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## Criminal Law—Evidence

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The more persuasive view, however, held by the Court of Appeals in the *Prosser* case, is that the burden of providing a speedy trial is upon the state, not on the defendant.<sup>41</sup> The state initiates the action and the state must see that the defendant is arraigned. It is likewise incumbent upon the state to see that the defendant has a speedy trial.

The legislature expressly excepted from Section 668 of the New York Code of Criminal Procedure a defendant who has neither applied nor agreed to a postponement. If it had been the intent of the legislature to deem the right to a speedy trial likewise waived by inaction under the statute, it would have so specified in the statute.

A defendant may, however, consent to delay in bringing the indictment to trial and, by this consent, thus waive his right to a speedy trial.<sup>42</sup> This agreement need not be by express terms or by stipulation but can be implied if, for instance, the case has been placed on the calendar and the defendant interposes no objection to the District Attorney's motion for postponement.

"The actual result of the present decision, therefore, is merely to impose upon the officers, charged with enforcing the law and who secured the indictment, the quite reasonable, far from burdensome, duty of noticing it for trial."<sup>43</sup>

## Evidence

From normal experience we know that refusal to answer a question or accusation is often as much an affirmation of guilt as a positive answer. Thus in New York, a defendant's silence is competent evidence for the jury's consideration.<sup>44</sup> The prosecution is limited to this extent: the defendant must fully comprehend the question or accusation;<sup>45</sup> he must have full liberty to answer;<sup>46</sup> and the circumstances must justify an inference of assent or acquiescence.<sup>47</sup> However, evidence of this kind of conduct after a defendant is arrested is not admissible and evidence of this nature will be excluded.<sup>48</sup> This latter rule was the

41. *State v. Carillo*, 41 Ariz. 170, 172, 16 P. 2d 965 (1932); *State v. Chadwick*, 150 Or. 645, 650, 47 P. 2d 232 (1935); *Flanary v. Commonwealth*, 184 Va. 204, 35 S. E. 2d 135 (1945).

42. *People v. Perry*, 196 Misc. 922, 96 N. Y. S. 2d 517 (County Court 1949).

43. *People v. Prosser*, 309 N. Y. 353, 361, 130 N. E. 2d 891, 896 (1955).

44. *People v. Allen*, 300 N. Y. 222, 90 N. E. 2d 48 (1949).

45. *People v. Koerner*, 154 N. Y. 355, 374, 48 N. E. 730, 736 (1897).

46. *People v. Allen*, 300 N. Y. 222, 90 N. E. 2d 48 (1949).

47. See note 46 *supra*.

48. *People v. Rutigliano*, 261 N. Y. 103, 107, 184 N. E. 689, 690 (1933) (dictum); *People v. Abel*, 298 N. Y. 333, 335, 83 N. E. 2d 542, 543 (1949).

basis for the Court's reversing convictions in *People v. Travato*<sup>49</sup> and *People v. Namer*.<sup>50</sup>

In *People v. Travato*, appellant, his hands and clothes oily and greasy, was discovered in an automobile with one Fanning and fifteen sewing machines. Fanning pleaded guilty, but exonerated appellant by stating that he met defendant after the burglary. Defendant was convicted of burglary and larceny<sup>51</sup> mainly upon circumstantial evidence. At the trial it became important to know where defendant got the oil and grease. Police officers were permitted to testify that defendant repeatedly refused to answer questions regarding his oily and greasy hands and clothes. Defense counsel moved to strike this evidence but the Court denied the motion and in its charge referred to the defendant's refusal to answer.

Upon appeal the Appellate Division affirmed without opinion.<sup>52</sup> The Court in reversing the conviction and ordering a new trial, held that a defendant under arrest has a right to remain silent and has no duty to answer questions. His silence, therefore, was not to be considered by the jury as an admission that greasy hands and clothes were the result of taking the sewing machines. The Court felt this error was aggravated by the trial judge's referring to the defendant's silence in his charge.

In *People v. Namer*, the appellant had been convicted of possessing a pistol without a license which is proscribed by the PENAL LAW.<sup>53</sup> The Court reversed the judgment and ordered a new trial because of two errors in admitting evidence at the trial. The Court decided it was error to allow testimony that defendant remained silent when interrogated at the police station about his having been

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49. 309 N. Y. 382, 131 N. E. 2d 557 (1955).

50. 309 N. Y. 458, 131 N. E. 2d 734 (1956).

51. i.e., first degree burglary and third degree grand larceny. Defendant was also convicted of possessing burglar's tools, a crime under the N. Y. PENAL LAW §408. The Court reversed this conviction and dismissed that charge on the ground that testimony of the presence of screwdrivers and gloves in Fanning's automobile was insufficient to sustain the conviction. *People v. Spillman*, 309 N. Y. 295, 130 N. E. 2d 625 (1955).

52. *People v. Travato*, 286 App. Div. 853, 143 N. Y. S. 2d 640 (2d Dep't 1955).

53. N. Y. PENAL LAW §1897(4).

involved in other crimes in the area where he lived.<sup>54</sup> The Appellate Division in a 3-2 decision had affirmed,<sup>55</sup> the majority holding that the errors did not affect the result in view of uncontradicted evidence, (defendant had admitted he must have had the pistol in his possession).

This writer submits that the decision in each case is sound. Although the defendant in *People v. Namer* admitted possession of the pistol, a new trial was properly granted because it is difficult to tell what effect the incompetent evidence had on the jury.

### Wiretapping

In *People v. Ableson*,<sup>56</sup> the court in a per curiam decision reversed the Appellate Division<sup>57</sup> and ordered a new trial for nine appellants who had been convicted of *inter alia*, the crime of bookmaking<sup>58</sup> in a trial in which the People's case rested mainly on wire-tap evidence.<sup>59</sup> The Court felt that the People had failed both in their proof of the identity of the suspects and the commission of the crime.

Since the wire-tapping was done pursuant to court order, not its legality but rather its evidentiary value was questioned here. At the trial, the People's case rested on the testimony of a special investigator for the District Attorney, who

54. The Court also found that the trial court erred when it permitted respondent to introduce evidence that defendant had violated his parole under previous sentences. The respondent argued for its admission because it showed that the defendant had a motive to possess the pistol. Evidence of motive is competent provided it will establish the motive for the particular crime charged, *People v. Molineux*, 168 N. Y. 264, 293, 61 N. E. 286, 295 (1901), and has a logical relationship to the motive for the commission of the specific crime, *People v. Fitzgerald*, 156 N. Y. 253, 50 N. E. 846 (1898). Evidence of motive, however, is not competent to show general criminal propensities in the defendant. *People v. Zachowitz*, 254 N. Y. 192, 197, 172 N. E. 466, 468 (1930). The Court applied these principles and reasoned as follows: we doubt whether motive is relevant where possession alone is criminal; assuming its relevance, the proof of motive offered here does not meet the "logical relationship" test; therefore, respondent's object was a forbidden one—to show defendant's criminal tendencies. In a concurring opinion, Judge Desmond voted to reverse on the ground that motive is irrelevant where the statute makes possession itself a crime.

55. *People v. Namer*, 286 App. Div. 890, 142 N. Y. S. 2d 351 (2d Dep't 1955).

56. 309 N. Y. 643, 132 N. E. 2d 884 (1956).

57. 286 App. Div. 946, 143 N. Y. S. 2d 165 (4th Dep't 1955).

58. N. Y. PENAL LAW §936. Any person who engages in pool-selling or book-making with or without writing at any time or place; . . . and any person who records or registers, bets or wagers or sells pools or makes book, with or without writing, upon the result of any trial or contest of skill, speed or power of endurance of man or beast . . . or any person who aids, assists or abets in any manner in any of the said acts, which are hereby forbidden, is guilty of a misdemeanor

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59. N. Y. CONST. art. I §12; N. Y. CRIM. CODE §813(a).