Filed 13th April 1863

IN THE COURT OF APPEALS OF MD.

THOMAS HOFFMAN

vs.

STATE OF MARYLAND.

No. 4—On Special Docket to December Term. 1862.

ERROR TO THE CRIMINAL COURT OF BALTIMORE.

STATEMENT OF APPELLANT.

The appellant was, together with a certain Robert Miller, presented for the murder of a certain Hugh D. O'Sullivan. (See page 1 of Record.) And on the same page of the Record is to be found a list of witnesses for the State.

On pages 2, 3 and 4 of the Record is to be found the indictment. The first count in the indictment charges the appellant with firing the pistol, and the second count charges Miller with firing the pistol, by reason of which O'Sullivan was killed; in both of which the said parties (Hoffman and Miller) are indicted for murder *in the first degree*, and there are *no counts* in the indictment charging Hoffman and Miller, or either of them, with murder in the second degree nor with manslaughter.

On pages 4 and 5 of the Record will be found the recognizance of witnesses to appear and testifiy for the State.

On the third day of October, 1859, the Court decided to try your appellant and Miller separately. (See Record, page 6.)

On the 6th page of Record it will be found that the appellant pleaded "not guilty," and on the same page is to be found the summons for the State's witnesses.

On the 24th of October, 1859, twelve jurors were *elected, tried* and *sworn* to say the truth of and upon the premises, in the case of this appellant, (see page 7 of Record,) and on the 25th of October, 1859, George Kelly

and P. J. Lyons, two witnesses for the State, not appearing, attachments were issued to compel their appearance, (see Record, page 7,) both of which attachments were, on the 26th of October, 1859, returned *"non est."*

On page 8 of the Record we find that on the 26th of October, 1859, that because it appears that after the jury had been sworn and the indictment had been read to them, and they had been charged in the usual way by the clerk, several witnesses for the State, who had been in attendance up to that period. had been discovered to be absent, and that after adjournment to the next day the said witnesses were still absent, which said absent witnesses had been summoned and put under security for their presence in Court upon the trial of the case; and attachments against them having been issued and returned non est, no statement having been made or evidence offered to the jury in said case, by order of the Court the jury were *wholly* discharged from giving any verdict of and upon the premises in the case of this appellant—this appellant by Coleman Yellott, his attorney, *"objecting to the said discharge of the jury aforesaid."* (See Record, page 8.)

On page 8 of the Record we find the case continued to the January Term of the Court; this appellant, by Coleman Yellott, his attorney, *objecting to the continuance.*

On page 9 of the Record we find that on the 9th of January, 1860, this appellant, by Coleman Yellott and D. S. Sweany, his attorneys, filed in Court a motion for his discharge, for the reasons to be found on page 9 of the Record.

On pages 9 and 10 of the Record will be found an affidavit by Deputy Sheriff Alford, relative to the witnesses P. J. Lyons and George Kelly.

On the 10th of April, 1860, the motion filed by Messrs. Yellott and Sweany was overruled, and the case further continued until the May Term of said Court. (See Record, page 10.)

On the 11th of June, 1860, a jury was empannelled and this appellant was tried, and notwithstanding the *counts* in the indictment charge the appellant and Miller with murder in the *first* degree only, yet we find on page 11 of the Record that the jury upon their oath did say "that the said Thomas Hoffman (this appellant) is guilty of the said felony and murder above charged and imposed upon him, *and that the said felony and murder is murder in the second degree.*"

On page 11 of the Record is to be found the sentence pronounced by the Criminal Court aforesaid, by which this appellant was sent to the penitentiary for fifteen years.

On page 11 of the Record is to be found the writ of error issued by the Superior Court for Baltimore city, on the 3rd of July, 1860.

The appellant will contend as follows:

1st. That the decision of the Criminal Court for Baltimore city overruling the motion for the discharge of this appellant ought to be reversed, for the reasons mentioned in their motion, found on page 8 of the Record, and this appellant be discharged.

Constitution Maryland.
19 Article of Bill of Rights.
Price vs. The State, 8 Gill, pages 313, 314.
1st Bishop on Criminal Law, page 659.
Peiffer vs. Commonwealth, 3rd Harris, Pa. State Reports, 468, 470.
Commonwealth vs. Clue, 3 Rawle Reports, 498, 500.
Commonwealth vs. Cook et al., 6 S. & R., 577.
State vs. Kreps, 8 Alabama, 956.
1 Devereux' Reports, 491 and 494.
2 Devereux & Battles, N. C. Rep., 162 to 171.
Williams vs. Commonwealth, 2 Grattan Va. Rep., 568.
Mahala vs. The State, 10 Yerger, Tenn. Rep., 532.

2d. That the State having *full* power to secure the attendance of her witnesses by imprisonment in the jail of Baltimore city and otherwise, and the witnesses for the State having answered to their names on the 24th of October, 1859, and the jury having been kept together after being sworn and charged, it was the duty of the State's Attorney to have had his said witnesses secured so as to be able to have gone on with said trial to its final end and determination.

3d. That after the jury being summoned and sworn on the 24th of October, 1859, the trial of this appellant was commenced by the State, and the absence of the State's witnesses constituted no legal or justifiable cause for the discharge of said jury without their finding a verdict.

4th. That if it was the intention of the State's Attorney to try this appellant and the jury was sworn on the 24th of October, 1859, for that purpose, and if the State's Attorney found any of the State's witnesses absent on the 25th of October, 1859, it was his duty to have waited and to have used the power placed in his hands, to have had said State's witnesses brought into Court, and the Court erred in discharging said jury without their finding a verdict.

5th. That inasmuch as the only two counts to be found in the indictment, charge the appellant with murder in the first degree, and contains *no* counts for murder in the second degree, nor manslaughter, the appellant will contend that the verdict of the jury in the above cause was erroneous and illegal, because the jurors, as stated on page eleven of the Record, "upon their oath do say, that the said Thomas Hoffman is guilty of the said felony and murder above charged and imposed upon him, and that the said felony and *murder is murder of the second degree.*" And this appellant ought to be discharged.

6th. That the State's Attorney, having commenced the trial of said cause on the 24th and 25th days of October, 1859, and the jury having been sworn and charged, it was incompetent for the said Court to discharge said jury without taking the verdict of said jury, and when the State's Attorney refused or failed to produce evidence on the behalf of the State, it was the duty of the Court to have instructed the jury to find a verdict of "not guilty," for the want of evidence. And the plaintiff in error ought to be discharged.

D. S. SWEANY,
R. J. BOULDIN,
Att'ys for Pl'tff. in Error.

13
#9.10

Filed April 16th 1863.

IN THE COURT OF APPEALS.

THOMAS HOFFMAN,

vs.

THE STATE OF MARYLAND.

ERROR TO THE CRIMINAL COURT OF BALTIMORE.

STATEMENT AND POINTS OF THE DEFENDANT IN ERROR.

The Record discloses that Thomas Hoffman, the Plaintiff in Error, together with Robert Miller, was indicted in the Criminal Court of Baltimore at the September Term, 1859, for the murder of Hugh D. O'Sullivan, by shooting him with a pistol. Five witnesses named Mittendorf, Orem, Lyons, Brooks and Mercer were returned on the presentment by the Grand Jury. On the 29th of September, Orem and Mittendorf were put under security for their appearance to testify in $500, and *Lyons* was placed under $2,000. Mercer and Brooks were committed to Jail in default of security.

On the same day other witnesses not returned by the Grand Jury, to wit: McHenry, Carroll, Kelly, Snyder, Carlwell and Scilley, were placed under security in $500. On the same day the Plaintiff in Error was arraigned, pleaded not guilty, and on the 3d of October, the parties jointly indicted severed in their defense.

On the 5th of October, the above named witnesses were returned "summoned" by the Sheriff, except Snyder, Carlwell and Scilley, who were severally returned "*non est.*" On the 24th of October a jury was impannelled and sworn. On the 25th the witnesses, Kelly and Lyons, although returned summoned, did not answer when called and attachments were issued against them.

The Court adjourned to the next day when the Sheriff returned the attachments *non est.* These witnesses returned by the Grand Jury, put under security, summoned to testify, having been in actual attendance up to a short time before they were called, were not only absent when called, but with their residences well known and the delay of a day given to the Sheriff—were not to be found. They were important witnesses; the unusual bond of $2,000 taken for Lyons, shows the special importance attached to *him.* The special facts as to Lyons and Kelly, revealed by the affidavit of Deputy Sheriff Alford on pages 9 and 10 of Record, and referred to to show the facts surrounding the absence of these witnesses.

These witnesses absent under these circumstances, disappearing suddenly from under the eye of the Court and so mysteriously hidden, Judge Stump, as appeared from all these facts and from the express reasons set out on page 8 of the Record, on the 26th of October discharged the jury, the prisoner, Hoffman, objecting.

A motion for his discharge was made before Judge Bond, the successor of Judge Stump, and overruled on the 10th of April, 1860.

On the 11th of June, Hoffman was tried before a jury, convicted of murder in the second degree, and on the 6th of July sentenced to the Penitentiary for 15 years.

The matters of fact apparent, are that a prisoner guilty of an atrocious crime, as shown both by the verdict of the jury and the sentence of the Court, was first placed at the bar for trial during the administration of the predecessor of the Judge who afterwards sentenced him, and after unusual means were taken by the State to secure the attendance of its witnesses, revealing clearly enough, that their attendance was not free or certain, that still two witnesses upon whose testimony the State was unwilling to proceed to trial, suddenly during the process of impannelling a jury and opening the case, disappeared, and after a search of nearly two days, could not be found. Their absence gives no concern to the prisoner; he is ready—anxious to go to trial in their absence.

The Judge, surveying all this, finds, with the accuracy and knowledge which the peculiar circumstances of his position enabled him under his oath and responsibility, decides and certifies that the cause of public justice demands that the cause should not go on.

These facts, thus patent to the Judge who discharged the jury, are brought before his successor, the present Judge, who approved the action of his predecessor and refused to discharge the prisoner. Under *other circumstances*, when witnesses do not mysteriously disappear, the prisoner is tried, is convicted by a jury on the same day they are impannelled, and as an evidence of the grade of his offence, is given by the Court almost the extreme limit of the law.

The State urges—

1st. That while the general principle may be admitted to be, that a jury must be kept together from the time they are charged with the prisoner until they deliver their verdict, unless the prisoner consents to their discharge, yet

2d. It is equally clear that the rule is not inflexible—is subject to many exceptions, and those exceptions depend on the necessities of each case and the requirements of practical justice.

2 Archbolds Crim Prac pages 593 to 598
9 Wheaton 579
12 Pick 496
2 McLean 114
4 Halstead 256
4 Wash C C 402
5 Littell 137. 139
13 Wendell 55
18 John 200
2 Sullivan 364
2 Day 504
7 Porter 188
9 Leigh 613
26 Miss 531
26 Ala 135
2 Hills S C 680
2 Sumner 19
2 Cowen 820
8 Wendell 10
12 Conn 243
9 Mass 494
Kinlochs case Foster 22 to 40

3. That the rule not being inflexible must depend on the circumstances of each case, and the discharge of a jury is a matter in the sound discretion of the Judge in each case, and the prisoner must show of record, an abuse of discretion.

Same authorities
Hales P C Vol 2 p 295
Graham and Waterman on New Trials Vol 2d
1 Vent 69

4. That where the Judge acts within the scope of his discretion, the exercise of the discretion is not the subject of review by the Appellate Court, and that the presumption is that he so acted.

5 That *in this case* the Judge acted within the scope of his discretionary power, and that the absence of witnesses under the circumstances disclosed by the record is a cause for the discharge of jury.

6. That the discretion was rightly exercised and the jury properly discharged.

7. In answer to the point made by the Plaintiff in error as to the form of the verdict, the State says the indictment is for murder, and that the degree is properly found by the jury, and that Plaintiff's idea about "counts for murder in the 2d degree and manslaughter" are absurd, and that the indictment, verdict and judgment are in express conformity to the precedents and to the decisions of the Court of Appeals.

State v Meighan
7 Md 450
Manly case 7 Md 135
6 Md 167

A. STIRLING, Jr.,

State's Attorney of Baltimore.