1887).

91. *Ibid.*

92. *People v. Dolan*, 186 N. Y. 4, 78 N. E. 569 (1906).

93. *Ibid.*

94. *People v. Miller*, 257 N. Y. 54, 57, 177 N. E. 306, 307 (1931); N. Y. CODE CRIM. PROC. §§265, 952-t.

95. N. Y. PENAL LAW §§1783, 1784.

96. *People v. Miller*, 257 N. Y. 54, 177 N. E. 306 (1931).

of the grand jury minutes at the trial, then if defense counsel seeks them for cross-examination he may examine them only if the court, upon inspection, has found that they contain material at variance with the testimony given by the particular witness on the stand.⁹⁷ The rule as to disclosure of statements in the custody of the district attorney, for purposes of cross examination, is similar to that applying to grand jury minutes.⁹⁸

In *People v. Lee*⁹⁹ the Court deal with a decision of the Appellate Division¹ which reversed the convictions of two defendants (Sarra and McCarthy) for admitted error in the admission of evidence, and dismissed the indictment as to the third (Lee) on the ground that the complainant's identification of him as a participant in an alleged robbery and assault was insufficient to go to the jury. On appeal Sarra and McCarthy claimed that the lower court erred in not dismissing the indictment as to them, because complainant had a criminal record and was not to be believed. On cross appeal the State argued, as to Lee, that the Appellate Division lacked the power to dismiss his indictment. The court held that the questions of fact were for the jury in both cases.

The court reindorsed the well entrenched principle that pollution of the source of testimony does not automatically brand it as mendacious,² but due to the admitted error a new trial was ordered. The court found error in the dismissal of Lee's indictment by the Appellate Division because there was sufficient evidence upon which the jury could base its decision.

Charging Lower Counts

The common law rule has been incorporated into statute³ that, if a defendant could be found guilty of a lesser degree of any crime charged in the indictment, the trial judge must submit such lower offense⁴ unless no conceivable view of the evidence would allow the jury to find the defendant innocent of the higher crime

97. See, e.g., *People v. Boniello*, 303 N. Y. 619, 101 N. E. 2d 488 (1951).

98. *People v. Walsh*, 262 N. Y. 140, 186 N. E. 422 (1933).

99. 308 N. Y. 302, 125 N. E. 2d 580 (1955).

1. 283 App. Div. 876, 129 N. Y. S. 2d 201 (2d Dep't 1955).

2. *People v. Landers*, 264 N. Y. 119, 190 N. E. 204 (1934); *People v. Arata*, 255 N. Y. 374, 174 N. E. 758 (1931).

3. N. Y. CODE CRIM. PROC. §444; "Upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the crime . . ."

§445 provides, "In all other (than §444) cases, the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment."

4. *People v. Lapolte*, 253 N. Y. 573, 171 N. E. 788 (1930); *People v. Seiler*, 246 N. Y. 262, 158 N. E. 615 (1927).