Chapter 13: Criminal Law and Procedure

Richard C. Driscoll Jr.

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CHAPTER 13
Criminal Law and Procedure
RICHARD C. DRISCOLL, JR.

A. Legislation

§13.1 New trial. In 1966, the legislature expanded the power of a justice of the Superior Court to grant a new trial in criminal cases. A new trial may be granted for any cause for which by law a new trial may be granted, as before. But the power to grant a new trial was further expanded by the addition of the following ground: "If it appears to the Court that justice may not have been done, a justice of the Superior Court may at any time, upon motion in writing of the defendant, grant a new trial." ¹

This will enable the justices of the Superior Court to prevent a miscarriage of justice in instances in which the restriction may have prohibited the granting of a new trial. This amendment, however, raises the question of how long physical evidence and transcripts of testimony should be preserved in order to apply this test for a new trial.

§13.2. Suspended sentences. A trial judge cannot suspend the execution of a sentence imposed on a person convicted of a crime punishable by death or imprisonment for life or of a crime an element of which is being armed with a dangerous weapon. ¹ The legislature also prohibited placing on probation or suspending the sentence of a person convicted more than once of breaking and entering a dwelling house in the nighttime while armed or of the other offenses listed in General Laws, Chapter 266, Section 14.²

§13.3. Motions. General Laws, Chapter 277, Section 47A, now provides that upon an appeal to the Superior Court from a conviction in a district court, the motions allowed under Section 47A may be filed in the Superior Court within ten days after the entry of the appeal or within such reasonable further time as the court may allow by special order or general rule.¹

§13.4. Motor vehicle operator’s license. During the 1966 Survey year, General Laws, Chapter 90, Section 24, and General Laws, Chap-

RICHARD C. DRISCOLL, JR. is associated with the firm of Lyne, Woodworth & Evarts, Boston.


² Id., c. 330.

§13.6 CRIMINAL LAW AND PROCEDURE

169

ter 266, Section 28, were amended to require revocation of an operator's motor vehicle license for minimum specified periods of time after conviction for using a motor vehicle without authority or for larceny of a motor vehicle.1

§13.5. Interstate compact on detainers. In line with the current trend of protecting the rights of the accused, the legislature attempted to secure speedier trials by allowing the Commonwealth to enter an interstate compact by which the participants cooperate to deal with detainers against prisoners based on untried indictments, informations or complaints.1 If, during a term of imprisonment in a penal or correctional institution of a party state, there is pending in any other party state such an outstanding detainer, the prisoner is to be brought to trial within a specified time period. This period is to be within 180 days after the prisoner delivers to the prosecuting officer and to the court of this officer's jurisdiction, a written notice of the place of his imprisonment and the prisoner's request for a final disposition of the indictment, information or complaint.2 This request for final disposition will be deemed a waiver of extradition with respect to any charge contemplated thereby and also a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state.3

The compact also provides a procedure whereby a state in which an untried indictment, information or complaint is pending will be entitled to have a prisoner made available for trial. The trial will commence within 120 days of the arrival of the prisoner in the receiving state.4 However, the governor of the sending state may disapprove a request for the custody of a prisoner.

If there is no trial on the indictment, information, or complaint prior to the return of the prisoner to the original place of imprisonment, the indictment, information, or complaint will no longer be effective and the court will enter an order dismissing the same with prejudice.5

§13.6. New crimes. The legislature created new statutory offenses during the 1966 Survey year. Several are worthy of mention: breaking and entering a vehicle with intent to commit a misdemeanor;1 transportation of alcoholic beverages by minors unaccompanied by their legal guardian;2 possession of a master key designed to fit more than one motor vehicle with intent to use it to steal a motor vehicle or

§13.4. 1 Acts of 1966, c. 191.

§13.5. 1 Acts of 1965, c. 892.
2 Id. §1, Art. III(a).
3 Id., Art. III(e).
4 Id., Art. IV(a), (c).
5 Id., Arts. III(d), IV(e).

§13.6. 1 Acts of 1966, c. 408.
2 Id., c. §17.
property therefrom;\(^4\) sale of such a master key;\(^4\) and soliciting rides on the Massachusetts Turnpike.\(^5\)

§13.7. Unlawful assembly. The legislature has redefined an unlawful assembly; the offense is committed when five or more persons, armed with clubs or other dangerous weapons, or when ten or more persons, whether armed or not, are unlawfully, riotously or tumultuously assembled.\(^1\)

§13.8. Increased penalties. The legislature increased the penalty for the unauthorized use of a motor vehicle.\(^1\) A mandatory sentence in a state prison was prescribed for any person convicted of a second or subsequent offense of statutory rape.\(^2\) Finally, if a prisoner commits an assault and battery (or an assault) upon an officer or other employee of his jail or house of correction, he is to be punished by imprisonment in the state prison for not more than five years. This sentence will be served after the prisoner has satisfied any outstanding sentences for other offenses.\(^3\)

§13.9. Duration of imprisonment. During the 1966 Survey year the legislature made several changes relative to the length of time prisoners may be confined. Violators of certain so-called morals offenses are no longer entitled to have the term of their imprisonment reduced for good conduct.\(^1\) The act therefore also struck as no longer applicable the provisions in the earlier law that violators when released would not be given a certificate of discharge, but were to be released on parole and were to be subject to the law governing parole until the expiration of the term of imprisonment to which they had been sentenced.\(^2\)

General Laws, Chapter 127, §129, has been amended to provide that a prisoner released on parole by the Parole Board, who has failed to observe all the rules of his parole and has been returned to a correctional institution for the violation of his parole, will not receive deductions for good conduct for any of the first six months after he is returned to the correctional institution.\(^3\) The legislature rewrote Sections 133 and 133A of General Laws, Chapter 127, relating to granting of parole permits. Section 133, after amendment, restricts the general power of the Parole Board to grant parole permits in prescribed situations, as follows: (a) no prisoner convicted of a viola-

\(^1\) Id., c. 269, §1.

\(^2\) Id. §2.

\(^3\) Id., c. 270.

§13.7. 1 Acts of 1965, c. 647.


\(^2\) Id., c. 291.

\(^3\) Id., c. 279.


\(^2\) Id. §2.

\(^3\) Id. §3.
§13.9 CRIMINAL LAW AND PROCEDURE

Division of certain crimes against the person and certain crimes against morality who is held under a sentence containing a minimum sentence, shall receive a parole permit until he shall have served two thirds of his minimum sentence, but in any event, not less than two years, or if he has two or more sentences to be served "otherwise than concurrently," two thirds of the aggregate of the minimum terms of such several sentences, but in any event not less than two years for each such sentence; 4 (b) no other prisoner held under a sentence containing a minimum sentence is to receive a parole permit until he has served one third of his minimum sentence, but in any event not less than one year, or if he has two or more sentences to be served otherwise than concurrently, one third of the aggregate of the minimum terms of such several sentences, but in any event not less than one year for each such sentence; (c) no prisoner held under a sentence containing a minimum sentence for a crime committed while on parole shall receive a parole permit until he shall have served two thirds of his minimum sentence, or, if he has two or more sentences to be served "otherwise than concurrently" for offenses committed while on parole, two thirds of the aggregate of the minimum terms of these several sentences, but in any event not less than two years for each of his sentences. 5 However, in each of the above instances, the portion of a minimum sentence or sentences which a person must serve before being eligible for a parole permit is to be reduced by the number of days which the prisoner earned by donating blood. This new Section 133 was further amended by providing that those prisoners mentioned in clause (a) of the section, upon written recommendation of the superintendent or the director of the prison camp and the Commissioner of Correction and with the unanimous consent and approval of the Parole Board, will become eligible for parole consideration and may be given a parole permit before the time provided in clause (a), but in any event not sooner than a parole permit may be granted to other prisoners under clause (b) of the section. 6

New Section 133A reduces from 20 to 15 years the time which must be served by a person serving a life sentence (other than for murder in the first degree), before being eligible for parole. The section now requires a public hearing within 60 days before the expiration of the 15 years and a four-fifths vote of all of the members of the Parole Board in order for the board to grant a parole permit to a prisoner serving a life sentence.7

Under the amendment, parole permits are to be granted to those inmates only after at least three members of the Parole Board have

4 The crimes listed in the statute are those defined in C.L., c. 265, §§13, 13B, 14, 15, 15A, 15B, 16, 17, 18, 18A, 19, 20, 21, 22, 22A, 23, 24, 24B, 25 and 26, and c. 272, §§17, 35, and 35A.
seen him, with an exception that only two need see him if a three-man Parole Board is appointed by the chairman under the general power granted him to do so in General Laws, Chapter 27, Section 5.

The legislature also amended General Laws, Chapter 127, Section 134, by repealing the authority of the chairman of the Parole Board to designate one or more members of the board to conduct a preliminary hearing for inmates of a jail or house of correction other than an inmate transferred thereto from a correctional institution of the Commonwealth. 8

B. DECISIONS

§13.10. Search warrant. The case of Commonwealth v. Dias 1 re-emphasizes the necessity of strict compliance with General Laws, Chapter 276, Section 2B, which requires that the affidavit in support of an application for a search warrant contain the "facts, information and circumstances upon which such person relies to establish sufficient grounds for the issuance of the warrant." In this case, the affidavit, which was held to be insufficient to permit the issuance of the search warrant, was given by a police officer stating that the officer "believes, and has probable cause to believe that the rooms in the cellar and every story of a certain building... namely: Corner Cafe, 50 Washington Street, Taunton, 1st floor of 5 story wooden structure... is unlawfully used as and for a common gaming house..." Since the warrant was invalid because the affidavit was insufficient, the subsequent arrest of the defendant and the seizure of evidence were unlawful. Such evidence cannot be used at trial. 2

§13.11. Gaming. In Commonwealth v. Demogenes 1 the defendant was charged with a violation of General Laws, Chapter 271, Section 17, in that he "was found in a place with apparatus, books or any device for the purpose of registering bets upon the results of a trial or contest of skill or endurance of beasts, to wit: a horse race and did register bets upon such trials or contest of speed." The Supreme Judicial Court held that wagered money, without more, is not an "apparatus" or "device" for registering bets. This case again points up, as was clearly stated in Commonwealth v. Chagnon, 2 that Section 17 of General Laws, Chapter 271, does not prohibit registering bets as such.


8 Id., c. 769.
1 Commonwealth v. Dias, 349 Mass. 583, 211 N.E.2d 224 (1965), also noted in §§12.2 supra and 25.5 infra.


Chapter 277, Section 72A, which provides that

the commissioner of correction shall notify such prisoner in writing [of an untried indictment, information or complaint], stating its contents, including the court in which it is pending, and that such prisoner has a right to apply to such court for prompt trial or other disposition thereof. Any such prisoner shall, within six months after such application is received by the court be brought into court for trial or other disposition of any such indictment, information or complaint, unless the court shall otherwise order.

The Supreme Judicial Court in the *Needel* case said that "[n]otice by the commissioner of correction to the defendant is to be presumed in view of the bench warrant lodged at the correctional institution in 1960." It is, however, certainly far from clear how the bench warrant notified the defendant of his right to apply for a prompt trial, as is required by Section 72A.

The entire effect of Section 72A is far from certain. What rights does a prisoner have if the commissioner does not give the notice required by Section 72A? Would violation of this section prohibit prosecution of the defendant after six months has elapsed from the time the court would have received an application by a prisoner had the prisoner been notified as required?

§13.13. *Larceny.* During the 1966 Survey year the Supreme Judicial Court considered for the first time, in *Commonwealth v. England*,¹ the question of whether several takings of the property of another over a period of time pursuant to a single and continuing intent, constitutes a single offense of larceny or a series of separate crimes. This determination is obviously more important when the crime would constitute the felony of grand larceny if it were a single offense but not if it were a series of separate offenses.² The Court declared the requisite for the finding of a single crime to be the singleness of the defendant's intent.

In our view, "whoever steals" (G.L. c. 266, §30) may do so in successive acts impelled by one intent. In the indictments there is sufficiently charged a larceny consisting of a series of takings over a period of time pursuant to a single scheme, which implies a continuing intent, involving in the aggregate property worth more than $100. That the value of the property involved in any single taking may have been more or less than $100 is immaterial.

⁴ Id. at 581-582, 211 N.E.2d at 337.

² G.L., c. 266, §30.
§13.14. Nolle prosequi. In the case of Commonwealth v. Massod, the Court considered the effect of a nolle prosequi. In the case the first complaint charged the defendant with (a) being a person found or present in a room "with apparatus for registering bets" upon horse races and that (b) "he did register such bets." At the close of the Commonwealth's case, the District Attorney entered a nolle prosequi with respect to so much of the first complaint as charged the defendant with registering bets. The Supreme Judicial Court affirmed the denial of the defendant's motion for acquittal with respect to the entire first complaint, the motion being based upon the fact that the nolle prosequi had been entered without the defendant's consent.

It is within the power of a district attorney to enter a nolle prosequi either as to an entire indictment or complaint or any count thereof, or any distinct and substantive part of it, so long as there remains a charge of an offense originally set forth. "A nolle prosequi cannot be entered after the jury has been empanelled without the express or implied consent of the defendant. A nolle prosequi without the consent of the defendant after the trial has commenced and before verdict has the effect of acquittal."2

The Court held that the nolle prosequi, which was entered without the defendant's consent after the jury had been empanelled and before verdict, eliminated from the first complaint a distinct and severable portion of it and left it with a charge of an offense originally set forth, to wit: being a person found or present in a room "with apparatus for registering bets" upon horse races.

§13.15. Police investigation of jurors. In the 1966 Survey year case of Commonwealth v. Smith the Supreme Judicial Court indicated its belief that the practice of using police officers to gather appropriate information about prospective jurors should be subject to the general supervision of the trial court. The information obtained by the police officers will also be as available to the defendant as to the district attorney.
