United States Supreme Court

362 U.S. 610

LEVINE v. UNITED STATES

Argued: March 22, 1960. --- Decided: May 23, 1960

Mr. Justice FRANKFURTER delivered the opinion of the Court.

This is a prosecution for contempt arising from petitioner's refusal to answer a series of questions propounded to him by a federal grand jury. In every respect but one, this case is a replica of Brown v. United States, 359 U.S. 41, 79 S.Ct. 539, 3 L.Ed.2d 609, and as to all common issues it is controlled by that case. In Brown, however, we expressly declined to decide the effect of claimed 'secrecy' upon proceedings culminating in the petitioner's sentencing for contempt, 'because the record does not show this to be the fact.' 359 U.S. at page 51, 79 S.Ct. at page 547, note 11. Here, it appears that the contemptuous conduct, the adjudication of guilt, and the imposition of sentence all took place after the public had been excluded from the courtroom, in what began and was continued as 'a Grand Jury proceeding.' The effect of this continuing exclusion in the circumstances of the case is the sole question presented.

On the morning of April 18, 1957, pursuant to a subpoena, petitioner appeared as a witness before a federal grand jury in the Southern District of New York engaged in investigating violations of the Interstate Commerce Act. He was asked six questions relevant to the grand jury's investigation. After consultation with his attorney, who was in an anteroom, he refused to answer them on the ground that they might tend to incriminate him. He persisted in this refusal after having been directed to answer by the foreman of the grand jury and advised by government counsel that applicable statutes gave him complete immunity from prosecution concerning any matter as to which he might testify. See 49 U.S.C. § 305(d), 49 U.S.C.A. § 305(d).

Later that day the grand jury, government counsel, petitioner and his attorney appeared before Judge Levet, sitting in the District Court for the Southern District of New York, the grand jury having sought 'the aid and assistance of the Court, in a direction to a witness, Morry Levine, who has this morning appeared before the Grand Jury and declined to answer certain questions that have been put to him.' The record of the morning's proceedings before the grand jury was read. After argument by counsel, the judge ruled that the adequate immunity conferred by statute deprived petitioner of the right to refuse to answer the questions put to him. Petitioner was ordered to appear before the grand jury on April 22, and was directed by the court then to answer the questions.

On the morning of April 22 petitioner appeared before the grand jury. The questions were again put to him and he again refused to answer. Once again the grand jury, government counsel, petitioner and his counsel went before Judge Levet, for 'the assistance of the Court in regard to

the witness Morry Levine.' At this time the record shows the following:

'The Court: Will those who have no other business in the courtroom please leave now? I have a Grand Jury proceeding.

'The Clerk: The Marshal will clear the court room.

'(Court room cleared by the Marshals.)'

Petitioner, his counsel, the grand jury, government counsel and the court reporter remained. Petitioner objected to further participation by the court in the process of compelling his testimony, except according to the procedures prescribed by Rule 42(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. That provision, which relates to contempts generally, excluding those 'committed in the actual presence of the court' as to which the judge certifies 'that he saw or heard the conduct constituting the contempt,' provides in effect for a conventional trial. In petitioner's view the court was compelled to regard his contempt, if any, as having already been committed out of the presence of the court, through petitioner's disobedience before the grand jury that morning of the court's order of April 18.

The judge, however, did not treat petitioner's renewed refusal to answer the grand jury's questions as a definitive contempt. He chose to proceed just as he had two weeks earlier in the case of Brown, reviewed here as Brown v. United States, supra, 359 U.S. 41, 79 S.Ct. 539, 3 L.Ed.2d 609. The morning's grand jury proceedings, showing petitioner's refusals to answer, were read, and petitioner was ordered by the judge to take the stand. The court indicated it was proceeding as '(t)he Court and the Grand Jury' 'in accordance with Rule 42(a),' which relates to the procedure in cases of contempt 'committed in the actual presence of the court.' Over objection, the court then put to petitioner the six questions which he had refused to answer when propounded by the grand jury. Petitioner again refused to answer these questions on the claim of the privilege against self-incrimination. In answer to a question by the court he stated that he would continue to refuse on that ground should the grand jury again put the questions to him. Government counsel asked that petitioner be adjudged in contempt 'committed in the physical presence of the Judge.' The court asked for reasons 'why I should not so adjudicate this witness in contempt.' Petitioner's counsel made three points: (1) that the procedures had not been in accordance with 'the requirements of due process'; (2) that the procedures had not followed the requirements of Rule 42(b) of the Federal Rules of Criminal Procedure; and (3) that, on the merits of the charge, the statutory immunity was not sufficiently extensive to deprive petitioner of his privilege not to answer. No reference was made to the exclusion of the general public from the proceedings. Petitioner was adjudicated in contempt and, after submission by counsel of views regarding sentence, one year's imprisonment was imposed. The conviction was affirmed by the Court of Appeals, 267 F.2d 335, and we granted certiorari, 361 U.S. 860, 80 S.Ct. 118, 4 L.Ed.2d 101, limiting our grant to the question left open in Brown v. United States, namely, whether the 'secrecy' of the proceedings offended either the Due Process Clause of the Fifth Amendment of the Constitution or the public-trial requirement of the Sixth Amendment.

The course of proceeding followed by the District Court in this case for compelling petitioner's testimony was the one approved in Brown. Specifically, it was established by that case that, after petitioner had disobeyed the court's direction to answer the grand jury's questions before that body, it was proper for the court, upon application of the grand jury, (1) to disregard any contempt committed outside its presence; (2) to put the questions directly to petitioner in the court's presence as well as in the presence of the grand jury; and (3) to punish summarily under Rule 42(a) as a contempt committed 'in the actual presence of the court' petitioner's refusal thereupon to answer.

It was surely not error for the judge initially to have cleared the courtroom on April 22 when the grand jury appeared before him for the second time seeking his 'assistance * * * in regard to the witness Morry Levine.' The Secrecy of grand jury proceedings is enjoined by statute (see 18 U.S.C. § 1508, 18 U.S.C.A. § 1508, and Federal Rules of Criminal Procedure 6(d) and (e)), and a necessary initial step in the proceedings was to read the record of the morning's grand jury proceedings. The precise question involved in this case, therefore, is whether it was error, once the courtroom had been properly, indeed necessarily, cleared, for petitioner's contempt, summary conviction and sentencing to occur without inviting the general public back into the courtroom.

From the very beginning of this Nation and throughout its history the power to convict for criminal contempt has been deemed an essential and inherent aspect of the very existence of our courts. The First Congress, out of whose 95 members 20, among them some of the most distinguished lawyers, had been members of the Philadelphia Convention, explicitly conferred the power of contempt upon the federal courts. Section 17 of the Judiciary Act of 1789, 1 Stat. 73, 83, 18 U.S.C.A. § 401. That power was recognized by this Court as early as 1812, in a striking way. United States v. Hudson, 7 Cranch 32, 34, 3 L.Ed. 259. As zealous a guardian of the procedural safeguards of the Bill of Rights as the first Mr. Justice Harlan, in sustaining the power summarily to punish contempts committed in the face of the court, described the power in this way: 'the offender may, in (the court's) discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; * * * such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions.' Ex parte Terry, 1888, 128 U.S. 289, 313, 9 S.Ct. 77, 83, 32 L.Ed. 405. It is a particular exercise of this power of summary punishment of contempt committed in the court's presence which is at issue in this case. This Court has not been wanting in effective alertness to check abusive exercises of that power by federal judges. See Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767; Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11. It would, however, be throwing the baby out with the bath to find it necessary, in the name of the Constitution, to strangle a power 'absolutely essential' for the functioning of an independent judiciary, which is the ultimate reliance of citizens in safeguarding rights guaranteed by the Constitution.

Procedural safeguards for criminal contempts do not derive from the Sixth Amendment. Criminal contempt proceedings are not within 'all criminal prosecutions' to which that Amendment applies. Ex parte Terry, 128 U.S. 289, 306-310, 9 S.Ct. 77, 80-82, 32 L.Ed. 405; Cooke v. United

States, 267 U.S. 517, 534-535, 45 S.Ct. 390, 394, 69 L.Ed. 767; Offutt v. United States, 348 U.S. 11, 14, 75 S,.ct. 11, 13, 99 L.Ed. 11. But while the right to a 'public trial' is explicitly guaranteed by the Sixth Amendment only for 'criminal prosecutions,' that provision is a reflection of the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, at page 14, 75 S.Ct. 11, at page 13. Accordingly, due process demands appropriate regard for the requirements of a public proceeding in cases of criminal contempt, see In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682, as it does for all adjudications through the exercise of the judicial power, barring narrowly limited categories of exceptions such as may be required by the exigencies of war, see Amendment to Rule 46 of the Admiralty Rules, June 8, 1942, 316 U.S. 717, revoked May 6, 1946, 328 U.S. 882, 28 U.S.C.A., or for the protection of children, see 18 U.S.C. § 5033, 18 U.S.C.A. § 5033.

Inasmuch as the petitioner's claim thus derives from the Due Process Clause and not from one of the explciitly defined procedural safeguards of the Constitution, decision must turn on the particular circumstances of the case, and not upon a question-begging because abstract and absolute right to a 'public trial.' Cf. Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 114-117, 54 S.Ct. 330, 335-336, 78 L.Ed. 674. The narrow question is whether, in light of the facts that the grand jury, petitioner and his counsel were present throughout and that petitioner never specifically made objection to the continuing so-called 'secrecy' of the proceedings or requested that the judge open the courtroom, he was denied due process because the general public remained excluded from the courtroom.

The grand jury is an arm of the court and its in camera proceedings constitute 'a judicial inquiry.' Hale v. Henkel, 201 U.S. 43, 66, 26 S.Ct. 370, 375, 50 L.Ed. 652. 'The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecution for the most important federal crimes. It does so under general instructions from the court to which it is attached and to which, from time to time, it reports its findings.' Cobbledick v. United States, 309 U.S. 323, 327, 60 S.Ct. 540, 542, 84 L.Ed. 783. Unlike an ordinary judicial inquiry, where publicity is the rule, grand jury proceedings are secret. In the ordinary course, therefore, contempt of the court committed through a refusal to answer questions put before the grand jury does not occur in a public proceeding. Publicity fully satisfying the requirements of due process is achieved in such a case when a public trial upon notice is held on the charge of contempt under Rule 42(b) of the Federal Rules of Criminal Procedure.

Brown v. United States, supra, established that a grand jury as an arm of the court has available to it another course to vindicate its authority over a lawlessly recalcitrant witness. Appeal may be made to the court under whose aegis the grand jury sits to have the witness ordered to answer the grand jury's inquiries in the judge's physical presence, so that the court's persuasive exertion to induce obedience, and its power summarily to commit for contempt should its authority be ignored, may be brought to bear upon him. Since such a summary adjudication of contempt occurs in the midst of a grand jury proceeding, a clash may arise between the interest, sanctioned by history and statute, in preserving the secrecy of grand jury proceedings, and the interest, deriving from the Due Process Clause, in preserving the public nature of court proceedings.

In the present case grand jury secrecy freely gave way insofar as petitioner's counsel was present and was permitted to be fully active in behalf of his client throughout the proceedings before Judge Levet. Petitioner had ample notice of the court's intention to put the grand jury's questions directly to him, and to proceed against him summarily should he persist in his refusal to answer. Had petitioner requested, and the court denied his wish, that the courtroom be opened to the public before the final stage of these proceedings we would have a different case. Petitioner had no right to have the general public present while the grand jury's questions were being read. However, after the record of the morning's grand jury proceedings had been read, and the six questions put to petitioner with a direction that he answer them in the court's presence, there was no further cause for enforcing secrecy in the sense of excluding the general public. Having refused to answer each question in turn, and having resolved not to answer at all, petitioner then might well have insisted that, as summary punishment was to be imposed, the courtroom be opened so that the act of contempt, that is, his definitive refusal to comply with the court's direction to answer the previously propounded questions, and the consequent adjudication and sentence might occur in public. See Cooke v. United States, 267 U.S. 517, 534-536, 45 S.Ct. 390, 394-395, 69 L.Ed. 767. To repeat, such a claim evidently was not in petitioner's thought, and no request to open the courtroom was made at any stage of the proceedings.

The continuing exclusion of the public in this case is not to deemed contrary to the requirements of the Due Process Clause without a request having been made to the trial judge to open the courtroom at the final stage of the proceeding, thereby giving notice of the claim now made and affording the judge an opportunity to avoid reliance on it. This was not a case of the kind of secrecy that deprived petitioner of effective legal assistance and rendered irrelevant his failure to insist upon the claim he now makes. Counsel was present throughout, and it is not claimed that he was not fully aware of the exclusion of the general public. The proceedings properly began out of the public's presence and one stage of them flowed naturally into the next. There was no obvious point at which, in light of the presence of counsel, it can be said that the onus was imperatively upon the trial judge to interrupt the course of proceedings upon his own motion and establish a conventional public trial. We cannot view petitioner's untenable general objection to the nature of the proceedings by invoking Rule 42(b) as constituting appropriate notice of an objection to the exclusion of the general public in the circumstances of this proceeding under Rule 42(a).

This case is wholly unlike In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682. This is not a case where it is or could be charged that the judge deliberately enforced secrecy in order to be free of the safeguards of the public's scrutiny; nor is it urged that publicity would in the slightest have affected the conduct of the proceedings or their result. Nor are we dealing with a situation where prejudice, attributable to secrecy, is found to be sufficiently impressive to render irrelevant failure to make a timely objection at proceedings like these. This is obviously not such a case. Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal.

Affirmed.