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Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

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The Supreme Court of South Carolina handed down fourteen decisions involving substantive and procedural rules of criminal law during the review period. Out of the fourteen cases considered, two were reversed. The Court reviewed four cases where the verdict of the jury made the death penalty mandatory and one of the four was reversed.

Several of the cases are somewhat unusual. One involves the injunctive process to enforce laws which are punitive in nature.

Abatement and Injunctions

In *Ex parte Stone*[1] the defendants were operating a place of business in the city of Chester known as the "Teenage Canteen" in which alcoholic liquors were allegedly unlawfully sold. Warrants for the arrest of the defendants had been issued charging them with the unlawful sale of intoxicating beverages on two occasions. This action did not have a restraining influence on the defendants and they allegedly continued the unlawful sale of alcoholic liquors. The Chief of Police of Chester petitioned the court of general sessions for an order restraining and enjoining the defendants from selling or giving away any alcoholic liquors and alleged in his petition that defendants' place of business was "a menace to the community at large" and "endangered the morals and well-being of the young people who constantly frequent the said Teenage Canteen."

Based on this restraining order the defendants were restrained and enjoined from selling or giving away any alcoholic liquors temporarily and were required to show cause why such restraining order should not be made permanent.

Subsequently the chief of police petitioned the court for an order adjudging the defendants in contempt of court for violating the restraining order by selling additional alcoholic liquors after the court's order had been issued.

When the contempt proceedings were heard the lower court filed an order holding one defendant in contempt and ordered

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1. 236 S. C. 263, 113 S. E. 2nd 786 (1960).

him to pay a fine of $200.00 and be imprisoned for a period of six (6) months.

From the order adjudging him in contempt, the defendant appealed, contending that the order was too vague and general and that in any event the punishment should have been imposed under another section of the Code, to-wit Section 15-231.1, rather than section 4-406.

The Supreme Court dismissed the defendant's exceptions and held that the legislature had the power to declare places where liquor is sold contrary to the law to be common nuisances and had the power to provide for their abatement. The court ratified the law as laid down in *Ex parte Keeler*[2] wherein it was held that the procedure to abate nuisances such as this might be summary in nature and the fact that no provisions were made for trial by jury did not render such legislation unconstitutional. The Court reaffirmed the principle that the equitable jurisdiction of the court to enjoin a public nuisance is not affected by the fact that a criminal prosecution may also be instituted for the acts which constitute the nuisance.

The appellant in the case above, Langley, was also the appellant in two other cases before the Supreme Court. In one of the cases, *State v. Langley*,[3] the appellant appealed from the conviction referred to above for the unlawful sale of intoxicating liquor. The defendant's appeal was predicated on the contention that the judge improperly admitted certain evidence and on the ground of insufficiency of the evidence to convict.

The Court held that the question of the insufficiency of the evidence had been properly ruled upon by the lower court and that the guilt or innocence of the defendant was a question for the jury.

Gaming

In the third case, *State v. Langley*,[4] the appellant was convicted before a magistrate of permitting a minor, under the age of 18, to play a pin ball machine. He appealed to the general sessions court and from there to the South Carolina Supreme Court. In this appeal, appellant called to his aid

2. 45 S. C. 537, 23 S. E. 865 (1895).
3. 236 S. C. 395, 114 S. E. 2d 506 (1960).
4. 236 S. C. 583, 115 S. E. 2d 368 (1960).

Article I, Section 5 of the Constitution of South Carolina, and the 14th Amendment to the Constitution of The United States.

The appellant was convicted of violating Section 5-624.2 of the Supplement to the Code of Laws South Carolina for 1952 which provides, "It shall be unlawful for the operator of any pinball machine to permit any minor under the age of 18 to play or operate such machine. The operator of any pinball machine shall be responsible that every person who plays or operates his machine is in fact legally authorized to do so."

The defendant admitted that the operator of the machine referred to at the time of his arrest was a minor of the age of 17 and that the machine was in his place of business. The appellant contended that the act in question prohibited the carrying on of a legal business. The State contended that the act in question was a regulation of business under the police power of the State. The Supreme Court held that the General Assembly in licensing the operation of such machines had a right to regulate such operation under its police power for the public benefit and to require that the operation be conducted in such a way as not to be obnoxious to public health or morals. The Court held, "the very nature of the machine, the flashing of the lights, the mounting of the score, and its operation in general, is conducive to wagering or gaming." The Court went on to say, "Such police power may be exercised for the benefit of the public safety, health, peace, morals, or general welfare . . . ."

Arrest: Crime Committed in the Presence of the Officer

In *State v. Williams*[5] the defendant was a passenger in an automobile operated by his brother when the car was stopped by a highway patrolman. After the defendant dismounted from the car, the patrolman saw in the vehicle a jar of unstamped whiskey and removed it. The driver of the vehicle was placed under arrest and then an attempt was made to place Williams under arrest. The defendant resisted, took the officer's pistol and threw it in a field.

The defendant was subsequently charged with assault with a deadly weapon and at the trial raised as a defense unlawful arrest. It was argued that defendant had nothing to do with the whiskey being in the automobile and therefore he com-

5. 237 S. C. 252, 116 S. E. 2d 858 (1960).

mitted no offense while in the presence of the patrolman. At the conclusion of the trial, appellant's counsel asked that the jury be instructed that an offense is not committed in the presence of an officer unless his senses afford him knowledge that the offense is being committed. It would therefore follow that if the officer did not know at the time of the arrest that an offense was being committed he would have no authority to arrest the defendant. The trial judge refused the request to charge.

The Supreme Court concluded that the request of the appellant's counsel involved a sound legal principle and said, quoting the Minnesota decision of *State v. Pluth*,[6]

> Although a person may actually be committing a criminal offense, it is not committed in the presence of an officer within the meaning of the statute, if the officer does not know it. And where the officer could not observe nor become cognizant of the act constituting the offense by the use of his senses it could not be committed in his presence so as to authorize an arrest without a warrant.

Grand Larceny

In the same case the defendant was charged with robbery and grand larceny because of his having taken the officer's pistol. The defendant contended that in order to make out the offense of larceny there must be a felonious purpose. The taking must be done *animo furandi*—with a view of depriving the true owner of his property and converting it to the use of the offender. He contended that the taking here was to avoid an unlawful arrest and that there was no intent to steal.

The Court was apparently genuinely concerned about whether the evidence warranted an inference of an intent to steal under the peculiar facts of the case. It reviewed a number of cases and concluded, "While the question is a close one, it is our conclusion that the question of felonious intent should be determined by the jury." It went on to say, "of course a jury would be fully justified in concluding that there was no intent to steal the pistol but that the dominant and primary purpose of appellant was merely to disarm the patrolman, and that shortly after doing so, he discarded the pistol."

The defendant moved for a directed verdict on the larceny charge on the ground that there was no proof that the pistol

6. 157 Minn. 145, 195 N. W. 789 (1923).

was worth $20.00 or more. There was no evidence produced at the trial as to its value. The Court concluded that the appellant's contention that the evidence did not support a conviction of grand larceny should be sustained since there was no proof of the value of the pistol.

Rape

The Court reviewed four cases involving rape. The death penalty had been given in three cases and the jury had failed to convict the defendant of the crime of rape in the other case, but had returned a verdict of guilty of assault and battery of a high and aggravated nature.

Charge of the Facts

In *State v. Thorne*,[7] the defendant was convicted of the rape of a sixteen-year-old girl. One unusual aspect of the case was that the defendant took the stand and asked that he be executed for his crime.

In the charge of the presiding judge to the jury the following language was used:

> Mr. Foreman and Gentlemen, every man the law says has the right to walk up and down the streets and highways of our State without fear of being robbed of his money. And I will tell you frankly that every woman has the right to walk upon the highways and our streets without fear of being robbed of something which God alone gives her and when that is stolen from her she is very poor indeed. Such an act is not looked upon by the law with any degree of lightness. The facts are for you. The law is established in this State as it is written.

The defendant appealed contending that this was an improper expression of opinion on the facts.

The Court concluded that this was an improper expression of opinion prohibited by Article 5, Section 26 of the Constitution of the State of South Carolina which provides, "Judges shall not charge juries in respect to matters of fact, but shall declare the law."

The Court went on to say:

> Proper evaluation of the erroneous portion of the charge requires that we view it in the light of the circumstances and it is impossible to say just what effect this portion

7. 237 S. C. 248, 116 S. E. 2d 854 (1960).

of the instruction, coming so late in the charge, had upon the jury, but it must be assumed that it was not disregarded.

Being Held in Custody for Unreasonable Length of Time Prior to Being Charged with Rape

In *State v. Outen*[8] the defendant was prosecuted for and convicted of rape. Numerous exceptions were raised, among them one that the defendant had been held in custody for an unreasonable time prior to being charged with rape. The Court dismissed the exception because review of the appeal record failed to show that the question was raised upon the trial of the case. The Court said:

> If the appellant conceived that any prejudice had resulted to him by reason of his detention without being formally charged with the crime of rape before a magistrate, this question should have been raised by proper objection or motion during the trial. We have held that where a party has the option to object or not as he sees fit, the failure to exercise the option when the opportunity therefor presents itself must, in fairness to the Court and to the adverse party, be held either to constitute a waiver of the right to object, or to raise an estoppel against the subsequent exercise thereof.

Evidence of Reputation

The defendant also objected to the refusal of the trial judge to permit a witness to answer the following question about the defendant. "Q. From your knowledge, and from the reputation he had, do you think he was a kind of person to get into this kind of difficulty?"

The solicitor interposed an objection to this question and the lower court sustained it. The Supreme Court sustained the lower court: "It was proper for the witness to testify to the general reputation of the appellant but he could not express an opinion as to whether he was guilty of the crime with which he was charged."

Admissibility of Photographs

In *State v. Johnson*[9] the defendant was convicted of assault with intent to ravish and appealed on the ground, principally,

8. 237 S. C. 514, 118 S. E. 2d 175 (1961).
9. 236 S. C. 207, 113 S. E. 2d 540 (1960).

that photographs of the home of the prosecutrix were inadmissible. The Court concluded there was nothing in any of them which was calculated to inflame or arouse the sympathy or prejudice of the jury.

Admissibility of Complaint of Female

In *State v. Harrison*[10] the defendants were charged with rape and convicted of assault and battery of a high and aggravated nature. The court permitted the mother of the prosecutrix to relate the details of the complaint made by her daughter when she arrived at the home of a friend less than two hours after the assault. The defendants objected, but on appeal the Supreme Court sustained the trial judge saying, "It is well settled that the fact that the prosecutrix complained of a rape may be shown in corroboration of her testimony." The Court went on to say, "The particulars or details are not admissible but so much of the complaint as identified 'the time and place with that of the one charged' may be shown."

Inquiring into Voluntariness of Confession

Further objection was had to the trial judge's conducting the preliminary inquiry as to the voluntariness of a confession in the presence of the jury. The Supreme Court, while concluding that the better practice would be to conduct this preliminary examination in the absence of the jury, concluded that where the confession was found to be admissible the failure to conduct the preliminary examination in the absence of the jury would not be a reversible error.

Election Between Reckless Homicide and Involuntary Manslaughter

In *State v. Cavers*[11] the defendant was prosecuted for homicide as the result of a fatal traffic accident at an intersection in the city of York. From a conviction of reckless homicide, the defendant appealed on the ground, *inter alia*, that the State should have been required to elect between reckless homicide and involuntary manslaughter. The Court sustained the trial judge's action in not requiring an election and charging involuntary manslaughter even though the defendant had not been specifically indicted for it. "The State cannot be required to elect between counts in an indictment when

10. 236 S. C. 246, 113 S. E. 2d 783 (1960).
11. 236 S. C. 305, 114 S. E. 2d 401 (1960).

they charge offenses of the same character and refer to the same transaction, whether or not one charge is a common law offense and another statutory offense."

Contributory Negligence as a Defense to Reckless Homicide

Appellant raised a second question asserting that the only reasonable inference from the evidence was that decedent's negligence and recklessness was the sole proximate cause of the collision. The Court disagreed with this contention and asserted that even if decedent had been contributorily negligent such negligence would not be a defense in a case such as this. The Court said, "It is sufficient to convict if defendant's recklessness is a contributing proximate cause."

Evidence of Willingness to Take Polygraph Test

The only murder case to be reviewed by the Supreme Court was *State v. Britt.*[12] Following the conviction of murder, the defendants appealed alleging numerous specifications of error. One defendant wanted to introduce evidence of his willingness to take a lie detector test and argued that had he been tried separately he could offer such testimoney. The Court overruled this objection and stated, "It is our opinion that evidence of the willingness of the appellant, Westbury, to take a lie detector test was inadmissible whether tried jointly with the appellant, Britt, or separately." The Court quoted several cases holding in effect that evidence of a lie detector test is not admissible and neither is evidence of professed willingness or refusal to submit to such test.

Separate Trials for Jointly Indicted Defendants

The defendant, Westbury, asserted that error was committed by the failure of the trial judge to order separate trials. He contended that upon a separate trial he could impeach the testimony of Britt by showing previous convictions and that in a separate trial the confession of Britt would not be admissible against Westbury. He also asserted that upon a separate trial he could show that he was over-persuaded and dominated by Britt. The Court overruled all these objections holding that a trial together was proper and it concluded that Britt's testimony could be impeached at this trial should it be offered and that in the instant trial the confes-

12. 237 S. C. 293, 117 S. E. 2d 379 (1960).

sion of Britt would not be admissible against Westbury. The Court further concluded that if Britt had over-persuaded and attempted to dominate Westbury there was no reason in the instant trial why Westbury could not have tendered such evidence.

Voir Dire

The defendant, Britt, contended that he was entitled to a new trial because the trial judge erred in refusing him the right of cross examination of the jurors on their voir dire. The Court disposed of this contention by stating:

> The record shows that the trial Judge sufficiently examined the jurors to determine whether they were indifferent in the cause. This is a question of fact for determination by the trial Judge and is not reviewable in this Court unless it should appear that his conclusion is wholly without evidence to support it. *State v. Fuller*, 229 S. C. 439, 93 S. E. (2d) 463.

The trial judge in this case did, with meticulous care, examine each and every prospective juror and presented them only when found to be fully qualified and indifferent.

Numerous other exceptions were urged upon the Court as grounds for a new trial. None of these exceptions invited any new principles of law and all were overruled by the Court.

Change of Venue

State v. Graham[13] was a prosecution for wilfully and feloniously setting fire to a hotel with the intent of defrauding insurance companies. From a judgment of conviction, the defendant appealed, alleging insufficiency of evidence to convict and alleging that under any circumstances the place of trial should be changed from the county where the crime occurred to an adjoining county on the ground that an impartial jury could not be obtained.

The Court held that the evidence was sufficient for the jury to pass upon it and that the conviction of the defendant by the jury would not be disturbed by the Supreme Court. The Court concluded that the motion for change of venue on the ground that an impartial jury could not be obtained was addressed to the discretion of the trial judge and no abuse of discretion had been shown.

13. 237 S. C. 278, 117 S. E. 2d 147 (1960).

Habeas Corpus

Kelly v. Manning,[14] was a habeas corpus proceeding. Appellant, an inmate of the State Penitentiary serving two life sentences, contended that at the time of his plea of guilty he was drunk and by reason thereof he should be granted a new trial. The facts showed that if he were drunk he was voluntarily so. The Court disposed of this contention with the following:

> No appeal was taken from his sentence; no motion for new trial was made; and more than ten years lapsed before the petitions now under review were filed in his behalf. If in fact he was drunk when he entered his plea, he has shown no excuse for his failure to make that contention known before now.

14. 237 S. C. 364, 117 S. E. 2d 362 (1960).