16 Just. 105
Court of Quarter Sessions of the Peace of Pennsylvania, Philadelphia County.

Commonwealth
v.
Kipnis.

February Sessions, 1917.
|
August 3, 1917.

****1 *927** Motion to quash return of magistrate.

Attorneys and Law Firms

Samuel P. Rotan, District Attorney, and *Charles Edwin Fox*, Assistant District Attorney, for Commonwealth.

Samuel W. Salus and *Herbert W. Salus*, for defendant.

Opinion

STAAKE, J.

***928** In this case the defendant moved the court to quash the return of Magistrate Robert Carson, of Court No. 20 in the County of Philadelphia. The reasons submitted in support of the motion were:

(1) Because the magistrate, in giving "a preliminary hearing outside of his jurisdiction, violated the law and made said hearing void," and that "he had no jurisdiction in committing the defendant for court."

(2) That the magistrate had not complied with the requirements of art. I, s 8, of the Constitution of Pennsylvania, which required that an oath must be subscribed to by the affiant, wherein the defendant is charged with a crime, that the oath must be in writing, and that an oral complaint was not sufficient.

(3) That the warrant was issued without an oath in proper form prescribed by law.

As to the jurisdiction of the magistrate, it was argued that he had been assigned to Court No. 20, which court was located in the City of Philadelphia, between School House Lane, Wissahickon, and Roberts Avenue on the north, Germantown Avenue on the east, Susquehanna Avenue on the south, and the Schuylkill River on the west.

It was argued that paragraph 10 of the Act of Feb. 5, 1875, P. L. 56, provided that in cases of disability for twenty days of a magistrate, one of the other magistrates "having the closest court shall have charge of all proceedings before the said magistrate and conduct hearings for him during his absence."

It was submitted to the court that "The record of the station house shows that the defendant was brought there charged with a violation of the act of assembly, and nowhere does it appear he had been brought there for the purpose of having a hearing, excepting the statement of the magistrate, which, after all the circumstances, may be taken as a mere subterfuge or excuse to relieve him of the delicate position in which he places himself by his at least non-judicial actions."

Counsel for the defendant also contended that even assuming that the magistrate was "telling the truth in saying that it was merely for the purpose of holding a hearing to fix bail and ascertain some of the facts, even though that procedure had never

been used by any magistrate, including the one in question, at any time before, and for the simple reason that on issuing a warrant he went into sufficient details to have at least a *prima facie* oath, which would entitle him to fix bail;" when the magistrate did so he performed a "ministerial act" as well as a "judicial act."

Counsel for the defendant further contended that, if it was a judicial act, the magistrate had violated the law as interpreted by Judge Barratt of the Court of Common Pleas No. 2 of Philadelphia County, in his opinion in the case of *Com. v. Kurz*, 14 Dist. R. 741. If the act was a ministerial act, it was then contended there was no reason for the hearing.

****2** It was averred that Court No. 20 had been assigned to Magistrate Robert Carson, and that this court, located in the district already stated by boundaries, was the place where justice was to be judicially administered by the magistrate, and that he was without authority to hold a hearing out of this district; that a fixed place within the district could meet the exacting provisions of the Act of Assembly of Feb. 5, 1875, P. L. 56; that it was part of the establishment of "a regular, orderly, exact system of magistrates' courts, in which is apparent the purpose that the respective magistrates shall each sit in his own district and nowhere else;" that a prisoner could not give sanction to a jurisdiction not vested by law; that if such a practice were permitted there could be no orderly system of accuracy, and it might lead to a ***929** condition in which magistrates "might vie with each other for business in great centres of the city."

The facts averred in the brief for defendant, as shown by the testimony, were that "The magistrate was 'phoned for by a private party, the Forrest Theatre, and issued a warrant and had the hearing within one square of the said theatre, out of his jurisdiction, solely for the benefit and accommodation of the prosecutor."

It was submitted that this conduct was "certainly lowering the judicial dignity of the office." It was also argued that this practice was "against the principles of fair and impartial justice," and would lead to conduct which "would not be fair and impartial."

Citing Livingston's Appeal, 88 Pa. 209, it was claimed in support of the motion that, in the absence of statutory authority, a judge cannot hold court in another county, and that the only case for the substitution of one magistrate for another, or for acting in the district of another magistrate, was in the case of sickness.

It was further contended in support of the motion that the Act of May 3, 1915, P. L. 240, creates a night court, which act had been faithfully complied with by the Honorable Thomas B. Smith, the present Mayor of Philadelphia, and which night court opened every night at ten o'clock with the exception of Sundays and holidays, and as to which court it was a matter of common knowledge in Philadelphia that the then presiding magistrate was Evan T. Pennock. The court was also asked to take judicial notice that the Central Station in Philadelphia consists of two branches, the central court, which is held during the day, over which Magistrates Mecleary and Beaton were then alternately each month the presiding officers, and Magistrate Pennock was then at all times presiding officer at the night court.

It was alleged that the averment by the magistrate of having given the hearing for the purpose of entering bail was a subterfuge or lame excuse, as the magistrate had no jurisdiction, "in that the Act of 1915, as already quoted, either meant something or nothing," and that provided for the establishment of the night court for that very purpose.

****3** It was, therefore, formally submitted to the court:

(1) That the oath administered by Magistrate Robert Carson "was not taken in the proper form as prescribed by law."

(2) That by virtue of the Act of 1875 and the decision by his Honor, Judge Barratt, which provided for the holding of magistrate's courts from ten o'clock A. M. to four o'clock P. M., and that such hearings must be held within the magistrates' jurisdictions, and because the Act of 1915 gave only one court the power to enter bail at night-time, sitting as a court, the magistrate's return in the present case should be quashed.

The contention of counsel for the defendant was qualified by the statement that he did not "for a minute contend that magistrates might not comply with the ministerial requirements of the law by entering bail," but that he did contend that "if there is a hearing for the purpose of entering bail and the proceedings then develop, instead of an administrative duty, a judicial act, said hearing must be held only at Central Station."

Contra the motion of the defendant to quash the magistrate's return, it was, on behalf of the Commonwealth, argued, first, at the defendant had entered into a recognizance and thereby waived all irregularities in his arrest, citing Sadler on Criminal Procedure, page 152, s 82 (edition 1903), and *Com. ex rel. Hartman v. Warden*, 8 Dist. R. 159, where Bell, P. J., held: "Even

assuming the original arrest to have been illegal, it is now too late to raise ***930** the question or to apply for relief. The relator, after his arrest, made no complaint as to its illegality, but had a hearing before the committing magistrate, and entered into recognizance for his appearance at court. His bail afterwards surrendered him into custody in order that the present writ of *habeas corpus* might be sued out. His thus entering into recognizance for court was a waiver of such illegality or irregularity in his arrest. In 28 Am. & Eng. Ency. of Law, 733, it is said: 'When the defendant applies for and agrees to a continuance of the cause, over the subject-matter of which the magistrate has jurisdiction, and enters into a recognizance for his appearance at a subsequent time, he thereby waives all defects in the warrant, or the service thereof, as he is then held by force of the recognizance and not by virtue of the warrant." DDD'

This principle is also recognized in a host of cases, notably in *Com. v. Dingman*, 26 Pa. Superior Ct. 615; *York City v. Hatterer*, 48 Pa. Superior Ct. 216; *Com. v. Williams*, 54 Pa. Superior Ct. 545; *Com. v. Brennan*, 193 Pa. 567; and *Com. v. Mallini*, 214 Pa. 50. In *Com. v. Williams*, 54 Pa. Superior Ct. 545, attention is particularly called to the Mallini Case, 214 Pa. 50, which involves an indictment for murder. At the trial a motion to quash the indictment for the insufficiency of the information was made, and it was held by Mitchell, C. J.: "It was too late. The indictment was regularly found after a hearing before the justice, and such finding 'cannot be invalidated for any such reason;"DDD' citing *Com. v. Brennan*, 193 Pa. 567.

****4** As to the contention in favor of the motion, that the magistrate had acted out of his regularly constituted district, it was argued on behalf of the Commonwealth that he was not violating the acts of assembly relating thereto, when he had merely given a preliminary hearing for the purpose of fixing bail, and also that the oath administered by him to the complainant who took the affidavit upon which the warrant was issued was a proper oath, and did not, therefore, invalidate all subsequent preceedings.

The Commonwealth, as well as the defendant in his contention, relied upon the case of *Com. v. Kurz*, 14 Dist. R. 741, in which it was admitted that his Honor Judge Barratt, in his elaborate opinion rendered in that case, had practically exhausted the subject, as he had left no phase of the situation unreferred to. In this case it was held that: "A magistrate of Philadelphia County may receive an information and issue a warrant within the county while away from his magisterial office and out of his district. Such acts are ministerial."

It does not appear that the magistrate did more than perform a purely ministerial act in the present case, as the Commonwealth submits that the testimony of Magistrate Robert Carson, reinforced by the record of the Fifth District Police Station, establishes the fact that the defendant's hearing in the Fifth District was for the purpose of fixing bail alone, which was the performance of a ministerial function only, and one that was clearly within his rights.

As to the more debatable question, as to whether the oath administered by Magistrate Robert Carson to the complainant was such as conformed to the spirit of the acts of assembly on the subject, it was admitted that the oath administered was neither one nor the other of the usual forms of administering oaths; that is to say, it was not by having the hand of the affiant placed on the Bible, nor by having him repeat *verbatim*, with upraised hand, the words set out in the Act of April 3, 1895, P. L. 32, but the oath was a combination of the two forms of oath.

We have most earnestly contended that there is, in the administration of ***931** justice and the multiplicity of litigation in the courts of to-day, a real need of more solemnity in the manner in which the oath is administered to witnesses before giving their testimony. It is not necessarily the mere form or language of the oath only which impresses the witness with the fact that he is calling upon Almighty God to witness the truth of what he is about to state as evidence, or subscribe to in a formal writing, which gives it that solemnity which should accompany the administration of an oath in any case in which an oath is administered, but it is the surroundings of the person at the time the oath is administered, and the emphasis which is placed upon the language of the oath, which cause the impression upon the witness that may fortify him "to resolve to tell the truth and nothing but the truth, no matter what may be the passions of the case or the distractions of his examination."

****5** The Commonwealth contends in the present case that it was not, or certainly is not, the purpose of the acts of assembly as they should be interpreted to-day that a mere form of recital be gone through with in order to satisfy the underlying purpose of the administration of the oath.

The Commonwealth earnestly contended that: "The Act of April 3, 1895, P. L. 32, provides for 'pronouncing' a rigid form or an 'assenting' thereto. Surely the word 'assenting,' coupled as it is to the word 'pronouncing' by disjunctive, has a meaning other than that word. To assent to a fact or declaration means an agreement of the mind rather than a verbal repetition that might not necessarily involve an agreement of the mind. In short, a study of the Act of April 23, 1909, P. L. 140, leads one to the conclusion that an oath is properly administered when the attention of the person who comes to swear is called to the fact

that his statement is not a mere asseveration, but must be sworn to, and in recognition of this affiant must do some corporal act, and does it."

We have not been persuaded "that an oath must be a literal and *verbatim* repetition of the form prescribed by the Act of 1895." We do not believe that the mere omission of a single word in the form of an oath or affirmation would invalidate the oath, especially if such omission was intentional, for the very purpose of bringing about a desired invalidity.

An oath is in reality a prayer to Almighty God to witness the sincerity of the purpose of the person taking the oath, as well as of the official administering the oath. We agree with the summarization of Sergeant, J., in *Cubbison v. McCreary*, 2 W. & S. 262, as expressing "the spirit of the whole law," viz.: "An oath is an appeal to the Supreme Being for the truth of what the party declares, and the best test of the witness's competency on the ground of his religious principles is whether he believes in the existence of a God who will punish him if he swears falsely."

In the early case of *Respublica v. Newell*, 3 Yeates, 407, the statement that defendant "took his corporal oath" before a competent court, without alleging it to have been taken "upon the Holy Gospel of God," or "in the presence of Almighty God, with uplifted hand," was held to be sufficient.

In *United States v. Mallard*, 40 Fed. Repr. 151, in which the defendant was charged with perjury for taking a false affidavit before a United States Commissioner, wherein the commissioner, in swearing a witness, said only, "If you swear to this statement, put your mark here," and affiant put his mark, Judge Simonton said: "The oath may be administered on the Book, or with the uplifted hand, or in any mode peculiar to the belief of the person sworn, or in any form binding on his conscience:" 1 Greenleaf, Evidence, s 371.

The case of Cambria Street, 75 Pa. 357, is distinguishable from the general principle above enunciated, because there was a special act with reference to ***932** viewers, and the court there held that, even though the oath administered might be binding on the conscience of the person subscribing to it, it was not the special oath set forth by the act.

****6** In our own local courts there have been instances as to the particular manner in which the oath has been administered to men of a particular religious belief or of a special nationality. The orthodox Israelite is sworn upon the Pentateuch or the Old Testament Scriptures and with his head covered; a Mohammedan upon the Koran; the Chinaman has been sworn in a special manner, by the breaking of a China saucer.

An oath is "an outward pledge given by the person taking it that his attestation or promise is made under an immediate sense of his responsibility to God:" Tyler, Oaths, 15.

"The form of administering the oath may be varied to conform to the religious belief of the individual, so as to make it binding upon his conscience:" 4 Blackstone's Com., 43; 1 Wharton, Evidende, ss 386-8.

"Where a justice asks affiant if he swears to the affidavit, and he replies that he does, the oath is sufficient, though he does not hold up his hand and swear:" *Dunlap v. Clay*, 65 Miss. 454.

For the reasons herein set forth, the motion to quash the return of the magistrate is refused.

All Citations

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