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CRIMINAL LAW AND PROCEDURE

EUGENE F. ROGERS*

The Supreme Court of South Carolina during the review period commencing April 1, 1961, through March 31, 1962, decided 18 cases involving substantive and procedural rules of criminal law. Of the 18 cases, 5 were reversed. The Court reviewed five cases where the verdict of the jury made the death penalty mandatory and three of the five appellants were granted new trials.

One-third of all cases or six of the cases appealed to the Supreme Court were cases involving civil rights. One of these cases was reversed, and two reversed in part and affirmed in part. The other five cases, while not reversed by our South Carolina Supreme Court, cannot yet be considered to be the law of the state. They have been appealed to the United States Supreme Court. By the time this article is published the United States Supreme Court should have made a decision in some of the appealed cases.

CIVIL RIGHTS

Trespass

In *City of Greenville v. Peterson*,[1] the defendants were convicted of trespass after notice in violation of Section 16-388, Code of Laws of South Carolina, 1952, as amended. From this conviction they appealed to the Supreme Court.

The defendants, all Negroes, were seated at a lunch counter in the S. H. Kress Store in Greenville, South Carolina. Because of the custom that only white persons shall be served at the counter, the store manager announced that it was closed, the lights were extinguished, and all persons were requested to leave. There were some white persons at the counter who left, but all of the Negroes refused to leave. There were some ten Negroes above sixteen years of age and four under sixteen years of age.

The Code section under which they were prosecuted provides:[2]

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1. 239 S. C. 298, 122 S. E. 2d 826 (1961).
2. CODE OF LAWS OF SOUTH CAROLINA § 16-388 (1952).

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> Any person . . . who, having entered into the . . . place of business . . . of another person . . . and fails and refuses . . . to leave immediately upon being ordered . . . to do so by the person in possession . . . shall, on conviction, be fined not more than $100.00, . . .

Defendants, after conviction, appealed, contending that their arrest and conviction was in furtherance of a custom of racial segregation in violation of the Fourteenth Amendment to the Constitution of the United States.

Our Court dismissed this contention and stated:

> The Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful, *Shelley v. Kraemer,* 314 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A.L.R. 2d 441; and the operator of a privately owned business may accept some customers and reject others on purely personal grounds in the absence of a statute to the contrary, *Alpaugh v. Wolverton,* 184 Va. 943, 36 S. E. 2d 906. In the absence of a statute forbidding discrimination based on race or color, the operator of a privately owned place of business has the right to select the clientele he will serve irrespective of color, *State v. Avent,* 253 N. C. 580, 118 S. E. 2d 47. Although the general public has an implied license to enter any retail store, the proprietor or his agent is at liberty to revoke this license at any time and to eject such individual if he refuses to leave when requested to do so, Annotation 9 A.L.R. 379; Annotation 33 A.L.R. 421; *Brookside-Pratt Mining Co. v. Booth,* 211 Ala. 268, 100 So. 240, 33 A.L.R. 417; and may lawfully forbid any and all persons, regardless of reason, race or religion, to enter or remain upon any part of his premises which are not devoted to public use, *Henderson v. Trailway Bus Company,* 194 F. Supp. 423, 426.

In the next case decided on this point, *City of Charleston v. Mitchell,*[3] the defendants were charged with trespass and with opposing and interfering with police in discharge of duties. The facts in this case were substantially identical to the facts in the preceding case with the exception that the offense occurred in the city of Charleston and the defendants were charged with simple trespass rather than trespass

3. 239 S. C. 376, 123 S. E. 2d 512 (1961).

after notice. The defendants asserted that since the store of S. H. Kress & Company was open to the public, they were there as business invitees and the refusal to serve them because of their race was a denial of their constitutional rights. They did not attack Section 16-386 of the Code (the trespass statute) as being unconstitutional but contended that their rights were abridged in its application, in that they were invitees and were refused service because of their race.

The Court dismissed this contention with the following language:

> Section 16-386 of our Code is not a racial segregation one. It forbids any person, irrespective of his race or color, to make entry upon the lands of another after notice from the owner or tenant prohibiting such entry. There is no statute in this State which forbids discrimination by the owner of a restaurant of people on account of race or color. In the absence of a statute forbidding discrimination based on race or color, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building, has the right to select the clientele he will serve and to make such selection based on color or race if he so desires. This rule has been repeatedly recognized by the Appellate Courts of this country.

City of Columbia v. Barr[4] is another case with similar facts. The Court affirmed appellants' conviction for trespass under authority of *Greenville v. Peterson*[5] and *City of Charleston v. Mitchell.*[6]

Obstructing Justice

In *City of Charleston v. Mitchell,*[7] defendants were charged with interfering with police in discharge of their offical duties. The interference complained of was the failure of the appellants to leave the premises after being ordered and requested to do so by the Chief of Police. The question on appeal was whether or not the act of the appellants in doing "nothing" and refusing to leave the premises in question,

4. 239 S. C. 395, 123 S. E. 2d 521 (1961).
5. 239 S. C. 298, 122 S. E. 2d 826 (1961).
6. 239 S. C. 376, 123 S. E. 2d 512 (1961).
7. 239 S. C. 376, 123 S. E. 2d 512 (1961).

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after being ordered and requested to do so, amounted to an unlawful interference by them with the Chief of Police.

The Court in quoting 47 C.J.S., at page 83, said:

> "Interfere" has been said to import action, not mere inaction, an active rather than a passive condition, and has been defined as meaning to interpose, to prevent some action, sometimes in a bad sense to intermeddle, to check or hamper, and, specifically to do something which hinders or prevents or tends to prevent the performance of legal duty. In its broadest aspects "interfere" bears the significance of "disarrange", "disturb", "hinder."

The Court concluded that the conduct of the appellants in refusing obedience to the request of the Chief of Police, was merely inaction on their part and did not constitute interference with an officer in the discharge of his duty.

Resisting Arrest

In *City of Columbia v. Bouie*,[8] appellants were charged with breach of the peace. They were convicted in the lower court and appealed. This offense occurred in one of Columbia's eating establishments. The appeal from resisting arrest was based on insufficient evidence to convict. The evidence indicated that the defendant's resistance was his failure to obey immediately the officer's order, with the result that the latter "had to pick him up out of the seat."

The Court concluded that "resisting arrest is one form of the common law offense of obstructing justice; and the use of force is not an essential ingredient of it." The Court decided however, that the momentary delay in responding to the officer's command did not amount to resistance within the intent of the law.

Breach of the Peace

In *State v. Edwards*,[9] the appellants, 187 in number, were convicted in the Magistrate's Court of the common law crime of breach of the peace. The charges arose out of certain activities in which the appellants were engaged in about the State House grounds in the City of Columbia. The appellants after

8. 239 S. C. 570, 124 S. E. 2d 332 (1962).
9. 239 S. C. 339, 123 S. E. 2d 247 (1961).

attending a meeting at a church walked in groups of approximately 15 from the church along public sidewalks to the State House grounds and paraded about the grounds in protest to the General Assembly and to the general public against the laws and customs of the State relative to segregation of the races. The appellants stated such demonstrations were to continue until their conscience told them that it had lasted long enough. At the time the General Assembly was in session. When appellants reached the State House grounds they were met by police authorities who permitted them to parade for about 45 minutes. The parading affected the flow of pedestrian and vehicular traffic and the police authorities warned the leaders that they must disperse and upon their failure to have the group dispersed all were arrested and charged with breach of the peace.

After conviction, the defendants appealed contending that their arrest and conviction deprived them of their constitutional right of freedom of speech and assembly.

The Court used this occasion to define the term "breach of the peace" as follows:

> Breach of the peace is a common law offense which is not susceptible of exact definition. It is a generic term, embracing "a great variety of conduct destroying or menacing public order and tranquility". *Cantwell v. Connecticut,* 310 U. S. 296, 60 S. Ct. 900, 905, 84 L. Ed. 1213, 128 A.L.R. 1352. *State v. Randolph,* 239 S. C. 79, 121 S. E. 2d 349, 350.
>
> The general definition of the offense of breach of the peace approved in our decisions is that found in 8 Am. Jur. 834, Section 3 as follows: "In general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence . . . , it includes any violation of any law enacted to preserve peace and good order. It may consist of an act of violence or an act likely to produce violence. It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. Nor is actual personal violence an essential element in the offense . . ."

> By "peace", as used in the law in this connection, is meant the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members, which is the natural right of all persons in political society.

The Court concluded that in this instance the appellants disobeyed the orders of the police officers and these orders were under all of the facts and circumstances reasonable and were motivated solely by a proper concern for the preservation of order and prevention of further interference with traffic upon the public streets and sidewalks.

Preparation of Warrants

In *State v. Randolph*,[10] the defendants were convicted in Magistrate's Court of conspiring to breach the peace. From adverse judgment from the Court of General Sessions they appealed to the Supreme Court, contending that the warrant was defective and failed to set forth facts constituting the alleged offense. The warrant in effect stated that the appellants "did combine, confederate and conspire, together one with the other, to commit a breach of the peace, . . ." against the peace and dignity of the State. The appellants at the time the case was called for trial moved to dismiss the warrant on the ground that it did not set forth the offense charged plainly and substantially.

In upholding appellants' contention the Court cited Article I, Section 18 of the South Carolina Constitution, which provides that in all criminal prosecutions the accused shall have the right "to be fully informed of the nature and cause of the accusation." The Court also cited Section 43-111 requiring proceedings in Magistrates' Courts in criminal cases to be commenced on information plainly and substantially setting forth the offense charged. The Court concluded that the defendant had the fundamental right to be informed of the nature of the offense charged against him, and that in the instant case no facts constituting the offense were stated. The only thing stated in the warrant was the name of the offense that the defendants were charged with committing.

In all the civil rights cases the court is to be commended for its logic, judgment and reasoning in reaching its conclu-

10. 239 S. C. 79, 121 S. E. 2d 349 (1961).

sions. It is readily apparent that the Court carefully weighed the rights of the defendants and carefully compared the facts in each case with the statutes, ordinances or law which they were charged with violating. It is difficult to see how the Court could have reached any conclusion other than that which it did in the premises. It will be interesting to note what the United States Supreme Court does with the decisions of our Supreme Court which have been appealed to it.

Appointment of Counsel in Non-Capital Cases

In *Shelton v. State and Manning*,[11] the appellant in a habeas corpus proceeding called to his aid the United States Constitution. He had entered a plea of guilty to assault of a high and aggravated nature in 1958. Fifteen months later he filed a writ of habeas corpus contending that his sentence was invalid because he was not represented by counsel at the time he pleaded guilty.

The case is significant in that the Court for the first time appears to recognize the requirement of the United States Constitution that counsel be appointed to represent a defendant in non-capital cases in state courts where the circumstances of the particular case are such that without counsel the furtherance of justice would be defeated. There is no statute in this state requiring that counsel be appointed to represent one charged with a commission of a crime except where the charge is a capital offense.[12] *State v. Hallman*[13] is the only other case in the state bearing on this question. In that case the Court refused to make a decision as to whether or not there were any non-capital cases where a defendant would be entitled to have the Court appoint an attorney to represent him. In the instant case, while the Court recognized the right of counsel to a non-capital defendant in some instances, it concluded that the appellant had not been unfairly treated and that he was not entitled to a new trial under the showing made.

Rape

During the review period there were four rape cases which were reviewed by the Supreme Court. In each of them the death penalty had been made mandatory by the verdict of the jury. New trials were granted to defendants in three cases.

11. 239 S. C. 535, 123 S. E. 2d 867 (1962).
12. CODE OF LAWS OF SOUTH CAROLINA § 17-507 (1952).
13. 232 S. C. 489, 102 S. E. 2d 873 (1958).

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In *State v. Worthy*,[14] the defendant requested the Court to permit a guilty plea with a recommendation to mercy. This was after the jury had been selected and sworn. The State refused and the trial proceeded. At the conclusion of the trial, counsel for defendant made the following request: "I would like for you to point out to them, . . . that they can bring back guilty with recommendation to the mercy of the Court, without any reason at all, they don't have to have anything to go on, it is in their province to do that, and that no one can criticize them for it . . . " The trial judge declined this instruction and upon conviction this appeal followed.

Justice Legge, writing what he apparently thought was a dissenting opinion but which became majority opinion by a Court divided three-two, wrote a scholarly review of the history of the recommendation to mercy statutes.

The majority opinion held that the trial judge errs if he refuses to instruct a jury, as requested by defendant's counsel, with regard to their unrestricted power to recommend mercy. Justice Legge stated:

> . . . It is therefore of vital importance to the accused that the jury be charged as to its power under the statute (Section 16-72 giving the jury power to recommend mercy upon conviction of rape) for it is a part of the law peculiarly applicable in a death case. The accused has no right whatever to such recommendation; he has a substantial right, under Article V, Section 26 of the Constitution of 1895, to have the jury instructed as to the meaning of that statute . . .
>
> . . . the jury's power to recommend mercy is not dependent upon its view of the facts and circumstances revealed by the evidence, but is absolute, unlimited, and not subject to review.
>
> Every conclusion by a jury, other than that with respect to recommendation to mercy, is required by law and by the juror's oath to be based upon the evidence or lack of it. In the absence of instruction as to that distinction, I am convinced of the likelihood that the average juror would think that his power to recommend mercy is limited to considerations arising from the evidence. The distinc-

14. 239 S. C. 449, 123 S. E. 2d 835 (1961).

tion is a vital one, and in my opinion the trial judge's refusal to point it out deprived the defendant of a substantial right under Article V, Section 26.

Course And Conduct of Trial

State v. Sharpe[15] and *State v. Davis*,[16] attracted national interest. The two cases were tried in the same term of court and in the former, Sharpe, a Negro, was tried on an indictment charging that he committed rape upon a white woman, while Davis, a white man, was tried on an indictment charging that he committed rape upon a Negro woman. Both were convicted without a mercy recommendation and both appealed.

In his appeal Sharpe contended that the Court should set aside the verdict of the jury because it was the product of the atmosphere and surroundings in which the case was tried. He contended that on the previous day Davis, a white man, had been convicted, without recommendation to mercy, of raping a Negro woman and by reason of such trial preceding that of the appellant, a general atmosphere of hostility was created which was prejudicial to his rights and which denied him a fair and impartial trial. Mr. Justice Moss, speaking for the Court, had this to say:

> The power of the law to take the life of human beings for a violation thereof is one which should be and is exercised with extreme caution. The frailties of human nature are so manifest and manifold until the law should and does place around the defendant, whose life would be taken for a violation of the law, every safeguard to enable such defendant to secure a fair and impartial trial. When it is made to appear that anything has occurred which may have improperly influenced the action of the jury, the accused should be granted a new trial, although he may appear to be ever so guilty, because it may be said that his guilt has not been ascertained in the manner prescribed by law. This Court has taken the position that in all cases involving the life of the defendant, it is not bound down to a consideration of the exceptions raised, but if anything appear in the record which would warrant a reversal, this Court will consider

15. 238 S. C. 258, 122 S. E. 2d 622 (1961).
16. 238 S. C. 280, 122 S. E. 2d 633 (1961).

that matter as if raised by the exceptions. What effect improper argument of a Solicitor, even though made in another case, yet in the presence of a jury panel from which a jury was later selected to try the appellant, is impossible to say. *State v. Britt et al.*, 235 S. C. 395, 111 S. E. 2d 669. Every case should be tried in a calm and judicial atmosphere so that the arbiters of the fact may not be affected by any outside interference or extraneous influences. We do not know what effect the trial of the previous case and the argument of the Solicitor therein may have had upon the trial of the appellant. We, therefore, conclude that in order to remove all doubt as to whether the appellant received the fair and impartial trial guaranteed to him by the Constitutions of this State and of the United States that this Court should reverse the conviction of the appellant and remand the case to the lower Court for a new trial.

Improper Argument of Prosecuting Attorney

In *State v. Davis*,[17] the solicitor in his argument made the following statement:

> I have one or more similar cases to the one being tried, to be brought up later in this court, and if you turn this defendant loose you might as well be turning these other defendants loose also, because if you turn this man loose I'm going to turn the others loose.

The Court considered this comment by the solicitor and had this to say:

> The reference was obviously to the impending trial of Sharpe; and the plain threat was a *nolle prosequi* in that case. In the circumstances before detailed, it would be hard to conceive of a statement more likely to excite the emotions of the jury and to coerce a conviction. The solicitor should prosecute vigorously; he must prosecute fairly, for the concern of the state, whose representative he is, is not that a defendant shall be convicted, but that justice shall be done.

Based on the foregoing the Court reversed the judgment of the lower court and remanded the case for a new trial. It is of interest that this defendant on retrial was acquitted.

17. 238 S. C. 280, 122 S. E. 2d 633 (1961).

In *State v. Robinson*,[18] the defendant was convicted of rape and on appeal contended that the trial judge committed error in refusing to order a new trial on the ground that the solicitor, in his argument to the jury, commented on the fact that the defendant did not take the witness stand and testify in his own behalf. The solicitor in his argument made a number of statements and then asked the question: "Is that contradicted or denied?" On another occasion, after making a statement, he continued with this statement, "and it is certainly not disputed or denied". The Court held that it was improper for the solicitor to comment on or to make any reference to the fact that the accused failed to testify as a witness in his own behalf but decided that it was unreasonable to conclude that the argument of the solicitor conveyed to the minds of the jurors the fact that the appellant had not testified in the case. The Court went on to say that if by any chance any juror received such an impression, its effect was removed by the charge of the trial judge when he charged them that a defendant was under no obligation to testify in his own behalf and the fact that the defendant does not testify cannot and must not be considered against him under any circumstances.

In *State v. Edgeworth*,[19] the defendant was convicted of housebreaking and larceny. The defendant appealed on the ground, among others, that the solicitor's argument was improper because he commented on the fact that the defendant stated to the sheriff upon arrest, "I am not talking until I get a lawyer." The lower court ruled that the defendant was under no duty to talk to the sheriff and was within his rights in asking to be permitted to talk with his attorney. The Court concluded that it was improper for the solicitor to have made any comment about defendant having requested an attorney and said the following:

> There was no impelling reason why the solicitor should have made any comment thereby, as it is always the duty of the prosecuting attorney to treat the defendant in a fair and impartial manner and this applies while making argument to the jury.

The Court went on to say, however, that the failure of the circuit judge to restrain the solicitor in his argument in this

18. 238 S. C. 140, 119 S. E. 2d 671 (1961).
19. 239 S. C. 10, 121 S. E. 2d 248 (1961).

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particular case did not warrant setting aside the verdict on that ground as the Court could not order a new trial for every departure from the record.

Photographers Taking Pictures in Courtroom

In *State v. Sharpe*,[20] the trial judge permitted photographers and newsreel men to make pictures in the presence of the jury during the trial of the case. While the case was reversed on other grounds, the Court reviewed the judge's action in permitting the photographers and newsreel men to make the pictures. It concluded that the trial judge committed error in permitting the photographs to be taken and cited Canon 35 of the American Bar Association's Canon of Judicial Ethics. The Court had this to say:

> We agree that Canon 35, above quoted, should be enforced in the trial of cases in the courts of this State. The Canon sets forth a standard which should govern the conduct of judicial proceedings. To allow a deviation therefrom would permit distractions or disturbances that are inimical to judicious conduct.

Entrapment

It is elementary in criminal law that entrapment by an officer and his procurement of the commission of a crime by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer is a good defense. Surprisingly enough, South Carolina has no case prior to the case of *State v. Jacobs*[21] setting forth this principal. To the contrary, the only case on the point is *State v. Rippey*,[22] which indicates that South Carolina might not recognize the defense of entrapment. In that case the Court said, ". . . we do not approve of the prosecution inducing anyone to violate the law in order that he may be caught, yet there are times that it is the only way that a violator of law can be entrapped". In *State v. Jacobs*,[23] the defendant was convicted of conspiracy to kidnap and appealed on the ground, among others, that he was entrapped into the alleged conspiracy and that it was instigated by an agent of the sheriff of Laurens County. In

20. 238 S. C. 258, 122 S. E. 2d 622 (1961).
21. 238 S. C. 234, 119 S. E. 2d 735 (1961).
22. 127 S. C. 550, 122 S. E. 397 (1924).
23. 238 S. C. 234, 119 S. E. 2d 735 (1961).

this case the Court, while holding that no entrapment had occurred, recognized the doctrine and said, "It is a general rule that where the criminal intent originates in the mind of the entrapping person and the accused is lured into the commission of a crime which he had otherwise no intention of committing in order to prosecute him therefor, no conviction may be had, though the committing of the act is not affected by any question of consent."

Intoxicating Liquors

In *State v. Cunningham*,[24] the defendant was convicted of unlawful possession of fruit jars being an apparatus, appliance and device for manufacturing alcoholic liquors. He appealed, contending that there was nothing to show that fruit jars were suitable for use in manufacturing liquor and that the evidence at most showed that he was simply taking jars to the still to transport whiskey which had already been manufactured.

In order to fully understand the decision of the Court the statute under which the defendant was prosecuted must be set out. Section 4-103.2, South Carolina Code for 1952, provides:

> The unexplained possession of any part or parts of any still, apparatus or appliance, or any device or substitute therefor, commonly or generally used for or that is suitable to be used in the manufacture of prohibited alcohol liquors shall be *prima facie* evidence of the violiation of Section 4-103.1.

Section 4-103.1 makes it unlawful to manufacture alcoholic liquors.

The jury decided that the defendant was not guilty of manufacturing whiskey but that the jars constituted an "apparatus, appliance or device" used for the purpose of manufacturing liquor. The Court held that in this case there was no evidence that fruit jars were suitable for use in manufacturing liquor. They concluded, "They are certainly not specifically designed for that purpose and are in common use in many if not most homes for other purposes." The record in the case was silent as to what type of receptacle was being used to receive the liquor as it came from the condenser.

24. 239 S. C. 212, 122 S. E. 2d 289 (1961).

The still operators may have used a tub or barrel for that purpose, the Court observed. The Court reversed the lower court, concluding that the evidence was insufficient to warrant the defendant's conviction on the ground that the jars were an apparatus, appliance or device to be used in the manufacturing of liquor.

Assault And Battery

In *State v. Prince*,[25] appellant with one boy friend drove to another boy friend's home wherein the first boy friend assaulted the second boy friend. The evidence indicated that the appellant, while the first boy friend was committing the assault, slid over in the driver's seat, backed the car up, straightened it out and when the first boy friend had finished beating boy friend No. 2 and after he got into the car, she drove off. Upon conviction of assault and battery of a high and aggravated nature the appellant appealed, contending that there was no evidence which reasonably tended to prove her guilt or no evidence from which her guilt might be fairly and logically deduced. The Court declined to favorably consider this argument on the part of appellant and stated:

> If several persons in pursuance of a common design to commit an unlawful act, whether it be felony or misdemeanor, set out together or in small parties, and each takes the part agreed upon or assigned him, some to commit the act, others to watch at proper distances and stations to prevent interference or surprise or to encourage the commission of the unlawful act or to favor, if necessary, the escape of those immediately engaged in the commision of the unlawful act, under these circumstances, if the unlawful act is committed, the act of one is the act of all and all are presumed to be present and guilty; for this would be in pursuance of a common purpose in a common cause with them each operating in his station at one and the same instant to arrive at a common end. The act of each would tend to give countenance, encouragement and protection to the whole gang and to insure the success of the common undertaking in the commission of the unlawful act.

The Court held that the evidence in the case was ample to submit to the jury the question of whether or not the ap-

25. 240 S. C. 96, 124 S. E. 2d 778 (1962).

pellant and her first boy friend went to the home of Davis, the victim, for the unlawful purpose of committing an assault upon him.

Several other cases were considered by the Court, but none of them presented novel or unusual questions and none of the cases contained questions of sufficient significance to permit review here.