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CASE

COURT OF GENERAL SESSIONS OF THE PEACE,

CITY AND COUNTY OF NEW YORK. PART III.

1807

In the Matter of THE PEOPLE -vs- ERVING L. DWYER, and others.	Before: HON. OTTO A. ROSALSKY, J.

New York, August 20th, 1912.

-: A P P E A R A N C E S :-

ASSISTANT DISTRICT ATTORNEY WILLIAM A. DE FORD, for the People.

I. N. JACOBSON, ESQ., for the Defense.

TRANSCRIPT OF STENOGRAPHER'S MINUTES.

Frank S. Beard,
Official Stenographer.

New York, August 20th, 1912.

MR. DE FORD: Now, if your Honor please, I am presenting to your Honor a condensation of the People's proposed amendments to the case on appeal, People against Dwyer and others, and I am submitting with the proposed case the proposed amendments so condensed, with an explanation of the interlineations whereby the eliminations of parts of the original proposed case are made, so that your Honor may know what the People have withdrawn, the matter that the People have withdrawn, in their proposed amendments as originally submitted.

The result of the People's withdrawals of matters in the proposed amendments is to reduce it about two-thirds. Now, I submit with the condensed People's proposed amendments a brief, showing the People's reasons for insisting on the amendments as they now stand, with the eliminations to which I have referred.

I do not care to make any argument in support of the matter set forth in the brief, but I am quite willing that your Honor should take up the matter with the counsel for the defense at any time, ex parte, for discussion of the proposed amendments as condensed,

and the brief offered in support of the condensation, or of the amendments as they now stand.

I will, also, submit to your Honor, at this time, a descriptive statement of the exhibits that the People will require the defense to make part of the case on appeal.

This descriptive statement contains, in its first column, the number of the exhibit, the particular exhibit referred to; in the second column, the description of that exhibit generally; and, in the third column, a memorandum as to whether the People will require the exhibit to be printed at length, or whether they will accept a stipulation in lieu of the printing of the exhibit, and the character of the stipulation, and I am leaving the original of that memorandum with the Court, and am now handing a copy to the counsel for the defendant, Mr. Jacobson, and I will retain a copy myself.

And I am telling this only for the purpose of calling the Court's attention to the fact that the People are ready to take up at any time the disposition of the question of what exhibits shall be printed.

MR. JACOBSON: Now, first, as to the statement as to the exhibits. I ask that that be laid aside for the present, on the settlement of the case, be-

cause I don't think it is necessary to take that up. Mr. De Ford had arranged to gothrough the list of exhibits, and agree upon them with us, but I have not had an opportunity to do that, and there is no necessity for hurrying this branch of the case, because the District Attorney has had the case for months --- the proposed case on appeal was served some time last winter, and theDistrict Attorney did not serve a proposed amendment until a month or so ago, and so there is no use of hurrying along now a statement of the proposed exhibits.

MR. DE FORD: I am not hurrying anything along. I am simply making the statement to make a recordthat I have submitted to you suggestions as to the printing of the record.

MR. JACOBSON: And I make the same suggestion as to the absence of any necessity for hustling the matter now.

THE COURT: Gentlemen, I have nothad any vacation, and I am going away at the end of this term, to be gone until October 5th, and, if it is agreeable to you gentlemen, I would like to hear argument on the part of the defense, if you desire to be heard, or perhaps you prefer to submit your views in the form of a brief. I prefer a brief, rather than oral argument, if you

can file a brief, say, a week from to-day.

MR. JACOBSON: Yes, sir, we can. Now, I don't have to file any further brief than the memoranda which I have filed, but I would like to discuss the different branches from recollection, and I ask that the matter of exhibits be laid over, inabeyance, for the present.

MR. DE FORD: I am simply endeavoring to make a record for the People that I have submitted to you a memorandum of the exhibits for consideration.

MR. JACOBSON: And now I say, too, as matter of record, that some of the exhibits are not in the stenographer's minutes as written out. And I say, further, in my memorandaum, that I do not remember an instance where an objection was made by the defense, and overruled, and an exception not taken on the trial, and I don't recollect an instance where an objection of the prosecution was sustained, and an exception not taken, and, therefore, I ask that they be allowed, be permitted to remain in the proposed case, in the discredtion of the Court, even if the recollection of the Court doesnot show that they were taken at the time.

MR. DE FORD: What do you mean? That exceptions have been made to appear in the proposed case, where they were not shown to have been taken in the stenographer's minutes?

MR. JACOBSON: Yes, because my recollection is distinct that an exception was taken to every objection that was overruled, and I do not think that the case would be affirmed or reversed on that account, and I think that the defense, in this kind of a case, ought to be allowed to present every question to the Appellate Court, every question that arose in the case on the trial, regardless of whether the stenographer's notes do or do not show that exception was taken at the time.

Now, another branch. There is one instance in particular that I recollect where a question was asked of the witness, and an answer was given, and some statement was made, some objection made by counsel, and the District Attorney --- that answer was an answer to the District Attorney's question --- and the District Attorney said, "I meant so-and-so," and no further question was put, and no further answer given by the witness on the subject.

Now, on the proposed case on appeal, what the District Attorney said, "I meant so-and-so", is omitted, and I say that it should go out, because the District Attorney cannot qualify evidence given by the witness on the stand, no matter what statements he makes himself.

THE COURT: Do you mean to say that it was not made

by him at the time, that statement?

MR. JACOBSON: Yes, it was made by him, after the witness had testified. But I say that what the District Attorney said, in explanation of the witness's testimony, is not a part of the record on appeal, because the District Attorney cannot qualify a witness's testimony by any statement that he makes, because the testimony is the question and the answer to the question, and nothing more, and, if the answer can be printed without the question, in the proposed case, and show clearly what it means, the question need not be printed.

And, another branch is on those concessions where a concession was offered by the defense and not accepted by the District Attorney. In such an instance, I submit it does not belong in a case on appeal, whether it is claimed that it is atmosphere, or that it is not atmosphere, because the defendant has the right to offer concessions, and, because the District Attorney does not accept them, that is no reason why the defendant should be convicted, or the appeal not sustained, and we claim that is no part of the record on appeal. And where the defense makes a concession, and then states that it is made under a misapprehension, and the Court permits the concession to be withdrawn, that doesnot belong in the record on appeal either.

And I ask the Court to bear this in mind in framing the proposed case on appeal, that we have omitted everything, whether in our favor or against ourselves, that we don't think is properly a part of the record, such as statements of counsel. Now, the District Attorney suggests that a portion of them be printed. Obviously he has pickedout such of those statements as are beneficial to his view of the case, but has not presented the true atmosphere, because only part of those statements would be printed in that way. So, if it is for the purpose of presenting the atmosphere of the case, the District Attorney does not succeed when he only presents such parts of the statements made on the trial as he thinks are beneficial to the District Attorney and detrimental to the defendant, and for that reason those things should not be printed.

And those concessions should not be printed that were not accepted, or were withdrawn, and the argument of counsel should not be printed, and the only argument that is printed is the first argument made on the proof as to the "Four Borough Pool", and that is only for the purpose of showing that we raised the question fully, and all subsequent arguments are omitted, even upon that one question. And I think even subsequent objections or exceptions are omitted, and those things

should not be printed.

And the statement of Mr. Jerome, after the coming in of the verdict, should not be printed.

THE COURT: I think as to that you are clearly in error. There is a case of record here, the Stanley case, tried before Judge Malone, and also a case in which Mr. Abraham Levy appeared, as to comments, and they were passed upon by the Appellate Courts.

MR. DE FORD: yes, sir, and Mr. Taylor told me there were a number of such cases.

MR. JACOBSON: Well, if the Court will analyze Mr. Jerome's statement at the end of the case ----

THE COURT: I simply answer your statement by saying that there are cases approving of that. There is the case of Gambara, a homicide case, tried in the Supreme Court, before Judge Fitzgerald.

MR. JACOBSON: Very well. But, upon an analysis, you will find, I feel quite sure, that Mr. Jerome said that the jury's verdict was correct.

MR. DE FORD: Well, that is all a question of interpretation. But that is not to be taken into question as to whether it should or should not go into the record.

THE COURT: Well, pass to the next question, please.

MR. JACOBSON: Well, the only other matter that I can recollect now is the narrative. Now, I succeeded in putting the testimony in narrative form. There is no reason why the parts that the District Attorney thinks would be beneficial to the prosecution should be printed in full, and the other parts, not beneficial to the prosecution, should be printed in narrative.

Now, where the District Attorney asks a question, if the witness hasnot answered as fully as the District Attorney asks, that is no reason to place the question and answer in the record, instead of the narrative, because, if the witness didn't answer fully enough to satisfy the District Attorney, he shouldhave repeated the question. But it is the witness' testimony, and not the District Attorney's question, which is the subject of review by the Appellate Division. And that covers the entire branch, and most of the proposed amendments are as to that subject.

MR. DE FORD: I will tell you my reason for doing that, your Honor, asking the questions and answers be incorporated in many cases. My reason was this, that, very often, a narrative, based simply on the matters contained in the answer, would not set forth fully the significance and meaning of the witness's answer, which could only be had by taking the particular

answer in connection with the particular question asked. Now, that is the reason that I have inserted questions and answers in different places, in lieu of the narrative, which is an incorrect statement of what the witness said, because it is not complete, because it does not show the full significance of the answer.

Now, I have incorporated, too, there, statements by Mr. Jerome, and argument concerning concessions which he made, even though he subsequently withdrew them, and stipulations that he entered into, though he attempted subsequently to withdraw them, and some of the matter relates to matters and concessions which were not withdrawn at all.

And then one or two amendments that I suggested contain statements of his with respect to matter already in proof, which go to the qualification of matter already in evidence, and which wouldmake the Court's ruling sound as to the matter then proposed to be admitted in evidence, and wherever he has made a statement as to a fact proven, or anything in thenature of a stipulation, I have embodied that in the record, because I thought it ought to go there.

THE COURT: Now, when do you want this case settled?

MR. DE FORD: Just as soon as you can settle it,

having due regard to your own convenience.

MR. JACOBSON: Now, as to Mr. Hand's report, I think we have agreed not to print that in full.

MR. DE FORD: Yes. The part of Commissioner Hand's report which Mr. Jerome read related to the charges against Mr. Jerome, with respect to the so-called Ice Trust, and his failure to indict and prosecuteit, and also it contained certain general statements as to Mr. Jerome's high character and efficiency as a public officer, and it was only that much of the report that I wish to have incorporated in the record, as part of his speech.

MR. JACOBSON: Well, I consent to that. That's all right.

THE COURT: When do you propose to argue the case?

MR. DE FORD: As soon as it can be printed, and I can brief it, because I propose to brief it throughly. I don't think it can be reached in October, because it will take considerable time to print these exhibits.

THE COURT: Well, I will be able to settle the amendments by the 1st of September.

MR. DE FORD: Well, I wish you would do that. And, in the meantime, we will take up the exhibits proposition, and see whether we can agree upon that.

MR. JACOBSON: Yes, that is the best course to pursue.