

Criminal Law--Murder in First Degree--Insanity as a Defense-- Recommendation for Mercy by Jury (The People of the State of New York v. Sherwood, 271 N.Y. 427 (1936))

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our legal system was actuated by lofty ideals of justice and ethics. But at no time was it intended as a shrine of worship for our super-criminals. To exculpate a murderer because of a legal technicality, is at best a ludicrous anomaly. Such practice will undermine our system of jurisprudence, and relegate it to the fate of sophism in ancient Greece. The ideal of justice is the search for human truth. The ultimate inquiry in every criminal proceeding should be whether the accused is innocent or guilty and not whether all the requirements of the legal formulae are met with mathematical precision. If we are to dam the flood of twentieth century crime, with its scientific efficiency, we must recast and reform our Criminal Code,¹⁰ so as to weed out whatever¹¹ impedes the successful administration of justice. The assailed statute is a stride forward in our state's battle against entrenched criminality. It will close a main avenue of escape to the guilty, and will reduce the voluminous amount of perjury prevalent in our courts as a direct consequence of the dilatory plea of alibi. It would seem to follow that the contention that the statute is in contravention of the principle against incrimination, is nebulous and unfounded.¹²

A. F.

CRIMINAL LAW—MURDER IN FIRST DEGREE—INSANITY AS A DEFENSE—RECOMMENDATION FOR MERCY BY JURY.—Defendant, a woman, overcome by economic hardship, drowned her infant son, believing that by this act she could free him from the suffering that might otherwise be his lot. She was indicted for murder in the first degree. The defense was temporary insanity.¹ The trial judge charged

¹⁰ POUND, *Program of Procedural Reform*, PROCEEDINGS OF ILLINOIS STATE BAR ASSOCIATION FOR 1910, p. 395; *Report of Committee E of the Am. Institute of Criminal Law and Criminology*, 1 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, 587.

¹¹ See 3 WHARTON, CRIMINAL PROCEDURE (10th ed. 1918) citing cases which hold it error for a judge to say without qualification, that an alibi is a defense which should be offered at the preliminary hearing, and that it should be regarded with suspicion.

¹² This measure, one of the significant landmarks in New York's fight for a more effective prosecution of the criminal, was originally drawn by the Committee on Criminal Courts and Procedure of the N. Y. County Lawyer's Association, for the American Bar Association. It was introduced in the New York Legislature as early as 1931, but was not passed until 1935. Its enactment was undoubtedly influenced by the similar statutes of Michigan, Ohio, and New Jersey, which were enacted in 1927, 1929, and 1934, respectively. See *People v. Miller*, 250 Mich. 72, 229 N. W. 475 (1930); *People v. Marcus*, 253 Mich. 410, 235 N. W. 202 (1931); *Reed v. State*, 44 Ohio App. 318, 185 N. E. 558 (1933). In the above jurisdictions, the constitutionality of the alibi statutes was either expressly decided upon, or its validity assumed.

¹ 1 BISHOP, CRIMINAL LAW (9th ed. 1923) § 381. "Insanity in the criminal law is any defect, weakness or disease of the mind rendering it incapable of

the jury that the insanity necessary to excuse her must be the result of some mental *disease* which prevented her from knowing the nature and quality of the act *and* that it was wrongful. And in reply to a question by the jury which had been deliberating five hours, he stated that the *law* permits a recommendation of mercy. Almost immediately thereafter, the jury brought in a verdict of murder in the first degree with a recommendation for mercy. On appeal, *held*, reversed; the charge of the court in stating that there must be a mental disease, and in substituting "*and*" for "*or*" in construing Section 1120² of the Penal Law, and the instruction to the jury that the *law* permits a recommendation of mercy, when it does not, were reversible error. *The People of the State of New York v. Sherwood*, 271 N. Y. 427, 3 N. E. (2d) 581 (1936).

The word "wrong" in Section 1120 has been held to mean moral wrong,³ and after evidence is offered that defendant had no knowledge that the act was wrongful, the prosecution must establish the sanity of the defendant beyond a reasonable doubt.⁴ Where insanity is doubtful and expert testimony as to this condition is conflicting, the jury may determine whose testimony to accept.⁵ In the instant case, although the verdict was not against the weight of evidence, the various errors of the trial judge in his charge compelled a reversal. The statute has changed the legal requisites of insanity as a defense. Formerly an insane person was one having a diseased mind (as in

entertaining, or preventing its entertaining in the particular instance the criminal intent which constitutes one of the elements in every crime."

² N. Y. PENAL LAW § 1120: "A person is not excused from criminal liability as an idiot, imbecile, lunatic or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as: (1) Not to know the nature and quality of the act he was doing; or (2) not to know that the act was wrong."

³ *People v. Schmidt*, 216 N. Y. 324, 332, 110 N. E. 945, 947 (1915). "In *Bellingham's Case*, *Collinson on Lunacy*, p. 636, Lord Mansfield said, 'It must be proved beyond all doubt that at the time he committed the atrocious act, he did not consider that murder was a crime against the laws of God and nature.'" (This is a restatement of the common law.) In *MacNaghten's Case*, 10 Clark & F. 200 (H. L. 1843), the rule was laid down (p. 210) that "If the accused was conscious that the act was one that he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong."

⁴ RICHARDSON, EVIDENCE (5th ed. 1936) § 91. Compare 1 WHARTON, CRIMINAL LAW (12th ed. 1932) § 79, n. 21. *People v. McCann*, 32 N. Y. 147 (1865) (Error to charge the jury in a criminal case that the insanity of the prisoner must be proved beyond a reasonable doubt to entitle him to an acquittal); *Brotherton v. People*, 75 N. Y. 159 (1874) (If a reasonable doubt remains as to the sanity of the prisoner he is entitled to it); *O'Connell v. People*, 87 N. Y. 377 (1882); *Walker v. People*, 88 N. Y. 81 (1882) (Refusal to charge that person will be excused from criminal responsibility if he had not sufficient power of control to govern his action where he knew right from wrong held to be no error).

⁵ *Dougherty v. Milliken*, 163 N. Y. 527, 533, 57 N. E. 757, 759 (1900).

the rule laid down in MacNaghten's Case⁶—now he is one with a "defect in reason",⁷ which does not have to be pathological in nature. The legislature takes cognizance of present-day medical research and realizes that the mental states excusing persons from criminal responsibility may be brought about not only by delusions, but by the pressure of sociological and economic hardship.⁸ In addition, it is not necessary that the defendant should be unable to know *both* the nature and the quality of the act, and that it is wrongful, as failure to understand either of these is sufficient. This is so both under the statute⁹ and under the common-law rule.¹⁰

Finally, when the jury cannot come to a decision and the judge charges that they may recommend mercy, following which they bring in a verdict of murder in the first degree with a recommendation of mercy, the law is well settled in this and other jurisdictions¹¹ that such instruction is tantamount to holding out an inducement to the jury to agree upon a verdict, and is reversible error.¹²

J. K.

DECLARATORY JUDGMENT—PLEADING AND PRACTICE—CONTRACT.—It is alleged that the plaintiff, author, composer and owner of five operettas, offered the defendant, in a writing subscribed by plaintiff, the right to perform these operettas in the United States and Canada, upon the payment of specified royalties. Defendant failed to notify plaintiff of acceptance of the offer and has failed to pay the royalties, but claims that this instrument constitutes a binding agreement and that thereby he possesses the exclusive right to perform or

⁶ 10 Clark & F. 200 (H. L. 1843).

⁷ N. Y. PENAL LAW § 1120.

⁸ In the instant case at p. 430, Crouch, J., says, "The claim here rests upon evidence which, on the one hand, neither discloses nor even suggests any rational motive for the tragic act; and on the other hand, does build up a *personality which might well crack and crumble under the hard blows which fate, within a brief period dealt it.*" (Italics supplied.) Also, in reference to the delusion that in death alone could the infant son be saved from suffering and misery, the judge said, "*The time has gone by when such a claim could seem fantastic, either to judge or juror.*" (Italics supplied.)

⁹ N. Y. PENAL LAW § 1120.

¹⁰ 10 Clark & F. 200 (H. L. 1843).

¹¹ State v. Kernan, 154 Iowa 672, 135 N. W. 362 (1912); State v. Kiefer, 16 S. D. 180, 91 N. W. 1117 (1902); Hackett v. People, 8 Colo. 390, 8 Pac. 574 (1885); cf. also, People v. Santini, 221 App. Div. 139, 222 N. Y. Supp. 683 (1st Dept. 1927), *aff'd*, 246 N. Y. 612, 159 N. E. 672 (1927).

¹² N. Y. PENAL LAW § 1045 has been amended so that the jury may, in convicting a person of felony murder, recommend, as a part of its verdict, that the defendant be imprisoned for life, and "the court may sentence the defendant to imprisonment for the term of his natural life" upon such recommendation. Amended by N. Y. Laws 1937, c. 67, N. Y. PENAL LAW § 1045-a, in effect March 17th, 1937.