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Evidence--Equal Protection--Defendant Granted Greater Latitude to Prove Discriminatory Prosecution (People v. Walker, 14 N.Y.2d 901 (1964))

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EVIDENCE — EQUAL PROTECTION — DEFENDANT GRANTED GREATER LATITUDE TO PROVE DISCRIMINATORY PROSECUTION. — Appellant, owner of a three-story brownstone house in New York City,[1] was convicted of violations of the Multiple Dwelling Law[2] and the Administrative Code,[3] in that she failed to obtain a rooming house permit, made unlawful alterations, and failed to repair or replace a broken sprinkler valve. As her defense, she attempted to establish the malicious motive of the complainant, by offering evidence to show that her prosecution closely followed her exposure of corrupt practices in the Department of Buildings. The Court of Appeals, reversing the decision of the appellate term, which refused to admit into evidence facts tending to establish bad motive, granted a new trial and *held,* in a 4-3 memorandum opinion, that appellant was unduly restricted in her attempt to prove unequal protection and that she should have had a fair opportunity to establish bad motive at trial. *People v. Walker,* 14 N.Y.2d 901, 200 N.E.2d 779, 252 N.Y.S.2d 96 (1964).

Of paramount importance in construing a case in which a reversal is granted is an understanding of the basic concept upon which lower court decisions may be overturned. The general rule is that appellate courts can only reverse lower court decisions because of prejudicial error.[4] This rule is notably applicable in the area of criminal procedure.[5] A grasp of this concept is essential in order to crystalize the position of the instant case in the historical development of the concept of equal protection.

In this country, the state exercise of arbitrary power affecting the rights to life, liberty or the pursuit of happiness has been regarded as intolerable and violative of constitutional standards.[6] Such rights may be impinged by the enforcement of a statute which is invalid on its face,[7] or by discriminatory enforcement of a valid statute.[8]

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[1] Brief for Respondent, p. 2, People v. Walker, 14 N.Y.2d 901, 200 N.E.2d 779, 252 N.Y.S.2d 96 (1964).

[2] N.Y. MULT. DWELL. LAW §§ 187, 300, 302. Section 187, in part, sets standards of maintenance for sprinkler systems; § 300 provides for submission of plans and prohibits alteration at variance with the plans submitted without prior approval of the Building Department; and § 302 requires vacation of the premises if they are not in compliance with the building regulations.

[3] N.Y.C. ADMIN. CODE § D26-3.22 regulates the operation of rooming house accommodations and single room occupancy in view of health and safety standards.

[4] *E.g.,* FED. R. CIV. P. 61; CPLR 2002.

[5] *E.g.,* ALA. CODE tit. 15, § 389 (1940); CAL. PEN. CODE § 1258; IND. ANN. STAT. § 9-2320 (1905); N.Y. CODE CRIM. PROC. § 542; HARNO, CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE 764-65 (4th ed. 1957).

[6] Yick Wo v. Hopkins, 118 U.S. 356, 369-70 (1886).

[7] McFarland v. American Sugar Ref. Co., 241 U.S. 79, 86-87 (1916); People v. Munoz, 9 N.Y.2d 51, 60, 172 N.E.2d 535, 540, 211 N.Y.S.2d 146, 153 (1961).

[8] Smith v. Texas, 311 U.S. 128, 130-31 (1940). In this case, a dis-

The standard to be employed in judging claims of discriminatory enforcement of a statute, valid on its face, was first stated by the Supreme Court in *Yick Wo v. Hopkins.*[9] In that case, petitioner, a Chinese subject, was refused a license to carry on his laundry business although he had complied with all the relevant health and safety requirements.[10] Imprisoned for nonpayment of a fine incurred because he was operating without a license, the petitioner established that the board of supervisors discriminated by arbitrarily withholding licenses from those of Chinese ancestry, whereas licenses were freely granted to Caucasians in similar circumstances.[11] The Court, in ordering the prisoner's release, held that the unequal administration of a law, resulting in "unjust and illegal discriminations" between similarly situated persons, constitutes a denial of the equal justice granted by the Constitution.[12]

In *Ah Sin v. Wittman,*[13] the Court extended the *Yick Wo* doctrine to the criminal law. There, petitioner was imprisoned for the violation of a gambling ordinance, and alleged that it was enforced exclusively against the Chinese. The Court's position in regard to this allegation was that the defendant would have to establish not only the enforcement of the ordinance against Chinese, but also that there were other offenders against whom the law was not enforced.[14] Therefore, the Court re-established and clarified the defendant's burden of proof, showing that without proof that others had violated the law *with impunity,* discrimination could not be demonstrated.[15] In conjunction with this holding, it is also well to note that conviction of a *guilty* party would be a violation of the equal protection clause if other violators were not prosecuted. This is true because the constitutional provision not only guarantees valid laws, but also their equal enforcement.[16]

The *Yick Wo* doctrine was further defined in *Snowden v. Hughes.*[17] There, the petitioner was a candidate for nomination to the office of representative in the state assembly. Under a proportional representation scheme, there were to be two Republican candidates, and in this instance, nomination was tantamount to election. The petitioner polled the second highest total vote, but

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cretionary power of jury selection, under a statute valid on its face, was abused, resulting in exclusion of qualified Negroes from jury service.

[9] 118 U.S. 356 (1886).

[10] *Id.* at 358.

[11] *Id.* at 359.

[12] *Id.* at 374.

[13] 198 U.S. 500 (1905).

[14] *Id.* at 507-08.

[15] *Ibid.*

[16] East Coast Lumber Term. v. Town of Babylon, 174 F.2d 106, 112 (2d Cir. 1949).

[17] 321 U.S. 1 (1944).

the individual defendants, who constituted the State Primary Canvassing Board, designated only one nominee.[18] The Court held that appellant's assertion that respondent's action was willful, malicious and arbitrary, and hence was "an unequal, unjust and oppressive administration" of the state laws, was not sufficient to state a cause of action.[19] The Court also examined and determined the ways in which "intentional and purposeful discrimination" can be demonstrated. The first is *intrinsic,* in which the action itself is unconstitutional,[20] *e.g.,* where the action taken is authorized by a statute which contravenes constitutional guarantees.[21] The second is *extrinsic,* in which evidence must be educed which indicates unequal treatment of individuals or classes,[22] *e.g.,* where, although the statute is not unconstitutional, its administration is at variance with the concept of equal protection.[23]

In New York, the recent cases dealing with the equal protection clause have adhered to the Supreme Court's position on the minimum proof necessary to establish discriminatory enforcement.[24] In *People v. Friedman,*[25] the court of appeals held that a claim of discriminatory enforcement was without merit. Although the offer of proof by defendant, a meat-seller, indicated some non-enforcement as to other businesses, it was not extensive enough to indicate that the statute was discriminatorily enforced.[26] Likewise, in *People v. Utica Daw's Drug Co.,*[27] the defendant, in violation of a "blue law," [28] sold non-drug items on Sunday. Admitting the violation, he alleged intentional discrimination against "cut-rate" stores in the enforcement of the statute, since stores of other types were not prosecuted.[29] The trial court held that defendant's contentions, if established, would constitute a defense, but excluded evidence designed to prove that twenty-one other drug stores had engaged in the sale of similar commodities.[30] The appellate division, in reversing the con-

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[18] *Id.* at 3-4.
[19] *Id.* at 10.
[20] *Id.* at 8.
[21] See cases cited note 7 *supra.*
[22] Snowden v. Hughes, 321 U.S. 1, 8 (1944).
[23] People v. Harris, 182 Cal. App. 2d 837, 5 Cal. Rep. 852 (Super. Ct. 1960).
[24] People v. Friedman, 302 N.Y. 75, 96 N.E.2d 184 (1950), *appeal dismissed,* 341 U.S. 907 (1951); People v. Utica Daw's Drug Co., 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (4th Dep't 1962).
[25] 302 N.Y. 75, 96 N.E.2d 184 (1950), *appeal dismissed,* 341 U.S. 907 (1951).
[26] *Id.* at 80-81, 96 N.E.2d at 186-87.
[27] 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (4th Dep't 1962).
[28] N.Y. PEN. LAW § 2147 (delineating items which may be sold on Sunday).
[29] People v. Utica Daw's Drug Co., *supra* note 24, at 13-14, 225 N.Y.S.2d at 129-30.
[30] *Id.* at 14, 225 N.Y.S.2d at 130.

viction, held that non-enforcement as to others was evidence relevant to the question of discriminatory enforcement.[31]

Thus, until the present case, the law had been clear and unwavering in its position that a demonstration of unequal protection of the laws, through discriminatory enforcement of a valid statute, would be impossible without demonstrating both enforcement against a defendant and unprosecuted violations by others similarly situated. The absence of prosecution would have been indicative of intentional and purposeful discrimination.

However, in the instant case, the appellant, Mrs. Walker, offered to introduce evidence relative only to the fact of enforcement against her, namely, the malicious motive which activated the Building Department's prosecution. She dismissed, as insignificant, the question of enforcement against others.[32]

The majority, in a cryptic memorandum opinion, stated that the appellant had been unduly restricted in her attempt to prove that she had been denied equal protection of the laws. The Court noted that its holding did not include a finding that the appellant had not demonstrated intentional discrimination in her prosecution. The vagueness and the terse nature of this opinion might well lead to an observation that the majority was concerned with appellant's plight at the trial. The trial judge's refusal to admit into evidence background information tending to show motivation or to listen to argument that the facts disclosed intentional discrimination[33] considerably weakened her case. Wishing to grant the appellant a full opportunity to establish her contention, the majority decided that more latitude was necessary in this area of proof.

The minority, on the other hand, reasoned that since appellant's offers of proof were directed to a showing of bad motive alone, she could not have thus established a valid defense. This conclusion, in the minority's view, is mandatory since she admitted the existence of the violations which led to her convictions, in both lower courts, and since the statutes were generally enforced against others similarly situated throughout the city, as shown by almost 80,000 violations filed by the Building Department in the three immediately preceding years.[34] Thus, as in the *Snowden* case, the validity of the statute was not drawn in issue, nor was any claim made that the law was not enforced against other violators. The

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[31] *Id.* at 15, 225 N.Y.S.2d at 131.

[32] Reply Brief for Appellant, pp. 8-9, People v. Walker, 14 N.Y.2d 901, 200 N.E.2d 779, 252 N.Y.S.2d 96 (1964). "This appeal is not based on the failure to prosecute others . . . but rather on the contention that this prosecution was deliberately and affirmatively directed by officials of the Department of Buildings under circumstances which plainly demonstrate purposeful discrimination." *Ibid.*

[33] Brief for Appellant, p. 8, People v. Walker, *supra* note 32.

[34] Brief for Respondent, p. 21, People v. Walker, *supra* note 32.

minority, therefore, concluded that there could be no showing of intentional discrimination.

Since a substantial right of a party must be prejudiced before an appellate court can grant a reversal,[35] the majority appears to regard the exclusion of evidence, relating solely to bad motive on the part of an administrative agency, as prejudicial error. If appellant has been prejudiced by exclusion of evidence which the Supreme Court has regarded as insufficient to establish the defense,[36] the Court of Appeals would appear to be reducing the minimum of proof demanded by *Yick Wo, Ah Sin* and *Snowden.* Therefore, the New York Court seems to require evidence of only one of the two elements required by the Supreme Court to demonstrate constitutional deprivation. If this is true, then the majority opinion is contrary to prior New York law. Nevertheless, it is clearly within the power of a state to clothe a defendant with greater protection against unconstitutional invasion of his rights than the minimum protection demanded by the Supreme Court.[37]

Still, reasonable analysis of the necessary and practical implications of such a holding would seem to contraindicate this grant of greater protection to a guilty defendant. Were the constitutional protection thus expanded, without making exception, this defense would be made available to all lawbreakers. Is it not then hypothetically possible that a corrupt union official, who had made personal use of organization funds, would go free were he able to show that prosecution was engendered because of a personal vendetta against him by an attorney general? This would be anomalous to criminal law as it is known today, for regardless of the motives of the prosecutor, the policy reasons which led to the enactment of the penal statute are being carried out, since society is still being protected from forbidden conduct.[38]

In accord with the cogent dissents, one is constrained to conclude that nullifying the effectiveness of penal administration to such a great degree, through the expansion of the protection afforded by the fourteenth amendment, is a manifestly undesirable result; but, on the other hand, emasculation of the constitutional guarantee, by subjecting the defendant to insurmountable burdens of proof, is certainly not a better result.

Perhaps the result of this case might be justified if the majority based its conclusion on the possibility of a citizen's being coerced to consent to corrupt practices in order to avoid swift retributive administrative action.[39] However, it cannot be assumed that this was the basis for the decision.

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[35] N.Y. CODE CRIM. PROC. § 542.

[36] Snowden v. Hughes, 321 U.S. 1 (1943); Ah Sin v. Wittman, 198 U.S. 500 (1905); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[37] *Cf.* John v. Paullin, 231 U.S. 583, 585 (1913).

[38] Sauer v. United States, 241 F.2d 640, 648 (9th Cir. 1957).

[39] See DAVIS, ADMINISTRATIVE LAW 75-6 (1959); GELLHORN & BYSE,

In conclusion, it would appear that in order to avoid the danger that lower courts will construe this decision as do the dissenting judges, this case should be viewed as an equivocal opinion designed to grant the appellant her full day in court, and yet not intended by the majority to effectuate drastic changes in both criminal and constitutional law in New York.

JURY TRIAL — SURROGATE'S COURT — EXECUTRIX HAS RIGHT TO JURY TRIAL UNDER NEW YORK STATE CONSTITUTION. — Claimants petitioned for a compulsory accounting in the surrogate's court nearly six years after the executrix of decedent's estate rejected their claim for legal services. The executrix answered that an accounting would be unnecessary since there were no other claims pending against the estate, the assets of which were sufficient to meet the claim if it was determined to be valid. The executrix then demanded a trial by jury of the disputed claim. In reversing the lower court decisions which rejected this latter demand, a divided Court of Appeals *held* that petitioners' claim was in the nature of an action at law for work, labor and services for which a trial by jury was preserved by the New York State Constitution. *Matter of Garfield*, 14 N.Y.2d 251, 200 N.E.2d 196, 251 N.Y.S.2d 7 (1964).

In 1830 the Revised Statutes of New York conferred upon the surrogate's courts [1] the powers of equity formerly utilized in administration suits in chancery.[2] However, it should be noted that a primary limitation on the equity jurisdiction in administration suits was the necessity of first establishing disputed claims at law where claimant would be afforded a jury trial.[3] Therefore, in

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ADMINISTRATIVE LAW 688 n.5 (4th ed. 1960); Vanderbilt, *Functions and Procedure of Administrative Tribunals*, 12 U. CINC. L. REV. 117, 119-21 (1938); Rourke, *Law Enforcement Through Publicity*, 24 U. CHI. L. REV. 225, 235 (1957).

[1] Before the Revolutionary War the surrogate's court was called the prerogative court. The colonial governor was its judge and his deputies were called surrogates. In 1686 these courts were given the powers exercised in England by the ecclesiastical courts. One of these powers was the settlement and adjustment of executors' accounts. In 1788, by statute, the prerogative court became the surrogate's court. See Malone v. Sts. Peter & Paul Church, 172 N.Y. 269, 64 N.E. 961 (1902).

[2] Matter of Kent, 92 Misc. 113, 120, 155 N.Y. Supp. 383, 387 (Surr. Ct. 1915); 1 JESSUP-REDFIELD, LAW AND PRACTICE IN THE SURROGATES' COURTS IN THE STATE OF NEW YORK § 91 (rev. ed. 1947).

[3] Matter of Kent, *supra* note 2, at 123, 155 N.Y. Supp. at 389.