41 N.Y.2d 1018, 363 N.E.2d 1371, 395 N.Y.S.2d 626

The People of the State of New York, Respondent, v Michael Rice, Appellant.

The People of the State of New York, Respondent, v Charles Mehr, Appellant.

Court of Appeals of New York

Argued February 11 and March 30, 1977; decided April 26, 1977

CITE TITLE AS: People v Rice

HEADNOTES

Crimes—consensual sodomy.

People v Rice, 87 Misc 2d 257, affirmed.

People v Mehr, 87 Misc 2d 257, affirmed.

SUMMARY

Appeals, each by permission of an Associate Judge of the Court of Appeals, from orders of the Appellate Term of the Supreme Court in the Second Judicial Department, entered March 5, 1976, which (1) reversed, on the law, orders of the Suffolk County District Court, First District (Gioanna I. La Carrubba, J.; opn 80 Misc 2d 511), granting motions by defendants to dismiss informations charging them with consensual sodomy (Penal Law, § 130.38), and (2) denied defendants' motions.

POINTS OF COUNSEL

Anna M. Perry, John F. Middlemiss, Jr., and Leon J. Kesner for appellant in the first above-entitled action.

E. Carrington Boggan, Alan J. Azzara and Bruce J. Ennis for appellant in the second above-entitled action.

Henry F. O'Brien, District Attorney (Denis R. Hurley of counsel), for respondent in the first above-entitled action.

Henry F. O'Brien, District Attorney (Kevin J. Crowley of counsel), for respondent in the second above-entitled action.

OPINION OF THE COURT

Per Curiam.

In both of these cases novel and difficult constitutional questions in a field, largely unsettled, come to the court without a trial record and solely on the informations filed. Intermeshed are questions of conduct traditionally treated as criminal and yet, when committed privately and circumspectly, suggestive of an unwarranted interference by the State with the lately recognized and inchoate "penumbral" right of privacy (see, e.g., Griswold v Connecticut, 381 US 479, 484-485; Stanley v Georgia, 394 US 557, 564-568). The solution to these questions should not be determined in the *1019 bare outline of a criminal information, especially since divergencies of view, properly, may turn, among other things, on the different degrees of interference with privacy, or better, freedom of conduct, which may be tolerated in an organized society without infringing on a society's right to require conformance to standards which it believes essential to its survival or character. Resolution of these issues may, conceivably, make irrelevant the contentions of defendants that equal protection of the laws is involved.

In one of the cases, there is no specification at all of the place where the acts occurred or whether the two actors were the only ones present. In the other, the information tells us only that the acts occurred in some portion of a public toilet, not otherwise described, and without suggestion whether any others were present before the police burst in. None of these distinctions may turn out to be material. On the other hand, great constitutional issues, and they are present in these cases, should not be determined on appeals from nonfinal orders on a fact complex as stark as one would expect in an abstract question on a bar examination.

Accordingly, the informations having been upheld, the court concludes that the orders should be affirmed, without prejudice, however, to a review or application for review of the issues on the merits when, as, and if defendants, or either of them, are convicted.

Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Cooke concur in Per Curiam opinion.

In each case: Order affirmed.