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Article 16

Criminal Law--Material Witness--Amount of Bail--Holding as a Witness a Person Charged with a Crime (People ex rel. Gross v. Sheriff of City of New York, 277 App. Div. 546 (2d Dep't 1950))

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It is submitted that the problem raised in the instant case is more satisfactorily answered, in accordance with advanced social concepts, by the "Briggs Law" [22] in Massachusetts. By statute, a routine mental examination is made of all persons indicted by a grand jury for a capital offense, and persons who have been convicted of a felony or are known to have been previously indicted for any other offense more than once.[23]

CRIMINAL LAW—MATERIAL WITNESS—AMOUNT OF BAIL—HOLDING AS A WITNESS A PERSON CHARGED WITH A CRIME.—Application for writ of habeas corpus. Relator was a material witness for the People in a grand jury investigation of gambling and corruption in Kings County. The County Court directed him to furnish a 250,000 dollar bond and upon his failure to do so he was committed to jail. Thereafter, on the basis of the above-mentioned grand jury investigation an information was filed charging relator with conspiracy and bookmaking. A plea of not guilty was entered and relator was paroled in his own custody in view of his detention in the grand jury investigation. Relator contends that inasmuch as he is now a defendant named in the information, the order detaining him as a witness should be vacated and he should be released. *Held,* writ dismissed. An order requiring bail in a high amount may be justified by the facts of the particular situation. The fact that an information has been filed in which a person is charged with crimes does not preclude his being held as a witness in an investigation embracing matters other than the crimes charged in the information. *People* ex rel. *Gross v. Sheriff of City of New York,* 277 App. Div. 546, 101 N. Y. S. 2d 271 (2d Dep't 1950).

Section 618-b of the Code of Criminal Procedure provides that a witness for the People may be ordered to enter into an undertaking to insure appearance or be committed for failure to comply.[1] This section of the Code was enacted to guarantee attendance of key witnesses at a criminal trial or a grand jury investigation.[2] The req-

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[22] See WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 351, 401-407 (1933).

[23] MASS. ANN. LAWS c. 123, § 100A (1949).

[1] Section 618-b provides: "Whenever a judge of a court of record in this state is satisfied, by proof on oath, that a person residing or being in this state is a necessary and material witness for the People in a criminal action or proceeding . . . he may, after an opportunity has been given to such person to . . . be heard in opposition thereto, order such person to enter into a written undertaking . . . and upon his neglect or refusal to comply . . . the judge must commit him. . . ."

[2] People *ex rel.* Ditchik v. Sheriff of Kings County, 171 Misc. 248, 12 N. Y. S. 2d 341 (Sup. Ct.), *aff'd,* 256 App. Div. 1081, 12 N. Y. S. 2d 232 (2d Dep't 1939).

uisite fact which must be present is that a criminal action or proceeding is pending in some New York court.[3] A grand jury investigation is a proceeding within the purview of this section.[4] While there is little reason to doubt its constitutionality,[5] Section 618-b has been characterized as "harsh" because it interferes with personal liberty.[6] Therefore, the People must comply strictly to the requirements of the section.[7]

Any judge of a court of record may detain a witness for the People under Section 618-b.[8] He must be satisfied by proof on oath that the individual is a material witness in a criminal action.[9] The proof required is not the kind which a conviction requires but merely such as satisfies the court.[10] Upon hearing the prosecutor and the witness[11] the judge may set bail in such amount as he deems proper[12] or commit the witness for failure to comply. An order requiring bail in a high amount may be justified by the seriousness of the crimes under investigation, the extensive criminal operations of the witness, his relations with those against whom he may testify, and the possibility of his flight to avoid giving testimony.[13]

An order fixing bail is not a "final" order and is not appealable.[14] However, where there is an invasion of one's constitutional

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[3] Matter of Prestigiacomo, 234 App. Div. 300, 255 N. Y. Supp. 289 (4th Dep't 1932); Matter of Di Piazzi, 234 App. Div. 302, 255 N. Y. Supp. 291 (4th Dep't 1932).

[4] People *ex rel.* Nuccio v. Warden of Eighth Dist. Prison of City of N. Y., 182 Misc. 654, 45 N. Y. S. 2d 230 (Sup. Ct. 1943).

[5] People *ex rel.* Ditchik v. Sheriff of Kings County, 171 Misc. 248, 12 N. Y. S. 2d 341 (Sup. Ct.), *aff'd,* 256 App. Div. 1081, 12 N. Y. S. 2d 232 (2d Dep't 1939); People *ex rel.* Bruno v. Maudlin, 123 Misc. 906, 206 N. Y. Supp. 523 (Sup. Ct. 1924). *Contra:* People *ex rel.* Maloney v. Sheriff of Kings County, 117 Misc. 421, 192 N. Y. Supp. 553 (Sup. Ct. 1921) (held Section 618-b unconstitutional).

[6] Matter of Prestigiacomo, 234 App. Div. 300, 255 N. Y. Supp. 289 (4th Dep't 1932).

[7] *Ibid.*

[8] See note 1 *supra.*

[9] See note 1 *supra;* People *ex rel.* Ditchik v. Sheriff of Kings County, 171 Misc. 248, 12 N. Y. S. 2d 341 (Sup. Ct.), *aff'd,* 256 App. Div. 1081, 12 N. Y. S. 2d 232 (2d Dep't 1939).

[10] People *ex rel.* Ditchik v. Sheriff of Kings County, *supra* note 9.

[11] Under Section 618-b the witness must receive a hearing. See note 1 *supra.*

[12] "The bailing court has a large discretion, but it is a judicial, not a pure or unfettered discretion." People *ex rel.* Lobell v. McDonnell, 296 N. Y. 109, 111, 71 N. E. 2d 423, 425 (1947). The relator, a defendant in a larceny case, was held in 250,000-dollar bail although prosecution asked for 100,000 dollars. Relator had voluntarily surrendered to the police and there was nothing to indicate that he had any intentions of absconding. The Court of Appeals reversed an order of the Appellate Division denying a writ of habeas corpus.

[13] People *ex rel.* Rao v. Adams, 296 N. Y. 231, 72 N. E. 2d 170 (1947).

[14] People v. John Doe (*Re* Bernoff), 261 App. Div. 504, 26 N. Y. S. 2d 458 (1st Dep't 1941); People v. John Doe (*Re* Rubenstein), 259 App. Div. 921, 20 N. Y. S. 2d 263 (2d Dep't 1940); People v. John Doe (*Re* Workman), 259 App. Div. 1027, 20 N. Y. S. 2d 608 (2d Dep't 1940); People *ex rel.* Deliz v. Warden of City Prison, 260 App. Div. 155, 21 N. Y. S. 2d 435 (1st Dep't

right by being unreasonably detained as a witness or by being held in excessive bail,[15] a means of relief may be granted by a writ of habeas corpus.[16] Relief is granted to prevent only such invasion and not because of any difference of opinion as to the amount of bail fixed.[17] In the case at bar the court found no violation of the relator's constitutional rights and held that setting the bail at 250,000 dollars was justified in light of the facts; namely, relator had no visible means of support apart from his confessed criminal activities, he admittedly had bribed police officers, and there was reason to suspect relator would not appear when required.

In the instant case the question also arose as to whether or not relator could be legally detained as a material witness in a grand jury investigation in view of the fact that he was thereafter named as a defendant in an information resulting from such investigation. The majority held that the relator could be so held where the investigation related to crimes other than those charged in the information. The dissent felt that there was no substantial difference between the two proceedings and relator was, therefore, being held both as witness and defendant in the same action. There is no doubt that a person cannot be held as a witness for the People in an action in which he is a defendant. As a witness he necessarily would have to give self-incriminating testimony and could not be compelled to do so without being guaranteed immunization.[18] But if the witness, in such case, is guaranteed immunity the People would lose its defendant. The process, therefore, would be self-defeating.

There seems to be no direct authority for the proposition laid down in the present case, that is, that one may be held as a witness and a defendant in different actions. But as the majority said: "There is no statute which prohibits, and as far as I am aware, no judicial fiat which indicates that a person may not at the same time be held as a defendant in a criminal prosecution and as a necessary and material witness in another criminal action or proceeding." The dissent was in accord with this and merely disagreed on the facts as to the existence of another criminal action or proceeding.[19] There

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1940) (relator defendant). *But cf.* Matter of Prestigiacomo, 234 App. Div. 300, 255 N. Y. Supp. 289 (4th Dep't 1932); Matter of Di Piazzi, 234 App. Div. 302, 255 N. Y. Supp. 291 (4th Dep't 1932).

[15] N. Y. CONST. Art. I, § 5. "Excessive bail shall not be required . . . nor shall witnesses be unreasonably detained."

[16] See note 13 *supra.*

[17] People *ex rel.* Rao v. Adams, 296 N. Y. 231, 72 N. E. 2d 170 (1947); People *ex rel.* Deliz v. Warden of City Prison, 260 App. Div. 155, 21 N. Y. S. 2d 435 (1st Dep't 1940); People *ex rel.* Weiner v. Collins, 22 N. Y. S. 2d 774, *aff'd*, 260 App. Div. 806, 22 N. Y. S. 2d 775 (2d Dep't 1940).

[18] U. S. CONST. AMEND. V. ". . . nor shall [any person] be compelled in any criminal case to be a witness against himself . . ."; N. Y. PENAL LAW § 996. Matter of Doyle, 257 N. Y. 244, 177 N. E. 489 (1931).

[19] Carswell, J., in his dissenting opinion in which Wenzel, J., concurred, said: "A different situation would exist if the prosecution in which the relator is named as a defendant related to a field other than that covered by the Grand

is no reason to believe that the law in New York is not as expressed by the holding in the principal case. It would seem that any other conclusion would hamper the administration of justice.

CRIMINAL LAW—SUNDAY LAWS—CARRYING ON OF A PUBLIC TRAFFIC.—Two Jewish merchants offered for sale and sold uncooked meats on a Sunday. They were convicted for a violation of Section 2147 of the New York Penal Law, which forbids all manner of public selling or offering for sale of any property on a Sunday. On appeal the Appellate Division, First Department affirmed the conviction. The Court of Appeals sustained the Appellate Division, holding that the exemption of Section 2144 allowing work or labor to be performed by those who uniformly keep a day other than the first day of the week as a holy time and do not work on that day cannot be interposed as a defense to a prosecution for the carrying on of a public traffic on Sunday, and that Section 2147 is not unconstitutional because it imposes a hardship on merchants who keep a day other than Sunday as a day of rest and holy time. *People v. Friedman, People v. Praska,* 302 N. Y. 75, 96 N. E. 2d 184 (1950).

The basis of the present Sunday laws is found in the Act of October 22, 1695.[1] As the present law, although it required no affirmative religious act, it specifically enumerated the acts forbidden: ". . . travelling servile Labouring and working shooting fishing sporting playing horse Racing hunting or frequenting Tipling houses . . . ." With the exception of travelling and frequenting tippling houses, the activities restricted by the Act of 1695 are still prohibited by the present law, while the acts which have since been constituted offenses are all occupations which have been developed since 1695. Exemptions under the Act of 1695 were very limited; primarily free Indians, works of necessity and travelling to church.

This act gradually evolved into our present system of Sunday regulation and now constitutes Article 192 of the Penal Law.

Jury investigation. In such an event the relator might be held both as a defendant and as a witness." People *ex rel.* Gross v. Sheriff of City of N. Y., 277 App. Div. 546, 552, 101 N. Y. S. 2d 271, 276 (2d Dep't 1950).

[1] 1 Colonial Laws of New York 356 (1894). The earliest law of New York providing for the observance of religion is contained in the Conditions of Burgomasters of Amsterdam of 1656. It required that the city send a schoolmaster to a place established by the colonists where he would read the Holy Scriptures and set the Psalms. See People v. Hoym, 20 How. Pr. 76 (N. Y. 1860). Subsequently, under English rule, by the Duke of York's Laws of 1665 public preaching on Sunday was established and Sabbath breaking was prohibited. 1 Colonial Laws of New York 25 (1894). The same laws express the colonist's religious feeling and toleration by providing that, "If any person within this Government shall by direct, exprest, impious or presumptous ways, deny the true God and his Attributes, he shall be put to death." 1 Colonial Laws of New York 20 (1894).