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PENNSYLVANIA CRIMINAL LAW AND PROCEDURE CASES OF 1961

BY CHARLES E. TORCIA*

Assisted by David J. Humphreys and James F. Toohey

After-Discovered Evidence

Commonwealth v. Tyson.[1] Relator was convicted of robbery by assault and force. His motion for a new trial, on the ground that new evidence had been discovered since the trial which would tend to discredit the victim's identification of him as the author of the crime, was denied. In affirming, the appellate court felt that a new trial should not be granted where the newly discovered evidence merely amounted to a possible basis for the impeachment of the credibility of a witness.

Commonwealth's Right of Appeal

Commonwealth v. Melton.[2] Defendant on a jury verdict was convicted of murder in the first degree and sentenced to death. The court en banc granted defendant's motion for a new trial on the "ground that the aggregate of untold events happening at trial, including emotional outbursts by the bereaved husband . . . 'created such an inflammatory atmosphere that the jury's determination may well have been based upon other than the substantive factual evidence introduced.' "[3] The Commonwealth appealed. In dismissing the appeal, this court declared that the Commonwealth only has a right to appeal from an adverse ruling in a criminal case "where the question involved is purely one of law." Since the question presented here—whether the attending circumstances at the trial were "prejudicially inflammatory"—was, according to the court, one of "fact as well as law," the Commonwealth had no right of appeal.

Coram Nobis

Commonwealth v. Whalen.[4] Relator's petition, treated as a petition for a writ of error coram nobis, alleged "after-discovered" evidence to the effect that another person had confessed to committing the crime for which he (petitioner) had been convicted and sentenced. The appellate court, on the opinion of the court below (Alessandroni, P. J.), sustained the dismissal of

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1. 194 Pa. Super. 593, 168 A.2d 785 (1961).
2. 402 Pa. 628, 168 A.2d 328 (1961).
3. *Id.* at 629, 168 A.2d at 329.
4. 194 Pa. Super. 330, 169 A.2d 349 (1961).

the petition on the ground that "coram nobis does not lie to permit the review of a judgment for after-discovered evidence."[5]

Delay in Trial

Commonwealth ex rel. Graham v. Myers.[6] In January 1959, relator was arrested, taken before a magistrate, formally charged, and committed to a county prison. In February 1959, he was indicted for conspiracy, rape, aggravated assault, and robbery by violence. In June 1959, he was tried, convicted, and sentenced to a prison term. After examination at a diagnostic center, he was transferred, in September 1959, to the state correctional institution at Graterford, where he is presently confined. He sought his release by way of habeas corpus on the ground that "he was denied the speedy public trial guaranteed to him under Section 9, Article I of the Constitution of this Commonwealth." As additional support, he pointed to the so-called "two-term" statute[7] which provides that "if such prisoner shall not be indicted and tried the second term, session or court after his or her commitment . . . he shall be discharged from imprisonment."[8] Hence, relator concluded, "by the prosecution delaying the trial for approximately five months," the trial court was "without jurisdiction to proceed" and all subsequent proceedings were "null and void." In rejecting relator's argument, the appellate court declared (quoting from *Commonwealth v. Mitchell*): "Our interpretation of the Constitution and our statute permits a prisoner to be discharged from unlawful imprisonment, but does not permit the guilty to escape prosecution because of a fortuitous circumstance which delays the trial."[9] Since the right to be discharged existed only prior to trial—and since relator had already been tried and convicted—the question whether relator "should have been released pending trial is now moot."

Entrapment

Commonwealth v. Conway.[10] Defendant, who had been convicted of bookmaking, urged on appeal that the trial judge erred in failing to submit the question of entrapment to the jury. After examining the two leading cases, *Sorrells v. United States*,[11] and *United States v. Sherman*,[12] the court declared that the defense of entrapment in Pennsylvania "arises only when a law enforcement officer, by employing methods of persuasion or inducement which create a substantial risk that persons not otherwise ready to commit

5. *Ibid.*
6. 194 Pa. Super. 561, 168 A.2d 796 (1961).
7. Pa. Stat. Ann. tit. 19, § 781 (Supp. 1960).
8. *Supra* note 6, at 563, 168 A.2d at 797.
9. *Id.* at 564, 168 A.2d at 797.
10. 196 Pa. Super. 97, 173 A.2d 776 (1961).
11. 287 U.S. 435 (1932).
12. 356 U.S. 369 (1938).

the criminal act will do so, actually induces such a person to commit the act."[13] In brief, the defense of entrapment requires: "(1) a defendant not disposed to commit the crime, and also (2) police conduct likely to entrap the innocently disposed." Noting that defendant had no prior conviction of bookmaking and "the defendant's own evidence suggests that considerable persuasion was used by the law enforcement officer," the court, in reversing, felt that the defense should have been submitted to the jury. Two judges dissented.

EXTRADITION

Commonwealth ex rel. Wright v. Banmiller.[14] Petitioner, in a habeas corpus proceeding, claimed irregularities in connection with his extradition from Washington, D. C. to Philadelphia where he later pleaded guilty to an indictment for robbery. In sustaining the dismissal of the petition, the court observed that no evidence had been offered to substantiate the charge of extradition irregularities. In any event, it was noted, "the entry of a plea and sentence" constituted a waiver of any such alleged irregularities.

Commonwealth ex rel. Gant.[15] Relator, who had pleaded guilty to seventeen burglaries and related offenses in 1948 and was sentenced to prison, claimed by way of habeas corpus that he had been arrested in Brooklyn, New York and returned to Philadelphia on the burglary charges and had not been "advised of his rights in extradition proceedings." In sustaining the dismissal of the petition, the appellate court declared: "Even if relator had been brought into Pennsylvania without extradition proceedings, he has no standing to question the jurisdiction of the Pennsylvania court to accept a plea of guilty to an indictment regularly found charging crimes committed in this state."[16]

FIREARMS

Commonwealth ex rel. Curry v. Myers.[17] Petitioner, who allegedly shot and critically wounded his estranged wife, was indicted on three counts: (1) assault and battery, aggravated assault and battery, and assault and battery with intent to murder; (2) commission of a crime of violence while armed with a firearm; and (3) carrying a concealed deadly weapon and unlawfully carrying a firearm without a license. Convicted on counts (1) and (2) petitioner received consecutive sentences. In a subsequent habeas corpus proceeding the petition was dismissed, but it was felt that the sentence imposed under the matter alleged in the second count was illegal in that it did not constitute

13. *Supra* note 10, at 103, 104, 173 A.2d at 779.
14. 195 Pa. Super. 124, 168 A.2d 925 (1961).
15. 195 Pa. Super. 417, 171 A.2d 603 (1961).
16. *Id.* at 419, 171 A.2d at 605.
17. 195 Pa. Super. 480, 171 A.2d 792 (1961).

a crime.[18] The pertinent statute provided: "If any person shall commit or attempt to commit a crime of violence when armed with a firearm contrary to the provisions of this section, he may, in addition to the punishment provided for the crime, be punished also as provided by this section."[19] According to the lower court, this language did not create a new crime but rather prevented the crimes enumerated in the following paragraphs of the section—such as the crime of carrying a firearm without a license—from merging with the "crime of violence." The appellate court agreed that no crime as alleged in the second count existed and vacated the sentence imposed thereunder. Two justices dissented.

Habeas Corpus

Commonwealth ex rel. Baerchus v. Myers.[20] Petitioner who had been convicted of burglary sought his release from imprisonment by way of a writ of habeas corpus. Noting that petitioner's contentions—*inter alia*, that his confession was coerced, that the judge was prejudiced, that the conviction was obtained as a result of perjured testimony—had not been raised by post-conviction motion nor had an appeal been taken, the court sustained the dismissal of the petition. It was held that habeas corpus was not available to attack a conviction on the grounds urged, and in any event, it appeared that the petitioner had been "afforded ample opportunity to demonstrate a denial of due process" by three previous petitions.

Commonwealth ex rel. Garrison v. Myers.[21] By way of habeas corpus, relator claimed "that his sentence was too severe; that his lawyer incompetently conducted his defense, and that [he] did not receive a fair and impartial trial."[22] The court affirmed the dismissal of the petition on the opinion of the lower court (Guerin, J.), which had declared that while such "reasons might have been assigned upon a motion for a new trial," they may not be urged by habeas corpus "which cannot be made the substitute for normal appellate review."[23]

Instructions of Trial Judge

Commonwealth v. Lomax.[24] Defendant, who had been tried before a jury and convicted of the illegal possession and sale of drugs, urged on appeal that the trial judge erred "when he expressed his opinion concerning defendant's veracity and guilt." The court declared that the expression of such

18. The trial judge raised the illegality of the indictment himself. Petitioner's writ of habeas corpus contained no such contention and was dismissed because the contentions contained therein were without merit.

19. Pa. Stat. Ann. tit. 18, § 4628 (1939).

20. 194 Pa. Super. 377, 168 A.2d 754 (1961).

21. 194 Pa. Super. 611, 169 A.2d 584 (1961).

22. *Id.* at 611, 169 A.2d at 585.

23. 23 Pa. D.&C.2d 519, 520 (1960).

24. 196 Pa. Super. 5, 173 A.2d 710 (1961).

an opinion is proper so long as "(1) there is reasonable ground for any statement he may make; and (2) he clearly leaves to the jury the right to decide all the facts and every question involved in the case, regardless of any opinion of the court thereon." Since the trial judge instructed the jury that "they were the judges to finally believe or disbelieve the witnesses and to find the guilt or innocence of the defendant," and since he "cited his reasons for saying that he did not believe the defendant," it was held that no error was committed.

Commonwealth ex rel. Johnson v. Myers.[25] Relator, who had been convicted of murder in the second degree, contended, by way of habeas corpus, that he was denied due process because of error in the trial judge's charge. The pertinent instruction provided: "It may be stated as a general rule that all homicide . . . is presumed to be malicious, that is, murder of some degree, until the contrary appears in evidence. While it is presumed to be murder that presumption raises no higher than murder in the second degree. The burden is upon the Commonwealth to raise it to murder in the first degree, the burden is on the defendant to lower it."[26] This instruction was held to be erroneous for the reason that the presumption applies "not to all homicide but only to felonious homicide." Nevertheless, the writ was denied as this was, according to the court, matter that should have been raised at the trial or on appeal. In a concurring opinion Justice Bell maintained that the judge's charge, when considered as a whole, was free from prejudicial error and for that reason the writ was properly denied by the lower court. The majority also took this occasion "to disapprove the use hereafter of any instruction to the jury on an indictment for murder that all felonious homicide is *presumed* to be murder in the second degree."[27] Felonious killings—killings by poison or lying in wait or committed in the perpetration of one of the enumerated felonies—are "inherently malicious" and by statute defined as murder in the first degree. Hence, the court observed, it would be anomalous to assert that the law presumes such facts to constitute murder in the second degree. While wilful, deliberate and premeditated killings (which could rise to murder in the first degree by proving a specific intent to kill) and other killings with malice but without a specific intent to kill "according to their circumstances would fit the definition of murder in the second degree: these various conclusions are reached by facts and inferences, not by any presumption."[28] A disapproval of the use hereafter of an instruction that refers to defendant's "burden" was also noted by the court: it felt that "a defendant has no burden whatever."

25. 402 Pa. 451, 167 A.2d 295 (1961).
26. *Id.* at 453, 167 A.2d at 297.
27. *Id.* at 454, 167 A.2d at 297.
28. *Id.* at 455, 167 A.2d at 297.

INVOLUNTARY MANSLAUGHTER

Commonwealth v. Root.[29] Defendant was found guilty of involuntary manslaughter "for the death of his competitor in the course of an automobile race between them on a highway." Death resulted when, as uncontradicted evidence disclosed, the decedent, in attempting to pass defendant, collided head-on with an oncoming truck. The superior court sustained the conviction and the supreme court granted allocatur to decide the question "whether the defendant's unlawful and reckless conduct was a sufficiently direct cause of the death to warrant his being charged with criminal homicide."[30] The supreme court observed that theretofore the tort law concept of "proximate cause" had been employed in determining responsibility for criminal homicide. In light, however, of the "marked extension" of that concept in the civil realm, the court felt that it was no longer useful in the criminal law setting. Accordingly, it took this occasion to abandon it in favor of a narrower test—that of "direct cause." Henceforth, involuntary manslaughter might be warranted only where the act is (1) unlawful or reckless, and (2) is the direct cause of death. However, the court declared, even under the "proximate cause" yardstick, it could not sustain the conviction. For, under that doctrine, the "operative effect of a supervening cause would have to be taken into consideration."[31] Accordingly, it stated that decedent's act of passing when he was aware of the dangerous condition created by the defendant's reckless driving was such a supervening cause. The court noted that the superior court refused to look at decedent's supervening act on the ground that there could be more than one proximate cause of death, and if defendant's act was one of the many then he is guilty. This was error, according to the court, as each act must be considered in applying the "proximate cause" and "supervening cause" theories. Justice Bell filed a concurring opinion in which he advocated the adoption of a new definition of involuntary manslaughter: "Involuntary manslaughter is an unintentional and nonfelonious killing of another person without malice or passion, which results from conduct by defendant which is so unlawful as to be outrageous, provided such conduct is a direct cause of the killing."[32] In this case he concluded that "the unlawful racing by defendant was not only unlawful, it was outrageous, but it was not a direct cause, *i.e.*, one of the direct causes, of the killing."[33] Justice Eagen, in dissenting, felt that the defendant's unlawful conduct was a direct cause of the collision.

29. 403 Pa. 571, 170 A.2d 310 (1961).
30. *Id.* at 573, 170 A.2d at 310.
31. *Id.* at 578, 170 A.2d at 313.
32. *Id.* at 582, 170 A.2d at 315.
33. *Id.* at 583, 170 A.2d at 315.

Commonwealth v. Thomas.[34] Defendant was indicted on two counts—murder and involuntary manslaughter—for the fatal shooting of a nine-year-old boy. Over defendant's objection, the trial judge permitted the district attorney to try defendant only on the murder charge. A jury's verdict of guilty of murder in the second degree followed. The supreme court ruled that the failure to prosecute for involuntary manslaughter constituted prejudicial error, for the evidence strongly indicated criminal negligence, not malice. Further, it was observed that the trial judge acted improperly in refusing to explain to the jury the difference between involuntary manslaughter and murder. His charge gave the jury "the impression that the defendant must be found guilty of murder, or else be set free." This was not so, the court noted, for he could still be tried for involuntary manslaughter. Accordingly, the court reversed and ordered a new trial—one justice dissented.

JURY

Commonwealth v. Clark.[35] Defendants were found guilty of murder in the first degree and sentenced to life imprisonment. At the trial, it appeared that the jury retired to deliberate at 5:37 p.m. At 2:00 a.m. the next morning a verdict of first degree murder was returned. When, however, a poll of the jury disclosed that one of the jurors was not in accord with the verdict, the jury was sent back, over the defendant's objection, for further deliberation. The jury returned at 4:12 a.m. and declared that they were "hopelessly deadlocked." It further appeared that the jury was confused and it asked the court for guidance. After a brief discussion the jury was sent back at 4:17 a.m. Finally, the verdict of guilty was rendered at 5:25 a.m. In reversing and remanding for a new trial, the appellate court declared that the trial judge "should have adjourned the jury's deliberations at 4:17 a.m. in order to have minimized the possibility of a verdict which was the product of impatience, fatigue and confusion." *Commonwealth v. Moore,*[36] where it was held to be within the "trial judge's discretion to direct a jury to deliberate through the night," was distinguished on the ground that there was no indication of confusion. In the instant case, however, there was "utter confusion" and the trial judge "did not seriously endeavor to dispel this disorder and confusion other than by terse and unilluminating advice." Accordingly, the appellate court remarked: "The trial court obviously abused its discretion when at 4:17 a.m. it ordered a confused and overworked jury to continue its deliberations."

Commonwealth v. Tyson.[37] Defendant, who was convicted by a jury of

34. 403 Pa. 553, 170 A.2d 112 (1961).
35. 404 Pa. 143, 170 A.2d 847 (1961).
36. 398 Pa. 198, 157 A.2d 65 (1959).
37. 194 Pa. Super. 593, 168 A.2d 785 (1961).

robbery by assault and force, contended on appeal that his "rights were infringed by the court and the district attorney in permitting a member of the State Police to sit at counsel table and assist the district attorney in the selection of the jury."[38] As the court saw it, there was no indication of how defendant's rights were infringed by such action and "the district attorney was entitled to use any information the officer could furnish in assisting him with the proper preparation and presentation of the case."[39]

PAROLE

Commonwealth ex rel. Godfrey v. Banmiller.[40] Relator while on parole committed a burglary and was returned to the penitentiary to serve the balance of the sentence remaining when he was paroled—three years and seven months. After pleading guilty to the burglary indictment, relator was sentenced to five to ten years "to run concurrently with sentence now being served." Some eight years and seven months later he was again placed on parole. He violated this parole and was returned to serve the balance of the sentence imposed for the burglary conviction—which was five years according to the prison officials. In his petition for habeas corpus, relator—demanding his discharge from further imprisonment—argued that the time remaining was only one year and five months (which time had elapsed) since the sentencing judge had specified that his sentences were to run concurrently. In the alternative he urged that if the imposition of concurrent sentences was improper "the case should be remanded to the lower court for the imposition of a correct legal sentence in accordance with the sentencing judge's intention."[41] The appellate court in affirming the dismissal of the petition referred to the statute[42] which regulates the imposition of new penalties on parole violators. It noted that this statute "has frequently and repeatedly been construed by the Superior Court of Pennsylvania to mean that if a person commits a crime while on parole, he must serve the new sentence in addition to the back time, *regardless of the intention of the sentencing judge. The manner and order of service of imprisonment having been specified by law, the courts are powerless to change it.*[43] Hence, the court observed, while the term of imprisonment imposed was legal, "the additional words stipulating concurrent operation were illegal, of no effect and properly disregarded by the prison and parole authorities."

Commonwealth ex rel. Yanczak v. Warden, U.S. Penitentiary.[44] Peti-

38. *Id.* at 599, 168 A.2d at 788.
39. *Id.* at 600, 168 A.2d at 788.
40. 404 Pa. 401, 171 A.2d 755 (1961).
41. *Id.* at 403, 171 A.2d at 756.
42. PA. STAT. ANN. tit. 61, § 305 (Supp. 1960).
43. *Supra* note 40, at 404, 171 A.2d at 757.
44. 194 Pa. Super. 327, 169 A.2d 120 (1961).

tioner, while on parole from a Pennsylvania prison, committed a federal offense for which he was incarcerated in a federal penitentiary. By habeas corpus, petitioner contended that the surrendering by the state authorities of his person to the federal authorities consituted a waiver by the state of any further right to hold him. Hence he could not be compelled by the state to serve the balance of his sentence when released from the federal penitentiary. In affirming the dismissal of the petition, the court adopted the opinion of the lower court (Waters, J.) to the effect that there was "no authority for such contention."

PERJURY

Commonwealth ex rel. Rook v. Myers.[45] Petitioner had pleaded guilty to an indictment for murder. At a hearing to determine the degree of murder and to fix the penalty the court found the petitioner guilty of murder in the first degree and sentenced him to life imprisonment. Subsequently, by way of habeas corpus, petitioner claimed that at the hearing "he was denied his constitutional rights of due process and equal protection of the laws" in that the prosecutor used "false, untrue, conflicting perjured evidence and testimony." The supreme court, on the opinion of the lower court (Troutman, J.), affirmed the denial of the writ. While, the court noted, there were "some discrepancies in the testimony of several of the witnesses," there was "no indication whatsoever of even a suspicion of perjury." As the court saw it, "a mere variance in testimony, or the fact that a witness may have made contradictory statements, goes to the question of the credibility of the witness but does not, in itself, indicate perjury on the part of the witness, or that defendant was convicted on perjured testimony."[46]

POLYGRAPH TEST

Commonwealth ex rel. Hunter v. Banmiller.[47] Relator had been convicted in a non-jury trial of aggravated robbery and sentenced to prison. No appeal was taken, but by way of a petition for a writ of habeas corpus relator complained that "the results of a polygraph or 'lie detector' test were allegedly considered by the trial court in determining his guilt."[48] In sustaining the dismissal of the petition, the appellate court observed that while a polygraph test or the results thereof "is not judicially acceptable," there was no evidence "that such test was admitted or considered by the trial court in the disposition of the trial."[49] Indeed, when the trial judge found the relator guilty, he said: "I make that adjudication on the basis of the evidence without reference to

45. 402 Pa. 202, 167 A.2d 274 (1961).
46. *Id.* at —, 167 A.2d at 276.
47. 194 Pa. Super. 448, 169 A.2d 347 (1961).
48. *Id.* at 450, 169 A.2d at 348.
49. *Id.* at 451, 169 A.2d at 348.

the results of the lie detector test."[50] In any event, the court noted, even if the allegation were true, such a trial error cannot be raised by habeas corpus.

Post-Trial Motions

Commonwealth v. Harris.[51] Defendant had been found guilty of carrying concealed deadly weapons and of carrying a concealed firearm without a license. Immediately consequent upon the rendition of the verdict, defendant's counsel was required to argue his post-trial motions—which motions were denied. The appellate court condemned the requirement of a post-trial argument immediately after the verdict. It felt that counsel should have "the benefit of the transcribed testimony and proper time to prepare his reasons and argument in support of his motions."[52] However, it affirmed the conviction on the ground that no harm had been visited upon the defendant in that he had been allowed to raise all alleged errors irrespective of whether they had been urged below.

Preliminary Hearing

Commonwealth v. Burger.[53] Defendant, who had been convicted of burglary, urged on appeal that "he was proceeded against by 'witnesses and evidence' upon which he was not given a preliminary hearing."[54] In affirming the conviction, the court declared that, at the preliminary hearing, "it was only necessary for the Commonwealth to show a prima facie case."[55] Defendant was not entitled "to be confronted with all the Commonwealth witnesses and evidence." It was noted that he could have obtained "information by a bill of particulars."

Commonwealth v. Davis.[56] Defendant had pleaded not guilty before a justice of the peace to a complaint of operating a motor vehicle while under the influence of intoxicating liquor and waived the preliminary hearing. After having been indicted and convicted at a jury trial, defendant appealed contending that he "could not properly waive a preliminary hearing." The court adopted the lower court's opinion (Biester, J.) to the effect that the "right to be heard at a preliminary hearing is not self-executing and must be demanded." Hence, it was felt, such a right may properly be waived.

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50. *Ibid.*
51. 195 Pa. Super. 606, 171 A.2d 850 (1961).
52. *Id.* at 612, 171 A.2d at 853.
53. 195 Pa. Super. 175, 171 A.2d 599 (1961).
54. *Id.* at 180, 171 A.2d at 602.
55. *Ibid.*
56. 194 Pa. Super, 537, 169 A.2d 111 (1961).

PRIOR CONVICTIONS

Commonwealth v. Rucker.[57] Defendant had been convicted of murder in the first degree and the penalty fixed at death. Prior to the guilty verdict the court permitted evidence of defendant's prior convictions for the purpose of fixing the penalty without indicating "the sentences which were imposed on such prior convictions." This, it was held, did not constitute error. Two justices dissented.

PRISONERS

Commonwealth ex rel. Smith v. Banmiller.[58] Petitioner, a prisoner, claimed by way of habeas corpus that he lost weight, suffered from vertigo, and was "nearing a state of neuropsychosis." The relief sought was "proper medical attention." His claim to redress was predicated upon the eighth amendment of the Constitution of the United States "which proscribes cruel and unusual punishment."[59] While the appellate court observed—in affirming the dismissal of the petition—that the eighth amendment "does not apply to the states," it preferred to ground its decision upon the proposition that "it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries."[60]

Commonwealth ex rel. Reed v. Maroney.[61] Relator was convicted of burglary and sentenced to an indeterminate term in the State Correctional Institution at Camp Hill—formerly called the Pennsylvania Industrial School —an institution for young offenders. He was later transferred to the State Correctional Institution at Graterford, and from that institution to the State Correctional Institution at Pittsburgh—these institutions were formerly known as "penitentiaries." By habeas corpus relator questioned the power of the Deputy Commissioner for Treatment to make such transfers. The lower court ordered relator's return to the institution at Camp Hill. The appellate court, in reversing that order and giving effect to the transfers, declared that "when the legislature gave the Deputy Commissioner for Treatment authority to make transfers from any state institution under the control of the Department of Justice, it intended to include the institution at Camp Hill among such institutions."[62] It noted that the school at Camp Hill "is geared to the less hardened offender between the ages of 15 and 23" and that an "intolerable situation" would be created "by making impossible the removal of the serious troublemakers."

57. 403 Pa. 262, 168 A.2d 732 (1961).
58. 194 Pa. Super. 566, 168 A.2d 793 (1961).
59. *Id.* at 567, 168 A.2d at 794.
60. *Id.* at 568, 168 A.2d at 794.
61. 194 Pa. Super. 514, 168 A.2d 800 (1961).
62. *Id.* at 521, 168 A.2d at 803.

REPUTATION OF VICTIM

Commonwealth v. Meszaros.[63] Defendant, who had been charged, *inter alia,* with tending to corrupt the morals of a female child under the age of eighteen years, applied, during his trial, for a continuance predicated upon the absence of a witness who would testify to the bad reputation of the prosecutrix. This was denied and his conviction followed. Upon appeal, the court stated that "an application for a continuance of a case is addressed to the sound discretion of the trial judge and in the absence of an abuse of discretion the action thereon will not be disturbed."[64] Finding that there was no such abuse, the appeal was quashed. In any event, it was noted, "evidence relating to reputation for chastity, if offered, would have been incompetent." The court observed: "We see no reason why evidence of bad reputation should not be treated the same as evidence showing consent of the minor."

RETROACTIVE EFFECT

Commonwealth v. Rucker.[65] Prior to the Split-Verdict Act[66] the defendant was convicted of murder in the first degree with penalty of death. On appeal, defendant claimed that due process was violated in that the trial judge allowed evidence of his prior convictions "for the purpose of affecting the penalty" prior to a "verdict of guilty." His claim was rejected on the ground that the Split-Verdict statute "will not be applied retroactively."

Commonwealth ex rel. Hough v. Maroney.[67] Relator, along with two accomplices, participated in a robbery during which an off-duty policeman was fatally shot. After pleading guilty he was convicted of murder in the first degree and sentenced to death—this was later commuted to life imprisonment. Although it was not clear whether the death-dealing bullet came from a robber's gun or from the gun of one of the policemen who attempted to stop the felons, the court found that it was necessary only that the fatal shot had been fired "in aid of or in resistance to the perpetration of the felony."[68] Ten years later, *Commonwealth v. Redline*[69] was decided. Relator argued that his guilty plea was entered in the "mistaken belief that the fatal shot had been fired by his co-conspirator." Accordingly, he urged a review of his case at which time the court would apply the "new felony murder rule" under which, as he saw it, his conviction could not be sustained. In affirming the lower court's dismissal of the petition, the supreme court ruled that the *Redline* decision would not be given retroactive effect.

63. 194 Pa. Super. 462, 168 A.2d 781 (1961).
64. *Id.* at 463, 168 A.2d at 782.
65. 403 Pa. 262, 168 A.2d 732 (1961).
66. PA. STAT. ANN. tit. 18, § 4701 (1959).
67. 402 Pa. 371, 167 A.2d 303 (1961).
68. *Id.* at 375, 167 A.2d at 306.
69. 391 Pa. 486, 137 A.2d 472 (1958).

RIGHT TO COUNSEL

Commonwealth ex rel. Johnson v. Myers.[70] Petitioner, who had been convicted of robbery, claimed by way of habeas corpus that "he was without benefit of counsel at the preliminary hearing." On the opinion of the court below (Shelley, J.), the appellate court affirmed the denial of the petition. It was observed: "The law does not require that a person arrested, even though on a charge of murder, must be provided with counsel as soon as he is taken into custody, or prior to indictment or arraignment."[71]

Commonwealth ex rel. Whitling v. Russell.[72] Relator and his brother had been tried and convicted of sodomy. By way of habeas corpus he contended that the court's appointment of relator's personal attorney as co-defendant's counsel constituted "such a conflict of interest as to deprive him of being heard by his counsel." In sustaining the denial of the petition, the appellate court declared that the relator must show "more than just the conflict of interest." He had to show that the conflict "resulted in such ineffective and improper representation as to result in basic and fundamental error." The requisite showing had not been made. Two judges dissented.

Commonwealth ex rel. Simon v. Maroney.[73] Petitioner, some twenty years after having been convicted of rape and robbery, contended by way of habeas corpus that due process had been violated in that the trial judge had failed to provide him with counsel. It appeared that petitioner, at that time, "had been told that the court would assign him a lawyer and that he had not requested that one be appointed." It also appeared that he was eighteen years of age, had an I.Q. of 59, and was (and is) recognized as a "potentially dangerous person of high moron intelligence." In sustaining the denial of the petition, the appellate court alluded to the principle that "there is no lack of due process in the failure to appoint counsel in a noncapital case unless it is established that for want of benefit of counsel an ingredient of unfairness operated in the process that resulted in the prisoner's sentence."[74] "Youth" and "low mentality," the court felt, do not per se establish the requisite unfairness—and no additional evidence of unfairness had been shown. One judge dissented.

RIOT

Commonwealth v. Abney.[75] Following a high school football game in Norristown, a group of boys "charged into the visiting color guards and

70. 194 Pa. Super. 452, 169 A.2d 319 (1961).
71. 23 Pa. D.&C.2d 397, 401 (1960).
72. 195 Pa. Super. 277, 171 A.2d 819 (1961).
73. 195 Pa. Super. 613, 171 A.2d 889 (1961).
74. *Id.* at 616, 171 A.2d at 890.
75. 195 Pa. Super. 317, 171 A.2d 595 (1961).

band members, knocking at least one girl to the ground."[76] A number of other students were also attacked. Fourteen boys were found guilty of participating in a riot. Five of the defendants appealed. Since the pertinent statute did not define riot, the common law had to be consulted. The court defined riot as a "tumultuous disturbance of the peace by three or more persons assembled and acting with a common intent; either in executing a lawful private enterprise in a violent and turbulent manner, to the terror of the people, or in exercising an unlawful enterprise in a violent and turbulent manner."[77] Defendants argued that there was no evidence that they "assembled and acted with a common intent." In rejecting their plaint, the court observed: "Even though some of the rioters may have attacked their victims because they attended a different school, and others may have attacked their victims because they were of a different race, the intent of all the participants, as demonstrated by their conduct, was to act in a violent and turbulent manner. That intent was common to all."[78] And, since the "defendants were at approximately the same place at the same time engaging in the same type of unlawful conduct,"[79] the defendants had "assembled."

"Split-Verdict" Statute

Commonwealth v. McCoy.[80] Defendant, who shot and killed the owner of a grocery store in the course of a robbery, was found guilty of murder in the first degree. As required by the so-called "Split-Verdict Act," a hearing was held to determine whether the penalty should be death or life imprisonment. The jury fixed the penalty at death. Defendant claims error in that at the hearing, "the victim of a prior armed robbery, to which the defendant had pleaded guilty, was permitted by the court to testify concerning the circumstances of that crime."[81] The supreme court felt that the admission in evidence of the prior robbery conviction was proper, but that the victim's testimony describing "The circumstances attending its perpetration and the force and violence to which the defendant had subjected him"[82] was "improper and should not have been admitted." In light, however, of the "heinous and cold-blooded killing"—"McCoy, without provocation of any kind, aimed his gun at Sabelli's face and shot him at a range of about 18 inches"[83]—the court felt that the improper testimony could not have "played any essential part in the

76. *Id.* at 319, 171 A.2d at 597.
77. *Id.* at 321, 171 A.2d at 597, 598.
78. *Id.* at 322, 171 A.2d at 598.
79. *Ibid.*
80. 405 Pa. 23, 172 A.2d 795 (1961).
81. *Id.* at 27, 172 A.2d at 796.
82. *Id.* at 32, 172 A.2d at 799.
83. *Ibid.*

fixing of the penalty."[84] Accordingly, it viewed the error as "clearly harmless" and as not warranting a new trial. Two justices dissented.

Tape Recording

Commonwealth v. Hart.[85] Defendant was found guilty of murder in the first degree and sentenced to life imprisonment. On appeal, he argued that the court erred "in admitting into evidence the transcribed testimony of a tape recording" of parts of his confession which had been made after arrest to an assistant district attorney. It appeared that, when he confessed, he had no knowledge that a recording was being made. The stenographic transcription of the recording was admitted into evidence by way of the stenographer's testimony in rebuttal of defendant's "fabrications." In affirming, the appellate court alluded to *Commonwealth v. Bolish*[86] where it was said that "tape recordings are admissible in evidence when they are properly identified and are a true and correct reproduction of the statements made, and when the voices are properly identified."[87] It noted that defendant's trial counsel had said that "he did not wish to hear the tape recording but believed the stenographer's notes were accurate and she was truthful."

Testimony of Accomplice

Commonwealth v. Pressel.[88] On appeal from his burglary and larceny convictions, the defendant urged that the trial judge erred in refusing to charge that the "testimony of one accomplice may not be used to corroborate the testimony of another accomplice." This, the court held, was "reversible error."

Witnesses

Commonwealth v. Emmel.[89] Defendant, who had been convicted of cheating by fraudulent pretenses, urged on appeal that the trial judge erred in allowing testimony by witnesses whose names had not been endorsed on the indictment. This contention was based upon a statutory provision[90] which regulates proceedings before a grand jury and requires the endorsement of the prosecutor's name on the indictment. The court held that the defendant's contention was without merit as the "requirement that the prosecutor's name be endorsed on the indictment" did "not require that all names of witnesses be endorsed thereon who are necessary to make out a case for conviction."[91]

84. *Ibid.*
85. 403 Pa. 652, 170 A.2d 851 (1961).
86. 381 Pa. 500, 524, 113 A.2d 464, 476 (1955).
87. *Supra* note 85, at 660, 170 A.2d at 855.
88. 194 Pa. Super. 367, 168 A.2d 779 (1961).
89. 194 Pa. Super. 441, 168 A.2d 609 (1961).
90. Pa. Stat. Ann. tit. 19, § 262 (1930).
91. *Supra* note 89, at 445, 168 A.2d at 611.

It noted, however, that our appellate courts have never squarely met the question of "whether a person whose name has not been endorsed on the indictment as a witness is disqualified from testifying at the time of trial."[92]

Unable to find "statutory authority or judicial precedents in this Commonwealth which prohibit the Commonwealth from calling additional witnesses to testify whose names were not endorsed on the indictment,"[93] the court concluded that such a prohibition would constitute an unjust restriction upon the state.

92. *Ibid.*
93. *Ibid.*