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IN

The Supreme Court

OF THE

STATE OF COLORADO.

ANTONIO BENEDICT, *Plaintiff in Error,* vs. THE PEOPLE OF THE STATE OF COLORADO, *Defendant in Error.*	No. 3409. *Error to the District Court of Gilpin County.*

Brief and Argument of Plaintiff in Error.

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Brief and Argument of Plaintiff in Error.

Plaintiff in error—defendant below—was charged with sodomy (with a cow). The trial occupied the 20th and 21st days of June, 1894, the jury returning a verdict of guilty. June 30th, a motion for a new trial, supported by affidavits, was filed by defendant; was argued and submitted July 5th, and overruled. July 6th, defendant filed a motion in arrest of judgment, which motion was denied, and the defendant was sentenced to the penitentiary. Afterwards, on motion of the District Attorney, the record was ordered amended. In each and

every case the defendant excepted to the rulings and orders of the Court. See abstract of the record—there is not much of it.

There are several errors assigned, but I do not deem it necessary to speak of more than three or four of them.

The clerk has certified that the transcript is a true, complete and full transcript of the record, and that the copies of the papers filed are true and correct copies of all the papers in the case, excepting subpœnas and papers from Justice of the Peace. Page 13, abstract of record. So the transcript contains a correct copy of *all* the papers filed in the case, as well as a copy of the record.

I shall first notice No. 14 of the assignment of errors, in regard to the refusal of the Court to give instruction No. 9, prayed for by defendant, which instruction is as follows:

No. 9. The Court instructs the jury that there is only one criterion by which the guilt of men is to be tested, and that is whether the mind is criminal; that the essence of an offense is the wrongful or evil intent, without which it cannot exist; that there must be union or joint operation of act and intention, and if, under the evidence in this case, either element was lacking, then your verdict should be for the defendant (fol. 28, abstract).

And at the same time, or in connection therewith, I shall speak of errors Nos. 6 and 7 as assigned, which are as follows:

6. Because the evidence showed that the defendant, at the time of the alleged commission of said offense, was not capable of forming an intention; did not know the distinction between good or evil; did not know right from wrong.

7. Because the evidence and affidavits of several of the jurors showed and show that the defendant was an idiot or verging on idiocy or imbecility to or in such a degree that he was incapable of discriminating between right and wrong, and was not accountable for what he did (page 14, abstract).

These matters—No. 14 in the assignment of errors and Nos. 6 and 7 based on reasons 7 and 12 in motion for a new trial—are so blended or related that it will be more convenient and probably better to carry them along together.

In the motion for a new trial, among other grounds, reasons 7 and 12 were given, which were as follows:

7. Because the evidence showed that the defendant, at the time of the alleged commission of said offense, was not capable of forming an intention, did not know the distinction between good or evil, and did not know right from wrong.

12. Because the defendant was and is an idiot or of unsound mind (fol. 33, abstract).

In support of the motion for a new trial, the affidavits of four of the jurors—John Dimler, Peter McFarlane, Horatio E. Hazard and John Eilman—were filed. Dimler swears that from the evidence adduced on the trial and from the appearance of the defendant on the witness stand he believed and believes that the defendant was, at the time of the alleged commission of said crime of sodomy, an idiot, or of such a low order of intelligence that he was incapable of forming any intention, of knowing the distinction between good and evil, or right from wrong (fol. 34, abstract). Hazard swears that from the evidence adduced on the trial of said case and from the appearance and demeanor of the defendant on the wit-

ness stand he believes that the defendant is and was, at the time of the commission of the alleged offense, an idiot or verging on idiocy, and that the defendant, at the time of the alleged commission of said crime, did not know what he was doing, and did not know the distinction between good and evil, and was not accountable for what he did (fol. 38, abstract). Eilman swears that from the evidence adduced on the trial of the case and from the appearance and demeanor of the defendant on the witness stand he believed and believes that the defendant is an idiot or bordering on idiocy, and seriously doubted and doubts, from the evidence in the case and the appearance and demeanor of the defendant on the witness stand, that the defendant, at the time of the alleged commission of the crime, knew what he was doing or was capable of knowing right from wrong (fol. 43, abstract). McFarlane, in his affidavit, says that from the evidence on the trial of said case and from the appearance of the defendant on the witness stand he believes that the defendant is an idiot or verging on idiocy, and seriously doubts that the defendant, at the time of the commission of said offense, knew what he was doing or was capable of distinguishing or discriminating between right and wrong; and he also states in his affidavit that the jurors were of the opinion that the accused was weak or simple minded and not capable of realizing the full nature of the crime of which he was convicted, and that a paper to that effect was prepared, to be presented to the Court, but that the jurors did not know the propriety of such a course, and the same was withheld (fols. 36 and 37, abstract).

I do not think the correctness of the legal proposition contained in the instruction prayed for by defendant will be questioned. Intent is the gist or essence of a

crime or misdemeanor, and if a person is insane, of unsound mind, an idiot, verging on idiocy, or of such a low order of intelligence that he does not know right from wrong, good from evil, or what he is doing, then he is incapable of forming an intent, and, therefore, is guiltless under the law. All the law books make legal responsibility to depend on the ability to distinguish right from wrong. Raymond's Medical Jurisprudence, Section 242; Haskell's case, Fish on Insanity, 83; Chitty's Medical Jurisprudence, 354; 1 Russell on Crimes, 8; American Criminal Law, by Desty, Section 23 *a*; Bishop's Criminal Law, 7th Ed., Vol. I., Section 375. Our Criminal Code says that intention is manifested by the circumstances connected with the perpetration of the offense, and sound mind and discretion of the person accused; that a person shall be considered of sound mind who is neither an idiot, nor lunatic, nor affected with insanity, and who hath arrived at the age of fourteen years, or before that age, if such person know the distinction between good or evil, and that a lunatic, insane person or idiot shall not be *found guilty* or *punished* for any crime or misdemeanor. Sections 1157 to 1162, Mills' Annotated Statutes.

The lack or ability to distinguish right from wrong, good from evil, or, in other words, the insanity may be one of many forms, such as idiocy, imbecility, mania, dementia, defect in mental power, etc. Bishop's Criminal Law, Vol. I., Section 379; American Criminal Law, Section 23 *a*. But whatever the form or cause may be, if the person was under such defect of reason as not to know the quality of the act he was doing, or if he was under such delusion as not to understand the nature of his act, or had not sufficient memory, or reason, or judgment, to know that he was doing wrong, or not sufficient

conscience to discern that his act was criminal, or if he had an uncontrollable impulse to do the act, then he is not responsible. American Criminal Law, Section 23 *b*.

Nor do I deem it material whether or not the unsoundness of mind was revealed by the testimony of the witnesses for the people, either on examination in chief or by cross-examination, or by direct testimony of witnesses for the defendant, or by the appearance and demeanor of the defendant, nor whether or not insanity was pleaded. If the jurors, or any of them, from the evidence, appearance and deportment of the defendant, believed the defendant was insane, or had a reasonable doubt concerning his sanity, then the defendant should not have been found guilty or sentenced. In the case of Jordan vs. The People, 19 Colo., 417, this Court held that it was not necessary for the State to prove the sanity of the defendant in the first instance, as every man is presumed to be sane until the contrary appears, which is unquestionably the law. And in the Jordan case this Court said: "In this case the cross-examination of the witnesses for the State and the direct testimony of the witnesses for the defendant tended to show some affection of his brain, technically called amnesia, or loss of memory. Although no witnesses introduced by the plaintiff in error testified that he was insane at the time of the commission of the crime charged, yet there was testimony which might have influenced the jury to this conclusion. Under the circumstances, it was not only proper, but wise for the State to meet the inferences which otherwise might have been indulged by the jury." This tends somewhat, at least, to support my view expressed above. Why should it matter from what or whose testimony it appeared that the defendant was of unsound mind, or whether or not insanity was a defense, so long

as the jurors or any of them believed, from the evidence and from the appearance of the defendant on the witness stand, that the defendant was an imbecile, idiot or lunatic? The material thing, it seems to me, is, Did the jurors or any of them so believe from the evidence and the appearance of the defendant as a witness? The evidence is not set forth in the transcript. It was not deemed necessary. The affidavits of some of the jurors in support of the motion for a new trial showed what they believed from the evidence and the appearance of the defendant concerning his mental condition at the time of the commission of the alleged offense, and, also, at the time of the trial, and this was deemed sufficient without bringing up the evidence.

But I may be asked, what has all this to do with the refusal to give instruction No. 9, asked by defendant, and reasons 7 and 12, in motion for a new trial? My answer is, that if the instruction prayed for is a correct proposition of law, although it may not be very pointed or definite, so far as the question of idiocy or insanity is concerned, yet it is broad and comprehensive enough to cover the point, and, in the light which the jurors viewed the mental condition of the defendant, as shown by the affidavits of jurors subsequently filed in support of the motion for a new trial, it should have been given. And, again, the Court should have set the verdict aside and granted defendant a new trial, in my opinion, without any hesitation whatever because of reasons 7 and 12 in said motion, supported by the affidavits of the jurors. As I have before stated, Nos. 6 and 7 of assignment of errors are based principally on the refusal to grant a new trial because of reasons Nos. 7 and 12 in motion for a new trial. And, if I am correct in this, then the Court

erred in denying defendant's motion for a new trial, which is No. 8 of the assignment of errors.

But it may be contended that the affidavits of the jurors impeach or tend to impeach their verdict, and this brings to my mind No. 4 of the assignment of errors, which is as follows:

No. 4. Because the verdict in said cause was returned through a misapprehension or mistake, and was not and is not a true or correct verdict, as shown by the affidavits of several jurors filed in support of the motion for a new trial.

Mr. Wharton, in his work on Criminal Law, Vol. III., Practice, 7th Ed., Section 3328, says: "Though the former practice was different, it is now settled in England that a juror is inadmissible to impeach the verdict of his fellows." It seems that the reason for the rule, as stated by Mansfield, C. J., is that it would open each juror to great temptation, and would unsettle every verdict in which there could be found upon the jury a man who could be induced to throw discredit on their common deliberations. The reason for the rule seems to be a good one, but, as in the case of all rules, there are exceptions to it. In the same section, Mr. Wharton says: "In this country the English rule has generally been adopted, though the affidavits of jurors will be entertained for the purpose of explaining, correcting or enforcing their verdict," and cites cases. And later on in the section he says: "Yet, at the same time, there is danger of construing the rule in such a way as to work a great wrong, by shielding with secrecy the deliberations of the jury, as to permit these deliberations to be irresponsibly conducted in such a way as to outrage public and private rights." And, again, he says: "From necessity, however, where gross injustice has been wrought

from misconduct or *misapprehension in their deliberations*, they are to be permitted to prove such misconduct or misapprehension. Thus, they may prove the case was decided by lot, or that the instructions of the Court were misunderstood, or that the verdict was agreed to on the representation that the Governor would pardon on the jury's recommendation, and that a distinction has been taken to the effect that though a juror cannot be admitted to stultify his own action, yet he may be permitted to prove gross misconduct in his fellows." And, in Section 3323 of the same work, Mr. Wharton cites some of the cases he cited in Section 3328, and some others, bearing on the point.

From reading Mr. Wharton, it seems to me that there is a distinction between cases of misapprehension or mistakes, purely, and others in which a juror willfully or intentionally stultifies or attempts to stultify himself or his action. If there is no such distinction, there ought to be. A mistake may be said to be some unintentional act, omission or error arising from unconsciousness, ignorance, forgetfulness, imposition or misplaced confidence. Kerr on Fraud and Mistakes, page 396. And if there is no precedent for a Court to set aside a verdict in a criminal case when it is shown by the affidavits of several of the jurors, and the fact is not contradicted, that the verdict was rendered under a mistake or misapprehension, then such a precedent should be made at the first opportunity, and, in this case, in my opinion, an opportunity is presented to this honorable Court to establish such a precedent, and, in so doing, I believe it would prevent a great wrong and gross injustice. Why is it not right and just to set aside a verdict, when it is shown by the affidavits, either directly or indirectly, that the verdict was unintentionally rendered, or presented

through mistake or misapprehension in their deliberations, or through ignorance? I respectfully submit that the affidavits show that some of the jurors believed, from the evidence and the appearance and demeanor of the defendant on the witness stand, that at the time of the alleged offense he was an idiot, was incapable of forming any intention, was not accountable for what he did, and believed that such was his mental condition at the time of the trial, and that other jurors entertained serious doubts concerning his sanity, based on the evidence and his appearance, and that all of the jurors were of the opinion that he was weak or simple minded and not capable of realizing the full nature of the crime. This being the case, then it logically, absolutely and necessarily follows that the verdict was rendered or presented through a mistake or misapprehension. An idiot or insane person should not be found guilty of or punished for any crime or misdemeanor.

The "idiotic" feature of this case is a most singular one. I doubt that just such another one was ever presented to a Court. But we must take a case as we find it, and, of course, it is the new point and the unheard-of circumstances that give us the most trouble, and present an occasion that gives birth to a new opinion.

I will now briefly notice No. 9 of the assignment of errors, which reads as follows:

9. The Court erred in denying defendant's motion in arrest of judgment.

After the motion for a new trial was denied, defendant filed his motion in arrest of judgment, which was denied by the Court July 6th. Among the reasons

stated in the motion in arrest of judgment is the following:

1. Because the record does not show that the defendant was furnished, previous to his arraignment, with a copy of the information and a list of the jurors and witnesses (fol. 51, abstract).

The motion in arrest was denied, the prisoner was sentenced to the penitentiary, and, afterwards, the District Attorney moved that the Clerk be permitted to amend the record so as to show that the defendant was furnished with a copy of the information, a list of the people's witnesses and a list of the jurors at the time he was arraigned and before he was required to plead thereto, which order was made by the Court (fols. 55–56, abstract).

The record shows that the defendant was not represented by an attorney at the time of his arraignment, on June 15th, and fails to show, as it originally appeared, that the defendant, at that time, or prior thereto, had been furnished with a copy of the information and a list of the jurors and witnesses (fols. 2–3, page 2, abstract).

The motion made by the District Attorney was an oral one. No affidavit was filed or any one sworn concerning the fact as to whether or not a copy of the information and list of the witnesses and jurors were furnished to defendant previous to his arraignment. It seems that the Court was governed in the matter by the *statements*, merely, of the District Attorney and the Clerk. "The Court being now sufficiently advised by the statements of the District Attorney and the Clerk of the Court, therefore, it is ordered" that the record be amended, etc. (fol 56, abstract). The record prior to July 6th, the date on which the motion in arrest was submitted and denied, had been perfected, written up by

the Clerk, and the amendment was afterwards made by interlineation. The District Attorney did not take the trouble to examine the record when the point was raised, and it was not until after the motion in arrest was denied and the defendant sentenced that he moved to amend (fol. 55, abstract).

Our Criminal Code requires that every person charged with a felony shall be furnished, previous to his arraignment, with a copy of the indictment or information and a list of the jurors and witnesses. Mills' Annotated Statutes, Section 1460.

In a case for felony, the record should show that the prisoner was furnished with a copy of the indictment and a list of the witnesses. 65 Ill., 372.

The leading purpose of the record, wherein, if it fails, it is certainly inadequate, is to set down and justify the punishment. Hence, it must state what will affirmatively show the offense, the steps, without which the sentence cannot be good, and the sentence. Bishop on Criminal Procedure, 3d Ed., Vol. I., Section 1347.

Assuming that a Court has the power to amend its record, it cannot amend at any time, and there ought to be a basis or something to amend by or upon—not merely on statements or hearsay. And there is a distinction between docket entries or minutes made by the Clerk or Judge and the record which follows. Under the head of "Judgment Amended," in Archibold's Criminal Practice and Pleading, 8th Ed., Vol. I., page 593, and note 1, it seems that at common law the Judge, during the term, may alter and supply from his own memory any order, judgment and decree. In the case at bar the Court ordered the record amended, not when the defect was called to the attention of the Court by motion before sentence was imposed, but after sentence, and merely on the statements

or say-so of the District Attorney and Clerk. Mr. Bishop, in his work on Criminal Procedure, Vol. I., Sections 1341, 1342 *et seq.*, speaks of docket entries and record distinguished and amendments, during and after the term, and cites a number of cases. From an examination of most of the cases cited, under said Section 1342, I fail to find that the Court can arbitrarily amend its record, or can, without proof, amend its record, unless it may be from the memory of the Judge during the term. The case of The Commonwealth vs. Weymouth, 2 Allen's Reports, page 144, probably gives a fair exposition of the law. The record failing to show that the defendant was furnished with a copy of the information and a list of the jurors and witnesses previous to his arraignment, if, in fact, such copy and list were furnished him prior to his arraignment, that fact, when raised prior to his sentence and prior to amendment of the record, should have been established by proof, if the Judge himself did not retain it in his memory. Under the circumstances of this case, can it be presumed that the trial Court proceeded regularly; that a copy of the information and list of witnesses and jurors were furnished the defendant?

And now I come to another matter, and which is covered by Nos. 1, 2 and 3 of the assignment of errors. These three of the assignment of errors are as follows:

1. The Court erred in not allowing the defendant a public trial.

2. The Court erred in not giving or allowing the defendant a trial according to law—that is, in giving defendant a private and not a public trial.

3. Because defendant did not have and was not allowed a public trial (page 14, abstract).

In the motion for a new trial, Nos. 9, 10 and 11 covered the same point (fol. 33, abstract). In support of the motion for a new trial were filed the affidavits of John Benedict, William Williams, under Sheriff, and of Thomas Hooper, Sheriff. No counter affidavits were filed, the facts stated in the affidavits were not denied, and the facts stated therein must be taken to be true. (See fols. 40, 41, 42, 45, 46, 48 and 49.)

Briefly, the affidavits show that just before the commencement of the trial—just before the jury was called in the case—the Judge ordered the Sheriff to clear the court room of the spectators and not to permit any person, except members of the bar, officers of the court, students at law, and the witness testifying, to be or remain in said court, or court room, during the trial of said cause; that the Sheriff, acting under said orders, cleared the court room of the spectators or the public; excluded the public from said court and court room during the whole time of said trial, which occupied nearly two days—the 20th and 21st of June; that the door of the court room was kept locked most of the time during the trial, and, when it was not locked, no one, unless he was an officer of the court, member of the bar, or student at law, was permitted to enter the court room by the Sheriff or remain therein.

Section 16 of Article 2 of the Constitution of the State of Colorado, Mills' Annotated Statutes, Volume I., page 189, says that in all criminal prosecutions the accused shall have the right to a public trial. The same provision is found in Article 6 of the Constitution of the United States. See Section 88, page 48, Volume I., Mills' Annotated Statutes. The language is plain. There seems to be no room for misconstruction—shall have the right

to a public trial—and this provision is in our Constitution, the supreme law of our commonwealth.

The public means the people, pertaining to or belonging to the people—opposed to private, open to the knowledge of all—common, open to common use; the general body of mankind, or of a nation, state or community, the people, etc. (See Webster.)

I have looked for decisions bearing on the point, but have found some two or three only. I suppose the scarcity of decisions is owing to the clearness of the constitutional provision itself.

Bishop on Criminal Procedure, Volume I., 3d Ed., Section 952, in speaking of arrangements within the court room, says: "The people have a right to be anywhere in the court house, except on the bench, in the bar, or clerk's box, so long as they demean themselves in a peaceable manner, except sauntering or standing between the bench and bar." And in Section 957, of the same work, under the head of "Open Court," says: "By immemorial usage, wherever the common law prevails, all trials are in open court, to which spectators are admitted. Perhaps it may not be strictly so of the preliminary examination. Offenses against the United States are by the Constitution to be tried in "public," and so are offenses against the States by their Constitutions. Some even deem, and probably justly, that a trial by twelve good men in private is not a jury trial, within constitutional guaranties."

Mr. Cooley, in his work on Constitutional Limitations, 5th Ed., page 380, star Section 312, says very little concerning the provision, but, from what he does say, it is to be taken that if the people generally are excluded, it is not a public trial.

In the case of Stone vs. The People, 2 Scammon, page 337, the same point was raised. The Constitution of the State of Illinois contains a provision similar to our own, and I suppose that the section of our Constitution was taken from that of Illinois. In the case of Stone vs. The People, the Supreme Court of the State of Illinois say: "On the fifth ground, it is to be remarked that there is no question that the Constitution of the State has guaranteed a public as well as an impartial trial, but the causes stated in the depositions do not show that the trial was not public. We should infer from the fact stated in the depositions that some noise and disturbance prevailed in the court room, and that, in order to avoid a confusion that might have arisen therefrom, the officers caused the doors to be locked. No inconvenience appears to have arisen from the course pursued, and we cannot well see how any could have occurred. We have no doubt, however, that the doors may be closed for a temporary purpose, when existing circumstances eminently require it to be done, but not for the purpose of excluding any one connected with the trial. The record shows the fact that it occurred while the motion for arresting the judgment was pending, under consideration and discussion, and it was, consequently, after the verdict had been rendered and trial by jury terminated. We see no cause for error here." In that case the public was not excluded during the trial. And in a criminal case, where, during the trial, for a few minutes, temporarily, under certain circumstances, the people generally are excluded, it may possibly be held to be a public trial, still it is treading on dangerous ground. But in a criminal case, where, during the whole of the trial, the people generally are excluded and not permitted to remain in the court room, it seems to me that it is unquestionably

a *private*, and *not* a public, trial, and is in violation of the right guaranteed by the Constitution.

In 17 Colo., O'Brien vs. The People, page 563, this honorable Court say: "The Constitution guarantees that every person accused of crime shall have a public and impartial trial, and that the accused shall have the right to appear and defend in person and by counsel. These provisions imply that the trial shall be conducted in open court and under the protection of the Court. Of what value are such guaranties if they may be taken away in the absence of the Court—the only power that can give them efficiency?" This is to the point, correctly states the law, and should be regarded as conclusive. And I might ask of what value is our constitutional provision guaranteeing to every person accused of crime a public as well as a speedy and impartial trial if the trial Judge is permitted to exclude the public, close and lock the doors of his court room and keep the people generally from entering or attending during the whole of the trial? If such a proceeding can be tortured into meaning or being a trial in open court, or a public trial, then I am unable to conceive what is meant by a "public" trial, and it would seem that the constitutional provision means nothing and should be regarded as superfluous, or as so much silly twaddle.

The motive of the Judge below was probably a good one. He probably thought that a public trial might corrupt the public morals. But it matters not what his motive was, or what he thought, and it is idle to speculate whether or not the verdict would have been different, or whether or not, in case of a new trial, it might have been the same. It is sufficient for us to know that our Constitution guarantees a public trial to the accused, and that such a trial was not had or permitted.

Bishop on Criminal Procedure, Volume I., Section 958, says: "Our public trials are sometimes corrupting to the public morals, especially by reason of the publicity given by newspapers to what should never be uttered except by command of justice. The Courts ought to put some restraint upon these abuses—at least, to forbid the publication of minute details of filthy evidence," and refers to Sections 259 and 260 of Volume II. of his Criminal Law. On the examination of those sections, in the 5th and 8th Eds., I find they do not bear him out in his assertion. From the cases cited in said Sections 259 and 260, it seems that the Courts hold that a publication, relating to a cause in court, if it has a tendency to prejudice the public respecting its merits and to corrupt the administration of justice, or if it reflects on the tribunal or its proceedings, or on the parties, the jurors, witnesses or counsel, it may be visited as a contempt, and that sometimes there are reasons why the proceedings in a cause should not be published until the suit is terminated; and in one case an order was made that no person should be admitted within the *bar* for the purpose of reporting except on condition of suspending all publication till after the trial was concluded. But not one word concerning the morals of the public, nor have I found a single case reported wherein the Court attempted to prevent the corruption of the morals of the public by excluding the people from the court room during the trial, or in any other way, for that matter.

It does not matter why, or for what reason or reasons, our Bill of Rights guarantees to the accused a public trial. It is doubtless a wise provision, and its violation should not be permitted or tolerated, regardless of the motive that prompted its violation.

I respectfully submit that this case should be reversed.

J. McD. LIVESAY,

Attorney for Plaintiff in Error.