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PENNSYLVANIA CRIMINAL LAW CASES OF 1960

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ADULTERY

Commonwealth v. Donald.[1] Defendants, separated from their respective spouses, had been convicted of adultery—based upon the testimony of paid private detectives. The parties, employed in the same office building, had been seen together frequently—shopping and dining. Early one evening, they were observed entering the residence of a third person. They were still in the house when the detectives abandoned their surveillance at 3 o'clock the next morning. On another occasion, again in the early evening, they were observed entering the apartment building of the female defendant. They were still in the apartment house when the detectives left the vicinity at 3 o'clock the following morning. When the detectives returned at 9:20 a.m., the male defendant's automobile was still parked in front of the apartment house, and he was seen leaving the building at about 1:10 p.m.

After noting that the "testimony of paid private detectives in adultery cases will be carefully scrutinized and is frequently open to suspicion," the appellate court, in upsetting the convictions, held that while there might have been sufficient proof of "opportunity," there was "no convincing proof of adulterous disposition or inclination on the part of the defendants." If, the court aptly observed, "adultery could be inferred from the mere existence of an opportunity to commit the act, it would be unsafe for persons of the opposite sex to meet except in the presence of others."[2]

AFTER-DISCOVERED EVIDENCE

Commonwealth v. Schuck.[3] Defendant, who allegedly shot and killed two persons—in a case of mistaken identity—was convicted of murder in the first degree. His motion for a new trial on the basis of "after-discovered evidence" was, it was held, properly denied. The court took occasion to point up the criteria for such a motion: "The evidence must have been discovered after the trial and must be such that it could not have been obtained at the trial by reasonable diligence, must not be cumulative or merely impeach credibility, and must be such as would likely compel a different result."[4]

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1. 192 Pa. Super. 276, 161 A.2d 915 (1960).
2. *Id.* at —, 161 A.2d at 918.
3. 401 Pa. 222, 164 A.2d 13 (1960).
4. *Id.* at 229, 164 A.2d at 17.

ALIBI—BURDEN OF PROOF

Commonwealth v. Scoleri.[5] The trial judge instructed the jury that in the case of alibi, "the burden to prove it . . . is on the defendant." This was in accordance with the law at the time. However, six months subsequent to the trial, the Pennsylvania Supreme Court held, in *Commonwealth v. Bonomo,*[6] that the defendant's presence at the scene of the crime is one of the facts which the prosecution must prove. In rejecting the appellant's argument that the *Bonomo* decision should be applied retroactively so as to render the charge of the trial judge erroneous, the court pointed to language in the *Bonomo* decision to the effect that the rule was to be followed only "hereafter."

BURGLARY

Commonwealth ex rel. Sickler v. Myers.[7] Relator, who had been indicted for "breaking and entering and forcible entry with intent to commit felonies within the premises," pleaded guilty to "burglary." Since, he claimed, burglary means breaking and entering in the nighttime, "he pleaded guilty to a crime which was not charged in the indictment." The appellate court—on the opinion of President Judge Hoban below—summarily rejected the argument on the ground that the "nighttime" feature is not an element of statutory burglary.

CIRCUMSTANTIAL EVIDENCE

Commonwealth v. Kravitz.[8] Defendant, who allegedly killed her husband, was convicted, after trial, of murder in the second degree. The prosecution's case was based entirely upon circumstantial evidence which, the court (one justice dissenting), upon appeal, held, after reviewing the evidence in careful detail, was "amply sufficient" to support the jury's verdict. While defendant, on appeal, apparently conceded that the corpus delicti—"(1) that the alleged victim is dead, and (2) that the death occurred as a result of a felonious act"[9] —may be established by circumstantial evidence, she urged that there must be "eye witness" proof that she was the author of the homicide. A scholarly review of the state of the law dictated a rejection of defendant's argument. Were the rule otherwise, the court observed, "few murderers would ever be convicted, and society could not possibly be adequately protected."[10]

Commonwealth v. Boden.[11] Defendant, who allegedly set fire to and thereby killed his wife, was convicted of murder in the first degree. In finding that the evidence amply supported the verdict—even though entirely of a

5. 399 Pa. 110, 160 A.2d 215 (1960).
6. 396 Pa. 222, 151 A.2d 441 (1959).
7. 191 Pa. Super. 522, 159 A.2d 768 (1960).
8. 400 Pa. 198, 161 A.2d 861 (1960).
9. *Id.* at 209, 161 A.2d at 866.
10. *Id.* at 213, 161 A.2d at 868.
11. 399 Pa. 298, 159 A.2d 894 (1960).

circumstantial nature—the court observed: "Few criminals are caught 'red-handed,' and if eye witnesses of the crime were necessary few murderers, arsonists and burglars could ever be convicted."[12]

Consecutive and Concurrent Sentences

Commonwealth ex rel. Nagle v. Myers.[13] Defendant pleaded guilty to five bills of indictment, and consecutive sentences were imposed. Some sixteen years later a clarifying (but, in a substantive sense, unnecessary) amendment of the sentences was made. Defendant contended that the effect of the amendment was to change the sentences from consecutive to concurrent. In rejecting this claim, the appellate court held that the amendment did not have to "repeat the direction" that the sentences were to be served "consecutively." Even if the intention were, by the amendment, to make the sentences concurrent—the court added—the sentencing court did not have the power to effect such a change because its term had long since expired. A sentencing court may modify a sentence after its term only where the sentence was "in excess of that prescribed by law."

Contributing to the Delinquency of a Minor

Commonwealth v. Kempisty.[14] Defendant was convicted of contributing to the delinquency of a child (seventeen years of age). The statute provided that "knowledge of the delinquent child's age . . . shall be presumed in the absence of satisfactory proof of the contrary."[15] It appeared that beer had been sold to the minor by the defendant's son on her licensed premises while she (defendant) was sleeping in an apartment upstairs; that she did not know of the minor's presence on the premises; and that she had instructed her son not to make such sales to any minor. In denying defendant's motion for arrest of judgment, the trial judge apparently felt *Commonwealth v. Koczwara*[16] was controlling. Defendant was sentenced to a fine of 500 dollars and to imprisonment for three months.

In the *Koczwara* case, the licensee, whose bartender sold liquor to minors, was convicted of a violation of the Liquor Code, and was sentenced to a fine and to imprisonment for three months. The supreme court affirmed the conviction, but modified the sentence by deleting therefrom the three months prison term. The court observed: "We have found *no* case in any jurisdiction which has permitted a *prison term* for a vicarious offense."[17]

If, the superior court noted in the instant case, defendant had been ar-

12. *Id.* at 304, 159 A.2d at 898.
13. 191 Pa. Super. 495, 159 A.2d 261 (1960).
14. 191 Pa. Super. 602, 159 A.2d 541 (1960).
15. Pa. Stat. Ann. tit. 11, § 262 (1933).
16. 188 Pa. Super. 153, 146 A.2d 306 (1958), *modified,* 397 Pa. 575, 155 A.2d 825 (1959).
17. Commonwealth v. Koczwara, 397 Pa. 575, 586, 155 A.2d 825, 830 (1959).

rested as a licensee for violating the Liquor Code, the *Koczwara* case would have been controlling—but only a fine could have been imposed. As noted in the *Koczwara* case, the intent of the legislature in enacting the Liquor Code was to eliminate the requirement of mens rea and "to place a very high degree of responsibility upon the holder of a liquor license to make certain that neither he nor anyone in his employ commit any of the prohibited acts upon the licensed premises . . . in order to protect the public from the potentially noxious effects of an inherently dangerous business."[18] Here, however, defendant was convicted "not as a licensee under the Liquor Code,"[19] but as a contributor to the delinquency of a minor. For the latter offense, not only would defendant be a victim of "vicarious criminal liability," but she would be subject "vicariously" to the provision that "knowledge of the delinquent child's age" creates a presumption of fact. Under the view that the supreme court in *Koczwara* intended "that the doctrine enunciated therein should not be extended beyond its stated limited confines,"[20] the superior court reversed the instant conviction.

Corpus Delicti

Commonwealth v. Deyell.[21] Defendant was prosecuted for the murder of one Rose Price. When her body was found—apparently several months after death—it was "largely skeletinized," but "not completely decomposed." While defendant had made some rather damaging admissions, he "did not admit that he criminally caused the death of the deceased." The medical pathologist who performed an autopsy testified "that he could not render a firm medical opinion as to the cause of death." At the close of the Commonwealth's case, a demurrer to the evidence was sustained on the ground that the corpus delicti had not been established. In affirming, the supreme court declared that corpus delicti requires proof that: (1) someone was dead, and (2) it was caused by the criminal act of someone. Defendant had admitted the dead body was that of Rose Price. But, the court found, there was no clear proof of the fact of a criminal death. While, the court observed, the attending circumstances pointed "the ugly finger of suspicion" at the defendant as having feloniously caused the death, "too much is left to conjecture," and one should not "be guessed into the electric chair or the penitentiary."

Double Jeopardy

Commonwealth ex rel. Patrick v. Banmiller.[22] Relator, in 1942, was found guilty of murder in the first degree and sentenced to life imprisonment.

18. *Id.* at 584, 155 A.2d at 829.
19. Pa. Stat. Ann. tit. 47, § 1-101 *et seq.* (1951).
20. Commonwealth v. Kempisti, *supra* note 14 at 608, 159 A.2d at 543.
21. 399 Pa. 563, 160 A.2d 448 (1960).
22. 398 Pa. 163, 157 A.2d 214 (1960).

In 1953, it was determined that the 1942 trial court did not have jurisdiction. Whereupon, a writ of habeas corpus was granted, but a new trial was ordered. As a result of the new trial, relator was convicted of murder in the second degree and sentenced to from ten to twenty years. The supreme court—one justice dissenting—rejected relator's plaint of double jeopardy: By applying for the reversal of his 1942 conviction, relator "waived his protection against being prosecuted again;" and, in any event, he "was not put in jeopardy a second time, since it was only the second trial that resulted in a valid sentence."[23]

False Pretense

Commonwealth v. Koritan.[24] This case involved a transaction between defendant, a real estate broker, and one Hettel, his elderly (86 years of age) principal. Hettel lent 7,035.33 dollars to defendant upon the latter's representation that he was the owner of a given parcel of real estate which, upon entry of a judgment note, would secure the loan. In fact, since the defendant owned the property only as a tenant by the entirety, the note was unsecured. Accordingly, defendant was convicted of the crime of false pretense. In affirming, the appellate court alluded to the elements of such a crime: "(1) a false pretense, as a false assertion of existing fact; (2) obtaining a property or something of value thereby; (3) an intent to defraud."[25] Defendant urged that his representation "that he was the owner of the property" was not false—for, a tenant by the entirety "owns" the property. In rejecting that argument, the appellate court declared that defendant, as a real estate broker, occupied "a confidential relationship with his elderly principal"[26] which called for a disclosure that "his signature alone" was ineffective to bind the "husband and wife" property.

Commonwealth v. Silia.[27] Defendant had been convicted of obtaining money by false pretenses, "based on his obtaining the sum of fifty dollars from an applicant for employment . . . for the purpose of paying for a fidelity bond which was never obtained."[28] Since, the court held, the evidence showed that the defendant demanded the fifty dollars as a condition of employment, it was represented that the purpose of this sum was to pay fifty per cent of the cost of a fidelity bond, and the bonding company named to the applicant did not in fact exist, "the evidence [was] sufficient to sustain the conviction."[29]

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23. *Id.* at 165, 157 A.2d at 215.
24. 193 Pa. Super. 212, 163 A.2d 915 (1960).
25. *Id.* at 216, 163 A.2d at 917.
26. *Ibid.*
27. See — Pa. Super. —, 166 A.2d 73 (1960).
28. *Id.* at —, 166 A.2d at 75.
29. *Ibid.*

FEDERAL AND STATE PROSECUTIONS FOR SAME ACT

Commonwealth v. Taylor.[30] Petitioner was convicted of and sentenced to prison terms for robbery in both a federal and state court—for the same act. He claimed, by way of a petition for a writ of error coram nobis—which had been dismissed in the lower court—that he had been "put in jeopardy twice for the same crime." While, the appellate court held, this contention could not be advanced in a petition for a writ of error coram nobis, it nevertheless saw fit to dispose of the question. Alluding to two recent United States Supreme Court decisions—*Bartkus v. People of State of Illinois,*[31] and *Abbate v. United States*[32]—for guidance, the court declared: "The same act may constitute an offense against both federal and state governments, and punishment by each sovereignty" is not violative of either the Federal Constitution or the Constitution of Pennsylvania.[33]

FELONY-MURDER

Commonwealth v. De Moss.[34] Defendant, on appeal from a conviction of murder in the first degree—based on a homicide in the perpetration of a robbery—argued that the evidence was insufficient in that he did not actually participate in the robbery and homicide, and in that, it was shown, he had only been "in association, prior to and subsequent to the happening of the robbery and homicide, with the persons who did participate in both crimes."[35] The theory of the prosecution was that defendant, "acting in concert with Thomas, Ellsworth and Wilson, conspired to rob Mrs. Rossman and in the course of such robbery, Mrs. Rossman met her death at the hands of Ellsworth and Wilson."[36] The supreme court observed: "Where a person enters into a conspiracy with other persons to commit a robbery and, in the course of that robbery, a killing takes place, the conspirators are all equally liable for the killing"—and it matters not that the conspirators "do not plan the death of the victim of the robbery."[37] It remained, then, to determine whether the evidence was sufficient to support a finding that defendant was a member of the conspiracy. Finding that defendant was not merely "associated" with the parties responsible for the crime, but was "an active participant in the conspiracy" to rob Mrs. Rossman, the court held—one justice dissenting—"he must share equal culpability with those who actually robbed and killed her."

30. 193 Pa. Super. 360, 165 A.2d 390 (1960).
31. 359 U.S. 121 (1959).
32. 359 U.S. 187 (1959).
33. Commonwealth v. Taylor, *supra* note 30 at 363, 165 A.2d at 392.
34. 401 Pa. 395, 165 A.2d 14 (1960).
35. *Id.* at 398, 165 A.2d at 15.
36. *Id.* at 398, 165 A.2d at 16.
37. *Id.* at 407, 408, 165 A.2d at 20.

Firearms License

Commonwealth v. Silia.[38] Defendant argued that his conviction of a violation of the Firearms Act[39] was erroneous because the Commonwealth did not prove his lack of a license for the gun. The court, in affirming the conviction, held: "If he had such a license it was incumbent on him to come forward with that proof."[40]

Formal Defect in Indictment

Commonwealth v. Foust.[41] Defendant had been convicted of "wilful neglect to support" a child born out of wedlock.[42] He had objected, at the close of the testimony, that the indictment should have been quashed because it did not specify the date of the intercourse causing conception. The appellate court affirmed the conviction on the ground that by failing to object to the formal defect "before the jury [was] sworn,"[43] he committed a waiver.

Insanity

Commonwealth v. Woodhouse.[44] Defendant was indicted and tried for the murder of his sixteen-year-old adopted daughter. He interposed the defense of insanity. The trial judge charged the jury in accordance with the M'Naghten rule: Defendant must show that a "disease of the mind is such as to render him incapable of knowing what he was doing, or if he did know what he was doing, the disease of the mind made him unable to judge that what he did was wrong."[45] Born in England in 1843, the M'Naghten test of insanity has been in effect in nearly all jurisdictions of the United States. The jury found the defendant criminally responsible and he was convicted of murder in the first degree. On appeal, defendant urged the abolition of the M'Naghten rule: It is "unsound, confusing, antiquated and based on notions of mental disorders which are discredited by modern science."[46] In a four-to-three decision, the supreme court rejected defendant's plaint. The following statement appeared to be the gist of the majority opinion:

> The protection of society is our paramount concern. The science of psychology and its facets are concerned primarily with diagnosis and therapeutics, not with moral judgments. Ethics is the basic element in the judgments of the law and should always continue to be. Until some rule, other than 'M'Naghten,' based on a firm founda-

38. See note 27, *supra.*
39. Pa. Stat. Ann. tit. 18, § 4628 (1943).
40. Commonwealth v. Silia, *supra* note 27 at —, 166 A.2d at 75.
41. 194 Pa. Super. 253, 166 A.2d 109 (1960).
42. *Id.* at —, 166 A.2d at 109.
43. *Ibid.*
44. 401 Pa. 242, 164 A.2d 98 (1960).
45. *Id.* at 248, 164 A.2d at 102.
46. *Ibid.*

> tion in scientific fact for effective operation in the protection and security of society, is forthcoming, we shall adhere to it. We shall not blindly follow the opinion of psychiatric and medical experts and substitute for a legal principle which has proven durable and practicable for decades, vague rules that provide no positive standards.[47]

One of the dissenting justices, in advocating the abolition of M'Naghten, advanced the following thought:

> I favor combatting crime by keeping a felon in prison, regardless of his offense, until he has been shown to be criminally harmless and no longer a menace to society. This should be done by a consensus of our best medical, legal, sociological, and lay brains. . . . The maximum social protection will occur when the judicial and penological processes are separated, when the courts decide whether or not defined anti-social deeds have been done and the prisons decide when it is safe to allow a prisoner to return to live among us.[48]

Commonwealth v. Baldassarre.[49] Defendant, aged sixty-seven, who surrendered to the police, "saying that he had just killed his wife," petitioned for a sanity commission. A commission was appointed and it found defendant "mentally ill but not of criminal tendency." The lower court approved the commission's report that defendant was mentally ill, but—disagreeing with the commission—found the defendant "of criminal tendency." Accordingly, he was ordered committed to the Farview State Hospital (an institution for the criminal insane). While, the court upon appeal observed, the findings of a sanity commission are only advisory, the lower court may not act "arbitrarily or capriciously." The record was remanded to the lower court for further proceedings, however, because the court felt "insufficiently informed to pass upon the exercise of the court's discretion." Noting that the presence of a stenographer "might unusually disturb the defendant," the court did not require—but indicated it would prefer—a stenographic transcript. The dissenting justice, in order to intelligently dispose of the case, felt that the proceedings upon remand should be fully recorded by stenography.

Implied Admission by Silence

Commonwealth v. Ford.[50] Defendant, who had been convicted of rape, urged error in that, when accused at the police station by the victim, his failure to deny his guilt was used as an admission against him. The court alluded to *Commonwealth v. Vallone*[51] for the proposition that a failure to deny an incriminating statement may constitute an implied admission of its

47. *Id.* at 258, 259, 164 A.2d at 107.
48. *Id.* at 265, 164 A.2d at 110.
49. 399 Pa. 411, 160 A.2d 461 (1960).
50. 193 Pa. Super. 588, 165 A.2d 113 (1960).
51. 347 Pa. 419, 32 A.2d 889 (1943).

truthfulness. Of course, this would not be true if the accused availed himself of the privilege against self-incrimination. There was a close question here whether the privilege had been invoked. It mattered not, however, for as the court noted, contrary to the claim of defendant, the trial judge "never applied the *Vallone* rule to this case."

INCOMPETENCE OF COUNSEL

Commonwealth ex rel. Fritchman v. Ceraul.[52] Relator claimed that his attorney improperly represented him at his trial. This, the court upon appeal observed, was a ground for discharge on a writ of habeas corpus only where the representation was "so lacking in competence that it becomes the duty of the court or the prosecution to observe it and correct it." And here, the court found, the attorney displayed "an unusual degree of skill and a complete loyalty for his client's cause." In any event, the court added, relator was "no novice in criminal proceedings"—having been convicted in the past of at least five felonies. If he thought his counsel was not defending him properly, he should have protested and called it to the attention of the court. "A criminal defendant cannot sit passively through the trial of his case and take his chance on the verdict and then complain about the manner of his lawyer's work in the event of an adverse verdict."[53]

INDIGENT DEFENDANT

Commonwealth ex rel. Whalen v. Banmiller.[54] Relator, serving a sentence for his conviction of robbery, petitioned for a writ of habeas corpus, alleging a denial of due process in his trial. The petition was denied and relator sought leave to appeal without payment of the statutory filing fee—alleging indigence and inability to pay. The superior court denied the application. Under the view that *Burns v. State of Ohio,*[55] decided by the United States Supreme Court in 1959, was controlling, the supreme court held that relator was not required to pay the filing fee. The *Burns* case held that a State may not constitutionally require "an indigent defendant in a criminal case" to pay a filing fee as a condition to moving for leave to appeal. That habeas corpus was a civil, not a criminal proceeding, did not disturb the Pennsylvania Supreme Court—it was viewed as a distinction, but not as one of substance. Accordingly, the Court felt that the *Burns* case was broad enough to apply here.

LESSER INCLUDED OFFENSE

Commonwealth v. Soudani.[56] The supreme court held that separate sentences could not be imposed for convictions of aggravated assault and bat-

52. 21 Pa. D.&C.2d 357 (1959), *aff'd,* 193 Pa. Super. 7, 163 A.2d 311 (1960).
53. Commonwealth ex rel. Fritchman v. Ceraul, 21 Pa. D.&C.2d at 364 (1959).
54. 400 Pa. 606, 162 A.2d 383 (1960).
55. 360 U.S. 252 (1959).
56. 398 Pa. 546, 159 A.2d 687 (1960).

tery (a misdemeanor) and of assault with intent to kill (a felony)—the former being a lesser included offense within the latter. "To hold otherwise," the court observed, "would contravene the intent of the legislature and impose double punishment for the same crime." Accordingly, the aggravated assault and battery sentence was set aside. The court also alluded to the well-settled principle that "upon an indictment charging a particular crime, the defendant may be convicted of a lesser offense included within it"—on an indictment for murder, however, "the jury is not permitted to return a verdict either for involuntary manslaughter or for any degree of assault and battery."[57]

New Trial

Commonwealth v. Brown.[58] Defendant was found guilty, after a non-jury trial, of "larceny by bailee."[59] Defendant moved in arrest of judgment and for a new trial. Pending disposition of the motions, defendant and the complainant settled their differences. Thereupon, the trial judge granted the motion to arrest and found the defendant not guilty. The reasons assigned were: The case had "strong civil overtones;" defendant's act was "not of a violent nature;" the complainant has been "fully satisfied;" and defendant had "no previous convictions." It was held, on appeal, that the trial judge erred. He had "no right, after a finding of guilty, to change his mind over a month later and enter a finding of not guilty."[60] However, since the reasons assigned by the trial judge were appropriate for the granting of a new trial, the appellate court ordered a new trial.

"Not Guilty" Verdict Instruction

Commonwealth v. Conklin.[61] Defendant, who allegedly killed her child, was indicted and, after her plea of not guilty, tried for murder. She interposed the defense of insanity. At the trial, she took the stand and admitted the fact of killing. In his charge, the trial judge instructed the jury that the only possible verdicts could be: Guilty of murder in the first degree or second degree, or not guilty by reason of insanity. When defense counsel inquired as to the possibility of a "not guilty" verdict, the trial judge declared: "You are putting me in the hole. I would say no, in my opinion, but it's up to the jury what they want to do."[62] The jury returned a verdict of guilty of murder in the first degree.

The appellate court, finding that *Commonwealth v. Edwards*[63] was controlling, ruled—two justices dissenting—that the trial judge erred (requiring

57. *Id.* at 547, n.1, 159 A.2d at 688, n.1.
58. 192 Pa. Super. 498, 162 A.2d 13 (1960).
59. Pa. Stat. Ann. tit. 18, § 4816 (1939).
60. Commonwealth v. Brown, *supra* note 58 at 501, 162 A.2d at 14.
61. 399 Pa. 512, 160 A.2d 566 (1960).
62. *Id.* at 516, 160 A.2d at 569.
63. 394 Pa. 335, 147 A.2d 313 (1959).

a reversal and new trial) in failing to instruct the jury that "not guilty" was a possible verdict. This was predicated on the following bases: Defendant's plea of not guilty put in issue each element of the prosecution's case, and proof thereof was required beyond a reasonable doubt. That the defendant admitted the fact of killing did not serve to relieve the prosecution of its burden. For, while the defendant's confession may have obviated the necessity of connecting her with the commission of an alleged crime, it did "not obviate the necessity of establishing the material and legal existence of a crime." It was observed that persons sometimes confess to crimes of which they are innocent "either out of a desire to cover up for the guilty person or because of a psychological urge to do so."[64]

The dissent—rejecting the *Edwards* decision as "illogical and not based on sound reason"[65]—was seemingly of the view that, because the defendant admitted the fact of killing, a jury finding of "not guilty" (assuming it found she was not insane) would not have been "realistic or in truth possible." Hence, the trial judge did not err in failing to note that such a verdict was possible.

PANDERING

Commonwealth v. Silia.[66] Defendant, who was the proprietor of an "Escort Service," contended that the evidence was insufficient to sustain a conviction of pandering because the females involved did not *personally* receive the money—hence, they were not prostitutes. The court referred to the statute: "Whoever . . . induces, persuades, inveigles or entices a female person to become a prostitute . . . is guilty of pandering."[67] Prostitution, said the court, is "the offering or using the body for sexual intercourse for hire."[68] Since "the bodies of the young women were submitted for hire," the court held, "it would be doing violence to the Act of assembly to say that pandering was not committed simply because the money was not given to the victims in the first instance."[69]

PHOTOGRAPHS

Commonwealth v. Boden.[70] Defendant allegedly burned his wife to death—"the burning was so deep in the area of the groin that there was a crevice so large a fist could be inserted in it"[71]—and the trial judge, over defendant's objection, allowed the introduction of photographs of the charred body. A majority of the appellate court held that the trial judge had not

64. Commonwealth v. Conklin, *supra* note 61 at 515, 160 A.2d at 568.
65. *Id.* at 520, 160 A.2d at 570.
66. — Pa. Super. —, 166 A.2d 73 (1960).
67. PA. STAT. ANN. tit. 18, § 4513 (1943).
68. *Id.* at § 4103.
69. Commonwealth v. Silia, *supra* note 27 at —, 166 A.2d at 76.
70. See note 11, *supra.*
71. *Id.* at 306, 159 A.2d at 899.

abused his discretion: The photographs aided the jury in understanding the crime and in determining whether or not the burning was accidental. The trial judge's exhortation to the jury, "let not those pictures prejudice you in any way," reminded the dissenting justice of "Mark Antony's speech in which he told the Roman populace that he must not let them see dead Caesar's body or hear dead Caesar's will because 'it will inflame you, it will make you mad.' And then, after conjuring up the terrible things the populace might do if they saw the body and heard the will, he proceeded to show them the body and to read to them the will."[72]

Polling of Jury

Commonwealth ex rel. Ryan v. Banmiller.[73] Relator had been convicted of murder in the first degree with the penalty fixed at life imprisonment. No appeal was taken. Five years later, by way of a writ of habeas corpus, relator urged that two of the jurors, when polled, "did not answer in the form in which they should have in order to evidence their assent to the verdict as announced by the forelady."[74] It seems that one juror started to read irrelevant matter from a verdict slip—"all of whom having been sworn"—and, when interrupted by the trial judge, declared: "They find the defendant guilty of murder in the first degree with the recommendation of life imprisonment."[75] The other juror also prefaced his finding of guilt and recommendation of life imprisonment with the pronoun "they." In finding that relator's contention was wanting in merit, the appellate court stated that the purpose of a poll is simply to accord a juror "who may possibly have been under pressure from other members of the jury"[76] the opportunity to inform the court that he did not join in the announced verdict voluntarily. The lower court (Judge Sheely)—on the basis of which opinion the appellate court affirmed—noted, *inter alia,* that the jurors clearly demonstrated their assent to the verdict. One justice dissented—pointing to the use of the pronoun "they"—on the ground that the polling of a jury, "especially in a murder case," should not be viewed "as a mere empty formality." To his mind, the majority opinion represented a retreat from *Commonwealth v. Martin.*[77]

Post-Conviction Motions

Commonwealth v. Landis.[78] Defendant had been convicted of corrupting the morals, and contributing to the delinquency, of a minor. No motions had been interposed by the defendant. Upon appeal, defendant, *inter alia,* chal-

72. *Id.* at 310, 159 A.2d at 901.
73. 400 Pa. 326, 162 A.2d 354 (1960).
74. *Id.* at 328, 162 A.2d at 355.
75. *Id.* at 330, 162 A.2d at 356.
76. *Id.* at 328, 162 A.2d at 355.
77. 379 Pa. 587, 109 A.2d 325 (1954).
78. 193 Pa. Super. 373, 165 A.2d 110 (1960).

lenged the sufficiency of the evidence. The court quashed the appeal on the ground that defendant had failed to raise the questions in the court below by appropriate post-conviction motions—hence, the matters could not be raised for the first time on appeal. "Only in extremely extraordinary circumstances," the court noted, "have we deviated from this rule."[79]

Prejudicial Statements

Commonwealth v. Johnson.[80] Defendant was convicted of burglarizing his employer's gasoline service station. Testimony was elicited on cross-examination of some of the Commonwealth's witnesses to the effect that defendant had been on parole, and that there had been prior robberies—suggesting "that the defendant might have had something to do with them."[81] In affirming the conviction, the appellate court observed "that defense counsel brought the prejudicial remarks upon himself" and, in light of other evidence of guilt, it doubted "whether such prejudicial statements had any effect on the jury."[82]

Prior Convictions

Commonwealth ex rel. Fritchman v. Ceraul.[83] Relator, who had been convicted of burglary, petitioned for a writ of habeas corpus. It was dismissed and the Superior Court affirmed (on the opinion of Judge Woodring below).[84] Relator urged that, because he had not adduced evidence of his "good reputation," the trial judge erred in permitting testimony on rebuttal as to his prior convictions. No error, it was held, was committed because the defendant had taken the witness stand: By doing so, he put his credibility in issue, and the Commonwealth could attack it "by proving prior convictions of felonies or of misdemeanors in the nature of crimen falsi."[85]

Privilege Against Self-Incrimination

Snyder Appeal.[86] It appeared that one Barbara Snyder, who was apparently in a state of pregnancy, obtained treatment from a Doctor Berberian in order to effect a miscarriage. The treatment being unsuccessful, he recommended her to a Doctor Fisher. The latter's attempt to abort her caused "physical distress" which put her in the Lancaster General Hospital. Doctor Fisher was indicted in Berks County for abortion. Doctor Berberian and Barbara Snyder (and her sister) were indicted in Lancaster County for

79. *Id.* at 376, 165 A.2d at 111.
80. 193 Pa. Super. 69, 163 A.2d 702 (1960).
81. *Id.* at 72, 163 A.2d at 704.
82. *Id.* at 74, 163 A.2d at 705.
83. 193 Pa. Super. 7, 163 A.2d 311 (1960).
84. 21 Pa. D.&C.2d 357 (1959).
85. *Id.* at 361.
86. 398 Pa. 237, 157 A.2d 207 (1960).

"conspiracy to commit abortion." At the trial of Doctor Fisher, Barbara Snyder, who was called as a witness for the Commonwealth, was asked "if she had been a patient in the Lancaster General Hospital." Availing herself of the privilege against self-incrimination, she refused to answer. It appeared that, in a statement made prior to the trial, she had disclosed her relations with Doctor Berberian and Doctor Fisher. Accordingly, the trial judge informed her that she had thereby waived her constitutional privilege. She, nevertheless, again refused to answer, and was adjudged guilty of contempt. The superior court held that no waiver was effected, but affirmed on the ground that there could be no incrimination because the "crime for which she was indicted in Lancaster County could not legally be committed by her."

The supreme court, in reversing (three justices concurring only in the result), found that both the trial judge and the superior court erred. (1) The trial judge erred in working out a waiver. While, it is true, the pre-trial statement of Barbara Snyder could have been used against her, this "did not destroy her constitutional right not to be required to give evidence against herself."[87] If the view of the trial judge were sustained, the court aptly observed, "it would mean no defendant who confessed to a crime could refuse to take the witness stand at his trial."[88] (2) The superior court correctly held that Barbara Snyder could not have been legally convicted of "conspiracy to commit abortion on herself." But it erred in concluding that, *therefore,* the privilege against self-incrimination was not available to her. Barbara Snyder "was confronted with a criminal prosecution" in Lancaster County. The fact of impending "criminal prosecution" was viewed as the test—not whether, on the law, the prosecution would have been successful.

Receiving Stolen Goods

Commonwealth v. Gazal.[89] Defendant, who had been convicted of receiving stolen goods, contended, upon appeal, that the evidence was insufficient. It appeared that a number of watches had been stolen; that defendant purchased fifteen of such watches from the thief; that, when sold, the watches had been procured from a hiding place; and that defendant made no effort to explain away his possession of the watches. The court felt, in finding the evidence sufficient, that the attending circumstances should have put a reasonably prudent man on notice that the watches were stolen. It added that the thief is not an accomplice of a receiver of stolen goods. Hence, so far as the thief's testimony was concerned, the rule that an accomplice's evidence should be received with caution was not applicable.

87. *Id.* at 242, 157 A.2d at 210.
88. *Id.* at 242, 157 A.2d at 211.
89. 194 Pa. Super. 132, 166 A.2d 314 (1960).

Reckless Driving

Commonwealth v. Vink.[90] Defendant, operator of a tractor-trailer, stopped to aid a disabled tractor-trailer on the Pennsylvania Turnpike. He pushed the tractor-trailer at a speed of twelve miles per hour, for about one-half mile, to a point where there was a wider berm. He was convicted of reckless driving. The court, upon appeal, after alluding to the test for reckless driving—"less than wilful and wanton conduct on the one hand and, on the other, something more than ordinary negligence"[91]—found a failure of proof and, accordingly, reversed the conviction. The main basis for the dissent was the inability of the defendant, while pushing the disabled tractor-trailer, "to see the road ahead."

Refusal to Take Blood Test

Commonwealth v. Kravitz.[92] In a murder prosecution, the district attorney informed the jury "that he would prove that defendant had refused to take a blood test." Defendant's motion for a mistrial was denied. Subsequently, the trial judge ruled that the testimony—that she refused the blood test—was inadmissible. In his charge, the trial judge instructed the jury to "erase from your minds, and forget the District Attorney's opening statement in this regard."[93] While noting that the constitutional immunity from self-incrimination related only to *"testimonial* compulsion," the appellate court (one justice dissenting) held, nevertheless, that, since "blood tests are not yet sufficiently scientifically determinative, or of such clear probative proof as to justify compelling a defendant in a murder case to submit thereto against his will,"[94] the trial judge did not err in precluding the district attorney from proving that defendant refused to take a blood test. And—contrary to the view of defendant and a forceful dissent—the trial judge's charge, that the district attorney's preliminary statement should be ignored, "rendered harmless" and cleansed the error from the district attorney's opening remarks.

Review of Death Sentence

Commonwealth v. Cater.[95] Defendants pleaded guilty to murder generally, and the trial court, after a hearing, adjudged them guilty of murder in the first degree, and sentenced them to death. The defendants argued on appeal that the death sentence constituted an abuse of discretion. However, the appellate court concluded that there was no such abuse. It held that in determining whether there has been an abuse of discretion in the imposition of the death sentence, the question is "not whether we would have imposed the same penalty, . . . but whether the trial court manifestly abused the discretion im-

90. 193 Pa. Super. 154, 164 A.2d 25 (1960).
91. *Id.* at 157, 164 A.2d at 27.
92. See note 8, *supra.*
93. *Id.* at 230, 231, 161 A.2d at 877.
94. *Id.* at 220, 221, 161 A.2d at 872.
95. 402 Pa. 48, 166 A.2d 44 (1960).

posed on it by the legislature."[96] There is no abuse of discretion where "all the facts surrounding the criminal act and the criminal actor have been exhaustively considered, and . . . no other conclusion can be justified than the extermination of the convicted criminal by death."[97]

While, the court said, it has the power to reduce a death sentence to one of life imprisonment, it only exercises this authority under extreme circumstances.

Right to Counsel

Commonwealth v. Jackson.[98] Petitioner, who, without benefit of counsel, had pleaded guilty to robbery and assault with intent to rob, argued that—because he did not have counsel—the convictions were void. It appeared that he was financially unable to retain counsel, and that the trial judge failed to apprise him of the fact that he had a right to have counsel appointed. On appeal, the order of the lower court dismissing his petition was affirmed. It was noted that a conviction, in a non-capital case, after a plea of guilty, is not void simply because defendant did not have counsel. Recognizing, however, that a defendant's right to counsel is a "fundamental right going to the very basis of the administration of criminal law," the court declared that the onus is upon the trial judge "to inform" the defendant of his right and "to assist" him in obtaining the benefit of such a right. Nevertheless, a trial judge's failure to inform the defendant of his right to have counsel appointed does not, in and of itself, invalidate his conviction. Defendant must go a step further and demonstrate that the lack of counsel operated to his prejudice—that, had counsel been present, the result reached in the case would have been different. No such showing was made here.

Commonwealth ex rel. Davis v. Banmiller.[99] Defendant, who pleaded guilty to four larceny charges, urged, on appeal, that the lower court erred in allowing him "to plead guilty without the benefit of counsel." In non-capital cases, the court observed, in order to upset a guilty plea, there must be a showing that the failure to provide counsel resulted in prejudice to the accused. And here, the court held, no such prejudice was demonstrated: Defendant was eighteen years of age; he was not illiterate; and he had "considerable experience in criminal procedure"—having been involved in about sixteen prior offenses.

Sequestration of Witnesses

Commonwealth v. Kravitz.[100] Defendant argued that the trial judge erred "in refusing to separate and sequester the police officers and detectives" who

96. *Id.* at 55, 166 A.2d at 48.
97. *Id.* at 55, 56, 166 A.2d at 48.
98. 193 Pa. Super. 631, 165 A.2d 392 (1960).
99. 192 Pa. Super. 130, 159 A.2d 770 (1960).
100. See note 8, *supra.*

were to testify for the Commonwealth. In light of inadequate "room space," the "long delays" which would necessarily ensue, and "other practical considerations"—the appellate court declared—sequestration of witnesses is "ordinarily impractical or inadvisable." Hence, it is always discretionary with the trial judge. And here, the court held, the refusal did not constitute an abuse of discretion.

SOLICITATION

Commonwealth v. Gary.[101] This case, one of first impression, involved a prosecution for, and conviction of, "immoral practices"—solicitation for the purpose of masturbation. It seems that a police officer called a massage parlor, where defendant was employed, and made an appointment for a massage. In the course of the massage, "defendant ran her hand over his private parts three or four times."[102] Except for some irrelevant small talk, "nothing whatever was said between them" and, after the massage, the police officer "paid the sum of $5 and left the premises." It was conceded, upon appeal, that the subject matter of the prosecution did not involve a "statutory" crime. It seems that the appellate court's decision was three-pronged: (1) Masturbation, "usually committed in privacy," is not a common law misdemeanor. (2) Even if masturbation could be viewed as a misdemeanor, it is "unreasonable or illogical" to treat "solicitation" to commit such a misdemeanor as a separate crime. (3) Even if solicitation to commit masturbation could be treated as a separate crime, there was, in the instant case, no solicitation—"there was no offer to commit masturbation." Accordingly, the court set aside the conviction. Of course, in light of ground (3), it was unnecessary for the court to decide whether masturbation is a crime and, if so, whether solicitation to commit masturbation is a separate crime.

"SPLIT-VERDICT" STATUTE

Commonwealth v. Scoleri.[103] One year subsequent to appellant's trial and conviction of murder in the first degree, the legislature passed the so-called "split-verdict" statute. The statute provides that "the commonwealth *cannot* introduce into evidence in a *capital* case a defendant's record of prior convictions until *after* the jury has determined the defendant guilty of murder in the first degree . . . ."[104] (Emphasis added.) Appellant contended that the new rule, which reverses prior law, should be applied to a case where prior to its passage a defendant was found guilty of first degree murder, but "at the time of the passage of the statute, an appeal . . . is pending."[105]

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101. 193 Pa. Super. 111, 163 A.2d 696 (1960).
102. *Id.* at 113, 163 A.2d at 697.
103. See note 5, *supra.*
104. PA. STAT. ANN. tit. 18, § 4701 (1959).
105. Commonwealth v. Scoleri, *supra* note 5 at 131, 160 A.2d at 226.

The court, in holding that the statute is only prospective in its operation, applied the rule that no law is to be construed as retroactive *"unless clearly and manifestly* so intended by the legislature," and that "[t]he soundness of the legislation alone does not compel a construction of this statute as retroactive."[106] Since the statute was not "clearly and manifestly" intended to operate retrospectively, it could not be so construed. Also, the court cited several cases which indicated that it was unconstitutional, as a usurpation of the judicial function, for a legislature to reverse decisions of prior cases by means of retroactive legislation.

STENOGRAPHIC NOTES

Commonwealth ex rel. Kittrell v. Banmiller.[107] The failure to take stenographic notes of trial testimony, absent a request by defendant, was held not to be violative of due process.

TESTIMONY OF ACCOMPLICE

Commonwealth v. Lawrence.[108] Defendants, who had been convicted of "issuing fraudulent instruments," pressed as error, upon appeal, that, *inter alia,* "the only evidence against them was the testimony of an accomplice."[109] In rejecting that contention, the court alluded to the well-settled principle that "a conviction may be sustained on the uncorroborated evidence of an accomplice."[110] Defendants were entitled only to a charge that such testimony should be "carefully scrutinized"—and this they received. In any event, the court noted, the testimony of the accomplice had been corroborated.

TRIAL JUDGE'S REMARKS AND INTERROGATION

Commonwealth v. McCoy.[111] Defendant, who allegedly killed his former employer in the course of a robbery, was found guilty of murder in the first degree—the penalty was fixed at death. In his charge to the jury, the trial judge had characterized defendant (who had a previous robbery conviction) as a man who was "steeped in crime, vicious crime." This, the appellate court noted in reversing, was unwarranted. It was particularly prejudicial, however, because—even though the new split-verdict statute was not applicable to this trial—there was no *clear* admonition that the jury should consider the defendant's prior conviction only as an aid in fixing the penalty. Further, the appellate court observed, the trial judge "took an unduly active participation in the trial of the case": He asked "numerous pointed questions" of the

106. *Id.* at 132, 160 A.2d at 226.
107. 192 Pa. Super. 133, 159 A.2d 576 (1960).
108. 193 Pa. Super. 75, 163 A.2d 690 (1960).
109. *Id.* at 77, 163 A.2d at 691.
110. *Id.* at 78, 163 A.2d at 691.
111. 401 Pa. 100, 162 A.2d 636 (1960).

defendant, and "exhibited an extended and aggressive cross-examination not conducive to a fair trial or proper judicial demeanor."[112] (Two justices dissented—one, only in part).

Unanimous Verdict

Commonwealth v. Ford.[113] In a prosecution for rape, the trial judge charged the jury: "Your verdict must be unanimous—that is all twelve must agree."[114] Defendant viewed this as error in that "it precluded the possibility of a hung jury."[115] This the court rejected with the terse observation that "a trial judge need not charge jurors specifically that they may disagree."[116]

Year and a Day Rule

Commonwealth v. Ladd.[117] Defendant had been indicted for murder. It appeared that the victim was struck on September 21, 1958, and, as a result, died on November 1, 1959. Defendant moved to quash the indictment on the ground that, under the common law of Pennsylvania, "no one is responsible for a killing where death ensues beyond a year and a day after the stroke."[118] The motion was denied and defendant took an appeal. In affirming, the supreme court held that the year and a day rule "was part of the common law of England in and before 1776;" but it was not part of the definition of murder—it was "only a rule of evidence or procedure." Noting that the reason for the rule "lay in the primitive state of medical knowledge at the time," and that it could take "judicial notice of the far advance since 1776 of scientific crime detection and of scientific medicine," the court felt there was now "no more reason for a rule of a year and a day than there is for one of a hundred days or a thousand and one nights."[119] In light, then, of current knowledge, the court concluded, there should be no restriction of time, but only proof of conventional causation. The court assumed that it had the power to "change a common-law rule of evidence"—without being guilty of judicial legislation —if, as here, "modern conditions have moved beyond it and left it sterile."[120] A dissenting justice—two dissented—felt that the majority had not demonstrated justification for changing the rule, and, in any event, it did not have the power to make such a change. Only the legislature had such power.

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112. *Id.* at 103, 162 A.2d at 638.
113. See note 50, *supra.*
114. *Id.* at 596, 165 A.2d at 117.
115. *Id.* at 596, 597, 165 A.2d at 117.
116. *Id.* at 597, 165 A.2d at 117.
117. 402 Pa. 164, 166 A.2d 501 (1960). See discussion in 65 Dick. L. Rev. 166 (1961).
118. *Id.* at 166, 166 A.2d at 502.
119. *Id.* at 173, 166 A.2d at 506.
120. *Id.* at 175, 166 A.2d at 507.