

Criminal Law--Conspiracy--Extortion--Conviction of One Defendant Not Inconsistent with Acquittal of Co-Defendant (People v. Scheppa, 295 N.Y. 359 (1946))

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There is one case in New York⁸ which is somewhat similar to the case under discussion. The testatrix in that case established a trust for her five dogs. The surrogate, after referring to many previous decisions in other jurisdictions, held it to be invalid, not because animals were the beneficiaries, but because it violated the rule against perpetuities. To be considered charitable, a trust must include an indefinite number of animals and not merely a few specified ones.

Another objection raised was that the provision of the trust might allow money to be used in the creation or maintenance of a haven for wild animals. Probably this objection was based on an English decision which held that a trust to establish a game preserve was not charitable.⁹ The court reasoned that a game preserve would benefit wild animals, and since wild animals are not beneficial to mankind, the trust was not charitable. This distinction has been vigorously attacked by the text writers as too narrow.¹⁰ The court in this case dismissed the objection because the surrogate had determined that it was the intention of the testatrix to provide for the care of domestic animals.

Presiding Justice Hill, in dissenting, argued that Section 12 of the Personal Property Law was passed to reestablish the English common law relating to charitable uses and no authority or text dealing with the meaning of the words charitable or benevolent under the common law of England showed that they contemplated a benefaction to other than the *human* group. He further argued that the reasons which sustain the perpetual application of income from invested funds and the use of real property for the relief and aid of the human race do not apply to the benefaction, care and relief of dumb animals.

The court in its result is in harmony with the majority view. However, in its opinion, it seems to have avoided the wealth of authority in other jurisdictions, and the text writers on the subject.

G. P. O.

CRIMINAL LAW — CONSPIRACY — EXTORTION — CONVICTION OF ONE DEFENDANT NOT INCONSISTENT WITH ACQUITTAL OF CO-DEFENDANT.—Appellant and a co-defendant were indicted jointly for extortion and for conspiracy to extort. The alleged taking of money from the proprietor of a garage by threats, was pleaded as the ex-

nized as one in which the community has an interest" (*i.e.*, in seeing that animals do not suffer).

⁸ Matter of Howells, 145 Misc. 557, 260 N. Y. Supp. 598 (Surr. Ct. 1932).

⁹ *In re Grove-Grady* (1929) 1 Ch. 557.

¹⁰ BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* (1935) § 379; SCOTT, *THE LAW OF TRUSTS* (1939) § 374.2; *see* More Game Birds in America, Inc. v. Boettger, 125 N. J. L. 97, 14 A. (2d) 778 (1940).

tortion and as one of the overt acts in the conspiracy count. At the close of the trial, the court, without objection, dismissed the conspiracy charge. The jury then acquitted the co-defendant and convicted the appellant of extortion. *Held*, conviction affirmed. Verdict of guilty against appellant was not inconsistent with jury's acquittal of co-defendant. *People v. Scheppa*, 295 N. Y. 359, 67 N. E. (2d) 581 (1946).

The main point of argument of appellant had its basis in the principle that where two and two only are indicted for conspiracy, an acquittal or reversal as to one is an acquittal or reversal as to the other.¹ Appellant, relying on the fact that the people had asserted that the two defendants had acted in concert, with the same guilty intent, sought to so link the two crimes that the law applicable to conspiracy would affect his conviction on the extortion count. Further, the appellant attempted to so clothe the extortion as to give to it the attributes of a joint crime even without the express charge of conspiracy.

The court drew a distinction between crimes which are by their nature joint, and those which can be committed by one person without any confederate. Conspiracy falls in the former classification.² It is a combination between two or more persons, with the unity of design to do an unlawful act or a lawful act unlawfully.³ No one person, acting alone, can commit a conspiracy and the rule put forth in *People v. Kuland*⁴ necessarily applies. But extortion is not of this nature. It is defined as "the obtaining of property from another . . . with his consent, induced by a wrongful use of force or fear, or under color of official right."⁵ There is nothing necessarily joint about the crime of extortion. It is such that if two or more persons are jointly indicted and tried before the same jury for its commission, the jury may, if the evidence warrants the difference in finding, convict one and acquit another.⁶

In the present action the conspiracy accusation had been stricken from the record before the case went to the jury. Since the actions were not merged,⁷ the jury could convict or acquit the defendants on the extortion count.⁸ The jury found that the appellant's co-defendant lacked criminal intent and was acting in the capacity of a friend of the complainant when he urged complainant to accede to appellant's demands, believing that discretion in compliance would

¹ *People v. Kuland*, 266 N. Y. 1, 193 N. E. 439 (1934).

² *People v. Hamilton*, 165 App. Div. 546, 151 N. Y. Supp. 125 (3d Dep't 1915).

³ *Russell v. Stammers*, 57 Misc. 96, 107 N. Y. Supp. 303 (Sup. Ct. 1907).

⁴ 266 N. Y. 1, 193 N. E. 439 (1934).

⁵ N. Y. PENAL LAW § 850.

⁶ *See Davis v. State*, 75 Miss. 637, 23 So. 770 (1898).

⁷ *People v. Tavormina*, 257 N. Y. 84, 177 N. E. 317 (1931).

⁸ N. Y. CRIM. CODE § 443-a.

serve complainant better than valor in resistance. The court found no reason to disturb this verdict.

Surprisingly, the facts and crimes being of such a common nature, this appears to be a case of first impression in New York. The logic of the court in dealing with this problem emits of no other opinion but that the decision is based upon a sound legal foundation.

J. R. S.

DOMESTIC RELATIONS—DIVORCE—ADULTERY—PRESUMPTION OF LEGITIMACY.—Plaintiff, husband, sues for an absolute divorce and the only evidence of adultery is an inference sought to be drawn from the length of the period of pregnancy. The husband, an officer in the Merchant Marine, left Norfolk for the Pacific on April 24, 1944 and did not return to the United States until after January 4, 1945. The defendant gave birth to a child on April 14, 1945 which, denying misconduct, she claims is the child of the plaintiff. The plaintiff adduced no evidence reflecting upon the conduct of the defendant. He offered no evidence to associate his wife with any paramour or with any act of indiscretion. He seeks a decree solely upon the hypothesis that it is impossible that so long a period as 355 days could intervene between coition and parturition. A gynecologist called as an expert witness by the plaintiff testified that the accepted period of gestation was 270 days, the longest authenticated case being 320 days, he admitted that there was a non-authenticated case of 369 days. A physician called by the defendant as an expert testified that there have been cases of 344 days. The physician who attended the defendant during her pregnancy testified that the head of the foetus was engaged for 68 days before birth, whereas birth normally occurs within one month after such engagement. *Held*, complaint dismissed. The plaintiff has failed to sustain the burden of proof and the court can not say, on inference alone, that the defendant has been guilty of adultery unsupported by any evidence reflecting on defendant's conduct. *Lockwood v. Lockwood*, — Misc. —, 62 N. Y. S. (2d) 910 (Sup. Ct. 1946).

A case decided in England appears to be very similar in many respects where the protracted pregnancy was 331 days. Viscount Birkenhead in dismissing the petition said:

In this case the only evidence of adultery is the admittedly abnormal length of pregnancy. No other fact or circumstance has been adduced which in the slightest degree casts any reflection upon the chastity or modesty of the respondent, who has on oath denied the alleged adultery. I can only find her guilty if I come to the conclusion that it is impossible, having regard to the present state of medical knowledge and belief, that the petitioner can be the father of the child. The expert evidence renders it manifest that there is no such impossibility. In these circumstances I accept the evidence of the