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# Criminal Law—Sentencing

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yet guilty of the lower.[5] In *People v. Mussenden*[6] the court found such a situation, where three of defendant's confreres accosted complainant (while defendant waited in their car), assaulted him, and unsuccessfully attempted to take his wallet. In their defense they alleged that complainant's entire story was mendacious, that they had merely asked him for directions when he became excited and created a scene. The Grand Jury charged in separate counts (1) Attempted Robbery, first degree; (2) Attempted Grand Larceny, first degree; (3) Assault, second degree. The trial judge submitted only the first count to the jury, which the Court of Appeals held to be proper.

The dissent argued that the jury would have been warranted in viewing defendant's conduct as not amounting to an attempt,[7] or merely as second degree Assault, if they chose to disregard that part of complainant's story relating to his wallet.[8] Therefore defendant's rights were substantially prejudiced when the jury was placed in the dilemma of either acquitting or convicting on the maximum count. Since the defendant chose to stand or fall on his version of the facts, it does not appear that his rights were substantially prejudiced when the trial judge refused to charge crimes of which defendant could have been guilty only on highly conjectural views of the testimony which were not even urged by defendant during trial.

*Sentencing*

The case of *People v. Tower*[9] presented the anomaly of a defendant's contending that his prior record proved he was beyond redemption,[10] and hence the sentencing judge erred in placing him in a correctional institution (maximum term: three years);[11] if sentence of a punitive nature had been pronounced, only one year could have been imposed for his unlawful entry.[12] Defendant also contended that the trial judge's recommendation that defendant not be released until he had served the maximum term was error. The court held the sentencing court was free to conclude that defendant was not incapable of rehabilitation even

5. *People v. Moran*, 246 N. Y. 100, 102-3; 158 N. E. 35, 36 (1927); *People v. Schleiman*, 197 N. Y. 383, 390; 90 N. E. 950, 953 (1910).

6. 308 N. Y. 558, 127 N. E. 2d 551 (1955).

7. *People v. Rizzo*, 246 N. Y. 334, 158 N. E. 888 (1927); *People v. Werblow*, 241 N. Y. 55, 148 N. E. 786 (1925).

8. That this is within the province of the jury, see *People v. Rytel*, 284 N. Y. 242, 245; 30 N. E. 2d 578, 580 (1940).

9. 308 N. Y. 123, 123 N. E. 805 (1954).

10. N. Y. CORRECTION LAW §203 (e) provides "This article shall not apply to any person who is . . . (3) Insane, or mentally or physically incapable of being substantially benefitted by being committed to a correctional or reformatory institution."

11. *Id.*, §203 (b): "The court in imposing sentence shall not fix or limit the term of imprisonment of any person sentenced to any such penitentiary. The term of such imprisonment . . . shall not exceed three years."

12. N. Y. PENAL LAW §§405, 1937.

though his record was bad and he himself maintained that he was beyond the pale. In addition, though the trial court exceeded its powers in recommending that defendant serve the maximum term, this was not reversible error; proper procedure would be followed when the determination as to his release was made.

The Court thus tacitly recognized that it cannot police the discretion of trial judges as to whether an offender is incorrigible, even when the trial court (as here) betrays its true motivation for using the Correction Law machinery. If the trial court wishes to utilize this to imprison defendants for a longer period of time than would be possible by using the determinate sentences, and then refuses to concur in the Parole Board's recommendation for an early release,[13] judicial review is powerless to intervene. It is deplorable that a trial judge may thus subvert the clear legislative intent to rehabilitate offenders by using the corrective statutes to impose a heavier sentence than a strict punishment statute would allow.

*Procedure; Appeal*

In *People v. Fromen,*[14] after a conviction had been reversed by the Appellate Division,[15] the state appealed, but they failed to note the case for argument for more than seven months. The Court, in a per curiam opinion, held that the appeal must be dismissed.

The Code of Criminal Procedure § 536 provides unequivocally that failure by either party to bring an appeal to argument within ninety days after it is granted, in the absence of any enlargement will result in a dismissal of the appeal on the theory that it has been abandoned. The Court has been very liberal in the past in excusing delays, even where both parties have been remiss in bringing the appeal to argument,[16] or counsel misinterpreted the law,[17] or assigned counsel was lax in noting the argument.[18] In *People v. Solomon,*[19] however, the Court warned against future delays of this type, and the instant case is indicative of their change of policy. It is suggested, however, that where strict application of

13. N. Y. CORRECTION LAW §204 (a)-2; "The parole commission shall have power to: Parole . . . provided the . . . court who made the commitment . . . shall . . . approve in writing such parole . . . ."
14. 308 N. Y. 324, 125 N. E. 2d 591 (1955).
15. 284 App. Div. 576, 132 N. Y. S. 2d 376 (4th Dep't 1954).
16. *People v. Sprager,* 215 N. Y. 266, 109 N. E. 247 (1915), three and a half year delay excused.
17. *People v. Solomon,* 296 N. Y. 85, 70 N. E. 2d 404 (1946), nine month delay excused.
18. *People v. Nelson,* 188 N. Y. 234, 80 N. E. 1029 (1907), delay of one year excused.
19. See Note 17, *supra.*