South Carolina Law Review

Volume 11 | Issue 1 Article 8

Fall 1958

Criminal Law and Procedure

Oscar H. Doyle Jr.

CRIMINAL LAW AND PROCEDURE

OSCAR H. DOYLE, JR.*

A review of the cases with which we are concerned in the 1958 Survey reveals that the Supreme Court of South Carolina has not departed to any great extent from well established and settled principles and rules of substantive and procedural criminal law and evidence. A majority of the cases dealt with concern the procedural and evidentiary aspect of criminal law rather than the substantive field.

I. SUBSTANTIVE CRIMINAL LAW

Murder — Inference of Malice From Wanton Use of Automobile

In *State v. Mouzon*[1] the defendants were indicted for murder. The testimony disclosed that the defendant Mouzon, while intoxicated, drove an automobile on the public highways in a reckless and wanton manner, resulting in his running into and over a pedestrian who was crossing the highway and causing the death of the pedestrian. The jury returned a verdict of guilty with recommendation to mercy. On appeal, the Supreme Court sustained the conviction, saying that although it may be fairly assumed there was no actual intent to kill or injure another, there was evidence of such recklessness and wantoness as to indicate a depravity of mind and disregard of human life from which a jury could infer malice.

The Supreme Court cited *State v. Heyward*[2] wherein it was stated "that malice as an essential ingredient of murder does not necessarily import ill-will toward the individual injured, 'but signifies rather a general malignant recklessess [sic] toward the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief.'" The Court further cites *State v. Long*[3] wherein it was held "that the driving of an auto-

*Member of the firm of Doyle & Doyle, Anderson; undergraduate education, Clemson College; LL.B., 1950, University of South Carolina; member of State Legislature, 1956-57; Assistant Solicitor, 10th Judicial Circuit.

1. 231 S. C. 655, 99 S. E. 2d 672 (1957).
2. 197 S. C. 371, 15 S. E. 2d 699 (1941).
3. 186 S. C. 439, 195 S. E. 624 (1938).

mobile on a public highway, while intoxicated is not only *malum prohibitum,* but *malum in se,* . . . 'and one so doing and occasioning injuries to another, causing death, may be guilty of murder or manslaughter, as the facts may determine.' "

This appears to be the only case in which the Supreme Court of South Carolina has had to deal with a verdict of murder arising out of the operation of an automobile.

Involuntary Manslaughter — Simple Negligence Sufficient — Contributory Negligence of Deceased No Defense

In *State v. Caldwell*[4] defendants were indicted for involuntary manslaughter in the operation of an automobile. Testimony disclosed that the actions of the deceased were such as would ordinarily constitute contributory negligence and a point raised on appeal was the refusal of the trial judge to direct a verdict upon the ground that the proximate cause of the death of the deceased was her own negligence. The Supreme Court adhered strictly to prior rulings holding that in prosecution for involuntary manslaughter contributory negligence of deceased is no defense and that simple negligence on the part of the defendant is sufficient to sustain a verdict of guilty as to involuntary manslaughter.

The Supreme Court states again that if a change in the "simple negligence" rule is desired, it should come from the Legislature.

Receiving Stolen Goods — Merger of Offenses

In *State v. Rutledge*[5] the defendant induced others to steal property. As to one of the indictments against him, the property was stolen in North Carolina and the defendant later received it in South Carolina. He was convicted of "receiving stolen goods." On appeal, he contended that one could not be guilty of receiving stolen goods when the goods were stolen in another state and received in this state and, further, that he could not be convicted of receiving stolen goods when he conspired with others to steal the property which he acquired as a result of the conspiracy. He further contended that those facts made him a principal in the offense of larceny and that he could not be convicted of receiving the same property which he conspired to steal.

4. 231 S. C. 184, 98 S. E. 2d 259 (1957).
5. 232 S. C. 223, 101 S. E. 2d 289 (1957).

As to the first point, the Court held that it is well settled in this state that one who steals property in another state and brings it into this state is subject to prosecution for larceny here and that " 'where one takes goods from another in any place, under circumstances which make the taking felonious, the possession of the owner, in contemplation of law, continues, and where the goods so taken are carried into another state, that constitutes a new taking and asportation in that state for which an indictment for larceny will lie.' " It follows that if an indictment for larceny will lie in the second state, a conviction for receiving the property knowing it to have been stolen will stand in the second state.

As to appellant's contention that his conspiracy made him a principal as to the crime of larceny, the Court stated that the fact that one enters into a criminal conspiracy with others to commit a crime does not necessarily make him a principal in the substantive crime resulting from the conspiracy and that, furthermore, the crimes of larceny and receiving stolen goods are two distinct offenses and there could not have been a merger of the two offenses because a conspiracy to commit a crime is not merged in the commission of the completed offense.

Murder — Irresistible Impulse and Insanity

In *State v. Allen*[6] defendant was convicted of manslaughter. Evidence was offered in his behalf to show that he was insane at the time of the act. On appeal, the Supreme Court reaffirmed the rule as to the defense of insanity, stating that the test in this state is the mental capacity or want of mental capacity sufficient to distinguish moral or legal right from moral or legal wrong and to recognize the act charged as morally or legally wrong. It was urged on behalf of appellant that the "McNaghten rule", the "right and wrong rule", be abandoned in favor of the "irresistible impulse rule." The Supreme Court expressly repudiated the "irresistible impulse rule" and firmly adhered to the well established "McNaghten rule."

II. CRIMINAL PROCEDURE AND EVIDENCE

Confessions

The subject of confessions has been fully and ably treated in prior editions of the *South Carolina Law Quarterly*. Dur-

6. 231 S. C. 391, 98 S. E. 2d 826 (1957).

ing the period of this survey, only one case substantially involving the question of confessions appears to have been passed upon. *State v. Clinkscales*[7] was a capital case. The defendant, a young Negro, made an oral confession to officers while in custody. The oral confession was later reduced to writing and introduced into evidence. All the testimony tended to show the confession was voluntary. The defense offered no testimony and no objection to the admission of the confession, nor did defense counsel request a charge as to confessions and apparently the trial judge did not charge on the law relating to confessions.

The Supreme Court stated that were the instant case not a capital one the failure of the trial judge to so charge would not be considered. However, the case being of a capital nature, the Court commendably gave the defendant every consideration and remanded the case, stating that although all the evidence may tend to show that a confession made while under arrest was a voluntary one, the jury may not be so convinced; and it is the jury who, in the final analysis, must determine the factual issue of voluntariness and that the jury should be instructed as to their power to deal with the confession.

Evidence of Previous Difficulty between Defendant and Deceased

In the *Clinkscales* case[8] the Court also held that evidence of previous difficulties between the parties is admissible, but that the details of such difficulties are not admissible. (In this case the defendant shot deceased in the back with a shotgun six weeks before the act resulting in the death of deceased).

Evidence — Statements by Co-Defendant In and Out of Court

The first case treated in this survey was *State v. Mouzon.*[9] Another point raised in that case was that the court erred in refusing to instruct the jury that the testimony of one defendant could not be considered against the other. The Court held that any statement or confession made *out of court* by one of the defendants could not be considered against the

7. 231 S. C. 650, 99 S. E. 2d 663 (1957).
8. *Ibid.*
9. 231 S. C. 655, 99 S. E. 2d 672 (1957).

other, but that the testimony *in court* of one defendant against his codefendant was admissible and such testimony should be treated like that of any other witness, with the jury being the judge of its credibility.

Change of Venue

In the *Mouzon* case[10] appellants' counsel moved for a change of venue upon the ground that a fair and impartial trial could not be had in Clarendon County in that there was a strong and aroused public sentiment against defendants. Appellants introduced affidavits which they contended supported that position. The Supreme Court reaffirmed that it was within the discretion of the trial judge to grant or refuse the motion. The feature of the motion which most concerned the Supreme Court was the statement of one of appellants' counsel that he could not obtain the services of any lawyer at Manning, the county seat of Clarendon County, to assist in the trial, although his clients were willing and able to pay a reasonable fee for such services. The Supreme Court stated that although "the fact that a defendant is unable to retain local counsel is a striking index of the condition of public sentiment, . . . it would be going too far that this necessitates in every case the granting of a motion to change venue" and that this is especially true in view of the fact that no showing was made as to why local counsel declined employment.

Disqualification of Over-Age Juror

It is provided in Article 5, Section 22 of the 1895 Constitution of the State of South Carolina that "each juror must be a qualified elector under the provisions of this Constitution between the age of twenty-one and sixty-five years and of good moral character."

Section 38-203 of the 1952 Code of Laws of South Carolina provides as follows:

> All objections to jurors called to try prosecutions, actions, issues or questions arising out of actions or special proceedings in the various courts of this state, if not made before the juror is empaneled for or charged with the trial of such prosecution, action, issue or question arising out of an action or special proceeding, shall be

10. *Ibid.*

deemed waived and if made thereafter shall be of none effect.

In *State v. Rayfield*[11] the Court cites *State v. Jones*[12] which held that it was incumbent upon movant for disqualification of juror to show "(1) the fact of disqualification, (2) that it was unknown before verdict and (3) that he was not negligent in making discovery of the disqualification before verdict."

State v. Rayfield also construes the word "objection" contained in section 38-203 of the Code to mean such objections of which the party had knowledge, or which, by the exercise of due diligence he could have known.

Impeachment of One's Own Witness

In *State v. Trull*[13] the Supreme Court reaffirmed the rule that a party may impeach or cross-examine his own witness where the witness is hostile or unwilling or who surprises the party calling him by offering testimony inconsistent or contradictory with prior statements made to the party calling him. The Court states that permission to so impeach or cross-examine is addressed to the sound discretion of the court.

Conduct of Counsel: Conference between Trial Judge and Solicitor

In *State v. Heath*[14] it appears that during an embezzlement trial the solicitor had information that the jury would be contacted by outsiders. The solicitor then conferred with the trial judge in chambers without the presence of counsel for the defendant. This was a point raised on appeal.

The Supreme Court held that it was not proper for the solicitor to confer privately with the trial judge, but since the conference had no bearing upon the guilt or innocence of appellant, it was not prejudicial to defendant and the conviction was affirmed.

Indictment by Grand Jury without Warrant

In *State v. Walker*[15] the defendant was indicted for the crime of statutory rape. Thereafter, his counsel agreed with

11. 232 S. C. 230, 101 S. E. 2d 505 (1958).
12. 90 S. C. 290, 73 S. E. 177 (1912).
13. 232 S. C. 250, 101 S. E. 2d 648 (1958).
14. 232 S. C. 387, 102 S. E. 2d 268 (1958).
15. 232 S. C. 290, 101 S. E. 2d 826 (1958).

the solicitor that the charge be reduced to bastardy and presented to the grand jury. At a subsequent term of court this was done and the grand jury returned a true bill. Defendant, in the meantime, had employed different counsel, and motion was made to quash the indictment upon the ground that no arrest warrant had been issued by a magistrate for the crime of bastardy.

The Supreme Court reviewed the Code sections relating to jurisdiction of magistrates with reference to bastardy and, concluding that the magistrate's jurisdiction was not exclusive, but that he could only bind defendant over or place him under recognizance for support should defendant admit guilt, held that a grand jury may indict for any crime which is not within the exclusive jurisdiction of a magistrate or other inferior court, whether or not there has been a prior proceeding before a magistrate and an arrest warrant issued.

Separation of Juror — Outside Influence

In *State v. Loftis*[16] the defendant was convicted of assault and battery of a high and aggravated nature. After the case had been submitted to the jury and while they were deliberating, the trial judge instructed the bailiffs to take the jurors to lunch. One of the jurors separated and went to his home to have his lunch. Upon learning that one juror was missing, the bailiffs located him and instructed him to return at once to the jury room. The only person the juror talked to while separated was his wife and a son of one of the bailiffs, but it was established that they did not discuss the case being tried. The appellant contended on appeal that the separation of the juror warranted a new trial.

The Supreme Court held that it was within the sound discretion of the trial judge upon motion for new trial to determine whether or not the jury had been subjected to outside influence and that the mere fact that a jury wrongfully separates without leave of the court after submission of a case is not per se sufficient for setting aside a verdict. The Court also differentiated the instant case from *State v. Senn*[17] and *State v. Campbell.*[18] In the *Senn* case the jury left the jury room while deliberating and continued deliberation in

16. 232 S. C. 35, 100 S. E. 2d 671 (1957).
17. 32 S. C. 392, 11 S. E. 292 (1890).
18. 144 S. C. 53, 142 S. E. 31 (1920).

the court room while mingling with other persons. In the *Campbell* case, a deputy who was definitely interested in the outcome of the case had lunch with the jury and conversed with members thereof.

III. LEGISLATIVE ACTION

Carelessly or Negligently Burning Lands of Another or Allowing Fire to Spread to Lands of Another

By Act No. 745, South Carolina General Assembly, 1958, section 16-318 of the 1952 Code was amended to make it unlawful to carelessly or negligently set fire to or burn any combustible matter on any lands so as to cause or allow fire to spread to the lands of another, or causes same to be done or aids and assists such to be done and provides that one so doing shall be guilty of a misdemeanor and punishable for a first offense by imprisonment for not less than twenty nor more than thirty days or by fine of not less than twenty-five dollars nor more than one-hundred dollars. Subsequent offenses carry a penalty of not less than thirty days nor more than one year or a fine of not less than one hundred dollars nor more than five hundred dollars, or both in the discretion of the court.

Desecration or Mutilation of Flags

Act No. 812, General Assembly of South Carolina, 1958, amends sections 16-532 and 16-533 of the 1952 Code and makes it a misdemeanor to (a) knowingly place or cause to be placed any figure, mark, picture, etc. upon any flag, standard, color or ensign of the United States, the Confederate States of America, or the State of South Carolina, and, (b) knowingly display to public view any such flag which shall have such markings, or (c) manufacture, sell or give away any such flag with any such markings. Penalty for violation is set at one hundred dollars fine or imprisonment for not more than thirty days.

Driving under Influence

Act No. 801, South Carolina General Assembly, 1958, amends section 46-348 of the 1952 Code so as to provide that in prosecutions for driving under the influence of intoxicants, etc. only those violations which occured within the period of ten years including and immediately preceding the date of the last violation shall constitute prior violations.

Unlawful to Park Vehicle on Private Property of Another

Act No. 807, South Carolina General Assembly, 1958, makes it unlawful to park a vehicle on the private property of another without the owner's consent and provides that the owner of the property may store the vehicle and charge the owner storage.

Convicts, Credit for Good Behavior

Act No. 902, South Carolina General Assembly, 1958, provides that prisoners whose record show good conduct shall be entitled to a deduction from sentence as follows:

1. Ten days for each month served during the first seven years of the sentence.

2. Six days for each month served during the remainder of the sentence.

Domestic Employees, Solicitation for Out-of-State Work

Act No. 915, South Carolina General Assembly, 1958, now makes it lawful for any person to solicit without a license domestic employees for out-of-state employment.

Obtaining a Drug by Fraud

Act No. 909, South Carolina General Assembly, 1958, makes it unlawful for any person to obtain any drug by fraud. Penalty is set at a fine not to exceed five hundred dollars or imprisonment of not more than eighteen months; subsequent offenses carry a fine not to exceed two thousand dollars or imprisonment of not more than five years in the discretion of the court.

Unlawful to Fire Certain Missiles without Permit

By Act No. 897, South Carolina General Assembly, 1958, the Legislature has taken note of Sputniks, Thors, Vanguards, etc. This act makes it unlawful to fire or discharge, without permit, any missile within the borders of this State. A missile is defined as any object or substance hurtled through the air by the use of gunpowder or any other explosive substance.