

8/22/85

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

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HYMAN RAFFE,
Plaintiff-Appellant,
GEORGE SASSOWER, Esq. and SAM POLUR, Esq.
Appellants,
XAVIER C. RICCOBONO, DONALD DIAMOND,
FELTMAN, KARESH & MAJOR, Esqs. and
KREINDLER & RELKIN, P.C.
Defendants-Respondents..
-----x

HYMAN RAFFE,
Plaintiff-Appellant,
GEORGE SASSOWER, Esq.
Appellant,
-against-
KREINDLER & RELKIN, P.C., Hon. WALTER
M. SCHACKMAN, "JOHN DOE", and "JOHN ROE",
names fictitious, persons intended to be
those who communicated with the Court,
ex parte,
Defendants-Respondents.
-----x

HYMAN RAFFE,
Plaintiff-Appellant,
GEORGE SASSOWER, Esq.,
Appellant,
-against-
DONALD B. RELKIN, Esq., MICHAEL J.
GERSTEIN, Esq., KREINDLER & RELKIN, P.C.,
CITIBANK, N.A. and JEROME H. BARR, Esq.,
individually and as Executors of the
Will of Milton Kaufman,
Defendants-Respondents.
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APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

POINT I

THIS COURT IS JUDICIALLY DISQUALIFIED

1a. Events, subsequent to the filing of the notice of appeal, with the availability of coordinate tribunals, makes disqualification of this Court and its justices, a constitutional and statutory imperative (Mayberry v. Pennsylvania, 400 U.S. 455; Lowcher v. NYC Teacher's, 54 N.Y.2d 373, 378, 445 N.Y.S.2d 696, 699; Judiciary Law §14).

b. Except where disqualification is affirmatively shown to be the object, and absent manifest necessity, there is a constitutional infirmity between exercising a judicial function and acting as a litigant.

This is particularly true where contempt of court is involved (Bloom v. Illinois, 391 U.S. 194, n. 4; cf. Sacher v. United States, 343 U.S. 1).

c. At bar, there are three other departments available as alternatives, eliminating the argument of the "duty to sit" (cf. Laird v. Tatum, 409 U.S. 824; Matter of Capoccia, 104 A.D.2d 536, 479 N.Y.S.2d 160 [3d Dept.]).

POINT IIA

THE ORDER OF CONVICTION FOR CRIMINAL CONTEMPT
IS A NULLITY

1a. Absent a plea of guilty, all american courts, as a matter of constitutional ministerial compulsion, lack the jurisdictional power to adjudicate criminal guilt and incarcerate pursuant thereto.

Likewise, appellants contend, that where the illegality of the incarceration is manifest, as a matter of ministerial compulsion, the writ of habeas corpus ad subjiciendum must be immediately adjudicated and sustained where the consequence is "freedom from an illegal restraint".

There is, nor can there be, any:

"... higher duty than to maintain the it [the Writ of Habeas Corpus] unimpaired and unsuspended, save only in cases specified in our Constitution" (Fay v. Noia, 372 U.S. 391, 400).

b. The right to a constitutional trial in criminal matters does not exist by reason of judicial and/or prosecutorial grace or discretion, but as a fundamental right of the accused, which cannot be waived, except by a voluntary plea of guilty, in haec verba.

Even the most scrupulously obtained confession cannot serve as a substitute for the plea of "guilty" so as to eliminate the necessity of a trial before a judgment of conviction and incarceration.

c. That non-summary criminal contempt is not an exception to such rule under federal law was made crystal clear in Gompers v. United States (233 U.S. 604, 610-611).

d. That non-summary criminal contempt is not an exception to such rule, as a matter of federal constitutional mandate imposed upon the states was made clear in Bloom v. Illinois (supra).

e. In view of the aforementioned it would serve no purpose to determine how far back such fundamental right existed, as a matter of state constitutional law.

In appellants' view, it always existed in this state, the confusion being as to whether the conduct could be treated summarily.

f. Since no claim is made that appellants' conduct could be adjudicated in a summary fashion (Cooke v. United States, 267 U.S. 517), no attempt will here be made to examine the "Supreme Court's long struggle" to mold the procedures in summary contempt so that they comply with constitutional standards.

POINT IIB

RESPONDENTS' BRIEF CONFIRMS APPELLANTS' MANDATED VIEW

1. Respondents, obviously finding nothing in law or jurisprudential logic to counter the jurisdictional deficiency of the order appealed from insofar as it found appellant in criminal contempt, instead argues that:

"In Rankin v. Shanker, 23 N.Y.2d 111, 295 N.Y.S.2d 625 the New York Court of Appeals emphatically rejected a similar contention." [emphasis supplied]

The later report of that proceeding reveals that in fact that a trial was afforded before the conviction and sentence (Rankin v. Shanker, 25 N.Y.2d 780, 781).

2a. While the precise matter involved in Bloom v. Illinois (supra), was the accused's right to a jury trial, the fundamental issue was to what extent federal constitutional standards, under the aegis of the XIV Amendment, had to be complied with by the states (see Fortas, J., concurring, and Harlan, J., dissenting).

b. Appellants seriously doubt whether, at any time, after the enactment of the XIV Amendment, the states could ever eliminate the need for a trial in a criminal proceeding, absent a plea of guilty!

The methods of the Klu Klux Klan and "lynch mobs" were antithetical to the constitutional and civilized judicial values in all states where "mob rule" did not exist (see Briscoe v. La Hue, 460 U.S. 325, 336-341).

3a. A defendant need only plead not-guilty or refuse to plead, for the court's constitutional, ministerial mandate for a trial to become operative!

b. The accused's constitutional, historical, and biblical right to a trial, with the attendant right of confrontation, the right to produce witness' testimony by judicial compulsion is directly in issue.

Whether appellants, or some of them, are entitled to a trial by jury because the legislature and this court have categorized criminal contempt as a "serious" crime for a particular class (Judiciary Law §90[4]; 22 NYCRR §603.12), is not before this Court at this time on this appeal.

POINT IIC

THE FUTURE OF NON-SUMMARY CRIMINAL
CONTEMPT

1a. This and related criminal contempt proceedings in the Puccini litigation, makes irresistible, as a constitutional imperative, the court's conclusions in Polo Fashions v. Stock Buyers (760 F.2d 698 [6th Cir.]).

b. Where, as here, a Brady v. Maryland (373 U.S. 83) situation is directly involved in its most quintessential respect (United States v. Agurs, 427 U.S. 97), and indeed a demand made pursuant thereto, adversarial private prosecution and attempted extortion is inconsistent with the societal vindication sought to be enforced by criminal contempt.

c. At bar, the private prosecution is being carried forward by parties and law firms whose egregious, if not criminal, conduct is documented, well-established, and uncontrovertable.

POINT III

THE BOTTOM OF THE BOTTOMLESS LEGAL PIT

1a. For eight hundred (800) years the Writ of Habeas Corpus ad subjiciendum, has existed as the most potent remedy against governmental tyranny.

b. By a unanimous vote of fifty-five (55) men in Carpenter's Hall the remedy of the writ was included in the Constitution (Article 1, Section 9, Cl. 2), as well as every state constitution.

There was never any question that everyone involved in the constitutional process, more than three (300) years ago, were familiar with The Bushell Case (6 How. St. Trials 999, 124 Eng. Rep. 1006 [1670]), where Bushell along with other jurors, were incarcerated for refusing to obey the judicial direction by the trial justice and return a verdict of guilty of "rioting" against William Penn and Mead, when all they were merely holding was a Quaker meeting.

The framers of the constitution knew that it was the writ of habeas corpus which freed those jurors, and firmly established the writ as the weapon against "judicial tyranny", as well as tyranny practiced by the executive branch.

c. The traditional writ of habeas corpus ad subjiciendum is, unlike all other legal proceedings, quick, summary, and mandatory.

The traditional writ of habeas corpus makes no distinction between "saint" and "sinner", between "guilt or innocence", only whether the rule of law was followed (United States v. Flynt [756 F.2d 1352 - 9th Cir.]; People ex rel. Tweed v. Liscomb, 60 N.Y. 559, 566). It was because of this speedy disposition, by limited inquiry, that the Writ obtained its deserved rank as the "Great Writ".

d. On July 29, 1985, this Court, made a frontal assault on the Great Writ by judging the merits of the conviction, rather than the process by which such conviction was secured (State ex rel. Geo. Sassower, Esq., on behalf of Sam Polur, Esq. v. Cunningham [#23984]).

2a. The founding fathers were also aware of the fate of John Lambert, who was roasted in flames in 1537, as an obdurate heretic, because he was suspected of having become a convert to Protestantism. Lambert was not opposed to the "oath to tell the truth", provided the demand was "lawful", and at his inquisition asserted the inquisitors own church doctrine was that "no man is bound to betray himself" [nemo tenetur seipsum prodere].

b. In distinguishing criminal from civil contempt, seventy-five (75) years ago, the Court, in Gompers v. Buck Stove (221 U.S. 418, 448) held that the right not to incriminate oneself was applicable to criminal contempt proceedings.

c. Nonetheless, this Court, on July 29, 1985, torpedoed the body of law surrounding the Fifth Amendment to the Constitution of the United States, when in passing on the "legality" of the conviction, the Court stated, inter alia:

"nor does the petitioner deny the actions taken were in violation of the order of Justice Gammernan, which formed the basis for the subsequent finding of [criminal] contempt." [emphasis supplied].

3a. Undoubtedly, the founding fathers were familiar with The King James version of the Holy Bible and in determining what to include in a Bill of Rights were aware of The Acts of the Apostles, wherein Paul stated (Chapter 25, ¶16):

"It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face ..."

b. Where the thrust of the moving papers to this Court was the denial to the accused of their constitutional right to a trial, it is incomprehensible for this Court to state in its opinion of July 29, 1985, supra,:

"The papers submitted do not demonstrate any basis to conclude that the detention is illegal ..."

b. Apparently, appellants' accusers, Mr. Justice Klein and this Court, in depriving appellants an opportunity to confront his accusers before conviction and sentence, have chosen to nullify not only the Constitution of the United States, but also to abandon all of history's civilized values.

POINT IV

THE ORDER OF MR. JUSTICE GAMMERMAN

1a. Repeatedly and incorrectly, this Court stated in its habeas corpus opinion of July 29, 1985, supra, stated that the Order(s) of Mr. Justice Gammerman, were not appealed.

b. The fact is that these Orders of Mr. Justie Gammerman were immediately perfected for appellate review, but such review has been stonewalled by this Court's own Orders of May 29, 1985 (#M-1809 and #M-1875) and the failure of nisi prius to comply with the mandatory provisions contained therein.

2. With documented support, the assertion has and is made by appellants that the Order(s) of Mr. Justice Gammerman, dated January 23, 1985, were secured without in personam jurisdiction, by extrinsic fraud and corruption. The respondents never even asserted in their moving papers or in the Order appealed from that such Orders of Mr. Justice Gammerman were "lawful mandate[s]" (cf. Judiciary Law §750A[3]).

b. To assume disobedience towards the Gammerman Orders for asserting their invalidity is neither warranted nor factual correct, no more than the assertion of the Fifth is an admission, legally or factually, of guilt!

c. Nevertheless, this Court in the habeas corpus opinion of July 29, 1985, supra, made the irrelevant, gratuitous, and highly improper comment:

"It unquestionably appears from the papers submitted that there have been flagrant violations of the injunction contained in the prior order of Justice Gammerman, entered January 26 [sic], 1985." [emphasis supplied]

3a. This Court, in its habeas corpus opinion of July 29, 1985, supra, made the irrelevant and gratuitous comment:

"as far as appears, it [the Order of Mr. Justice Gammerman] is a valid order binding on the petitioner [Sam Polur, Esq., was who not a participant in that proceeding, and without standing to appeal]"

b. An Order of nisi prius which prohibits the constitutional right to petition the government or its agencies for relief (Amendment I, Constitution of the United States; Article 1, §9, of the New York State Constitution; California Motor v. Trucking, 404 U.S. 508 and is directly contrary to professional mandate Disciplinary Rule 1-103) is plainly void, and beyond the reach of judicial contempt power and authority (Craig v. Harney, 331 U.S. 367; Pennekamp v. Florida, 328 U.S. 331; Bridges v. California, 314 U.S. 252).

The First Amendment is not limited to criticism of "God, Motherhood, and Apple Pie" (Garrison v. Louisiana, 379 U.S. 64)!

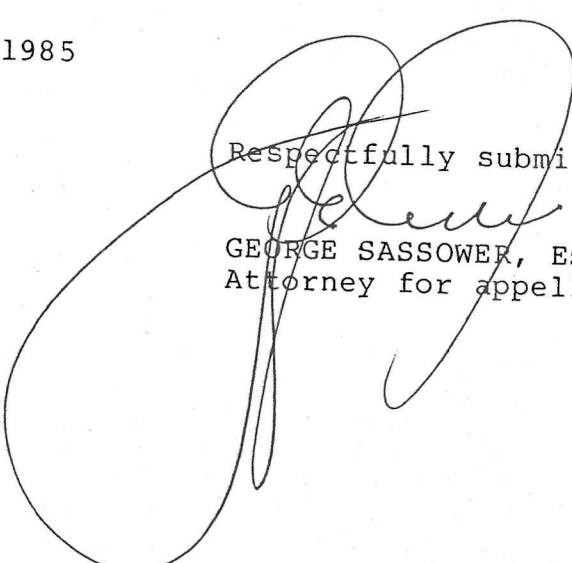
c. The Order of Mr. Justice Gammerman was made, and the penalty of incarceration imposed, in total disregard of Donovan v. City of Dallas (377 U.S. 408).

THE CONCLUSION OF MR. JUSTICE HOLMES

1. The law, as Mr. Justice Holmes attempted to convey, as the dog, distinguishes between being inadvertently tripped over, and intentionally kicked (The Common Law, p. 3).

2. The distinction is noted!

Dated: August 22, 1985



Respectfully submitted,

GEORGE SASSOWER, Esq.
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