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Criminal Law

V. G. Seavy

they actually happened and not with speculations upon what conceivably might have taken place under the authority of the act."

The Court also adhered to its previous decisions [23] holding that statutory separation of the trials on the two issues involved—guilt and sanity—and trial of both issues to the same jury were not without due process of law.

As it happened, the Court did not need to decide the constitutional issues in this case, since the conviction was reversed for errors in the giving of instructions and in the admission of evidence. But the Court no doubt felt compelled to express its views concerning the statute because of the frequency and vigor of the attacks being made upon it, and because of the apparent need for guidance of counsel and the trial court on re-trial of the case. The Court considered the question of the validity of the statute important enough to order oral argument of the matter, allotting one hour each to the State and the defendant.

For the further guidance of counsel and courts the Supreme Court volunteered, by way of dicta, two further principles which merit consideration here. First, a refusal on the part of a trial court to admit defendant's evidence of mental derangement or insanity in the trial of the defendant's guilt "would be a denial of due process of law." And, second, referring to the statutory provision which reads "A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged," the Court said, "As indicated by the specially concurring opinion of Mr. Justice Holland in *Bauman v. People, supra,* we doubt the validity of this provision, . . ." The General Assembly, taking its cue from the decisions, has modified the statutes [24] to permit the taking of testimony going to the defendant's incapacity to formulate intent or deliberate in the trial of guilt, to eliminate the conclusive presumption of guilt in the trial of the insanity issue, and to require trial on the insanity issue prior to the trial on the issues raised by the plea of not guilty.

CRIMINAL LAW

V. G. SEAVY *of the Pueblo Bar*

The cases which form the content of this review are those found in Volume 7 of the advance sheets published by the Colorado Bar Association, numbers 1 through 13.

Cases decided during this period dealing with the criminal law are not numerically great, and there is little that falls without the category of reaffirmation. The writer has attempted, with no great degree of success, to divide the cases into the two categories of procedure and substantive law. Some cases belong in

[23] Ingles v. People, supra; Wymer v. People, 114 Colo. 43, 160 P. 2d 987.
[24] Session Laws, 1955, Ch. 118.

neither, and others belong in both. But perhaps the division is warranted when the other known alternative would be to list the cases numerically.

PROCEDURE

The most worthy subject of comment in a review of our criminal law of this past year are the repeated admonitions, suggestions, and criticisms which the Court has made regarding the procedure which should be followed when before it upon writ of error. Although the Court, as it expressed in many of the cases here under consideration, will overlook procedural shortcomings upon the writ when it deems the merits of sufficient importance, this at most is a hazardous position inasmuch as there is not always a meeting of the minds in this regard between Court and counsel.

In the case of *Will v. People*,[1] the writ of error was dismissed because of failure to present assignments of error, failure to present a record which contained objections to evidence of which the defendant complained, and failure to note exceptions. Mr. Justice Alter concludes by saying, "The record in this case is fatally defective; in disregard of all rules of criminal procedure, and does not properly present any question for our determination."

The same Justice in *Leonard McRae v. People*,[2] made the following statement:

> At the outset we call attention to the fact that our court rules with reference to assignments of error, abstracts and briefs in criminal cases have been wholly disregarded in the instant case . . . There is in the record in our Court no abstract. We also call attention to the fact that in criminal cases the rules of civil procedure adopted by our Court, effective April 6, 1941, contain an express provision that "Criminal procedure in the Supreme Court shall be under the practice heretofore existing (order of Supreme Court January 6, 1951)." The rules effective in criminal cases require the filing of assignments of error at the time of the filing of the record; fifteen copies of an abstract of record, and printed briefs.

Such comments should provide a yellow light for all those seeking review on writ of error. The legislature amended 39-7-24 and 39-7-27 of '53 C.R.S. dealing with writs of error in capital and non-capital cases so that the distinguishing feature of the two sections is now the imposition of the death sentence.[3]

What would have been the principal criminal case decided in the past year is now largely of only academic interest. Luckily, the perplexities and confusion surrounding the procedure in insanity cases, preserved by the current decision of *Leick v. People*,[4] have

[1] Vol. 7, C.B.A. Ad. Sh. No. 5, pg. 156; 278 P. (2d) 178.
[2] Vol. 7, C.B.A. Ad. Sh. No. 9, pg. 280; 281 P. (2d) 153.
[3] S.B. 104, approved April 15, 1955.
[4] Vol. 7, C.B.A. Ad. Sh. No. 9, pg. 297; 281 P. (2d) 806

been somewhat alleviated by legislative amendment.[5] The defendant entered pleas of "not guilty" and "not guilty by reason of insanity" to the charge of murder. He was tried and convicted upon his "not guilty" plea and the jury fixed the penalty at death. Two days later the same jury convened to find him sane upon trial of his other plea. The question of the applicable statutes' constitutionality was raised, but the majority of the Court refused to pass thereon. The contention was made that since defendant was "conclusively presumed" to be sane upon the trial under his "not guilty" plea (as provided by statute) he was denied due process of law. But the Court found that voluminous evidence upon his mental condition—including sanity—was introduced, and under the well known maxim of constitutional law as applied to criminal cases, the test is what was actually done, not what could have been done.

Moreover, the Court stated that it would have been a denial of due process had the trial court refused this evidence of mental condition, including sanity, not for the purpose of guilt or innocence, but as bearing upon defendant's ability to deliberate "and form the intent essential to murder in the first degree," citing *Ingles v. People.*[6] Judge Holland's comment in his specially concurring opinion indicated that he was "amazed at the adroitness with which the majority of this Court still eschew the question of constitutionality of statutes that are constantly dogging the trail of murder trials involving the procedure under pleas of insanity."

The cause was, however, reversed upon two other grounds. An instruction as to what the jury should consider in regard to evidence of mental condition was found contradictory, and error was committed when testimony as to defendant's mental condition was given by a psychiatrist who had observed and examined him. The testimony was given during the People's case in chief in violation of 39-8-2, '53 C.R.S.. The ruling is important in that this section stands unamended by the legislature.

There were two specially concurring opinions, one, as mentioned before, by Justice Holland, who made reference to his dissent in the *Bauman* case,[7] the other by Justice Clark who determined the statutes to be constitutional, and also apprised the majority that in his opinion *Battalino v. People* [8] had modified the rule of *Ingles v. People,* supra. Perhaps the trial judge had in mind the *Battalino* case and its distinction between mental condition and insanity when he gave the erroneous instruction, and while it still may be considered somewhat contradictory, it does not reach that degree of contradiction to which the majority attribute it.

The important amendments to the insanity procedure statutes omit the "conclusive presumption of sanity" provision when the

[5] H.B. 491, approved April 14, 1955.
[6] 92 Colo. 518, 22 P. (2d) 1109. (1933).
[7] Bauman v. People, Vol. 7, C.B.A. Ad. Sh. No. 1, pg. 30, 274 P. (2d) 591.
[8] 118 Colo. 587, 199 P. (2d) 897 (1948).

proper plea has not been made, and the admission of guilt when only the insanity plea has been made. They have provided that the defendant must make an insanity plea if he is to rely on insanity as a defense; that evidence of mental condition is to be admissible with reference to proving or disproving specific intent; that when the insanity plea is joined with others, the issue of insanity is first tried or all are tried together, and that defendant may demand separate trials, and, finally that when issues are tried separately they are tried to different juries.[9] Whether the new procedure will eliminate the frustrations of that which the Leick case was determinative, only time will tell. It is to be wondered whether the simplicity of pre-1927 procedure when everything came in under the "not guilty" plea has not in retrospect proved more worthy than was its alleged principal evil of the People's inability to prepare.

Other cases dealing with procedure have not been so arduous. In *People v. Gomez*,[10] the Court was called upon in a review initiated by the People under the provisions of 39-7-27, '53 C.R.S. to approve or disapprove the action of the trial court in directing a verdict for the defendant. During the course of the trial and at the conclusion of the opening statement made by the District Attorney, the defendant moved for a directed verdict which was granted on the ground that nothing was stated in the "opening statement which would constitute a charge against the defendant." The Supreme Court disapproved the lower court's action, finding (1) it is not incumbent upon the prosecution to make an opening statement; (2) that the opening statement was in fact "sufficient to entitle the District Attorney to introduce evidence in support of the burglary charge", and (3) it was error to deny the District Attorney leave to amend his statement upon his request to do so.

Three principal contentions were made in *Hawkins v. People*,[11] which went to the Supreme Court after defendant had plead guilty to and was sentenced for a crime against nature. Plaintiff in error first contended that the trial judge erred in not considering probation. At the time of taking defendant's plea the trial court indicated that defendant had a right to apply for probation even though the court was not disposed to grant the same in this type case. However, the defendant failed to make application therefor, and thus was in no position to claim error upon this point. The defendant next contended that it was mandatory that the trial court order a psychiatric examination under Art. 19, Ch. 39, '53 C.R.S. The Court stated that this is discretionary with the trial court, for the examination is necessary only if the court proceeds under the mentioned statute in committing defendant to an institution for a sentence of one day to life. Here the trial court elected to proceed under the regular statute defining the offense.

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[9] Supra, note 5.
[10] Vol. 7, C.B.A. Ad. Sh. No. 11, pg. 386; 283 P. (2d) 949.
[11] Vol. 7, C.B.A. Ad. Sh. No. 8, pg. 269; 281 P. (2d) 156.

Lastly, it was contended that the guilty plea was made involuntarily, which contention the record did not support, and that evidence taken after the plea was insufficient to prove the corpus delecti. But this is not the purpose of the taking of testimony in this regard, said the high Court, but rather its purpose is to apprise the sentencing judge of mitigating or aggravating circumstances to guide him in imposing sentence, citing *Champion v. People.*[12]

A dismissal of an appeal to it from the County Court was made by the District Court of Huerfano County and affirmed by the Supreme Court in *Naranjo v. People.*[13] A conviction was had against the defendant in the County Court for killing deer out of season and related offenses. This being a criminal case it came squarely within the provision of section 176, chapter 46, '35 C.S.A., which prohibits certain type criminal appeals to the District Court and provides for appeal by writ of error to the Supreme Court.

In *People v. Griffith,*[14] it was held that the jurisdiction of the county court over the person of the defendant was not "impaired by the manner in which accused is brought before it."[15] The defendant unsuccessfully argued that he was arrested without a warrant, and was not taken immediately before a magistrate. Other findings of jurisdictional validity were determined, and the Court reversed the action of the court below in dismissing for lack of jurisdiction.

With reference to defendant's unsuccessful contentions, this is perhaps a proper place to interpose the following legislative addition designated as 39-2-20, '53 C.R.S.

> Any provision in this chapter prior to the effective date of this act to the contrary notwithstanding, an arrest may be made by an officer or by a private person, without warrant, for a criminal offense committed in his presence; and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.[16]

There were two cases before the Supreme Court during the past year which dealt with bonds. The decision in *Trujillo v. District Court of the County of Weld*[17] ordered a bond reinstated. The defendant had been convicted of involuntary manslaughter and without a request by the sureties or the District Attorney the court remanded petitioner to the custody of the sheriff and discharged the bondsmen, denying petitioner's motion that bond be continued until disposition of motion for new trial. It was the policy of the trial court to follow such procedure in all cases of

[12] 124 Colo. 253, 236 P. (2d) 127 (1951).
[13] Vol. 7, C.B.A. Ad. Sh. No. 1, pg. 22; 274 P. (2d) 607.
[14] Vol. 7, C.B.A. Ad. Sh. No. 3, pg. 110; 276 P. (2d) 559.
[15] 22 C.J.S., pg. 236, section 144.
[16] S.B. 251, approved April 9, 1955.
[17] Vol. 7, C.B.A. Ad. Sh. No. 10, pg. 328; 282 P. (2d) 703.

felony and manslaughter convictions. The error was that the court's policy was in contravention of the discretionary provisions in regard to bond continuances of 39-2-19, '53 C.R.S.

The second case, *Allison v. People v. Adamson* [18] was also disposed of by a reversal, with two Justices dissenting. The interesting facts of the case making it one of first impression warrant a somewhat lengthy comment. The defendant was at liberty on bond pending trial for burglary. While at liberty he was convicted and sentenced for a felony in California, and thus could not appear on the date set for trial. The plaintiffs in error here entered into a contract with the surety on the bond to indemnify it in case of forfeiture—which was the result in the trial court. Thus, since the surety did not seek review the indemnitors did.

The Court found indemnitors to be proper parties, then found the lower court in error in its ruling of forfeiture. All due diligence and good faith surrounded the acts of both surety and indemnitors. The Court rejected the reasoning of one line of authority which holds relief should be granted only when the "undertaking has been rendered impossible or excusable (a) by an act of God; (b) by an act of the obligee; or (c) by an act of law."[19] Rather, it adopted the rule that since the plaintiffs in error were totally unable to bring defendant back, their plight is the same were defendant dead or confined to bed by illness, thus bringing the case under *Western Surety v. People.*[20]

SUBSTANTIVE LAW

The first case appearing in this volume of the advance sheets which dealt with the substantive law was *People v. Gallegos.*[22] The defendant was found not guilty of the charge of aggravated robbery. The people sought a reversal of the judgment under section 500, chapter 48, '35 C.S.A.

The facts were not in serious dispute and established that defendant with the aid of a gun demanded and received wages owing him from his employer. The Court affirmed on the basis of *Analytis v. People.*[23] The writer of the opinion defined *animus furandi* as "a latin phrase which generally may be translated as intent to steal, that is, a criminal intent to feloniously deprive an owner of his property." Since there was no serious dispute as to the fact that this money was owing him, this element was lacking, and thus the not guilty judgment below was correct.

An interesting factor in this review was that the People were "seeking a reversal of the judgment," and not merely an approval or disapproval. The section mentioned expressly prohibits double jeopardy in its application. Here the People were apparently go-

[18] Vol. 7, C.B.A. Ad Sh. No. 13, pg. 468; 286 P. (2d) 1102.
[19] State v. Pelley, 222 N. C. 684, 24 S.E. (2d) 635. (1943).
[20] 120 Colo. 357, 208 P. (2d) 1164 (1949).
[21] People v. Pollock, 65 Colo. 275, 176 Pac. 329 (1918).
[22] Vol. 7, C.B.A. Ad. Sh. No. 1, pg. 21; 274 P. (2d) 608.
[23] 68 Colo. 74, 188 Pac. 1113 (1920).

ing on the theory that even though the direction was made at the conclusion of all the evidence, the direction was made by the court solely on legal principles, the trial being to the court without a jury. It would have been interesting to see whether a new trial would have been ordered had the ruling been opposed to the trial court's action.

Another affirmance was ordered by the Court in *Roll v. People.*[24] The defendant was convicted of conspiracy to commit the crime of confidence game, and acquitted upon a substantive count charging confidence game. The rulings of the Court upon defendant's contentions were for the most part based upon findings that the trial court had not abused its discretion, (a) in endorsing at the time of trial a witness who was a principal but had changed his plea, (b) in permitting the same witness to testify when he remained in the court room for a short period of time after the rule of exclusion had been invoked, but without the knowledge or consent of the District Attorney, and (c) in admitting a confession which was alleged to be involuntary, the court having followed the procedure in regard thereto as directed in *Downey v. People.*[25]

Although the question was not properly before it, the Court also held that a conviction was properly returned upon the conspiracy count even though an acquittal was returned on the substantive charge. The Court found sufficient evidence of a plan, scheme and design to cheat and swindle.

Justice Knauss, who wrote the opinion in *Roll,* supra, also was the author of *Hood v. People,*[26] which rejected the contentions of plaintiff in error who had been convicted under the indecent liberty statute.

The Court could find no error in permitting the victim, a girl of nine years, to testify. Before permitting her to take the stand the trial judge interrogated her at length to determine her qualifications and determined from her answers that she was qualified. Nor was error committed in the introduction of similar offenses when properly limited by instruction, and testimony as to the silence of the defendant while under arrest was not prejudicial, as "the admission of evidence which cannot have influenced the jury, is harmless."[27]

The Court also held that it was not error in submitting only one form of not guilty verdict to the jury covering the entire information when three guilty forms were given. The defendant was charged in four counts: (1) assault coupled with the taking of indecent liberties; (2) enticing or alluring into some place for the purpose of taking such indecent liberties; (3) taking indecent liberties, and (4) attempting to take such indecent liberties. Count two was dismissed, and defendant was found guilty on count three.

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[24] Vol. 7, C.B.A. Ad. Sh. No. 11, pg. 398; 284 P. (2d) 665.
[25] 121 Colo. 307, 215 P. (2d) 892 (1950).
[26] Vol. 7, C.B.A. Ad. Sh. No. 4, pg. 133; 277 P. (2d) 223.
[27] McQueary v. People, 48 Colo. 214, 110 Pac. 210 (1910).

The Court stated the District Attorney charged separate phases of the same act in the four counts, and the jury was instructed that it should not consider count four "unless it found defendant not guilty of one or both of the offenses set forth in counts one and three."

It is difficult to see how the jury could have found defendant not guilty of any of the single offenses under the not guilty form of verdict given to it. The Court, however, reasoned that since a proper verdict upon one count was returned, there was no error. Apparently the jury's common sense, and not proper legal procedures, form the basis of this affirmance.

The opinion undoubtedly paraphrased the counts of the information to a large extent. It should be remembered that "indecent and improper" liberties under the first offense of the statute is not synonymous with "immodest, immoral and indecent" liberties under the second, third, and fourth offenses of the statute, and a conviction upon taking "indecent and improper" liberties not coupled with an assault is not proper.[28]

There were four cases decided which dealt primarily with criminal evidence. The first of these, *Bauman v. People*,[29] was reversed because prejudicial hearsay was admitted. A psychiatrist gave evidence of the result of a staff meeting. This brought the case squarely within the rule pronounced in *Carter v. People*.[30] Mr. Justice Holland filed a lengthy dissent which has already been noted concerning the insanity procedures, and he also made comment in regard to prejudicial remarks made by the District Attorney as to punishment which the majority stated was corrected by instruction. It is his view that such instructions are of doubtful value in removing from the minds of the jury prejudicial remarks of this type.

The case of *Baney v. People* [31] dealt with the *res gestae* rule. The defendent was convicted of forcible rape, and the conviction was reversed with order to discharge the defendant. Testimony of what the complaining witness had related to law enforcement officers some ten to fourteen hours following the alleged attack was ruled hearsay and without the *res gestae* exception. After citing *Graves v. People*,[32] which quoted from Wharton as follows:

> Res gestae are events speaking for themselves through the instinctive words and acts of participants, not the words and acts of participants when narrating events.[33]

the Court determined that the testimony related only narrations of fact, and was therefore hearsay.

The rule of circumstantial evidence was determinative of

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[28] Kidder v. People, 115 Colo. 72, 169 P. (2d) 181 (1946).
[29] *Supra*, note 7.
[30] 119 Colo. 342, 204 P. (2d) 147 (1949).
[31] Vol. 7, C.B.A. Ad. Sh. No. 3, pg. 84; 275 P. (2d) 195.
[32] 18 Colo. 170, 32 Pac. 63 (1893).
[33] Wharton, Crim. Ev. sec. 262, 9th ed.

the ruling ordering the defendant discharged. The facts and circumstances "were not such as were incompatible with the innocence of the defendant and incapable of explanation upon any reasonable hypothesis other than that of the guilt of defendant."[34]

L. McRae v. People,[35] presents perhaps what is new law. The defendant was charged and convicted of aggravated robbery. It was his contention in the Supreme Court that error was committed in the introduction of testimony of an admission against interest into evidence which related the fact that accused had informed the officers while under arrest that he had once been in the penitentiary. The statement was made to the officers in explanation of his possession of a money order and currency.

The Court, speaking through the Chief Justice, held that if any of the admission comes in that it comes in in toto. It was also held that if it were admitted for purposes of attacking credibility, it would have been error for the defendant had not taken the witness stand.

However, the Court emphasized the voluntariness of the admission and stated the rule to be the same in written or oral confessions. Two early cases were cited by the Court in this regard to support its conclusion.[36] But if the Court has adopted the rule that both confessions and admissions must be voluntary, it has in effect overruled *Bruner v. People*.[37]

That opinion, which was by the same author, stated, "However, if the statement is not a confession, the question as to its voluntarity is unimportant." It also quoted Abbot as follows:

> A declaration made by one accused of a crime, denying any criminal act and explaining suspicious circumstances for his own advantage, is not a confession, and does not come within the rule that confessions must be voluntary to be admissible.[38]

Two decisions concerning the same defendant were handed down as *Miles v. People*.[39] The first allowed the record to be supplemented by the introduction of carbon copies of a confession which had been lost, there appearing no reason to doubt the authenticity of the copies. The second case dealt with the law surrounding the confessions.

It was held that the proper procedure as outlined by *Downey v. People*,[40] was followed here. The trial court held a preliminary hearing during which it concluded that the evidence was not suf-

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[34] Beeler v. People, 58 Colo. 451, 146 Pac. 762 (1915).

[35] *Supra*, note 2.

[36] Potyralski v. People, 53 Colo. 331, 124 Pac. 742 (1912); Rogers v. People, 76 Colo. 181, 230 Pac. 391 (1924).

[37] 113 Colo. 194, 156 P. (2d) 111 (1945).

[38] Abbot, Criminal Trial Brief, sec. 481.

[39] Vol. 7, C.B.A. Ad. Sh. No. 5, pg. 163; 282 P. (2d) 1094. Vol. 7, C.B.A. Ad. Sh. No. 10, pg. 318; 282 P. (2d) 1096.

[40] *Supra*, note 25.

ficient to exclude the confession, but that the weight to be given thereto was for the jury. It was also held that under *Schneider v. People* [41] it was proper to admit a joint confession which included statements regarding similar offenses, as they were restricted by instruction as evidence only of plan or design.

In the last case to be mentioned, *M. McRae v. People*,[42] it was held that where an irreconcilable conflict in the evidence was presented it was the sole province of the jury to determine the credibility of the witnesses. This was a case of manslaughter while driving a vehicle under the influence of alcohol where the blood alcohol analysis result was very high, and the only testimony as to what the defendant had had to drink was "one and a half bottles of 3.2 beer." The instructions as given by the trial court were found to be without error and the conviction was affirmed with one Judge dissenting.

In conclusion the writer would like to cite one more legislative amendment, 40-14-2, '53 C.R.S. relating to obtaining goods under false pretenses has been amended so that the dividing line between a felony and misdemeanor is now $50.00 instead of $20.00.[43]

TAXATION

By KEITH ANDERSON *of the Denver Bar*

DECISIONS

Only two cases dealing with this subject were before the Colorado Supreme Court during the past year. One has application only to a special class of taxpayers, but the other is of interest to all property owners.

In *Cooper Motors, Inc. v. Board of Jackson County Commissioners, et al.*,[1] the plaintiff's attorneys asked the court to overrule *City and County of Denver v. Hover Motors, Inc.*[2] On an agreed statement of facts, the trial court was presented with the issue whether automobiles, upon which the specific ownership tax had been paid, were subject to *ad valorem* taxes in those situations where they form a part of a dealer's stock of merchandise. The trial court, following the rule of law laid down in the *Hover* case, held that they were. The Supreme Court reversed the decision of the lower court, overruling its holding in the *Hover* case. With commendable frankness the court recognized its prior error in construction of the applicable statute and constitutional provision.

The other case, *Weidenhaft v. County Commissioners of El Paso County, et al.*,[3] was an attack upon the validity of the statewide reappraisal program as applied to real property. The plain-

[41] 118 Colo. 543, 199 P. (2d) 873 (1948).
[42] Vol. 7, C.B.A. Ad. Sh. No. 13, pg. 460; 286 P. (2d) 618.
[43] S.B. 124, approved April 15, 1955.
[1] 279 P. 2d 685, 1954-55 C.B.A. Adv. Sh. No. 6.
[2] 121 Colo. 439, 217 P. 2d 863.
[3] 283 P. 2d 164, 1954-55 C.B.A. Adv. Sh. No. 10.