1-1-1957

Chapter 23: Criminal Law, Procedure, and Administration

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Recommended Citation
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Criminal Law, Procedure, and Administration

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§23.1. Right of arrested person to speedy examination. In the enforcement of federal criminal statutes, the arresting officer has the duty of taking the arrested person before a judicial officer for hearing, commitment or the taking of bail for trial. Under the Federal Rules of Criminal Procedure this must be done "without unnecessary delay." The requirement that law enforcement officers show with reasonable promptness legal cause for detaining arrested persons, by presenting them before a judicial officer, has been characterized by the United States Supreme Court in McNabb v. United States as:

an important safeguard — not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the "third degree" which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime.

Arrests under warrant in accordance with Massachusetts statutes require the arresting officer to take the accused before a court or judicial officer to be dealt with according to law. Neither statutes nor rules of court require, however, except in limited cases, that the presentation of any arrested person be made within any designated period of time, and no injunction is placed upon the arresting officer to do so promptly. The Supreme Judicial Court has recognized, however, that the arrested person is not completely without rights in this

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The author wishes to acknowledge the research assistance of Theodore DiMauro and Mario Simeola of the Board of Student Editors of the ANNUAL SURVEY.

3 General Laws, c. 276, §§22, 29, 34 provide for the issuance of warrants and summons for arrest, as well as for the examination of arrested persons. The statutes are silent, however, as to the time of these examinations.
4 For example, G.L., c. 272, §45 provides: "Whoever arrests a person for drunkenness shall make a complaint against him therefor at the next session of the court or of the trial justice having jurisdiction of the case; . . ." See also G.L., c. 272, §44.
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regard. In cases involving civil suits for false arrest or false imprisonment against the arresting officer, the obligation of speedy presentment has been clearly and emphatically stated. Thus, in *Keefe v. Hart,* the court stated that while the arrest was not improper, the defendant officers had the duty to take the plaintiff before a magistrate to determine whether there was ground to hold him. "The defendants had no right to detain the plaintiff to enable them to make further investigation of the charge against him. It was their duty to bring him before the court as soon as reasonably could be done." How much time is contemplated within that expression is left undecided but the Court does state that "It cannot be said as a matter of law that their delay for an hour and a quarter was reasonable." In the same vein is the language found in the earlier case of *Tubbs v. Tukey* in which the plaintiff was arrested some time during Sunday. The Court stated, "If he [the arresting officer] had a legal right to keep the plaintiff in jail, during Sunday and Sunday night, yet he could be justified only by the necessity of the case, and so long only as that necessity existed." 

In marked contrast to these civil cases, the Court in criminal cases has failed to exhibit any such tender regard for the rights of arrested persons to reasonably prompt examination. In *Commonwealth v. DiStasio,* the arrest occurred about one o'clock in the afternoon, after the criminal session of the court was closed for the day, but while the civil session was still open. At three o'clock the arrested person was questioned and thereafter made a confession. The following day he was arraigned. While recognizing the rule laid down in the *Tubbs* and *Hart* cases, the Court tersely disposed of the question with the statement, "No undue delay was shown." During the 1957 Survey year, this problem was raised again in *Commonwealth v. Banuchi.* The defendant was convicted of malicious burning and murder. He was arrested Sunday about midnight, but was not brought into court until Wednesday morning. During the interim period he made confessions, which he contended at the trial were inadmissible as involuntary because they were secured during a period of unlawful detention. The Court found that the period of two days and nine hours was not unreasonable. The facts indicate that the defendant may have been too drunk to have been brought before a court Monday morning. However, the lack of a Tuesday appearance is justified on the ground that "he was in the process of recording the confession ... he had made early that morning." 

5 213 Mass. 476, 100 N.E. 558 (1913).
6 213 Mass. at 482, 100 N.E. at 559.
7 Ibid.
10 294 Mass. at 284, 1 N.E.2d at 196.
It is indeed startling to find that a practice frowned upon by the United States Supreme Court as "secret interrogation" constitutes a recognized justification in Massachusetts for failure to bring the arrested person promptly into court. It is hoped that the police will not take advantage of this decision and regard it as an open invitation to elicit confessions during detention in order to justify a delay in judicial examination.

On somewhat sounder ground is the Court's conclusion that the confession was not inadmissible solely because it was secured during a period of prolonged detention. While the United States Supreme Court has reached the opposite conclusion at a matter of federal law in the McNabb and following cases, the Massachusetts case of Commonwealth v. Mabey supports the holding in the present case. The reason behind the principle appears to be that a confession so obtained is in the same category as other evidence obtained when, after interrogation, the police take the arrested person to locate the evidence before taking him before a judicial officer or to jail. This evidence is regarded as being in no different category than any other illegally obtained evidence not inadmissible in Massachusetts courts for that reason alone.

The Court also appears to be correct in finding that there was no violation of the federal due process clause in the securing and admission of the confessions. The facts of this case are clearly distinguishable, as the Court points out, from those of Fikes v. Alabama in which other elements of coercion were present.

Since the Supreme Judicial Court has been entrusted with the general superintendence of the administration of justice in the courts of Massachusetts, it might have been hoped that greater concern would have been shown over this problem of lengthy detention before examination. Police do not hesitate to delay bringing an arrested per-

16 In Commonwealth v. Mercier, 257 Mass. 353, 375-376, 153 N.E. 834, 841 (1926), it is stated: "The officer to whom the mittimus for the defendant was issued, instead of taking him directly to the jail, took him to different places where certain evidence was obtained which was used at the trial. The defendant objected to all evidence obtained in this way. But if it be assumed that the officer had no right under his mittimus to take the defendant to these places, still evidence thus obtained if otherwise admissible was competent."
20 The Executive Secretary appointed to assist the Supreme Judicial Court by virtue of the provisions of Acts of 1956, c. 707, filed his first annual report as of June 30, 1957. Very little contained therein pertains to the administration of criminal justice. Similarly the report of the Judicial Survey Commission, which immediately antedated the enactment of Chapter 707, is silent on the problem in its survey on the administration of criminal justice.
§23.2. Right to assistance of counsel. Article XII of the Declaration of Rights of the Massachusetts Constitution states that every subject shall have a right "to be fully heard in his defense by himself or his counsel, at his election." By statute the court may assign counsel in capital cases if the defendant is unrepresented. Neither the language of Article XII nor that of the statute has been so construed as to require that an indigent defendant in a non-capital case be furnished counsel, irrespective of the severity of the crime for which he is indicted or the length of the sentence to which he is thereby exposed.

In *Pugliese v. Commonwealth*, decided during the Survey year, an indigent, feebleminded person was tried without counsel for assault with a dangerous weapon with intent to rob, robbery and kidnapping. Equating the language of Article XII of the Declaration of Rights that states "No subject shall be ... deprived of his life, liberty or estate, but by ... the law of the land" with the due process clause of the Fourteenth Amendment of the United States Constitution, the Supreme Judicial Court set the verdict aside because it found that the defendant, incapacitated as he was, could not secure the fundamentals of a fair trial without representation by counsel. The Court analogized this case to the United States Supreme Court cases requiring counsel for incapacitated defendants, but the case is firmly based, and properly so, on the Massachusetts Constitution and decisions.

This is a landmark case in the Commonwealth; it constitutes the first case in which the Court has reversed a conviction in a trial court for failure to furnish counsel in a non-capital case. This defendant had been in court some twelve or fourteen times in the past twenty-three years and thus came within the provisions of the Briggs Law; the trial judge should have had sufficient information from the Department of Mental Health on the defendant's mental condition to indicate the necessity for assignment of counsel. In cases arising in which unrepresented defendants do not come within the provisions of the Briggs

§23.2. 1 G.L., c. 277, §47. This statute has been construed to require, rather than permit, the assignment of counsel in capital cases in which an indigent defendant is unrepresented. *Commonwealth v. Dascalakis*, 246 Mass. 12, 140 N.E. 470 (1923); *Commonwealth v. Millen*, 289 Mass. 441, 194 N.E. 463 (1935).


4 G.L., c. 123, §100A.
Law, the trial court will henceforth have to be alert for indications of mental incapacity. An amendment to the Briggs Law, requiring automatic mental examination of all indigent and unrepresented criminal defendants, would provide a desirable certainty to aid the trial judge.

Also a landmark in its peculiar way is *Brown v. Commonwealth*. In the case of *Allen v. Commonwealth*, the Court, in finding no unfairness in the conduct of a trial of a non-capital case with defendant unrepresented by counsel, observed:

Whatever may be the inherent limitations upon the assistance a trial judge can render to a defendant, it is nevertheless true that under the practice long prevailing in this Commonwealth constant explanation and instruction as to his rights by the judge to a defendant on trial without counsel are far from perfunctory and are regarded as a sacred duty...[which duty was]...fully and painstakingly performed in this instance in accord with the best traditions of Massachusetts justice.

The *Brown* case presented a defendant, unassisted by counsel, being tried for armed robbery and assault and battery with a dangerous weapon. While the defendant was cross-examining a witness, the judge asked a number of questions of the defendant, including one as to how many guns he had in his possession at the time of his arrest. The defendant answered all questions put to him by the judge. At the completion of the case for the state, the defendant presented no evidence, whereupon the judge, contrary to the usual practice in cases in which the defendant is unrepresented, required that the prosecutor argue the case to the jury. The judge then gave his charge, in the course of which he instructed the jury that, from the fact that the defendant didn't take the stand and testify as to whether he was the person involved in these alleged robberies and this assault, "no inference against him should be drawn...because jurors might think that an honest man who had nothing to hide would be glad to come up here and tell his own story." While the jury was deliberating, one of their number raised the question as to whether defendant had been given the opportunity to have legal counsel. On the jury's being recalled, the juror was questioned by the judge concerning his inquiry, in the course of which the judge severely criticized the juryman. Upon the guilty verdict being returned and prior to sentencing, the judge inquired about and considered charges of robberies against the defendant that were pending but untried.

These events, said the Supreme Judicial Court, constituted such an accretion of judicial happenings, which could hardly have occurred

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7 324 Mass. at 563, 87 N.E.2d at 195.
9 335 Mass. at 482, 140 N.E.2d at 465.
if counsel had been present, as to result in the defendant not securing the fundamentals of a fair trial. The trial judge's charge to the jury and his questioning of the defendant were also found to be violative of the defendant's privilege against self-incrimination.

The defendant was sentenced in May, 1952, for a term of a minimum of five years; the decision of the Court reversing and setting aside the verdict was handed down in February, 1957. No extended comment is required on the unsatisfactory state of the law of the Commonwealth which so entrusted the constitutional rights of the unrepresented indigent defendant to the limited assistance of a trial judge performing his "sacred duty."

In a third case involving lack of representation, *Drolet v. Commonwealth*, no lack of due process was found when the defendant's counsel was absent from the courtroom during the closing arguments of counsel for a co-defendant and counsel for the prosecution, and during the judge's instructions. The defendant was an adult not unfamiliar with courtroom practice, and the trial judge was not informed at the time that defendant's counsel was absent other than through prearrangement with his client. The Court, finding that the defendant at the time of the trial was not surprised or disturbed at the departure of his counsel, likewise and properly appeared not to be disturbed.

**§23.3. Withdrawal of plea of guilty: Effect thereof.** For many years Massachusetts has had a statute permitting a defendant to be convicted on his plea of guilty. In application, no exception has been made in cases involving the more serious crimes. When a guilty plea is made in the District Court, the defendant on appeal to, or on trial in, the Superior Court, may with court approval have his plea withdrawn upon application. Court approval can be had if the judge is satisfied that the admission of guilt was inadvertent and not voluntary or intentional. Nevertheless, despite the successful withdrawal of the plea and the substitution of a plea of not guilty, the original guilty plea is admissible in evidence against the defendant as an admission. In admitting the former plea as evidence, Massachusetts takes a position apparently contrary to that of the majority of American jurisdictions.

In *Commonwealth v. Devlin* one of the defendants assigned error on the ground of the impropriety of the admission during the murder

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10 *335* Mass. 582, 140 N.E.2d 165 (1957).

11 *§23.3. 1* G.L., c. 263, §6; id., c. 277, §47.

2 Commonwealth v. Chiavar, 129 Mass. 489 (1880) (murder case in which a guilty plea was allowed).


5 For a collection of cases, see Annotation, 124 A.L.R. 1527 (1940).

trial of his guilty plea made in the District Court. In accordance with the established Massachusetts doctrine the admission of the earlier guilty plea was held not to be error. The case would not be significant in this respect except for the fact that it appears to be the first capital case presenting the problem in Massachusetts.

A month after the Devlin case was decided an amendment to the General Laws became effective which gives the judges of the Superior Court the power, within sixty days after sentence imposed without trial following a plea of guilty or nolo contendere, to revoke the sentence and permit the withdrawal of the plea. Prior to this amendment the power of the judge to revoke a sentence and permit withdrawal of the plea ceased at the end of the sitting at which the sentence was imposed. The amendment eliminates an unnecessary and undesirable technicality in the law, but it may be questioned whether the amendment accomplishes much practically. The defendant who successfully has his sentence revoked and plea withdrawn finds that the withdrawn plea will continue to haunt him as an important piece of substantive evidence tending to establish his guilt.

§23.4. Admissibility of evidence of prior identification. The unreliability of the identification by witnesses of a defendant as the perpetrator of a crime is one of the more serious and unsatisfactory problems connected with the trial of criminal cases. Every available safeguard should thus be employed to insure the accuracy of identification. When available, one means of checking an identification is to compare present courtroom identifications with previous ones made by the same witness in police lineups or elsewhere. While the jurisdictions in the United States are about evenly divided as to the propriety of admitting evidence of previous identifications, whether on a corroborative or other basis, Massachusetts, after originally rejecting testimony of prior identification, now permits it either to corroborate a present identification or on cross-examination to test its reliability. This issue came before the Court in two cases during the 1957 Survey year. In Commonwealth v. Locke the robbery and arrest occurred on a Friday. On the following Monday a witness identified the defendant in a police lineup. At the trial some fourteen months later the same witness was permitted to testify as to his identification of the defendant in the lineup. The Court held there was no error in admitting this testimony, stating: “An identification made in court frequently has little testimonial value as compared with a prior identification made in the circumstances here disclosed and such evidence ought to be admissible


to corroborate the identification in court." 4 A police stenographer was also permitted to testify that he was present at the lineup when the witness identified the defendant and that the witness then made a statement that the defendant was one of a group of three men he saw running along the street of the robbery shortly after its occurrence. The Court held that this testimony was properly admitted.

In Commonwealth v. Roselli, 5 another robbery case, the principal issue was the identification of the defendant as one of the robbers. There was evidence that the chief witness for the prosecution first identified the defendant in a police lineup some seven years after the robbery. She also identified him at the trial. She had appeared at several lineups at which one Conroy appeared. Her testimony was that she did not identify Conroy as one of the robbers. A police chief then testified for the prosecution that he had taken the witness to two lineups at which Conroy appeared; on cross-examination he testified that the witness had pointed out Conroy at one lineup. Counsel for defendant then asked whether Conroy was indicted as a consequence of the witness’s identification. The Court found the question properly excluded as not being within the personal knowledge of the witness. Conroy was then called by the defendant and testified that the witness had identified him. The trial court refused to permit Conroy to be questioned as to whether, as a result of this identification, he was indicted for the same offense as that charged to the defendant. The Court held there was no error since the fact of any indictment of Conroy following his identification could add nothing to the previous testimony of the erroneous identification. Undoubtedly the Court was correct in this conclusion, the important thing being the unreliability of the identification rather than the previous consequences of it.

§23.5. Admissibility of evidence of blood-grouping tests. In Commonwealth v. Stappen 6 the defendant was indicted for failure to support his wife and two children. He filed a pre-trial motion for a blood test of all parties under the provision of G.L., c. 273, §12A, which directs the court to order such tests of the mother, child and defendant in paternity cases. The motion was opposed. The trial judge reported to the Supreme Judicial Court the questions of (1) whether the provisions of Section 12A are applicable to non-support cases, and (2) whether blood type evidence is admissible in a non-support case in which the children involved were born during wedlock. The Court answered the first question in the negative and second in the affirmative. The Court held that evidence of paternity exclusion, such as blood tests, overcomes the presumption of legitimacy of children born during wedlock.

Left unquestioned and undecided in the case is whether a trial judge has the power to order blood tests in criminal proceedings, in

4 335 Mass. at 112, 138 N.E.2d at 364.
the absence of a statute authorizing him to do so. In the past quarter of a century blood tests have become increasingly important not only in cases involving paternity but also in cases that involve crimes of a bloody nature, in which identification or exclusion by blood type has been significant. Many jurisdictions have enacted legislation specifically authorizing these tests. In others, the courts have proceeded under general statutes or rules of court permitting the court to order physical examinations of the parties. In the absence of any statute or rule, the inherent power of the trial court to order these tests has been recognized.

With the reliability of blood tests now generally recognized, it is unfortunate that the Court in the Stappen case did not have the opportunity to consider and resolve the question in this jurisdiction. There is no sound reason why these tests should not be available in appropriate cases, even as are the universally accepted tests for the determination of the alcoholic content in blood. If the courts have the inherent power in this state to order these tests, they should not hesitate to do so under proper safeguards. If they do not have this power, which seems doubtful, then appropriate legislation should be provided.


