Journal of Criminal Law and Criminology

Volume 2 | Issue 4 Article 10

1912

Judicial Decisions on Criminal Law and Procedure

JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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APPEAL AND ERROR.

Cadenhead v. State, Okla. App., 117 Pac. 462. *Acceptance of Parole.* Pending an appeal from a conviction, the prisoner accepted a parole from the governor, and consented to the conditions thereof. Held, his appeal should be dismissed.

ARRAIGNMENT.

People v. Heath, Colo., 117 Pac. 138. *No Arraignment and No Plea.* The trial court arrested a judgment of conviction because the record did not show that the defendant had been arraigned or that he ever pleaded or was required to plead to the information. The prosecution appealed. Held, the error in the proceedings was not cured by a statute providing that "No motion in arrest of judgment or writ of error shall be sustained for any matter not affecting the real merits of the offense charged in such indictment," as that statute related to the merits of the offense as charged, and not to proceedings during the trial. And it was not cured by a statute providing that "No indictment or information shall be deemed insufficient, nor shall the trial, judgment or other proceedings thereon be reversed or affected by any defect which does not tend to prejudice the substantial rights of the defendant on the merits," as this seemed to refer to defects in the information, and not to errors committed by the court during the trial.

CONSTITUTIONAL LAW.

State v. Rogne, Minn., 132 N. W. 5. *Self-incrimination.* Without the prisoner's knowledge or consent, the sheriff and county attorney took from his premises certain articles tending to show that he had committed a crime, and these articles were put in evidence at his trial. Held, not a violation of his constitutional right, as he was in no proper sense compelled to give evidence against himself.

CONFESSIONS.

State v. Brown, Dela., 80 Atl. 146. *Voluntary Character.* Confessions obtained at a coroner's inquest under oath, while accused were in the custody of the sheriff, having been taken from jail handcuffed to the scene of the murder, where the inquest was held, were involuntary and inadmissible.

CONTEMPT.

U. S. v. Barrett, 187 Fed. 378. *Jurisdiction to Punish.* Where, after a trial of a case in a Federal Circuit Court, and while the jury were considering their verdict, two persons, interested in the corporation defendant, made an assault on the plaintiff's attorney on the street, in full view of the jury room,

the court, under its general jurisdiction to see that counsel practicing before it are not interfered with, had jurisdiction to punish such individuals for contempt.

In re Shay, Cal., 117 Pac. 442. *By Attorney.* An attorney wrote to his client falsely stating that the justices of the Supreme Court had stated their opinions to him on the case which was to be heard before them. The letter was subsequently published. Held to be contempt of court, as it tended to create the false impression that the members of the court were on terms of undue intimacy with powerful litigants, and such an impression "must tend greatly to impair the confidence of the people in the integrity of the court."

EMBEZZLEMENT.

State v. Geyer, N. J., 80 Atl. 489. *By Agent.* Under Crimes Act (P. L. 1898, p. 844) sec. 184, making it a misdemeanor for any agent intrusted with the collection or care of money to fraudulently take or convert the same or any part thereof to his own use, an attorney employed by a wife to defend a divorce suit, who made an agreement with the husband that if the husband would place in the attorney's hands a certain amount for purposes of settlement of the wife's claim for alimony and an additional amount for traveling expenses, the attorney would visit the wife and settle with her for as little as possible, and that he should, as between him and the husband, be entitled to retain whatever was left, was guilty of embezzlement, not only as to a portion of the amount which she agreed to take in settlement and which he refused to pay her except upon her giving a general release, but also as to the difference between the amount for which she agreed to settle and the amount committed to him for purposes of settlement.

EVIDENCE.

State v. Badnelley, R. I., 79 Atl. 834. *Res Gestae.* In a prosecution for assault with intent to commit rape, where the prosecutrix had made complaint in the house to members of the household as they came in soon after the offense, her complaint to her husband, made about one hour after the offense, is admissible as a part of the *res gestae.*

People v. Barnovich, Cal. App., 117 Pac. 572. *Corroboration of Accomplice.* The only proof that the prisoner was the person who blew up Hartman's house with dynamite, aside from the testimony on one admitted and one disputed accomplice, was evidence that the prisoner's shoes fitted perfectly in footprints found near the premises where the explosion occurred, that he had dynamite on his person shortly before and immediately after the explosion, and that he had repeatedly threatened to "fix Mr. Hartman with dynamite." Held, while this evidence, standing alone, might have but slight weight in connecting the prisoner with the crime, it did tend to do so, and was sufficient corroboration of the testimony of the accomplices.

State v. Mattivi, Utah, 117 Pac. 31. *Similar but Unconnected Facts. Harmless Error.* On a prosecution for statutory rape, the prosecutrix was permitted to testify, over the prisoner's objection, that they occupied the same room for three nights following that on which the offense was committed. The prisoner took the stand, denied that he had promised marriage and testified that the prosecutrix had told him she was above the statutory age, but did not deny the

fact of intercourse. Held it was error to admit the evidence of separate and independent acts of intercourse, occurring after the one complained of, as tending to prove independent offenses. That it was not admissible as corroboration, since she could not corroborate her testimony as to one fact, by testifying to a similar fact occurring at a different time. If the prisoner had not taken the stand, it might have been necessary to reverse the judgment for this error, as then his failure to deny any fact, however, inculpatory, could not be used against him. But when he took the stand and denied her testimony as to the promise of marriage but failed to deny that as to the intercourse, he, in effect, conceded the truth of the latter testimony. As the only effect of the evidence improperly admitted was to tend to establish this conceded fact, the error was without prejudice, hence the conviction should be affirmed.

EXTRADITION.

Gluckman v. Henkel, U. S. Marshal for the Southern District of N. Y., 31 Sup. Ct. Reptr. 704. Good faith to the demanding foreign government requires the surrender of the accused in extradition proceedings if there is presented, even in somewhat untechnical form, such reasonable ground to suppose him guilty of crime as to make it proper that he should be tried.

The effect of a variance between the complaint and the evidence in proceedings for the extradition of a person to a foreign country is to be decided on general principles, irrespective of the law of the state where the proceedings are had.

FOOD AND DRUG ACT CONSTRUED.

U. S. v. Johnson, 31 Sup. Ct. Reptr. 627. *Misbranding.* False and misleading statements in the labels on a proprietary medicine as to its curative or remedial effects, but which do not import any statement concerning identity, are not "misbranding," within the meaning of the Food and Drugs Act of June 30, 1906 (34 Stat. at L. 768, chap. 3915), sec. 8, which defines that term as applicable to all drugs or articles of food, the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular.

HOMICIDE.

Commonwealth v. Colandro, Pa., 80 Atl. 571. *Killing in "Passion."* Though the sudden passion which will reduce the killing to manslaughter is usually anger, yet it is not limited thereto, but sudden terror, rendering the mind incapable of cool reflection is sufficient.

Commonwealth v. Phelps, Mass., 58 N. E. 868. If accused without warning an officer to desist from attempting to arrest him, in cool blood, and with express malice, intentionally killed the officer, accused is guilty of murder, though the officer acted unlawfully in attempting to arrest without a warrant.

People v. Cleminson, Ill., 95 N. E. 157. *Harmless Error.* A conviction of murder will not be reversed for erroneous admission of evidence, where guilt is shown beyond a reasonable doubt by competent evidence.

People v. Gukouski, Ill., 95 N. E. 153. *Responsibility for Acts Done in Furtherance of a Common Design.* Evidence that defendants conspired with one

K, a co-defendant, to upset a bakery wagon belonging to a baker whose men were on strike, and destroy the bread, and that K was to attack the driver, and that, on the arrival of the wagon, K shot and killed the driver, sustained a conviction for murder: defendants being liable for the acts of K done in furtherance of the common object.

INDICTMENT—GRAMMATICAL ERROR.

State v. Hawkins, N. Car., 71 S. E. 326. An indictment for burglary charged that the prisoner "unlawfully, wilfully, and feloniously break and enter the town hall." Held, that as the meaning of the charge was clear, the omission of the word "did" was a clerical or grammatical error and was cured by the statute.

INDICTMENT AND INFORMATION.

People v. Payne, 129 N. Y. Supp. 1007. *Error in Information.* An information for violation of the motor vehicle law, referring to a chapter of the laws by a wrong number, does not entitle defendant to a dismissal, where the name of the law and the date of its passage are stated.

State v. Lamb, N. J., 80 Atl. 111. *Duplicity—Amendment.* An indictment charging in the same count two distinct offenses of which the mode of trial is the same, and the punishment is the same in character even though it be different in degree, where the same defenses are open to the accused, it is not necessarily bad for duplicity; and upon a motion to quash the state may be permitted to strike out one of the charges, if what is left suffices to charge a crime.

Dukes v. State, Ga., 71 S. E. 921.. *Exceptions Must Be Negatived.* An indictment charged that the prisoner "did unlawfully sell and furnish cocaine, contrary to the laws of said state," etc. The statute excepted from penalty sales made on prescription. Held, the statement that the sale was unlawful was not a statement of fact, but a conclusion of the pleader. Hence the indictment was fatally defective because it did not expressly state that the sale was not on prescription, nor so specifically state the facts as to show by implication that it was not. Conviction reversed.

INSTRUCTIONS.

State v. Burke, N. J., 79 Atl. 882. *Presumption of Innocence.* An instruction in a criminal trial that, "if the circumstances incident to the situation admit of drawing an inference excluding any notion but that of guilt, it would be sufficient to maintain the contention of the state that the presumption of innocence has been overcome," is erroneous.

State v. Papa, R. I., 80 Atl. 12. *Invading Province of Jury.* An instruction, in a prosecution for assault with a dangerous weapon, that the flight of accused after the assault made a prima facie case of guilt on his part, if not explained, is erroneous, since, under Const., Art. I, Sec. 14, giving the accused the protection of the principle that every person is presumed innocent until he is proven guilty, and under Art. I, Sec. 10, declaring an accused shall not be deprived of life, liberty, or property unless by the judgment of his peers or the law of the land, it is the province of the jury to determine the weight of this sort of evidence.

JURY.

People, ex rel., Stabile v. Warden of City Prison of City of New York, N. Y., 95 N. E. 728. *Power of Court to Discharge.* Code Cr. Proc., Sec. 428, authorizing the court to discharge the jury before verdict when, after the lapse of a reasonable time, the jury shall declare themselves unable to agree, does not permit a discharge before the jury has declared their inability to agree; and, where the jury in a murder case retired for deliberation at 5:15 o'clock p. m., their discharge five hours later without any request from the jury, and on the foreman's statement in response to a query that the jury had not yet agreed on a verdict, was unauthorized.

LARCENY.

State v. Smith, Nev., 117 Pac. 19. *Consent of Owner.* Pursuant to a conspiracy to steal gold amalgam, one conspirator tried to "fix" the watchman, thought he had succeeded, and told the conspirator who was to steal the amalgam that it would be safe to do so when the watchman said "All right." The watchman had reported the matter to a deputy sheriff, who was an employe of the company that owned the amalgam, and had been ordered to feign compliance, for the purpose of detecting the conspirators, but not to touch any of the amalgam himself nor consent to the stealing. The watchman said "All right," but refused to suggest any mode or proceeding, or to receive the amalgam and hide it for the thief. He told the thief that the agreement was he was to have nothing to do, only turn his back on the proceedings; and that it was not safe for him to touch the amalgam, as the watchmen were possibly watched. There was no evidence that either the watchman or the deputy was authorized by the company to induce the prisoner to take the amalgam or to aid in its removal. Held, as "the offense was planned by the prisoner, and every act necessary to constitute grand larceny was done by his confederates, without the taking of the amalgam being suggested or advised by the company or its agents" and the deputy sheriff and watchman allowed the amalgam to be taken "for the purpose of detecting crime and entrapping the perpetrators * * * but did not plan, urge or advise its taking, or handle it, or assist in its removal," the company had not so consented to the taking as to prevent the prisoner from being guilty of larceny.

MONOPOLIES.

U. S. v. Patton, 187 Fed. 664. *Cornering the Market.* Since the operation of a scheme to corner the cotton market and thereby raise the price of cotton for the purpose of compelling a settlement by short speculators at an abnormally high price does not directly affect or restrain interstate commerce, there being no direct relation between prices and such commerce, an indictment alleging a conspiracy to run a cotton corner without any alleged intent to obstruct interstate commerce did not charge a violation of Sherman Anti-Trust Act, July 2, 1890, Ch. 647, Secs. 1, 2, 26 Stat. at L. 209.

RAPE.

People v. Marks, 130 N. Y. Supp. 524. *Female under Age of Consent.* Neither the consent nor the previous chastity of a girl, nor her representations

nor information derived from others as to her age, nor her appearance with respect to age, is a defense to a prosecution for rape on a girl under statutory age of consent.

SENTENCE.

State v. Durham, S. Car., 71 S. E. 847. *Erroneous Sentence.* When the trial court imposes a sentence not authorized by law, a new trial will not be granted, but the sentence will be set aside and the case remanded for a lawful sentence.

TRIAL.

State v. Thorne, Utah, 117 Pac. 58. *Misconduct of Juror.* After a capital case had been submitted to the jury, one of the jurors, in violation of his instructions, left the others, and talked with someone over the telephone. An officer was with him. Held, as all communication was forbidden and the juror was a wrongdoer in talking to anyone without permission of the court, prejudice would be presumed, and as the state had not shown the communication to be harmless, the conviction should be reversed. It was said that if communication had not been forbidden, prejudice would not be presumed from an unexplained communication, even though from the attending circumstances it were of doubtful propriety.

Dowdell v. U. S., 31 Sup. Ct. Reptr. 590. *Confronting Witnesses.* The right of the accused, under the Philippine Island Bill of Rights of July 1, 1909 (32 Stat. at L. 691, Chap. 1369, Sec. 10), to meet the witnesses face to face, was not infringed by the action of the Supreme Court of the Philippine Islands, upon suggestion of diminution of the record, in ordering the judge and clerk of the court below to supply the failure of the record to show whether the accused pleaded to the complaint, and were present in court during the entire trial.

State v. Thomas, Ia., 132 N. W. 51. *Limiting Cross-examinations.* The limits to be placed upon the cross-examination of witnesses are so largely within the discretion of the trial court, that a conviction will not be reversed unless it is shown that the rulings were arbitrary or unfair, and resulted in prejudice to the defendant.

State v. McKay, S. Car., 71 S. E. 858. *Ordering Witness Arrested for Perjury.* A witness for the prosecution having sworn that he knew nothing about the case, and that the testimony he had given against the prisoner at the preliminary examination was false, the prosecuting attorney, in open court, ordered the sheriff to arrest him for perjury. The defendant objected on the ground that it was calculated to intimidate other witnesses from varying from the testimony given at the preliminary examination. Held, there was no prejudice, and the prompt action was commendable, as tending to prevent miscarriages of justice.

State v. Battey, R. I., 80 Atl. 10. *Waiver of Jury.* Const., Art. I, Sec. 15, declares that trial by jury shall remain inviolate, but that it may be waived in civil cases. Gen. Laws 1909, Ch. 296, Sec. 9, provides that all criminal appeals shall be tried in the Superior Court with a jury. Held, that accused, on an appeal to the Superior Court, cannot waive a jury trial.

People v. Kinney, N. Y., 95 N. E. 756. *Misconduct of Trial Judge.* Where the trial judge in rulings on evidence, in giving directions to counsel for accused and in charging the jury inadvertently and unintentionally did things which in the aggregate were calculated to create such a prevailing atmosphere of apparent prejudice to the accused's cause that the jury could scarcely escape its substantial influence, accused was entitled to a new trial, regardless of the strength of the people's case on the question of guilt or innocence.

People v. Toledo, 130 N. Y. Supp. 440. During adjournment, after the evidence had been all introduced, one of the jurymen was seriously injured, whereupon it was agreed between the assistant district attorney and the defendant's attorney that a juror should be deemed withdrawn, that the trial so far as it had taken place should be declared a mistrial, that the eleven jurors be resworn, that a new juror be impaneled and sworn to take the place of the absent juror, that the testimony theretofore taken be read to the entire jury, and that both sides then sum up, and the court charge the jury in the usual manner. This practice was carried out and the defendant convicted. Held, that, since all the jurors had not the benefit of the testimony as given by the witnesses, the legality of the procedure was sufficiently doubtful to entitle accused to a certificate of reasonable doubt.

UNNECESSARY PARTICULARITY—VARIANCE.

State v. Kelly, N. Dak., 132 N. W. 223. An information charged that the prisoner maintained a common nuisance for the sale of intoxicating liquors "in a building situated in the city of Minot, * * * in the county of Ward." The proof was that the building was about one hundred yards outside the city limits. Held, that though the information would have been sufficient had it merely stated that the building was situated in the county, the state having unnecessarily charged a more particular description, the description as laid in the information must be proven, and the trial court erred in not advising a verdict of acquittal.

WITHDRAWAL OF PLEA OF GUILTY.

People v. Walker, Ill., 95 N. E. 475. *Discretion.* It was an abuse of discretion not to vacate the judgment on a plea of guilty in a bigamy case, and permit defendant to withdraw his plea of guilty and allow him to submit his case to the jury; he making affidavit that he did so on the advice of counsel, on the assurance of such counsel that he had arranged with the state's counsel that the bigamy charge was to be dropped, he having pleaded to the charge of adultery.