UNITED STATES v. DOUGHERTY

473 F. 2d 1113 (1972)

LEVENTHAL, J. Seven of the so-called "D.C. Nine" bring this joint appeal from convictions arising out of their unconsented entry into the Washington office o£ the Dow Chemical Company, and their destruction of certain property therein. [The defendants had disrupted Dow's operations in an attempt to publicize their opposition to the Vietnam War. They then sought to use their criminal trial as a platform to further publicize their views. They made efforts to transform the trial into a "political fray" and attempted to argue to the jury that they should be acquitted because their actions were morally justified.] . . . [A]fter a six-day trial, the seven were each convicted of two counts of malicious destruction. . . .

Appellants urge [that] the judge erroneously refused to instruct the jury of its right to acquit appellants without regard to the law and the evidence, and refused to permit appellants to argue that issue to the jury. . . .

[Appellants] say that the jury has a well-recognized prerogative to disregard the instructions of the court even as to matters of law, and that they accordingly have the legal right that the jury be informed of its power. . . .

There has evolved in the Anglo-American system an undoubted jury prerogative-in-fact, derived from its power to bring in a general verdict of not guilty in a criminal case, that is not reversible by the court. The power of the courts to punish jurors for corrupt or incorrect verdicts . . . was repudiated in 1670 when Bushell's Case, 124 Eng. Rep. 1006 (C.P. 1670), discharged the jurors who had acquitted William Penn of unlawful assembly. Juries in civil cases became subject to the control of ordering a new trial; no comparable control evolved for acquittals in criminal cases.

The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge. Most often commended are the 18th century acquittal of Peter Zenger of seditious libel, on the plea of Andrew Hamilton, and the 19th century acquittals in prosecutions under the fugitive slave law. The values involved drop a notch when the liberty vindicated by the verdict relates to the defendant's shooting of his wife's paramour, or purchase during Prohibition of alcoholic beverages. . . .

The existence of an unreviewable and unreversible power in the jury, to acquit in disregard of the instructions on the law given by the trial judge, has for many years co-existed with legal practice and precedent upholding instructions to the jury that they are required to follow the instructions of the court on all matters of law. . . .

The rulings [in the early cases] did not run all one way, but rather precipitated "a number of classic exchanges on the freedom and obligations of the criminal jury."36 This was, indeed, one of the points of clash between the contending forces staking out the direction of the government of the newly established Republic. . . . As the distrust of judges appointed and removable by the king receded, there came increasing acceptance that under a republic the protection of citizens lay not in recognizing the right of each jury to make its own law, but in following democratic

processes for changing the law. . . . .

Since the jury's prerogative of lenity . . . introduces a "slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions," it is only just, say appellants, that the jurors be so told. It is unjust to withhold information on the jury power of "nullification," since conscientious jurors may come, ironically, to abide by their oath as jurors to render verdicts offensive to their individual conscience, to defer to an assumption of necessity that is contrary to reality.

This so-called right of jury nullification is put forward in the name of liberty and democracy, but its explicit avowal risks the ultimate logic of anarchy. This is the concern voiced by Judge Sobeloff in United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969): "To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable.. .."[T]he advocates of jury "nullification" apparently assume that the articulation of the jury's power will not extend its use or extent, or will not do so significantly or obnoxiously. Can this assumption fairly be made? . . .

The way the jury operates may be radically altered if there is alteration in the way it is told to operate. The jury knows well enough that its prerogative is not limited to the choices articulated in the formal instructions of the court. The jury gets its understanding as to the arrangements in the legal system from more than one voice. . . .

When the legal system relegates the information of the jury's prerogative to an essentially informal input, it is not being duplicitous, chargeable with chicane and intent to deceive. The limitation to informal input is, rather, a governor to avoid excess: the prerogative is reserved for the exceptional case, and the judge's instruction is retained as a generally effective constraint. We "recognize a constraint as obligatory upon us when we require not merely reason to defend our rule departures, but damn good reason. "49 The practicalities of men, machinery and rules point up the danger of articulating discretion to depart from a rule, that the breach will be more often and casually invoked. We cannot gainsay that occasionally jurors uninstructed as to the prerogative may feel themselves compelled to the point of rigidity. The danger of the excess rigidity that may now occasionally exist is not as great as the danger of removing the boundaries of constraint provided by the announced rules. . . .

Moreover, to compel a juror involuntarily assigned to jury duty to assume the burdens of mini-legislator or judge, as is implicit in the doctrine of nullification, is to put untoward strains on the jury system. It is one thing for a juror to know that the law condemns, but he has a factual power of lenity. To tell him expressly of a nullification prerogative, however, is to inform him, in effect, that it is he who fashions the rule that condemns. That is an overwhelming responsibility, an extreme burden for the jurors' psyche. And it is not inappropriate to add that a juror called upon for an

involuntary public service is entitled to the protection, when he takes action that

he knows is right, but also knows is unpopular, either in the community at large or in his own particular grouping, that he can fairly put it to friends and neighbors that the was merely following the instructions of the court. . . .

[W]hat is tolerable or even desirable as an informal, self-initiated exception, harbors grave dangers to the system if it is opened to expansion and intensification through incorporation in the judge's instruction. . . .

BAZELON, CJ., concurring in part and dissenting in part. . . .

[T]he Court apparently concedes - although in somewhat grudging terms - that the power of nullification is a "necessary counter to case-hardened judges and arbitrary prosecutors," and that exercise of the power may, in at least some instances, "enhance the over-all normative effect of the rule of law." We could not withhold that concession without scoffing at the rationale that underlies the right to jury trial in criminal cases, and belittling some of the most legendary episodes in our political and jurisprudential history.

The sticking point, however, is whether or not the jury should be told of its power to nullify the law in a particular case. Here, the trial judge not only denied a requested instruction on nullification, but also barred defense counsel from raising the issue in argument before the jury. The majority affirms that ruling. I see no justification for, and considerable harm in, this deliberate lack of candor.

[T]he justification for this sleight-of-hand lies in a fear that an occasionally noble doctrine will, if acknowledged, often be put to ignoble and abusive purposes - or, to borrow the Court's phrase, will "run the risk of anarchy.". . . The Court assumes that these abuses are most likely to occur if the doctrine is formally described to the jury by argument or instruction. . . . It seems substantially more plausible to me to assume that the very opposite is true. . . .

[T]he Court takes comfort in the fact that informal communication to the jury "generally convey[s] adequately enough the idea of prerogative, of freedom in an occasional case to depart from what the judge says.". . . [But if] awareness is preferable to ignorance, then I simply do not understand the justification for relying on a haphazard process of informal communication whose effectiveness is likely to depend, to a large extent, on whether or not any of the jurors are so well-educated and astute that they are able to receive the message. If the jury should know of its power to disregard the law, then the power should be explicitly described by instruction of the court or argument of counsel. . . .