

Criminal Law--Lotteries (The People of the State of New York v. James J. Hines, 284 N.Y. 75 (1940))

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Section 295(L) of the Code of Criminal Procedure does not apply to the testimony of a defendant but only to the testimony of other witnesses produced for the purpose of giving evidence upon the question of an alibi.¹⁷

A. M.

CRIMINAL LAW—LOTTERIES.—In 1931 a combination was formed to gain control of and operate the various "policy" enterprises. The appellant was taken into the combination for the purpose of affording its members and operators protection from arrest, and if arrested, immunity from conviction by using his political influence. Appellant was found guilty by the jury and convicted on thirteen counts in the court below. The first count charged a conspiracy to contrive, propose and conduct lotteries known as "policy"¹ and "the numbers game", and the remaining twelve counts charged twelve separate substantive crimes; each of which consisted of participating in, contriving, proposing or drawing a lottery. His conviction was unanimously affirmed by the Appellate Division.² On appeal, appellant contends: that the game of "policy" does not constitute a "lottery"; and that, consequently, the offenses of which he stands convicted, because they relate to "policy", are not punishable under provisions of the Penal Law on lotteries.³ Appellant also contends that the conspiracy count in the indictment should be dismissed for insufficiency on the face thereof, because it fails to allege an overt act⁴ committed within two years, the applicable period of limitations,⁵ for the crime of conspiracy is a misdemeanor.⁶ *Held*, conviction affirmed on the twelve counts of taking part in contriving, proposing or conducting a lottery, but modified so as to dismiss the count for conspir-

trial as to alibi, and the exclusion of such testimony was prejudicial. *Reed v. State*, 4 Ohio App. 318, 185 N. E. 558 (1933).

¹⁷ *State v. Nook*, 123 Ohio St. 190, 174 N. E. 743 (1930); *State v. Thayer*, 124 Ohio St. 1, 176 N. E. 656 (1931).

¹ "Policy" is a game of chance in which a player selects a number containing three figures. That number is written on a slip of paper which is given with the amount bet to a so-called collector. The winning number is determined by chance by a computation based on the moneys paid on the result of horse races at a designated track. Winners are paid six hundred times the amount of the bet.

² 258 App. Div. 466, 17 N. Y. S. (2d) 141 (1st Dept. 1940).

³ N. Y. PENAL LAW §§ 1370-1372. Appellant was convicted under § 1372 which provides: "A person who contrives, proposes or draws a lottery, or assists in contriving, proposing or drawing the same, is punishable by imprisonment for not more than two years, or by fine of not more than one thousand dollars, or both."

⁴ N. Y. PENAL LAW § 583.

⁵ N. Y. CODE OF CRIM. PROC. § 142.

⁶ N. Y. PENAL LAW § 580.

acy. The game of "policy" is a lottery, and the existence of penal statutes⁷ dealing with specific incidents of the game of "policy" does not prevent the prosecution of defendant under the general statutes relating to lotteries.⁸ The state may proceed under the more general statute even though a more specific one is available. *The People of the State of New York v. James J. Hines*, 284 N. Y. 75, 29 N. E. (2d) 483 (1940).

At common law keeping or operating a lottery was not an indictable offense.⁹ Lotteries have been made unlawful by statutes.¹⁰ The definition of a lottery¹¹ is broad enough to cover "policy",¹² and the decision in the instant case that "policy" is a lottery is in accord with decisions of this state¹³ and other jurisdictions which have decided the question.¹⁴ However, though "policy" is a lottery, does the later enactment of provisions of the Penal Law¹⁵ making certain acts relating to policy punishable as misdemeanors, prevent the prosecution of appellant for the felony under the general lottery statutes? The Court of Appeals decided it does not. The existence of a specific statute does not prevent the prosecution under a more general one.¹⁶ "The District Attorney may prosecute for the felony or the misdemeanor as he chooses."¹⁷ Repeal of a statute by implication is not favored, and a statute will not be deemed to have been repealed by a

⁷ N. Y. PENAL LAW §§ 970-974 (misdemeanors).

⁸ N. Y. PENAL LAW §§ 1370-1372 (felonies).

⁹ 2 WHARTON, CRIMINAL LAW (12th ed. 1932) 2074; 2 McCLAIN, CRIMINAL LAW (1st ed. 1897) 482.

¹⁰ N. Y. PENAL LAW §§ 1370-1386 (lotteries).

¹¹ N. Y. PENAL LAW § 1370 ("A 'lottery' is a scheme for the distribution of property by chance among persons who have paid or agreed to pay a valuable consideration for a chance, whether called a raffle, or gift enterprise or by some other name.").

¹² See note 1, *supra*.

¹³ *Hull v. Ruggles*, 56 N. Y. 424 (1874); *Grover v. Morris*, 73 N. Y. 473 (1878); *Wilkinson v. Gill*, 74 N. Y. 63 (1878); *Almy v. McKinney*, 42 Hun 651 (N. Y. 1886).

¹⁴ *Reilley v. United States*, 106 Fed. 896 (C. C. A. 6th, 1900), *rev'd on other grounds sub nom. Francis v. United States*, 188 U. S. 375, 23 Sup. Ct. 334 (1903); *Forte v. United States*, 106 F. (2d) 612 (App. D. C. 1936); *Thomas v. State*, 118 Ga. 774, 45 S. E. 622 (1903); *State ex rel. Kellogg v. Kansas Mercantile Ass'n*, 45 Kan. 351, 25 Pac. 984 (1891); *Boylard v. State*, 69 Md. 511, 16 Atl. 132 (1888); *Commonwealth v. Sullivan*, 146 Mass. 142, 15 N. E. 491 (1888); *People v. Hess*, 83 Mich. 128, 48 N. W. 181 (1891); *State v. Hilton*, 248 Mo. 522, 154 S. W. 729 (1913); *State v. Martin*, 68 N. H. 463, 44 Atl. 605 (1896); *Dombrowski v. State*, 111 N. J. L. 546, 168 Atl. 722 (1933); *Commonwealth v. Chirico*, 117 Pa. Super. Ct. 432 (1935); *Abdella v. Commonwealth*, 174 Va. 450, 5 S. E. (2d) 495 (1939).

¹⁵ N. Y. PENAL LAW §§ 970-974.

¹⁶ *Goode v. United States*, 159 U. S. 663, 16 Sup. Ct. 136 (1895); *People v. Singer*, 288 Ill. 113, 123 N. E. 327 (1919); *Bonahoon v. State*, 203 Ind. 51, 178 N. E. 570 (1931); *State v. Little*, 60 S. W. (2d) 83 (Mo. 1933); *Wilkinson v. Gill*, 74 N. Y. 63 (1878); *People v. Bord*, 243 N. Y. 595, 154 N. E. 620 (1926); *Bingham v. State*, 44 Okla. Cr. Rep. 258, 280 Pac. 626 (1929).

¹⁷ *People v. Bord*, 243 N. Y. 595, 596, 154 N. E. 620, 621 (1926) (conviction for the felony of incest under N. Y. PENAL LAW § 1110 when N. Y. DOM. REL. LAW § 3(5) made incest a misdemeanor).

later statute if the two are not clearly repugnant, unless the intent to do so is clearly expressed.¹⁸ Sections 970-974 of the Penal Law deal with specific incidents of the game of "policy" other than the actual running of the game by "insiders". The court recognizes that Section 1372¹⁹ of the Penal Law is directed at those persons who manage or direct the enterprise or scheme, that is, those who "contrive, propose or draw a lottery or assist in so doing". This offense constitutes a felony. On the other hand, the so-called "policy" statutes later enacted are directed at those persons who commit minor offenses in connection with "policy" games.²⁰ For these lesser offenses, a lesser penalty is provided.²¹ The interpretation of the lottery and "policy" statutes in the instant case is a salutary one, for, while it permits more frequent convictions of minor offenders under the "policy" statutes for misdemeanors, it preserves the sanction of a punishment for a felony under the lottery statutes for those persons actually running the game, the organizers and "bosses". This position is supported by a review of the history of the so-called lottery and "policy" statutes in New York.²²

J. E. M.

INTERSTATE COMMERCE—CONSTITUTIONALITY OF STATE LAW LEVYING TAX ON NON-RESIDENT CORPORATIONS.—In February of 1938 the appellant, a New York corporation, rented a portion of a North Carolina hotel for the purpose of displaying its wares and merchandise. While it did not sell any of its commodities in that state, it did, however, take orders which were subsequently filled at its New York place of business and from there shipped directly to the consumer. The State of North Carolina, pursuant to its statute,¹

¹⁸ *People v. Dwyer*, 215 N. Y. 46, 109 N. E. 103 (1915); N. Y. PENAL LAW § 2500.

¹⁹ See note 3, *supra*.

²⁰ N. Y. PENAL LAW § 974 provides that it shall be a misdemeanor to keep a place where "policy" slips are sold, or to sell such slips, or to make collections.

²¹ One of the reasons for making certain acts, in connection with "policy" misdemeanors, was to bring them within the jurisdiction of the Court of Special Sessions and thereby to make prosecutions more swift and to increase the number of convictions by making the penalties less drastic. *People v. Hines*, 168 Misc. 453, 465, 6 N. Y. S. (2d) 2 (1938).

²² For a historical review of these statutes see *People v. Hines*, 168 Misc. 453, 458, 6 N. Y. S. (2d) 2 (1938).

¹ N. C. Laws 1937, c. 127, § 121(e) ("Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in