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Criminal Law and Procedure—Waiver of Trial by Jury in Criminal Cases

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then the resulting search was likewise illegal. To avoid this conclusion the Court relies at least partially on the fact that the search uncovered the jewels. The validity of this reasoning is highly doubtful. Failure to comply with statutory requirements for arrest has rendered arrests illegal and unlawful.[33] The two requirements then for a legal arrest in this case were probable cause and compliance with the statutory provision of notice of authority and cause. All authorities agree that the fruits of the search could not be used to supply probable cause for the underlying arrest.[34] If the fruits cannot be used to fulfill one predicate of a legal arrest, *i.e.*, probable cause, they should not be used to justify the presumption that the defendant knew his cause of arrest. A search and arrest should not be permitted to pull themselves up by their own bootstraps in any manner.[35]

George P. Doyle

WAIVER OF TRIAL BY JURY IN CRIMINAL CASES

Defendant was indicted for rape in the first degree, assault in the second degree, carnal abuse of a child, and endangering the life, health and morals of a child. The case had given rise to some emotional newspaper commentary in which the defendant was described as a "sex monster," and a "molester of dozens of children." The defendant believed that because of this notoriety he could not obtain a fair jury trial,[1] and thus he moved, on the authority of a 1938 amendment to Article I, section 2 of the New York Constitution, to waive trial by jury.[2] The motion was denied, and the defendant subsequently was convicted on all counts. He appealed, assigning as error the denial of this motion. The Appellate Division reversed and ordered a new trial, granting the People permission to appeal. *Held,* in a four-three decision, that where a waiver of trial by jury is requested in good faith, the court, if confident that the defendant fully understands the consequences of his act, must then grant the waiver as a matter of right. *People v. Duchin,* 12 N.Y.2d 351, 190 N.E.2d 17, 239 N.Y.S.2d 670 (1963).

At common law, those accused of a felony could not waive the right to trial by jury.[3] While neither the courts nor the legislatures have generally distin-

33. People v. Gallo, 206 Misc. 935, 135 N.Y.S.2d 845 (N.Y. City Magis. Ct. 1954). See also Egan v. State, 255 App. Div. 825, 7 N.Y.S.2d 64 (4th Dep't 1938); People v. Dontz, 282 App. Div. 993, 125 N.Y.S.2d 526 (3d Dep't 1953).

34. *E.g.*, Johnson v. United States, 333 U.S. 10 (1947); United States v. Di Re, 332 U.S. 581 (1948).

35. McDonald v. United States, 335 U.S. 451 (1948). Compare Johnson v. United States, 333 U.S. 10 (1947).

1. People v. Duchin, 16 A.D.2d 483, 229 N.Y.S.2d 46 (2d Dep't 1962).

2. The relevant language of Article I, section 2, reads as follows: "A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense."

3. Lord Dacres Case, Kelyng's R. 59, Crown Cases 89 (reign of Henry VIII, jury

guished between waiver of a part of the full jury of twelve and waiver of the entire jury in advance of trial,[4] there had been at least one New York case prior to the 1938 amendment permitting the replacement of one juror where the defendant had consented to the change.[5] However, a general prohibition against either form of waiver persisted.[6] This rule had devolved by implication from the language of various constitutional provisions providing for jury trials.[7] Differing jurisdictions appear thus to have ruled according to the restrictive or permissive tone of the constitutional provisions with which they were concerned. The federal courts, without explicit constitutional authority, have since 1930 permitted the waiver of trial by jury in criminal cases, though not without the consent of both prosecution and court.[8] Since the rule in New York owed its existence largely to the strength of constitutional language,[9] it was not until a constitutional amendment explicitly provided for the waiver that it was allowed.[10] A waiver provision was first adopted in 1937 without limitations or qualifications other than for capital offenses, as to which trial by jury remained compulsory.[11] The Constitutional Convention of the following year, however, amended the provision, adding that the waiver must be by written instrument, executed before and with approval of a court of proper jurisdiction.[12] This qualification was then adopted as part of the 1938 constitution. The proposer of the amendment had sought in this way to insure against ill-considered waivers and to provide for evidence of the transactions.[13]

The 1938 amendment gave rise to no significant litigation until 1957, at which time the provision was held to be self-executing.[14] In the following year, the question of judicial discretion was considered in *Matter of Scott v. Mc-*

compulsory due to negative wording of Magna Charta); People v. Cosmo, 205 N.Y. 91, 98 N.E. 408 (1912) (common law rule); Cancemi v. People, 18 N.Y. 128 (1858) (common law rule); *But cf.* Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases,* 20 Va. L. Rev. 655 (1934) (arguing jury traditionally is by consent) *and see* 2 Pollock & Maitland, The History of English Law 648 (1895) (consent obtained by torture).

4. N.Y. Judicial Council, Second Report (1936) p. 100; Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942) (dissent based on this distinction).

5. People v. Toledo, 150 App. Div. 403, 135 N.Y. Supp. 49 (1st Dep't 1912).

6. N.Y. Judicial Council, Second Report (1936), at 99.

7. *Compare* Magna Charta ca. 39 ("[*N*]*ec super eum ibimus, nec super eum mittemus, nisi per legale judicium pariium, suorum vel per legem terrae.*" *trans.* "[N]or will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land." McKinney's Consol. Laws of N.Y., Const., Part 2, at 498), *with* N.Y. Const. art. I, § 2 (1777) ("[T]rial by jury . . . shall . . . remain inviolate forever; . . ."), *and with* U.S. Const. amend. VI ("[T]he accused shall enjoy the right [to trial by jury]"); See cases cited note 3 *supra.*

8. Patton v. United States, 281 U.S. 276 (1930), Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942); Fed. Rules Cr. Proc. rule 23(a).

9. See cases cited note 3 *supra;* N.Y. Judicial Council, Second Report (1936), at 99.

10. N.Y. Judicial Council, *supra* note 9.

11. N.Y. Const. art I, § 2 (1894), as amended, 1935, 1937.

12. See amendment quoted, *supra* note 2.

13. N.Y. State Const. Conv., 1938, Rev. Record, Vol. II, at 1274.

14. People v. Carroll, 7 Misc.2d 581, 161 N.Y.S.2d 339 (Kings County Ct. 1957), 4 A.D.2d 537, 168 N.Y.S.2d 265 (2d Dept. 1957), *aff'd,* 3 N.Y.2d 686, 148 N.E.2d 875, 171 N.Y.S.2d 812 (1958) (dictum to effect that amendment conferred absolute power to waive).

Caffrey.[15] The court there held, according to the intentions of the constitutional convention, that the trial judge is obliged only to insure against an ill-considered waiver, and that beyond this, the waiver may be had as of right.[16] The court further held that, although the defendant's purpose in seeking the waiver was merely to sever his action from that of his co-defendants, the waiver could nevertheless be granted, and, if necessary, the guilt or innocence of the person waiving could be excluded from the jury's consideration. Shortly after this case, however, in *People v. Masucci*,[17] the court specifically refused the conclusions of *Matter of Scott*, holding that the 1938 amendment gives the court full discretion in ruling on a motion for waiver. The Court of Appeals subsequently overruled *Matter of Scott* in part, holding that in co-defendant situations, a waiver of jury by one party necessarily requires a severance, and that a defendant should not be permitted to obtain by indirection the severance which had been directly refused him.[18] The Court of Appeals thus left until the instant case the interpretation of the 1938 amendment which, as is suggested by a comparison of *Matter of Scott* and *Masucci*, was open to differing views.

As noted above, the decision of the instant case was rendered by a bare majority. Judge Van Voorhis concurred, however, on the ground that there had been ". . . an abuse of discretion . . . in this case," and since this position rests at some indeterminate point between the majority and minority, the present holding offers no predictive value on this issue as to cases not precisely on all fours with the instant case. The point of dissension centered upon the latitude of judicial discretion attaching to the phrase, ". . . with the approval of a judge . . . ," as it appears in the relevant constitutional provision.[19] The majority interpreted the amendment as having been created primarily for the defendant, holding that according to legislative intentions,[20] the judicial function extends only to a finding that the defendant has been fully informed of the importance of the right being waived. Additionally, as had been earlier decided,[21] it must further be shown that the waiver is tendered in good faith rather than in pursuit of some procedural advantage. Judge Desmond, writing the dissenting opinion, reasoned that the authority of legislative intent is superceded where, as in the case of constitutional amendment, the provision is adopted by referendum. In such circumstances the language must be accepted at face value, according to its intent as the voters must necessarily have understood it to be. The effect of removing this legislative definition then gives the trial judge full

15. 12 Misc.2d 671, 172 N.Y.S.2d 954 (1958) (a proceeding under art. 78 of the Civil Practice Act for writ of prohibition and mandamus against the trial judge).

16. *Cf.* Matter of Nolan v. Court of Gen. Sessions, 15 A.D.2d 78, 222 N.Y.S.2d 635 (1st. Dept. 1961).

17. 21 Misc.2d 25, 198 N.Y.S.2d 110 (1958).

18. People v. Diaz, 10 A.D.2d 80, 198 N.Y.S.2d 27 (1st Dep't 1960), *aff'd*, 8 N.Y.2d 1061, 170 N.E.2d 411, 207 N.Y.S.2d 278 (1960).

19. See amendment quoted, *supra* note 2.

20. See Const. Conv. Record, *supra* note 13.

21. People v. Diaz, 10 A.D.2d 80, 198 N.Y.S.2d 27 (1st Dep't 1960), *aff'd*, 8 N.Y.2d 1061, 170 N.E.2d 411, 207 N.Y.S.2d 278 (1960).

discretion, for the disputed word, "approval," denotes ". . . a final expression of favorable view . . . subject to no limitation. . . ."[22] The dissenting judges clearly do not interpret the amendment as having conferred new powers upon the defendant.

The rule that a constitutional provision should not be construed so as to defeat either its purpose or the intent of the people in adopting it[23] would appear ambiguous in view of the instant case. There can be no doubt that the proposers of this amendment intended the effect which was given here.[24] And though it has been contended that those intentions could easily have been more explicit,[25] the framers of the provision nevertheless thought their language to be sufficiently clear.[26] The dissenting opinion, however, points to the entirely valid proposition that an intervening referendum may vitiate this legislative intent.[27] The people have a substantial interest in criminal proceedings, not only where a controlling statute has been adopted by referendum, but inasmuch as the people, theoretically at least, are an interested party, perhaps they, standing as a jury, should be permitted to try the offender.[28] It should also be observed that, where the jury is waived, a burden which formerly was shared by the conscience of twelve now devolves upon one. Opposed to these considerations is the traditional view that the jury trial is essentially a privilege of the accused,[29] and that in waiving the right, not only is the defendant benefited, but the state also benefits in savings of time and expense.[30] The commentators have generally endorsed the waiver, reasoning that a jury may be of definite disadvantage to the defendant,[31] and that to impose the process upon him abrogates the tradition of according the defendant all possible safeguards. There is, in addition, evidence that the common law rule may be leaned upon too heavily, for it cannot be shown that the framers of the United States Constitution had the intention of creating such a prohibition.[32] Though the federal courts continue to condition the waiver upon consent of the prosecutor and the

22. People v. Duchin, 12 N.Y.2d 351, 190 N.E.2d 17, 239 N.Y.S.2d 670 (1963).
23. 1 Cooley on Constitutional Limitations 124.
24. See Const. Conv. Record, *supra* note 13.
25. People v. Diaz, 10 A.D.2d 80, 87, 198 N.Y.S.2d 27, 35 (1st Dep't 1960), *aff'd*, 8 N.Y.2d 1061, 170 N.E.2d 411, 207 N.Y.S.2d 670 (1960).
26. See Const. Conv. Record, *supra* note 13, at 1284 ("Mr. Livingston: 'It is perfectly good English and there is no question about the intent or the meaning . . .'").
27. McKinney's Consol. Laws of N.Y., Const., Part 1, Constitutional Interpretation, Rule 8; Matter of Kuhn v. Curran, 294 N.Y. 207, 217, 61 N.E.2d 513 (1945); Matter of Carey v. Morton, 297 N.Y. 361, 381, 79 N.E.2d 442 (1948).
28. Cancemi v. The People, 18 N.Y. 128 (1858) (by implication); People v. Scornavache, 347 Ill. 403, 179 N.E. 909, (1931) (by implication). *Contra*, Hall, *Has the State a Right to Trial by Jury in Criminal Cases?*, 18 A.B.A.J. 226 (1932).
29. N.Y. Judicial Council, Third Annual Report (1937) at 111: Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942); Patton v. United States, 281 U.S. 276 (1930) (dicta).
30. See N.Y. Judicial Council, Third Annual Report (1937) at 111.
31. Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 Mich. L. Rev. 695, 696 (1927).
32. Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 Va. L. Rev. 655, 656 (1934).

court, there has been recurrent sentiment in favor of making the power to waive absolute. One could safely look to a liberalization of the present rule in the federal courts, much as (though with less than maximum assurance) the rule in New York has been liberalized. Many courts seem disturbed by the sort of reasoning which prohibits a defendant from waiving a right of this nature, since, as Justice Frankfurter put it, close adherence to the rule has the effect of ". . . imprison[ing] a man in his privileges."[33]

James B. Denman

ADMISSIBILITY OF EXCULPATORY PORTIONS OF A DEFENDANT'S STATEMENT AFTER INCRIMINATING PORTIONS HAVE BEEN ALLOWED INTO EVIDENCE

In this criminal proceeding the prosecution introduced as evidence incriminating portions of a record of a pre-arraignment interrogation of defendant. Counsel for defendant requested that exculpatory portions of the same record be read into evidence. This request was denied by the trial judge on the ground that the statements were not being offered as a confession. On appeal from an order of the Appellate Division[1] affirming a judgment of the Kings County Court convicting defendant, *held*, reversed unanimously and new trial granted. It was error to deny defendant's request that exculpatory portions of the record be admitted into evidence after allowing incriminating portions of the same record to be introduced by the prosecution, even though defendant, as a witness, denied making some of the statements contained therein. *People v. Gallo*, 12 N.Y.2d 12, 186 N.E.2d 401, 234 N.Y.S.2d 193 (1962).

The principle of evidence that a verbal utterance must be taken as a whole is deeply rooted in the common law and may be traced back to the seventeenth century.[2] There is no question that where one party offers into evidence only a part of a statement the other party may use any remaining parts of the same statement as he desires insofar as they are relevant.[3] Both the New York Civil Practice Law and Rules[4] and the Federal Rules of Civil Procedure[5] explicitly state the rule. The only limitation is that the parts of the statement which the parties wish to offer into evidence must be relevant and explanatory of those parts already given into evidence.[6]

The state of the law in New York can best be summed up as follows:

> It is well settled that where use is made in a judicial proceeding of a prior declaration the entire declaration at the time made so far as

33. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 280 (1942).

1. People v. Gallo, 16 A.D.2d 795, 227 N.Y.S.2d 943 (2d Dep't 1962).
2. 7 Wigmore, Evidence § 2094, at 475 (3d ed. 1940).
3. 7 Wigmore, Evidence § 2113, at 523 (3d ed. 1940). *E.g.*, People v. Miller, 247 App. Div. 489, 286 N.Y. Supp. 702 (4th Dep't 1936); People *ex rel.* Perkins v. Moss, 187 N.Y. 410, 80 N.E. 383 (1907).
4. N.Y. CPLR R. 3117(b).
5. Fed. R. Civ. P. 26(d)(4).
6. People v. Schlessel, 196 N.Y. 476, 90 N.E. 44 (1909).