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Criminal Law—At the Trial

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a. that the delay in moving the case for trial did not present mitigating circumstances such that remission should be granted;[49] and

b. that the circumstances of defendant's confinement under the Mental Hygiene Law,[50] which indicates it does not apply to those awaiting criminal trial, and his subsequent escape, do not make out a case for remission, particularly in view of available provision for commitment to a mental institute in the Code of Criminal Procedure insuring adequate safeguards against escape.[51] The court further remarked that sureties had more than adequate time to learn of Fiannaca's mental condition and have him properly committed by the court, or surrender the principal and rid themselves of the obligation to produce him upon trial.[52]

In a dissenting opinion by Judge Froessel, it was denominated a "travesty on justice"[53] that the State should collect a "debt" it created itself by its agents' careless guarding of the defendant who got away.

It is perhaps noteworthy that neither opinion comments specifically on the reasons why four years elapsed before the case was moved for trial, other than to suggest, by way of conjecture, that the incarceration of Fiannaca's codefendant was the cause. It may be deemed unfortunate that a surety is subject to such an elastic expansion of risk where trial is delayed for an inordinate period of time without requiring the People to produce adequate circumstances palliative of the postponement. Under the express dictum of the case, in this regard, the surety's only protective means available is the surrender of his principal whenever the risk of forfeiture impresses him as being imminent.

At the Trial

a. Privileged communications: The right to counsel, inherent in the concept of a fair trial,[54] embraces the right to consult counsel in private, either in the confines of an office or at the

49. CODE CRIM. PROC. § 590 provides for surrender of defendant in exoneration of bondsman.

50. See note 45 *supra;* see also *People on complaint of Scheinberg v. McDermott,* 179 Misc. 89, 37 N. Y. S. 2d 69 (Magistrate Ct. 1942).

51. CODE CRIM. PROC. §§ 658-662-f provides for an inquiry into sanity of defendant, before or during trial, or after conviction; an inquiry into ". . . such state of idiocy, imbecility or insanity that he is incapable of understanding the charge . . . or of making his defense . . .." There was no showing that Fiannaca was of such mental abnormality at the time of his civil commitment.

52. See note 43 *supra* at 518, 519, 119 N. E. 2d 363, 366.

53. *Id.* at 520, 119 N. E. 2d 363, 367.

54. U. S. CONST. AMEND. XIV; *People v. McLaughlin,* 291 N. Y. 480, 482, 53 N. E. 2d 356, 357 (1943); *Williams v. Kaiser,* 323 U. S. 471, 473 (1945).

counsel table in court, without the People in a criminal prosecution intercepting such consultation either openly, by use of force to effect counsel's divulgence of private information, or covertly, by planting an eavesdropper or concealed recording mechanism.[55] The burden of proving a violation of this particularized right of privacy, however, must be borne by the defendant; and in seeking to effectuate his constitutional privilege by achieving redress for an alleged deprivation thereof, he must clearly establish (1) that he and his attorney were engaged in professional consultation of a legal character, (2) that they intended such consultation to be private and with reasonable circumspection endeavored to preserve the secrecy of their communications, and (3) that either by open force or secret device, the privacy of their privileged communications was destroyed.[56]

In *People v. Cooper et al.*,[57] defendants, convicted of murder, first degree, upon reargument of appeal[58] for the purpose of determining whether the conviction should be reversed on grounds alleged in support of an application for *coram nobis*,[59] asserted *(inter alia)* that their right to counsel and a fair trial had been impaired by the stationing of a police officer who understood Yiddish in proximity to counsel table for the purpose of reporting to the prosecution Yiddish conversations between defendants and their attorneys. The Court of Appeals held that the evidence, adduced in their hearing upon application for the writ, was insufficient to establish a violation of their right in that there was no showing that the officer overheard anything, that he was stationed for that purpose, or that even if he had heard anything, it was not unintentional and excusable as an incidental result of reasonable and necessary efforts to prevent an attempted escape where a basis for such suspicion existed.[60]

In a concurring opinion by Judge Dye and Judge Van Voorhis, it is pointed out with some force that, for purposes of a practicable enforcement of the privilege, conversations conducted between

55. *Matter of Fusco v. Moses*, 304 N. Y. 424, 107 N. E. 2d 581 (1952) (spy posing as a co-defendant); *Coplon v. United States*, 191 F. 2d 749 (D. C. Cir. 1951), *cert. denied*, 342 U. S. 926 (1952), (eavesdropping by telephonic interception); *Powell v. Alabama*, 287 U. S. 45 (1932).

56. See RICHARDSON, THE LAW OF EVIDENCE §§ 475-490 (3d ed. 1928).

57. 307 N. Y. 253, 120 N. E. 2d 813 (1954).

58. CODE CRIM. PROC. § 517, 520, N. Y. Laws 1954, c. 806, amendment effective September 1, 1954, permits a defendant to take a direct appeal to the Court of Appeals from an order of the trial court, made in a capital case, denying a motion for a writ of error coram nobis.

59. See the discussion of the writ of error coram nobis, origin and limitations in 1 BFLO. L. REV. 268 (1952).

60. *E. g., Fusco v. Moses*, note 55 *supra* at 433, 107 N. E. 2d 581, 585; *Glasser v. United States*, 315 U. S. 60, 76 (1942). Had defendant's allegations been sufficiently proved, a new trial would have been required.

counsel and defendant in a crowded courtroom, even in a foreign tongue, should not be cloaked with the protective confidential status judicially recognized, absent prior objection to the court that adequate opportunity to confer has been denied during the trial. The thesis of the concurring opinion flows from the established principle that conversations between attorney and client conducted in the presence of third persons bearing no confidential relationship are not privileged;[61] and since the officer's propinquity was apparent to defendants, objection thereto should have been addressed to the court during trial. On this basis, the possibility of fabricated claims of violation would be obviated, and the practicability of adjudicating rights on appeal, in this regard, enhanced.

b. Co-conspirator's declarations: It has long been held that declarations of a co-conspirator made subsequent to and not in furtherance of the conspiratorial enterprise are not admissible in evidence against another co-conspirator.[62] This proposition was reaffirmed in *People v. Marshall*,[63] where statements to the District Attorney made by one of two defendants convicted of abortion[64] were read to the jury. Such statements were held by the Court of Appeals to have been erroneously received in evidence, reversing the decision of a divided court below.[65] The court emphasized that as well as the erroneously denied objection by defendant to such admission of evidence, the lower court's refusal to instruct at the time of the admission that the statements of a co-conspirator after and not in furtherance of the conspiracy were not binding on the other defendant, and that certain other statements concerning appellant's guilt subsequently expunged from the record should be completely disregarded by the jury, constituted reversible error. The unanimous opinion of the court pointed out the substantial prejudice to defendant occasioned by waiting until the conclusion of the trial so to instruct, such deferred instruction not being psychologically the equivalent of a proper instruction contemporaneous with the admission.[66]

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61. *Doheny v. Lacy*, 168 N. Y. 213, 61 N. E. 255 (1901).

62. *People v. Ryan*, 263 N. Y. 298, 305, 189 N. E. 225, 227 (1934); see *e. g., People v. Vaccaro*, 288 N. Y. 170, 42 N. E. 2d 472 (1942); *People v. Kief*, 126 N. Y. 661, 662, 663, 27 N. E. 556, 557 (1891); *People v. McQuade*, 110 N. Y. 284, 307, 18 N. E. 156, 166 (1888).

63. 306 N. Y. 223, 117 N. E. 2d 265 (1954).

64. PENAL LAW § 80.

65. 282 App. Div. 36, 121 N. Y. S. 2d 450 (1st Dep't 1953).

66. See *People v. Carborano*, 301 N. Y. 39, 92 N. E. 2d 871 (1950); *People v. Robinson*, 273 N. Y. 438, 8 N. E. 2d 25 (1937); see, *e. g., People v. Posner*, 273 N. Y. 184, 7 N. E. 2d 93 (1937); *People v. Mleczko*, 298 N. Y. 153, 81 N. E. 2d 65 (1948); *People v. Tassiello*, 300 N. Y. 425, 91 N. E. 2d 872 (1950).

The identical question was before the Court in *People v. Ramistella*,[67] where the confession and oral statements of one co-defendant, definitely implicating appellant and charging him with another crime, were admitted in evidence over appellant's objection and exceptions, the trial judge refusing to instruct the jury at the time of such admission that the statements were not binding on the co-defendant. The court, in reversing a conviction of grand larceny, first degree, again underscored the proposition that a general admonition in the formal charge at the close of the trial was insufficient to protect appellant from the prejudicial effect of such evidence.[68]

The court pointed out further errors basing their refusal, in that:

a. the right of cross-examination by the defendant was improperly impeded by the trial court where the Prosecution offered evidence to show that the serial number of the stolen car matched that number stamped in a secret location of the car, which "confidential location" is used by car manufacturers, certain representatives of auto theft insurance companies, and police auto squads, concerning the location of which the trial court prevented cross-examination;[69] and

b. that the trial judge permitted the jury to find defendant guilty on both count one and count three of the indictment, both of which related to the theft of one automobile, where count one charged defendant guilty of grand larceny under the special automobile theft statute, while on count three the jury found defendant guilty under Section 1290 of the Penal Law (so-called common law larceny). Hence, although defendant was only sentenced once on the two counts, he was convicted of two separate crimes, only one of which he could have committed.[70]

c. Inspection of notes used to refresh witness' recollection: In *People v. Gezzo*,[71] the right of a defendant in a criminal trial to protect against the introduction of memoranda used to refresh a witness' recollection, possibly spurious in character, which he is

67. 306 N. Y. 379, 118 N. E. 2d 566 (1954).

68. See note 66 *supra*.

69. See, *e. g., Alford v. United States*, 282 U. S. 687 (1931); *People v. Becker*, 210 N. Y. 274, 104 N. E. 396 (1914); *People v. Cole*, 43 N. Y. 508 (1871); *cf. Friedel v. Board of Regents of University of New York*, 296 N. Y. 347, 73 N. E. 2d 545 (1947). Concerning the question of the "privileged" character of such information, see *Gordon v. United States*, 344 U. S. 414 (1952); *United States v. Coplon*, 185 F. 2d 629, 638 (2d Cir. 1950); *People v. Schainuck*, 286 N. Y. 161, 36 N. E. 2d 94 (1941).

70. See PENAL LAW § 1293-a which is declarative that an act is a crime under this section only if the circumstances do not constitute larceny under any other section of art. 122, §§ 1290-1313.

71. 307 N. Y. 385, 121 N. E. 2d 380 (1954).

not permitted to inspect was reinforced by the Court of Appeals.[72] Defendant was convicted of murder in the first degree. It was contended on appeal that the refusal of trial court to permit defense counsel to examine notes purportedly made by a police inspector of a conversation between defendant and the inspector (at a time when defendant believed he was about to die), which notes were used to refresh the inspector's recollection while a witness, was reversible error. The witness had testified that defendant admitted guilt. Reasoning that since the jury might consider defendant's statements as recollected by the witness similar in nature to a dying man's declarations,[73] and since defendant asserted self-defense in justification of his admitted shooting of the deceased, the refusal by the court below of an examination of the memoranda in question was held to constitute error of a decidedly prejudicial nature, even though such inspection might not have assisted defendant in any way.[74]

A second point discussed by the court and deemed by them serious error involved the failure by the judge to answer precisely one of two questions submitted by the jury, while instructing both defense counsel and the District Attorney under no circumstances to speak or register an exception to the court's answers. Although the questions submitted were vague,[75] the court stated emphatically that it was binding upon the judge to request the questioners to make their inquiry clear,[76] and then to answer proper questions distinctly and responsively.[77] Being a capital case, the Court of Appeals had the power to order a new trial in the interests of justice whether or not an exception had been properly stated below.[78] Hence, the court declined to determine whether the judge's instructions to counsel not to speak in the presence of the jury while requesting instructions constituted, without more, reversible

72. *Richardson v. Nassau Elec. RR. Co.*, 190 App. Div. 529, 180 N. Y. Supp. 109 (2d Dep't 1920); *Schwickert v. Levia*, 76 App. Div. 373, 78 N. Y. Supp. 394 (2d Dep't 1902); *Tibbetts v. Sternberg*, 66 Barb. 201 (1870); *Peck v. Valentine*, 94 N. Y. 569, 571 (1884), ". . . a right of great importance as a protection against fabricated evidence."

73. See 5 WIGMORE, EVIDENCE § 1430 (3d ed. 1940).

74. *Tibbetts v. Sternberg*, see note 72 *supra* at 203.

75. The questions submitted were: "Classification of the Penal Law pertaining to the use of firearms in the case of first and second degree murder; also classification of first and second degree murder." The trial judge answered by reading §§ 1044, and 1046 of Penal Law defining murder, first degree, and murder, second degree, respectively.

76. CODE CRIM. PROC. § 427 reads, in part, "After the jury have retired for deliberation . . . if they desire to be informed of a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given . . .." *People v. Gonzalez*, 293 N. Y. 259, 261, 56 N. E. 2d 574, 576 (1944); *People v. Cooke*, 292 N. Y. 185, 193, 54 N. E. 2d 357, 361 (1944).

77. *People v. Gonzalez*, note 76 *supra* at 262, 56 N. E. 2d 574, 577.

78. CODE CRIM. PROC. § 528; see *People v. Leyra*, 302 N. Y. 353, 365, 98 N. E. 2d 553, 559 (1951); *People v. Nelson*, 189 N. Y. 137, 81 N. E. 768 (1907).

error as a deprivation of the right of defendant to counsel at every stage of the proceeding.

d. Blood test results: A new section of the Vehicle and Traffic Law[79] caused the Court of Appeals to examine the effect of the admission in evidence of blood test results where the defendant was convicted of driving while intoxicated.[80]

In *People v. Ward*,[81] defendant, who submitted without coercion to the administration of a blood test, the results of which (clearly indicating prima facie evidence of inebriation)[82] were admitted in evidence at his trial, grounded his appeal on a challenge to the admissibility of such evidence. Defendant reasoned that the statute which provided *(inter alia)* that he might refuse to submit to such test and have a physician of his own choosing conduct the test in addition to the one given under the direction of the arresting officer also required that he be specifically apprised of his rights thereunder at the time of arrest.[83] The court affirmed the conviction, however, on the ground that since defendant voluntarily submitted to the test, the statute in question was not applicable.[84]

In some cogent dicta, the court indicated that the legislative intent which supports Section 71-a quite clearly does not purport to limit or circumscribe the use of such tests in evidence,[85] which use was never questioned where the tests were given with defendants' consent; and it is further implied, by analogy to the admissibility of evidence seized illegally without a warrant but with consent,[86] that no requirement of apprising defendant of his right to refuse is applicable under the circumstance of voluntary submission. Recognizing, however, that the line between consent and compulsion when confronted even by an unusually tender and gentle police officer is diaphanous at best,[87] the court recommended

79. VEHICLE AND TRAFFIC LAW § 71 (a). Consent to chemical tests, under this section, is deemed, unless there is an explicit refusal, whenever the police officer, upon reasonable suspicion, detains a person for driving while intoxicated.

80. VEHICLE AND TRAFFIC LAW § 70 (5).

81. 307 N. Y. 73, 120 N. E. 2d 211 (1954).

82. VEHICLE AND TRAFFIC LAW § 70 (5) (c) indicates that .15% alcoholic content of blood is regarded as *prima facie* evidence of intoxication; Defendant's blood test showed an alcoholic content .183%.

83. See note 79 *supra;* VEHICLE AND TRAFFIC LAW § 71 (a) (4).

84. See Ladd and Gibson, *The Medical-Legal Aspects of the Blood Test To Determine Intoxication,* 24 IOWA L. REV. 191, 245-251 (1939); *cf. Matter of Schutt v. MacDuff,* 205 Misc. 45, 51-52, 127 N. Y. S. 2d 116, 125, 126 (Sup. Ct. 1954).

85. See *Interim Report of New York State Joint Legislative Committee on Motor Vehicle Problems. Chemical Tests for Intoxication,* N. Y. LEG. DOC. no. 25, p. 15-17, 35 (1953).

86. 8 WIGMORE, EVIDENCE § 2184-a (3d ed. 1940); see also *United States v. Williams,* 161 F. 2d 835 (2d Cir. 1947).

87. See Ladd and Gibson, *op. cit. supra* note 84 at 245-251.

that better practice on the part of the police would call for notification to defendant of his rights under section 71-a whenever there may be a charge of coercion.

e. Circumstantial evidence: Frequently in criminal cases a difficult area of analysis and sometimes conjecture arises in regard to the legal sufficiency of the quality of the proof required to convict when such proof consists, in major part, of circumstantial evidence. In the absence of direct proof in a criminal trial that the particular defendant committed the particular act charged, can the proof of a chain of circumstances or occurrences relating to the crime, in which the defendant was principally involved, be utilized to secure a conviction "beyond reasonable doubt" of such defendant for that crime?[88]

The Court of Appeals affirmatively answered this question in *People v. Harris*,[89] defining once again the proper qualifications applicable to the use and sufficiency of circumstantial evidence upon the basis of which a conviction is obtainable. In the instant case, defendant was convicted of murder, first degree committed during the commission, or attempt to commit, rape. In a question and answer statement, not consistent in all particulars with defendant's trial testimony, he told the assistant prosecutor that he had been with decedent on the morning of her death and had had intercourse with her at the place where she was later found dead, that a tussle preceded their sexual congress, and that afterwards she "couldn't move." Decedent died of strangulation, and the torn condition of her underclothing indicated a sexual assault. Inasmuch as an autopsy showed that decedent's system had absorbed an amount of alcohol sufficient to cause "staggering", and defendant as well as another witness testified that he and decedent had been drinking together just prior to the time of the homicide, the charge of the trial court authorizing the jury to find either rape by force or fear, or because of intoxication preventing resistance was justified.[90] Such admissions of the defendant, which were in no way confessions of guilt, together with other evidence from which actions of guilt were inferable, satisfied the court that the New York test of sufficiency of proof was complied with. The established test, which the court recapitulated, is that "the proven facts must exclude to a moral certainty every hypothesis except that of guilt or of the offense charged and not alone must all the

88. See 1 WIGMORE, EVIDENCE §§ 25, 26, 38, 43, 41 (3d ed. 1940); see also WIGMORE, *The Science of Judicial Proof* §§ 9-15 (3d ed. 1937).

89. 306 N. Y. 345, 118 N. E. 2d 470 (1954), *affirming* 282 App. Div. 156, 121 N. Y. S. 2d 868 (1st Dep't 1953).

90. See PENAL LAW § 2010.

proven facts be consistent with and point to guilt, but they must be inconsistent with innocence."[91]

A second argument by the defendant, that it was error for the court below to include in its charge the common law theory of homicide as well as felony murder, was denied by the court since there was nothing to indicate that such inclusion confused the jury or prejudiced the defendant.

The court was presented with another facet of the problem of evaluating circumstantial evidence in the light of standards of sufficiency of proof to convict, in *People v. Foley*.[92]

Defendants' conviction of the crimes of burglary, third degree and larceny, second degree, were predicated upon their alleged recent, conscious and exclusive possession of the fruits of those crimes.[93] The Appellate Division reversed the convictions on the law for the reason that the alleged possession was not established by direct evidence, but found its basis in circumstantial evidence alone.[94] The infirmity arising from such an application of circumstantial evidence is that an inference of guilt is supported by an inference of possession. In a *per curiam* opinion the Court of Appeals affirmed the reversal, but disagreed with the Appellate Division on the question of the propriety of establishing conscious and exclusive possession of the fruits of the crimes, stating that such proof is proper and sufficient where the clear and convincing evidence establishes circumstances which exclude to a moral certainty every other inference but that of exclusive possession of the stolen goods by defendants. Because the circumstantial evidence did not, in the instant case, meet the test of certainty expounded, the convictions were reversed, and a new trial granted.

Chief Judge Lewis and Judge Fuld dissented on the ground that the proof satisfied the proper standards of certainty.[95]

f. Force permissible to prevent illegal arrest: That an arrest without a warrant in certain limited fact situations has been authorized[96] is beyond dispute. But an arrest without a warrant

91. *People v. Weiss*, 290 N. Y. 160, 163, 48 N. E. 2d 306, 307 (1943); *People v. Taddio*, 292 N. Y. 488, 489, 55 N. E. 2d 749 (1944); *Shepherd v. People*, 19 N. Y. 537, 545 (1859).

92. 307 N. Y. 490, 121 N. E. 2d 516 (1954).

93. *Knickerbocker v. People*, 43 N. Y. 177, 179-180 (1870).

94. See note 91 *supra*.

95. *Cf. People v. May*, 290 N. Y. 369, 375, 49 N. E. 2d 486, 489 (1943); *People v. Woltering*, 270 N. Y. 51, 61, 9 N. E. 2d 774, 777 (1937).

96. CODE CRIM. PROC. § 177 provides for arrest without warrant for a crime committed or attempted in the presence of the officer, or where the person arrested has committed a felony, although not in the officer's presence; or where a felony has in fact been committed, and the arresting officer had reasonable cause for believing the person arrested to have committed the felony.

which is not effected within the legally circumscribed area of propriety, whereby the arrest becomes illegal, endows the victim with a right to resist by using reasonably sufficient force to prevent the offense against his person.[97]

People v. Cherry[98] involved a concededly illegal arrest by police officers, one of whom was attacked by the victim biting his thumb in an effort to avoid such arrest. The Appellate Division, affirming a finding by the court below that defendant was guilty of assault, third degree,[99] in that he employed more force than was necessary or sufficient to prevent the offense committed upon him, was reversed by the Court of Appeals. The majority opinion by Judge Fuld was to the effect that since the officers were guilty of an illegal arrest,[100] and the defendant was thereby empowered to use sufficient force to *prevent* that improper detention,[101] defendant's bite did not constitute an assault, either as a revengeful counter-attack, or vindictive infliction of needless injury, regardless of the fact that the officers displayed their badges before making such arrest.

The dissenting opinion by Judge Desmond, in which Judge Froessel concurred, is based on the premise that since the court below found that defendant did use more force than was necessary for the purpose, which finding was affirmed by the Appellate Division, the latter authorized to pass on facts unlike the Court of Appeals, a reversal would be justified only if as a matter of law the defendant did not use more force than was reasonably necessary under the circumstances.[102]

After Trial

a. Legality of Judgment—Habeas corpus: Does the omission of a direction by the trial court for the enforcement of payment of a fine, which fine was a part of an original sentence including imprisonment, render the judgment on which the sentence is imposed defective? This question was presented to the Court of Appeals in *People ex rel. Sedotto v. Jackson,*[103] where the relator, who had been convicted of perjury, first degree,[104] instituted habeas

97. PENAL LAW § 246.
98. 307 N. Y. 308, 121 N. E. 2d 238 (1954).
99. 282 App. Div. 948, 125 N. Y. S. 2d 654 (2d Dep't 1953).
100. See note 96 *supra.*
101. See note 98 *supra* at 310, 121 N. E. 2d 238, 239.
102. *Id.,* at 315-317, 121 N. E. 2d 238, 243; see, *e. g., People v. Murray,* 54 Hun 406, 7 N. Y. Supp. 548 (1889); *Magar v. Hammond,* 183 N. Y. 387, 390, 76 N. E. 474, 475 (1906).
103. 307 N. Y. 291, 121 N. E. 2d 229 (1954).
104. PENAL LAW § 1633 (1) provides the punishment for perjury, first degree: "Perjury in the first degree and subornation of perjury in the first degree are felonies and are punishable by imprisonment for a term not exceeding five years, or by a fine of not more than $5,000, or by both."