

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

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In the Matter of the Application of
HYMAN RAFFE, GEORGE SASSOWER, Esq., and
SAM POLUR, Esq.,

Petitioners,

-against-

Hon. ALVIN F. KLEIN and Hon. DAVID B.
SAXE,

Respondents.

Pursuant a Writ of Prohibition and a Bill
In Equity.

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STATE OF NEW YORK):
CITY OF NEW YORK)ss.:
COUNTY OF KINGS)

GEORGE SASSOWER, Esq., first being duly
sworn, deposes, and says:

1a. This reply affidavit is submitted with
respect to petitioners' petition dated July 2, 1985, and
which this Court made returnable September 10, 1985,
denying an interim stay.

b. The only opposing papers received are the
affidavits of Donald F. Schneider, Esq. ["Schneider"],
of Feltman, Karesh & Major, Esqs., sworn to on August 2,
1985 and of Michael J. Gerstein, Esq. ["Gerstein"], of
Kreindler & Relkin, P.C., sworn to on August 12, 1985.

2a. Three questions are presented to this Court:

(1) Can and should this Court adjudicate this or any Puccini related matter; (2) should a writ of prohibition be issued based upon the constitutional violation of petitioners' right to "equal protection of the laws" or a hearing be directed with respect to same; (3) and should a writ of prohibition be issued based upon a violation of petitioners' constitutional and/or statutory right not to be placed in jeopardy more than once or a hearing be directed with respect to same?

b. Since the issue of disqualification and the assertion of invidious discrimination overlap they will be treated simultaneously.

DISQUALIFICATION -- INVIDIOUS DISCRIMINATION:

1a. The criminal, civil, and other consequences of petitioners' convictions, sentences, and incarcerations, without a trial, and other alleged misconduct herein, is and will be an individual decision of the petitioners herein!

b. As there is no immunity for the criminal violation of civil rights and no civil immunity for ministerial misconduct, the lack of jurisdictional power of this Court to adjudicate is hereby asserted (Judiciary Law §14).

c. Insofar as the criminal aspect is concerned, the petitioners individualized decision belongs to the sovereign, and none of them, in deponent's view, have the authority to excuse or compound such misconduct.

d. Thus, deponent can, and only will, set forth some of his personal views on the subject.

2a. As a matter of constitutional ministerial prohibition, no american court nor american judge has the power, absent a plea of guilty, to convict, sentence, and incarcerate without a trial, for any alleged criminal act, including non-summary criminal contempt (Bloom v. Illinois, 391 U.S. 194), which everyone associated with this matter has actual knowledge!

b. Where as here, the constitutional jurisdictional ministerial predicate is patently absent, requiring those who have been made the subject of such "mock" convictions", serve their full terms before their trial, is "barbaric".

c. Constitutionally proscribed for lawful convictions are "cruel and unusual punishments" (Amendment VIII of the United States Constitution; Article 1 §5 of the New York State Constitution).

Full and complete service of a sentence of incarceration when the convictions are patently contrived and a sham, is sick, demented, and indeed criminal and barbaric!

If this Court and some of its members wish to mortgage the Courthouse and gosestep to the "American Housepainter" it is a matter of public concern!

d. For more than 800 years, the traditional writ of habeas corpus ad subjiciendum, was concerned only with the legality of the detention or incarceration. "Saint or sinner", "guilty or guiltless", was and is irrelevant.

This fundamental principal of the ancient Great Writ was discarded in State ex rel Sassower [Polur] v. Cunningham, (#23984), where this Court extensively commented on the merits of the accusation, including the failure of petitioners to "deny"!

For collateral reasons, such improper and prejudicial comment, caused petitioners to immediately and prematurely assert the fact that Schneider's uncorroborated affidavit alleging that petitioner, Sam Polur, Esq., served the summons, which was the basis of his conviction, was perjurious.

Indeed, because of the manifest impropriety of that opinion by this Court, again in face of a manifest constitutional prohibition, every aspect of deponent's stratagem is being reexamined and changed.

e. In short -- where there has been wilful and repeated violations of fundamental civil rights and ministerial misconduct, this Court and some of its members, loom as potential litigants.

4a. As long as the judiciary permits private adversarial counsel to control criminal contempt proceedings there will be a degree of selective enforcement (cf. Polo v. Stock, 760 F.2d 698 [6th Cir.]).

b. The judicial obligation is to control such private zeal, although humanly difficult since it is the "court and judge" who are also personally involved (cf. Sacher v. United States, 343 U.S. 1, 12).

c. Where, as here, courts and some of its members, aid and abet the improper desires of the "american housepainters", to the point where invidious and selective enforcement is not even denied by Mr. Schneider, Mr. Gerstein, nor the legal representative of the respondents, the petitioners are entitled to a decree of prohibition.

5a. The request for a writ of prohibition should not be viewed as a concession that petitioners, or any of them, have violated any lawful mandate.

On that issue, their innocence must be presumed, legally and factually.

Nevertheless, whether they can afford to rely on such writ of prohibition, once issued, because of the damage and stigma caused by this Court's conduct is another question!

b. Deponent, for himself personally, has several times stated, that given a constitutional forum and hearing, he would waive his "double jeopardy" assertion.

c. In view of this Court's opinion of July 29, 1985, whether a constitutional trial is at all possible, is now questionable!

d. The writ, based on invidious discrimination should be issued or a hearing ordered in order to determine that issue (People v. Utica Daw's, 16 A.D.2d 12, 225 N.Y.S.2d 128 [4th Dept.]).

Double Jeopardy:

6a. It takes a truly remarkable vivid imagination to conceive a situation wherein Hon. David B. Saxe finds Sam Polur, Esq. "not guilty", when he admits serving a summons, and Hon. Alvin F. Klein finds Mr. Polur "guilty" (without a trial), when such service is not admitted, without implicating the proscription against "double jeopardy"!

b. Repeatedly, petitioner Hyman Raffé has been found "not guilty", including by proceedings in this Court, nevertheless, Mr. Justice Alvin F. Klein, without a trial found him guilty and sentenced him to be incarcerated!

The proceedings in this Court (Exhibits "B-1" and "B-2") were simultaneous with those in nisi prius (Exhibits "A-1" and "A-2"), based on contemporaneous transactions, and the Order of Mr. Justice Klein was issued after the Orders of this Court which vindicated Mr. Raffé.

c. Mr. Gerstein and Mr. Schneider contend, in effect, that by severing various acts into microscopic particles, it can harass the petitioners by criminal proceedings in various courts before various judges with the hope that one of them can succeed!

d. Even before Ashe v. Swenson (397 U.S. 436), the Court of Appeals in People v. Farson (244 N.Y. 413, 419) stated:

"The principle is well settled that an acquittal or a conviction upon a charge that a continuing offense has been committed during a specified time will be a bar to another prosecution for a like offense for another specified time which includes any part of the time named in the first charge."

The "double jeopardy" statutory concept clearly prohibits the prosecution against Hyman Raffae (Barber v. Plumadore, 86 A.D.2d 710, 446 N.Y.S.2d 539 [3d Dept.]), at bar.

e. An acquittal or setting the matter down for a hearing merely triggers Mr. Gerstein and Mr. Schneider to resort to a "secret session" with Referee Donald Diamond, where even your deponent, the accused, cannot attend, and a report by Referee Diamond that your deponent is guilty!

Thus, as the motion returnable in this Court on September 18, 1985, and the proceedings pending in the Appellate Division, Third Department reveal, nisi prius, Mr. Gerstein and Mr. Schneider ignore directives of this Court (Exhibits "B-1" and "B-2"), and instead proceed ex parte by affidavit to Referee Diamond!

7a. The affidavit of Mr. Gerstein on this subject reads as follows:

"Although petitioners assert the existence of various other contempt proceedings, these acts resulting in Justice Klein's order were not the subject of any of those proceedings. Petitioners do not, and cannot, articulate any other contempts resulting from their service of the three summons for which they were punished by Justice Klein."

b. Mr. Schneider states:

"Petitioners argue that Respondents should have dismissed the proceedings which resulted in the Criminal Contempt Orders on the basis of 'double jeopardy', based on 'the same or similar' proceedings before different justices. ... We document below that the criminal contempt proceedings referred to by Petitioners involved different instances of criminal contempt and not the same conduct which resulted in the Criminal Contempt Orders".
[emphasis in original]

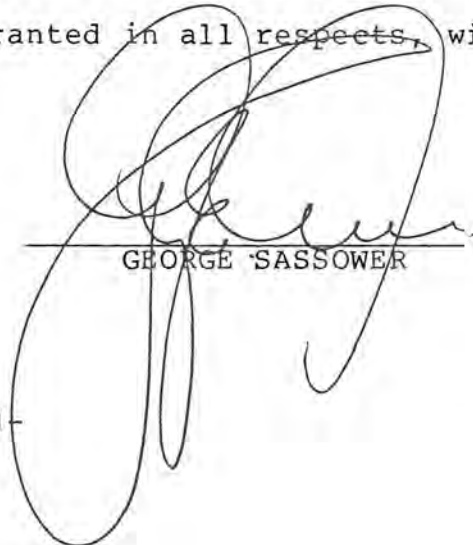
8a. The interim Order of Mr. Justice Martin Evans, dated April 5, 1985, reveals that His Honor intended, if that be legally necessary, that His Honor's prior order intended that "jeopardy" attach and that Mr. Gerstein and Mr. Schneider were attempting to resurrect a criminal proceeding wherein your deponent had already been vindicated!

b. In such Interim Order, His Honor stated:

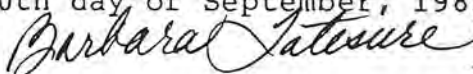
"Upon the foregoing papers this motion by receiver Feltman, seeking to obtain an Order punishing George Sassower, Esq. for criminal contempt of court is respectfully referred to Hon. Donald Diamond, Special Referee, pursuant to the administrative order of Hon. Xavier Riccobono, J.S.C. (3/26/84). The cross-motion by respondent Sassower seeking to renew his opposition to a prior motion for contempt which resulted in this court's civil contempt (12/14/84), is also so referred. Both motions raise questions of fact which cannot be determined on papers alone. Insofar as matters raised as predicate for the contempt order sought here may have been asserted as predicate for the previous contempt order and insofar as movant there asserted that they constituted criminal contempts, they cannot be reasserted here. To the extent that respondent Sassower asserts that there may be a distinction between the literal reading of the disqualification order of Mr. Justice Sinclair and the intent of Mr. Justice Sinclair, respondent Sassower should, if so advised, seek appropriate relief by motion addressed to Mr. Justice Sinclair." [emphasis supplied]

9. Separately raised, by still another proceeding, will be the latest criminal contempt proceeding brought against your deponent.

WHEREFORE, it is respectfully prayed that the application herein be granted in all respects, with costs.


GEORGE SASSOWER

Sworn to before me this
10th day of September, 1985



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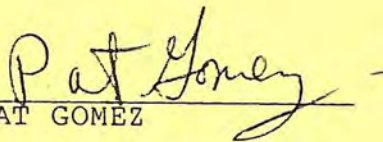
BARBARA TATURES
Notary Public State of New York
No. 24-4760746
Qualified in Kings County
Commission Expires March 30, 1986

STATE OF NEW YORK)
CITY OF NEW YORK)ss.:
COUNTY OF KINGS)

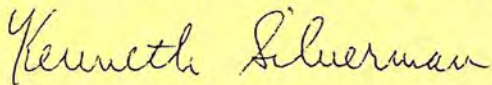
PAT GOMEZ, first being duly sworn, deposes,
and says:

I am over the age of 21, reside at 739 East
88th Street, Brooklyn, New York, 11236 and not a party
to this action.

That on the 10th day of September, 1985, I
served copies of the within Reply Affidavit by
depositing same in a Post Office Box in the State of New
York, addressed to Kreindler & Relkin, P.C.; Feltman,
Karesh & Major, Esqs.; and Hon. Robert Abrams at their
last known addresses.


PAT GOMEZ

Sworn to before me this
10th day of September, 1985



KENNETH SILVERMAN
Notary Public, State of New York
No. 24-4608988
Qualified in Kings County
Commission Expires March 30, 19 87