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Criminal Law

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Introduction

The cases which arose during the survey period add very little to the Criminal Law of South Carolina. For the most part, the cases turned on procedural questions which are frequently raised by persons accused of crime. The cases have been broken down into topics where possible and are not given individual treatment.

Multiple Counts

A defendant may be indicted and sentenced for the separate offenses of breaking and entering with intent to commit larceny and grand larceny although both offenses arise out of one act.[1] Breaking and entering with intent to steal is a statutory crime[2]—while grand larceny is a common law offense.[3]

When a defendant pleads guilty or is convicted of two or more counts alleged in the same indictment, the better practice is for the trial judge to separately assess the punishment on each count;[4] however, a sentence in gross which does not exceed the total time which could have been awarded if each sentence were separately assessed and then added together, is not error.[5]

Escape

Although a void sentence is imposed upon a defendant, he is subject to punishment for an illegal escape while he is serving such sentence. A person who is illegally restrained must test the question by the proper procedure. It is no defense to a charge of escape that the defendant is innocent of the crime charged or that the original conviction could be declared void in a habeas corpus proceeding.[6]

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1. Copeland v. Manning, 234 S. C. 510, 109 S. E. 2d 361 (1959).
2. SOUTH CAROLINA CODE OF LAWS § 16-332 (1952).
3. Copeland v. Manning, *supra* note 1.
4. *Ibid.*
5. *Ibid.* See *Ex parte* Klugh, 132 S. C. 199, 128 S. E. 882 (1925) which is cited in the *Copeland* case. See State v. Mayfield, 235 S. C. 11, 109 S. E. 2d 716 (1960) which apparently followed *Klugh* also.
6. Copeland v. Manning, 234 S. C. 510, 109 S. E. 2d 361 (1959).

Relaxation of Procedural Requirements in Criminal Cases

The cases which arose during the survey period continued the policy of the Court to relax rules of procedure in order to insure that persons accused of crime have every opportunity to prove their innocence. The liberality of the Court is most often demonstrated by the willingness of the court to review questions on appeal which were not in issue in the trial court.[7]

Presumption of Regularity

The Court frequently resorts to the presumption of regularity in criminal cases especially when the defendant rests his appeal on the ground that the trial court failed to comply with procedural requirements. In the *Britt* case[8] the Court considered the contention by the appellant that he was not present when the trial court conducted the *voir dire* examination of the jurors, even though this was not raised in the trial, but the Court concluded that even if the contention had been raised the record would affirmatively show that he was present, but in absence of this in the record, the Court would presume that the examination had been conducted in his presence.

In *State v. Mayfield,*[9] the defendant contended that he was not arraigned and the jury was not sworn. The case was further complicated by the loss of the original notes of the trial by the court reporter. The Court, in addition to invoking the presumption of regularity, accepted the affidavits of the reporter and some of the jurors that the defendant had been arraigned.[10] A statement by the appellant that the jury was not sworn, by itself, is not sufficient to overcome the presumption of regularity.[11]

Alibi

The defense of alibi is not an affirmative one and therefore the trial judge committed no error in charging the jury with the law applicable to alibi even though the appellant did not put up witnesses to establish this defense, where the

7. State v. Mayfield, 235 S. C. 11, 109 S. E. 2d 716 (1959); State v. Britt, 235 S. C. 395, 111 S. E. 2d 669 (1959).
8. 235 S. C. 395, 111 S. E. 2d 669 (1959).
9. 235 S. C. 11, 109 S. E. 2d 716 (1959).
10. The court also held that the appellant had waived whatever objection he might have had by his voluntary entry of a plea and by going to trial without objection.
11. State v. Mayfield, *supra.*

examination of the prosecution witnesses revealed that the appellant might have been in a different place at the time the crime was committed.[12]

Newly Discovered Evidence

A motion for a new trial based on after-discovered evidence is addressed to the discretion of the trial judge. A defendant making such a motion for a new trial must show that the evidence on which the motion is based:

> . . . (1) is such as would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching . . . .[13]

The credibility of newly discovered evidence is a matter for the consideration of the trial judge in deciding whether to grant a new trial. The trial judge was held to have properly exercised his discretion where the affidavits comprising the after-discovered evidence stated that the deponents had committed perjury and were made by persons of known criminal backgrounds.[14]

Non-Support

In *State v. Collins*[15] the appellant was prosecuted in Kershaw County for his failure to support his wife and minor child. The wife alleged that she was forced to leave the appellant husband by reason of his physical abuse of her, while they were residing in Athens, Georgia. The wife returned to the home of her mother in Kershaw but thereafter the husband did not furnish any support for her or the child. The appellant contended that the trial court did not have jurisdiction over him. The Court, affirming the lower court, held that the husband was guilty of constructive desertion by which the wife was forced to seek refuge in Kershaw County. In relation to jurisdiction, the Court held that the breach of the husband's duty to support his wife and child first occurred in Kershaw County and that it was this failure which violated the non-support statute,[16] and the venue was therefore proper.

12. *Ibid.*
13. State v. Mayfield, 235 S. C. 11, 109 S. E. 2d 716 (1959).
14. *Ibid.*
15. 235 S. C. 61, 110 S. E. 2d 270 (1959).
16. SOUTH CAROLINA CODE OF LAWS § 20-303 (1952).

Jurisdiction of Children's Court

In *State v. Gorey*,[17] the Court held that the State Constitution[18] prohibited the jurisdiction of the crime of murder upon any court inferior to the circuit courts. In view of this prohibition, the contention by the thirteen-year old appellant that his case should have been channeled through the Children's Court of Spartanburg County[19] was not valid. The Court properly held that the statutory provisions establishing the jurisdiction of the Children's Court could not divest the circuit court of the power to take direct supervision, but as a matter of policy it seems such cases should be referred to the Children's Court. This court could be invaluable to the circuit courts in providing a solution to the problem of what to do with a thirteen-year old boy who is charged with murder. To treat a child of this age in the same manner as adults is to defeat the humanitarian policies of the Legislature in setting up children's courts.

Continuance

The age old tactic of continuance in criminal trials was considered in two cases during the survey period. The Court disposed of these contentions, citing numerous cases, by saying that:[20]

> . . . [A] motion for a continuance is addressed to the discretion of the trial Judge and his disposition of such motion will not be reversed on appeal unless it is shown that there was an abuse of discretion to the prejudice of the appellant. . . .

Although the Court is more prone to find an abuse of discretion in criminal cases than in other proceedings,[21] abuse of discretion was not found in either case.[22]

17. 235 S. C. 301, 111 S. E. 2d 560 (1959). The appellant was charged with the murder of another boy. He was convicted of manslaughter but the Supreme Court ordered a new trial because the trial court failed to instruct the jury on the law applicable to involuntary manslaughter.

18. S. C. CONST. art. V, § 1 (1895).

19. The Children's Court of Spartanburg County is established pursuant to CODE OF LAWS OF SOUTH CAROLINA § 15-335 (1952). Appellant contended that § 15-336 of the South Carolina code was applicable which provides, "in case any child under sixteen years of age is charged with a serious criminal offense the judge of the Children's Court may certify such case to the Circuit Court of Spartanburg County for disposition."

20. State v. Bullock, 235 S. C. 319, 111 S. E. 2d 657, 661 (1959); State v. Britt, 235 S. C. 395, 111 S. E. 2d 669, 674 (1959).

21. See State v. Livingston, 223 S. C. 1, 73 S. E. 2d 850 (1952) on which appellant relied.

22. See State v. Bullock, *supra* note 20; State v. Britt, *supra* note 20.

Confessions

In *State v. Bullock*[23] the appellant contended that the confession used against him was involuntary and should have been excluded. The Court adhered to the rule laid down in earlier cases that a confession must be voluntary to be admissible and the proof of the voluntary character must be established by the prosecution. The question of the voluntary nature of the confession is addressed to the court in the first instance. If there is a question of fact to be determined as to the voluntariness of the confession, it is then submitted to the jury for final determination as to its voluntary nature, and in any event the jury will determine its truthfulness.[24] Judge Whaley[25] calls this process the "pig tracking doctrine."

The Court held that the trial judge did not commit error in this case by submitting the issue of voluntariness of the confession to the jury.[26]

In *State v. Brooks*[27] there was an appeal from a conviction of rape by the appellant, a young Negro man. The case does not present any points which need to be discussed, but it is interesting to note that while the appellant was charged and convicted of raping only one person, the evidence proved[28] that the appellant had raped two women during one transaction. The prosecutrix and her companion testified that the appellant had raped them in turn holding a gun on both of them during both acts. The credibility of this testimony has been established by the jury, still it is hard to believe that a male could maintain control of one woman in an open street with a pistol while raping another. It would seem that there should be a rebuttable presumption that this is physically and mentally impossible.

23. 235 S. C. 319, 111 S. E. 2d 657 (1959).
24. State v. Bullock, *supra* note 20.
25. WHALEY, SOUTH CAROLINA EVIDENCE, 9 S. C. L. Q. at 35 (No. 4A 1957).
26. State v. Bullock, *supra* note 20.
27. 235 S. C. 344, 111 S. E. 2d 686 (1959).
28. Evidence of the separate crime was held to be admissible on the ground that it tended to prove a common "scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others". *Id.* at 350, 111 S. E. 2d at 690.