Journal of Criminal Law and Criminology

Volume 50
Issue 1 *May-June*

Article 12

Summer 1959

Abstracts of Recent Cases

United States

Bail

Excessive bail may not be required. Only the amount of bail which is reasonably calculated to insure that the accused will stand trial is permissible in a bailable offense.

Cruel and Unusual Punishments

The Federal Constitution provides that cruel and unusual punishments shall not be inflicted. The punishments which are authorized must be set forth in the applicable statute and may include death, imprisonment, fine.

United Kingdom

Bail

The Bill of Rights, 1688, provides that "excessive bail ought not to be required." Except in various serious offenses, such as murder, bail is discretionary with the court. A person charged with other than certain enumerated indictable misdemeanors, before a justice of the peace is entitled to bail.

Cruel and Unusual Punishments

Although there is no express statutory prohibition against the imposition of cruel and unusual punishments in English law, a court may impose only such sentences as are enumerated and authorized by statute.

ABSTRACTS OF RECENT CASES*

Prosecutor May Ask for Mistrial without Fear of Double Jeopardy—The defendant went on trial for selling narcotics. When his counsel attempted to impeach the prosecuting witness on cross-examination the judge charged counsel with making a "manufactured and emotional appeal" to the jury. Following a colloquy between counsel and the court, the *prosecutor* asked for a mistrial and it was granted. Defendant was later retried and convicted. He appealed on the ground that his second trial had placed him in double jeopardy. The Illinois Supreme Court denied the appeal. *People v. Thomas*, 155 N.E.2d 16 (Ill. 1959).

The court admitted that the defendant had been placed in jeopardy at the first trial. It did not follow, though, the court declared, that the defendant's constitutional rights had been violated; juries have been discharged, and the defendant tried again, in many instances, e.g., when a judge or juror has been taken ill, without double jeopardy following.

The court seemed bothered by the fact that here the *prosecutor* asked for the mistrial. (See Abstract, "Mistrial As Acquittal," in vol. 49, at p. 356 of this *Journal*.)

The court avoided this, however, by holding that the remark of the trial judge to defendant's counsel was such serious error that a new trial or reversal would have been granted if the trial had gone to conclusion and the defendant had been convicted. Since the result was the same in either event, the court declared that the double jeopardy clause should not be given such an "expanded scope" that would allow the defendant to escape entirely.

To discourage prosecutors from deliberately setting up a mistrial situation, the court warned that "Different considerations might well come into play if the defect had been caused by the prosecution in an effort to secure an unfair advantage."

Jury Sees Jar Containing Victim's Flesh—In a prosecution for murder, committed by attaching dynamite to the ignition system of the victim's automobile, the prosecution brought into the courtroom and placed on the counsel table a jar which contained a portion of the flesh of the deceased. Defense counsel strenuously objected to this, and the trial judge excluded both the jar and its contents from the evidence. After the defendant was convicted and given a ninety-nine year sentence, he appealed on the ground that the use of the jar was prejudicial error. The Court of Criminal Appeals of Texas denied the appeal and affirmed the conviction, holding that, even though the jar was excluded from evidence, it had a sufficient connection with the case, so that it was reasonable for the prosecutor to attempt to introduce the jar into the evidence. *Washburn v. State*, 318 S.W.2d 627 (Texas 1958).

The defendant's argument was that this jar was obviously improper evidence, and thus it was prejudicial error for the prosecutor to bring it into the courtroom, in view of the jury, under the

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most heinous crime must be given a fair trial, and his rights protected as an American citizen. The court, in carrying out this duty, determined that photographs such as these were so gruesome and shocking that they were always prejudicial, unless they served a very important purpose in the case. However, the instant photographs served no material purpose, other than to arouse the emotions of the jury, and so their use was reversible error.

In vigorously opposing the announced decision, the dissent said, "A murder trial is never a *Sunday School Picnic* and can not be turned into one." Thus, if an accused created the "horrible sight" constituting the crime, the jury should know just how terrible it was. Likewise, society owes the defendant no protection from the consequences of his own viciousness and depravity in the commission of his crimes. The dissent characterized the rule announced in the majority opinion as substantiating the belief that, the more horrible and shocking the crime, the more likely it is that the guilty party will be able to escape conviction through the exclusion of such evidence "because it would prejudice the jury."

Court Protects Marriage in Mann Act Prosecution—The petitioner was convicted on a charge of violating the Mann Act (18 U.S.C. §2421) by transporting a girl from Arkansas to Oklahoma for immoral purposes. Over the petitioner's objections, the District Court permitted the Government to use his wife as a witness against him. The petitioner appealed, and the United States Supreme Court reversed his conviction, holding that the federal courts must bar the testimony of one spouse against the other unless both consent. *Hawkins v. United States*, 358 U.S. 74 (1958).

Mr. Justice Black, delivering the opinion for the court, stated that the basic reason the law refused to pit wife against husband or husband against wife in a trial, where life or liberty is at stake, is the belief that such a policy is necessary to foster family peace, not only for the benefit of husband, wife, and children, but for the benefit of the public as well. The Government did not dispute this point, but rather argued that if a husband or wife testifies against the other voluntarily, it is a strong indication that the marriage is already gone, and thus the general rule should have no application. The Court conceded that this might be true in some cases, but it would not believe that all marital flare-ups, in which one spouse wants to hurt the other, are permanent. Therefore, it could not allow adverse testimony which would surely destroy almost any marriage.

Mr. Justice Stewart concurred in the result reached by the majority, but he expressed a greatly divergent attitude toward the husband-wife privilege. He expressed concern that the announced rule would impede the discovery of truth in a court of law, and thus impede the doing of justice. However, he did not dissent, because he believed that the facts of this case indicated that the petitioner's wife testified involuntarily, since she had been imprisoned as a material witness, and released under a bond conditioned upon her appearance in court as a witness for the Government.

Wife Testimony Against Husband in Federal Cases—The Hawkins Case Distinguished—The petitioner was convicted on a charge that he violated the Mann Act (18 U.S.C. §2421) by transporting a girl from one state to another for immoral purposes. In this case, the woman transported was the petitioner's wife. At the trial, his wife, the prosecutrix, was allowed to testify about the crime, over the petitioner's objections. The conviction was appealed on the basis of *Hawkins v. United States*, 358 U.S. 74 (1958) (see above abstract), but the United States Court of Appeals for the Fifth Circuit affirmed the conviction, holding that a wife may testify against her husband concerning pre-marital Mann Act violations against her. *Wyatt v. United States*, 27 U.S.L. WEEK 2358 (5th Cir. Jan. 27, 1959).

The court acknowledged that the *Hawkins* case reaffirmed the general common law rule that a husband or wife may not testify against the other, but the court pointed out that *dictim* in the *Hawkins* case recognized that the general rule did not apply where the husband commits an offense against the person of his wife. The defendant contended that this exception did not displace the general rule in this case, because, although the woman and the defendant may have been contemplating marriage, she was not, at the time of the alleged offense, his wife. Thus, any possible offense was not, and could not have been, against the person of his wife. But this distinction the court refused to accept, holding that the fact that the transportation occurred before marriage certainly would not disqualify the testimony of the wife who was the victim.

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