SMU | DEDMAN SCHOOL OF LAW

SMU Law Review

Volume 9
Issue 2 *Survey of Southwestern Law for 1954*

Article 7

1955

Criminal Law

Joe H. McCracken III

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation

Joe H. McCracken III, *Criminal Law*, 9 Sw L.J. 197 (1955)
https://scholar.smu.edu/smulr/vol9/iss2/7

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.

CRIMINAL LAW

LITIGATION in the field of criminal law occurs more frequently than in any other one field of our law and one would be impressed with the voluminous number of decisions rendered each year. However, this field is the rampart of protection of our liberties as well as a protection of society from its offenders, and as a result, our courts are hesitant to lend an ear to the demand for its revision. This paper will attempt to encompass some of the noteworthy revisions in the field; in addition, some attention will be drawn to novel fact situations and well reasoned legal contentions.

THE DEFENSE OF INSANITY

For generations, the majority of jurisdictions have restricted the defense of insanity to the rule promulgated by the House of Lords in *McNaghten's Case*,[1] i.e., the accused is entitled to an acquittal if he did not know the nature of his act, or if he did, that it was wrong. Other jurisdictions have allowed the additional defense of the so called "irresistible impulse" test.[2]

However, due to the pressing contentions from the medical profession and the bar that these tests are antiquated and are not compatible with the knowledge and discoveries in the field of mental disorders, the courts of at least two jurisdictions made, in 1954, the initial step in revising the defense of insanity by promulgating new tests to determine the criminal responsibility of the accused.

The first of these tests was established by the Court of Appeals for the District of Columbia in the now famous *Durham* Case.[3] In this case, the court devised the so called "diseased mind" test by stating, that in order for the jury to acquit the defendant, it must find that he was suffering from a mental disease or defect of emotion and that this disorder must have produced the act committed by the defendant. It is manifest, that by this rule, the jury

[1] McNaghten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843).
[2] Parsons v. State, 81 Ala. 577, 2 So. 854 (1887).
[3] Durham v. U.S., 214 F. 2d 862 (C.A.D.C. 1954); see also 9 Sw.L.J. 35; 5 CATHOLIC U.L.R. No. 1, p. 25.

must find a causal connection between the mental disease of the accused and the act for which he is indicted.

The second of the new additions was promulgated by the Supreme Court of New Mexico in the case of *State v. White*[4] after having heretofore relied only on the *McNagthen Rule* of "right and wrong".[5] This test, highly recommended by the Britsh Medical Association,[6] establishes what might be called the "deprived of will power" test and would allow an acquittal upon a jury finding that the accused was laboring under such a disease of the mind that he did not possess the power to prevent himself from committing the act although he knew of its nature and quality. The court specifically refused to admit as a defense any contention that the accused's act was caused by a "wrought up mind," but pointed out that the mental condition required here must be a true disease of the mind and that this disorder must have deprived the accused of his will power, whatever its degree or level might be.

A distinction seems to exist between these two tests in that by the "diseased mind" test, the accused must be compelled to commit the act, whereas under the New Mexico test, the accused must have been deprived of his will power to prevent himself from committing the act. However, it is submitted that both of these tests are an advancement in the right direction toward incorporating into the law the knowledge of modern medicine.

ADMISSIBILITY OF PRIOR ACTS AND RELATIONS IN FONDLING AND RAPE CASES

It is axiomatic in criminal law that a defendant is entitled to be tried on the basis of the act committed and that the state may not prove the commission of collateral or extraneous offenses merely to brand the defendant a criminal, even though the prior offenses committed by the defendant involved the same variety of criminal intent.[7] However, there is an entirely different problem

[4] State v. White, 58 N.M. 324, 270 P. 2d 727 (1954).

[5] State v. Roy, 40 N.M. 397, 60 P. 2d 646 (1936); State v. Moore, 42 N.M. 135, 76 P. 2d 19 (1938).

[6] Royal Commission on Capital Punishment, 1949-1953 Report, p. 104 *et seq.*

[7] McCORMICK & RAY, TEXAS LAW OF EVIDENCE, § 695, p. 898.

presented when the prosecution attempts to have admitted into evidence testimony concerning acts and relations between the accused and the prosecutrix which transpired at a time prior to the act which is the basis of the indictment.

The rulings of the Texas Court of Criminal Appeals had not been uniform on this point prior to *Johns v. State*,[7a] but it was apparently settled there that in cases involving incest and rape under the age of consent, acts or relations committed with the prosecutrix other than the one made the basis of the indictment were admissible. The court in the *Johns* case pointed out that the testimony evidences the probability of the commission of the act charged and also tends to show the unnaturalness of the accused's attitude toward the victim of his lascivious intent.[8]

In the recent case of *Lozano v. State*,[9] the accused was indicted for the fondling of a male under the age of fourteen,[10] and over objection by the defendant, the prosecuting witness was allowed to testify concerning prior relations of the same nature with the accused. The confession in this case was novel in that the accused admitted the acts which he committed with the witness on a prior occasion, but made no mention of the act which was the subject of the indictment. The conviction was sustained on the basis of the holding of the *Johns* case. The court explained that in prosecutions of this sort, it becomes important to show the attitude of the accused toward his victim for the purpose of proving the intent to commit the act and the probability of its being committed.

There is a clear distinction between the evidence admitted in the *Johns* and *Lozano* cases and the evidence refused in such cases as *Young v. State*.[11] In the *Young* case, the evidence of prior acts of sodomy committed with persons other than the prosecuting witness who were not even present when the act in question was committed, was correctly excluded under the general rule as

[7a] Johns v. State, 155 Tex. Cr. R. 503, 236 S.W. 2d 820 (1951).

[8] McCormick & Ray, Texas Law of Evidence, § 690, p. 889; see also Burnett v. State, 32 Tex. Cr. R. 86, 22 S.W. 47 (1893); Vickers v. State, 75 Tex. Cr. R. 12, 169 S.W. 669 (1914).

[9] Lozano v. State, 159 Tex. Cr. R. 613, 266 S.W. 2d 147 (1954).

[10] Tex. Pen. Code, Art. 535d.

[11] Young v. State, 159 Tex. Cr. R. 163, 261 S.W. 2d 836 (1953).

having no bearing on the issue of whether the accused committed the act in question or tending to show in any way his attitude toward the prosecuting witness.

It should be noted that this question arose for clarification in Arkansas in 1954 in the case of *Alford v. State.*[12] In that case, the prosecuting witness in a rape trial was allowed to testify, over objection by the defendant, as to an attempt by him to rape her on a prior occasion. The evidence was held to be admissible as showing the depraved intent of the accused to commit the act upon the witness and tending to show the probability of the commission of the act. Thus, Texas and Arkansas have the same rule in respect to the admissibility of prior acts or relations, both jurisdictions recognizing "[the] * * * common-sense conclusion that proof of other offenses is competent when it actually sheds light on the defendant's intent; otherwise it must be excluded."[13]

Penal Liability of an Accessory

In Texas, one who is found guilty as an accessory to a crime is liable for the lowest sentence that could be imposed upon the principal.[14] The statute has been construed to mean that the accused is deemed to be an accessory to the offense that was committed by the principal and is thus liable for the minimum penalty that can be given in punishment for that crime, but in the case of *Ex parte Burch,*[15] the state contended that the proper punishment for the defendant, who had concealed a principal after a conviction for robbery, was life imprisonment due to the fact that the principal had been sentenced to life imprisonment under the habitual criminal statute[16] for being three times convicted of a felony less than capital. The court reversed this conviction and stated that the defendant should have been sentenced to only five years, which is the minimum sentence that can be given for the offense of robbery.[17] The court pointed out that there is no such offense as "habitual criminal," but that this statute is applied only

[12] Alford v. State, ___Ark.___, 266 S.W. 2d 805 (1954).
[13] See note 11 *supra,* at 808.
[14] TEX. PEN. CODE, art. 79; TEX. PEN. CODE, art. 77.
[15] Ex parte Burch, ___Tex. Cr. R.___, 267 S.W. 2d 560 (1954).
[16] TEX. PEN. CODE, art. 63.
[17] TEX. PEN. CODE, art. 1408.

to enhance the punishment of those who are three times convicted of a felony.[18] The court reasoned that though the principal aided by the defendant was a subsequent offender, the defendant is only an accessory to the crime committed by the principal and not to the degree of punishment.

It is submitted that the court reached the only logical conclusion in so ruling; for to hold otherwise would be to say that the accessory's liability would be enhanced by the prior convictions of the principal, or that there is a difference in the punishment of an accessory if he committed the act *before* the principal is sentenced than if he committed the act *after* the principal is sentenced.

THEFT CASES — EVIDENCE OF "VALUE" and "SUFFICIENT EVIDENCE"

In the case of *Givens v. State,*[19] the rule was promulgated by the Texas Court of Criminal Appeals that evidence of felony theft, i.e., that the value of the article was over $50., was not sufficient to sustain a conviction of misdemeanor theft under an information or indictment for that offense; the reason being that this would allow a variance between the pleadings and the proof and would also allow the county court to adjudicate a felony. This holding was recently overruled in the case of *Heard v. State.*[20]

In the *Heard* case, the accused contended that evidence of felony theft was not sufficient to sustain a conviction of misdemeanor theft, but the facts of this case raise the question of whether this contention need ever have been considered or the new rule promulgated. On direct examination, the prosecuting witness stated that the item had the reasonable market value of $46.05, but upon cross-examination, he stated that it had replacement value of over $50. It is clear that this evidence is sufficient to sustain misdemeanor theft, for the rule is clear that when "value" becomes the issue, the reasonable market value controls,[21] and it was on this

[18] *See, e.g., Punchard v. State,* 142 Tex. Cr. R. 531, 154 S.W. 2d 648 (1941).

[19] Givens v. State, 143 Tex. Cr. R. 277, 158 S.W. 2d 535 (1942); Keenan v. State, 120 Tex. Cr. R. 616, 48 S.W. 2d 264 (1932).

[20] Heard v. State, ___Tex. Cr. R. ___, 267 S.W. 2d 150 (1954).

[21] Larkin v. State, 157 Tex. Cr. R. 284, 248 S.W. 2d 134 (1952); Hatton v. State, 153 Tex. Cr. R. 94, 217 S.W. 2d 1021 (1949); Clark v. State, 149 Tex. Cr. R. 537, 197 S.W. 2d 111 (1946); Givens v. State, 143 Tex. Cr. R. 277, 158 S.W. 2d 535 (1942); McKnight v. State, 134 Tex. Cr. R. 373, 115 S.W. 2d 636 (1938).

well established rule that the case was originally disposed of. However, the court made the statement in closing that in no event should the accused complain of being convicted of only a misdemeanor and it was this remark that gained a rehearing and a contention that the *Givens* case should control.

On rehearing, the court should have pointed out that the evidence did not show felony theft, but rather misdemeanor theft. However, the court proceeded to overrule the *Givens* case and establish the holding that proof of the value being over $50. is sufficient to sustain a conviction of misdemeanor theft.

The court based its holding on the position of the *Carr* case[22] and cases cited therein which hold that a conviction of a lessor offense will be sustained even though the proof shows a greater offense to have been committed.[23] There are cases which tend to establish the position that misdemeanor theft is an included offense in felony theft or the same offense but of a lesser degree,[24] and it is clear that a verdict is not contrary to the law and evidence where the accused is found guilty of an offense of inferior grade to, but of the same nature as, the offense proved.[25]

However, there still remains the irreconcilable position that one offense can be adjudicated in the county court and the other only in the district court; not to mention the fact that there is a variance in the pleadings and proof. Certainly, however, the rule will enable the state to sustain convictions in cases where there has been no positive knowledge of the value until discovered through examination of experts in trial, and will thus enable the prosecution to avoid dismissals or *nolle prosequi* and be faced with the plea of double jeopardy on a subsequent trial.

AGGRAVATED ASSAULT — INDECENT PROPOSALS

It has long been the rule in Texas that an intent to injure coupled with the means used must be found before assault can be

[22] Carr v. State, 158 Tex. Cr. R. 337, 255 S.W. 2d 870 (1953); Grimes v. State, 71 Tex. Cr. R. 614, 160 S.W. 2d 689, 691 (1913).

[23] TEX. CODE CR. PRO., art. 695.

[24] Ingle v. State, 4 Tex. Cr. R. 91 (1878); Robles v. State, 38 Tex. Cr. R. 81, 41 S.W. 620 (1897); Mueller v. State, 119 Tex. Cr. R. 628, 43 S. W. 2d 589 (1931); see also TEX. CODE CR. PRO., art. 55.

[25] TEX. CODE CR. PRO., art. 753 § 9.

established from the acts committed by the accused.[26] By statute,[27] the intent is presumed where there is violence of the least degree to the person and the burden rests with the accused to show accident or innocent intention. In cases where the act is committed upon a female by a male, the offense becomes aggravated,[28] and in cases where there has been an indecent proposal made to the female, the injury is deemed to be the disagreeable or shameful emotion of the mind.[29] It is the rule that even though the accused did make the proposal and did embrace the female, he is entitled to be acquitted upon a finding by the jury that the proposal did not cause a shameful emotion in the mind of the female, or, that due to the relationship between the parties, he had no reason to believe that his actions would be unwelcomed.[30]

In the case of *Jones v. State*,[31] the facts were that the accused, a long time acquaintance of the prosecutrix, made an indecent proposal and took hold of her hand which she testified she immediately extricated. The case was reversed for the failure of the trial court to charge in accordance with the above mentioned rule. However, on rehearing, the state made the successful contention that the shameful emotion of the mind did not enter the case, but that the embrace was sufficient injury from which the intent can be presumed in order to make out the offense of aggravated assault.

It is submitted that a passionate embrace is not sufficient injury from which intent can be presumed, and that this case would thus allow a finding of aggravated assault without a finding of any intent to injure. Certainly, as Judge Morrison pointed out in the dissent, the intent to injure is not compatible with the desires and attitude of the accused toward the prosecutrix, and due to this factor, the accused should have been allowed to submit a charge

[26] White v. State, 29 Tex. Cr. R. 530, 16 S.W. 340 (1891); see also Anno. TEX. PEN. CODE, art. 1138.

[27] TEX. PEN. CODE, art. 1139.

[28] TEX. PEN. CODE, art. 1147.

[29] Chambless v. State, 46 Tex. Cr. R. 1, 79 S.W. 577 (1904); see note 25 *supra*.

[30] Shields v. State, 39 Tex. Cr. R. 13, 44 S.W. 844 (1898); Keon v. State, 50 Tex. Cr. R. 145, 95 S.W. 114 (1906); Kerr v. State, 83 Tex. Cr. R. 474, 204 S.W. 107 (1918); Ritcher v. State, 93 Tex. Cr. R. 444, 248 S.W. 373 (1922); Grace v. State, 115 Tex. Cr. R. 117, 29 S.W. 2d 394 (1930); see also an excellent discussion in 12 A.L.R. 2d 975-6.

[31] Jones v. State, ...Tex. Cr. R......., 269 S.W. 2d 399 (1954).

on his reasonable belief and on the creation of the disagreeable emotion.[32]

Society must have a reasonable rule concerning such human relations and it is submitted that under such circumstances, irrespective of the weight of evidence, the accused should be entitled to a charge as to the shameful emotion of the mind and the accused's relationship with the prosecutrix.

Joe H. McCracken, III.

---

[32] See note 30 *supra*.