IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

FRANK B. TIMMONS

v.

COMMONWEALTH OF VIRGINIA

MOTION TO DISMISS WRIT OF ERROR AND
BRIEF ON BEHALF OF COMMONWEALTH

LEWIS PRINTING CO., RICHMOND, VA.

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I

MOTION TO DISMISS WRIT OF ERROR

Examination of the Record, pages 10 and 11, shows that the accused was indicted by the grand jury attending the April, 1926, term of the Circuit Court of Henrico County for violation of the prohibition law. He was tried at the July, 1926, term of the court (R., p. 12), the trial resulting in a verdict of guilty with his punishment fixed at six months' confinement in jail and a fine of one hundred ($100.00) dollars (R., p. 13).

Final judgment was entered in the case on July 16, 1926

(R., pp. 12, 13). The bill of exceptions (R., pp. 14, 17) was not presented to the judge for signature until September 15, 1926 (R., p. 14), and was signed by the trial judge on that day (R., p. 17). Under the decisions of this court the bill of exceptions was presented after the time fixed by law had expired.

Section 6252 of the Code of 1919 as amended provides in part:

> "Any bill of exception may be tendered to the judge and signed by him, at any time before final judgment is entered, or within sixty days from the time at which such judgment is entered. * * *"

In the recent case of *Pembroke Lime Stone Works* v. *Commonwealth of Virginia, et al.*, 139 Va. 270, 272 (1924), this court said:

> "We have uniformly held that bills of exception not filed within the time prescribed by section 6252 of the Code were no parts of the record, and could not be considered. *Bragg* v. *Justis,* 129 Va. 354, 106 S. E. 335; *Kelly* v. *Trehy,* 133 Va. 160, 112 S. E. 757; *Harley* v. *Commonwealth,* 131 Va. 664, 108 S. E. 648; *James* v. *Commonwealth,* 133 Va. 723, 112 S. E. 761; *Rea* v. *Commonwealth,* 135 Va. 714, 115 S. E. 381."

It will be seen from an examination of the record that counting the 16th day of July, 1926, the day on which the final judgment was entered (R., p. 12) as one of the sixty, we have sixteen days in July, thirty-one days in August and fifteen days in September, making sixty-two days. From this it will be seen that the sixty days had already

expired when the bill was tendered to the trial judge for his signature.

This court had under consideration this identical question in *Kelly* v. *Trehy,* 133 Va. 160 (1922). In that case the final judgment was entered on March 29, 1920, and the bill of exceptions was tendered to the trial judge on May 28th, and signed by him on May 29th.

This court in dismissing the writ said (133 Va. 171):

> "Counting the day of the judgment as one of the sixty, we have three days in March, thirty days in April and twenty-eight in May, making sixty-one days, so that the sixty days had already expired when the bill was tendered to the judge for his signature."

In *Thrift* v. *Commonwealth,* 133 Va. 800 (1922), a similar question was also presented to the court. In that case final judgment was entered on October 31, 1921, and the bill of exceptions was not signed and made a part of the record until December 30th. Of this the court said (133 Va. 801-802):

> "This was not within sixty days of the final judgment, as prescribed by section 6252 of the Code. The date on which the final judgment was rendered is to be counted as one of the sixty days. *Kelly* v. *Trehy, ante,* p. 160, 112 S. E. 757, decided at this term, and cases cited. Thus counting, there was one day in October, thirty in November and twenty-nine in December. The sixty days expired on the last-mentioned date. December 30th, when the bill was signed, was the sixty-first day. The trial judge was without jurisdiction to sign the bill of

exception on December 30th. *Bragg* v. *Justis,* 129 Va. 354, 106 S. E. 335; *Exporters* v. *Butterworth,* 257 U. S. .., 42 Sup. Ct. 331, 66 L. Ed."

It will, therefore, be seen that the trial judge was without jurisdiction to receive and sign the bill of exceptions in this case and this court, under the authority of the decisions cited above, on its appearing to it that the bill of exceptions was not signed within sixty days from the day of final judgment, has no bill of exceptions properly before it, and, therefore, the writ of error should be dismissed as improvidently awarded, the sole questions before the court being presented by the so-called bill of exceptions.

II

BRIEF ON BEHALF OF THE COMMONWEALTH

The accused was indicted by the grand jury attending the April, 1926, term of the Circuit Court of Henrico County for violation of the prohibition law, the omnibus form of indictment being returned (R., pp. 10, 11). On the trial of his case at the July, 1926, term he was found guilty by the jury and his punishment fixed at six months' confinement in jail and a fine of one hundred ($100.00) dollars (R., pp. 12, 13). Final judgment was entered on this verdict July 16, 1926 (R., pp. 12, 13). From this judgment the case has been brought to this court on writ of error.

THE FACTS IN THE CASE

The indictment (R., p. 11) charges that the offense was committed in the County of Henrico "on the .... day of

February in the year one thousand nine hundred and twenty-six."

Police Officer Hedgpeth testified (R., p. 14) that the offense occurred on the night of February 26 on the Tappahannock highway, Henrico county, Virginia. On that night he arrested three persons—George Timmons, one Ford and Mrs. Timmons—for the unlawful transportation in an automobile belonging to the accused of thirty gallons of ardent spirits. Hedgpeth testified that the accused, Frank B. Timmons, was in the car, but succeeded in escaping; that the arrest occurred at night between 10:15 and 11 o'clock; that in making the arrest he used his flash light and in that way was able to "positively identify Frank D. Timmons as the one who was in the car and he knew him by sight" (R., pp. 14, 15). The accused was arrested on the following Sunday. It is certified by the court in the bill of exceptions "that Hedgpeth upon questions asked by the court and making the accused stand up testified that the accused was the man that ran away and he had no doubt of and gave his reasons therefor—and that there was a direct conflict of testimony in the case."

The Policeman Dawson, who assisted Hedgpeth in the capture of the car, it is certified, gave the same testimony as that given by Hedgpeth. The defense was an alibi.

The accused's wife testified that she was in the automobile which was transporting the whiskey at the time it was captured and that her husband was not in the car. George Timmons, who was also in the automobile, testified that the accused was not in the automobile.

The accused testified (R., p. 16) "that he had been at home from 8 o'clock on that night." In support of his alibi, Mrs. Annie Oliver testified that she was at Timmons' home in the city of Richmond from 8:00 until 11 o'clock February

26th "and that Frank B. Timmons was there all that time" (R., p. 15).

Frank Shepperson (R., p. 15) testified that he was at the home of the accused from 8:00 until 10:30 on the night of February 26th, "and that Frank Timmons was there all that time." On the other hand, the accused's witness, Stanley Haines, testified that he saw the accused come out of the confectionery of the 2200 block West Cary street between 10:15 and 11:00 o'clock and go to his home.

Some indication of the standing of Mrs. Oliver may be inferred from the fact that she stayed, according to her testimony, with the accused at his home from 8:00 until 11:00 at night while his wife was out transporting a carload of whiskey.

Manifestly, the testimony of Mrs. Oliver and the accused that he was in his house all of the time from 8:00 until 11:00 P. M. on the night of February 26th could not be true if his witness, Stanley Haines, of the Richmond Fire Department, saw him coming out of a confectionery between 10:15 and 11:00 that night (R., p. 15).

In addition to this, it is to be recalled that George Timmons said that the man who ran was some stranger that had been picked up by him on the road who had asked him to give him a ride to Richmond. It is hard to believe that any person traveling along the road with thirty gallons of whiskey would thus accommodate a stranger overtaken on the road.

THE ASSIGNMENTS OF ERROR

There are two assignments of error:

1. That there is no proof that the crime was committed within the period of limitation.

2. That the testimony of the officers with reference to the identification of the accused is too unreliable to be credited in the face of the testimony of the lady, who stayed with the accused while his wife transported the whiskey, and the other witnesses introduced by the accused.

We shall discuss these assignments in their order.

THE FIRST ASSIGNMENT OF ERROR

Examination of the record shows that the indictment charged that the crime was committed "on the ..... day of February in the year one thousand nine hundred and twenty-six" (R., p. 11). The indictment was found on April 5, 1926 (R., p. 11). The case was continued on April 14, 1926, until July 7, 1926, on motion of the accused (R., p. 12), and the trial occurred on July 16, 1926, at which time the jury found him guilty "as charged" (R., p. 13).

The testimony of the Policeman Hedgepeth is that the crime occurred on the night of February 26th (R., p. 14). A number of the witnesses introduced by the accused speak of the night of February 26th with reference to the time when the offense occurred (R., p. 12).

No plea of the statute of limitations was introduced by the accused, nor was this question raised in the trial court either by plea or by motion to set aside the verdict of the jury (R., p. 13). It is raised for the first time in this court. Under these circumstances the question has been conclusively settled by the decision in *Earhart* v. *Commonwealth*, 9 Leigh (36 Va.) 671, 677 (1839), where it is said:

> "It was said in argument, that a new trial should be granted because it does not appear that the offense was committed within twelve months before the indictment was found. Apparently, this objection is made for the first time here. It does not ap-

> pear to have been made below, either before the jury or the court. The time laid in the indictment is within the period limited for the prosecution; there is a verdict of guilty; and it does not appear from the evidence that the time of the act was without the period of limitation. We cannot say, therefore, that there was error. We cannot say that the indictment was not within twelve months from the time of the offense. *Doubtless it was shewn to be within the twelve months, and the blank in the bill of exceptions was merely accidental. In a case like the present, we think the party should in some manner have relied on the statute, or claimed the benefit of it.* (Italics supplied.)

The law has long been settled in this State in civil cases that upon the trial of an issue joined on the plea of the statute of limitations, the burden of proof is on the defendant to show that the cause of action did not accrue within the statutory period. *Goodell* v. *Gibbons,* 91 Va. 608 (1895), *Lewis* v. *Mason's Admr., et al.,* 84 Va. 731 (1885), *Elam* v. *Bass,* 4 Munf. 18 Va. 301 (1814). Where the time is properly laid in the indictment so as to conform to the rules applicable to criminal pleading, there is no reason why the same rule should not be applied to the proof in criminal trials. The burden of proof is, of course, on the Commonwealth to establish the *corpus delicti* beyond a reasonable doubt. The plea of the statute of limitations is properly a matter which should be raised and proved by the accused, just as it would be by the defendant in a civil case. There is no more reason why the Commonwealth should be required to prove that the offense was committed within the period of limitations than there is for the plaintiff to prove in a civil case that the cause of action occurred within the period of limitations. However, as had been pointed out

above, the decision in *Earhart* v. *Commonwealth, supra,* has settled the specific question raised by this assignment of error against the contention made by the accused.

THE SECOND ASSIGNMENT OF ERROR

Under the second assignment of error it is strenuously insisted that the evidence is not sufficient to support the verdict of the jury; the argument of counsel being that the testimony of the officers as to the identification of the accused by means of a flash light during the night time is of too uncertain and insignificant nature to be allowed to control the testimony of the witnesses offered by the accused.

The testimony of Hedgepeth (R., p. 14) is direct and positive that the accused was in the car and succeeded in making his escape. He testified that he used his flash light and in that way "was able to positively identify Frank B. Timmons as the one who was in the car, and he knew him by sight" (R., pp. 14-15). The accused was asked to stand up in court, and upon questions asked by the trial judge, Hedgepeth testified "that the accused was the man that ran away and he had no doubt of and gave his reasons therefor."

It is certified (R., p. 15) that the testimony of the policeman, Dawson, was the same as that given by Hedgepeth.

The law is well settled that any witness may give his opinion as to the identity of a person whom he has seen, provided he has some knowledge of or acquaintance with the person with whom he identifies the person seen by him.

6 Ency. of Evidence, 912;
Hopper v. *Commonwealth,* 6 Gratt. (47 Va.) 684, 686-687 (1849);
Gentry v. *McMinnis,* 3 Dana (Ky.) 382-382 (1835);
State v. *Harr,* 38 W. Va. 58, 62-63 (1893);
Commonwealth v. *Cunningham,* 104 Mass. 545 (1870);
Commonwealth v. *Kennedy,* 170 Mass. 18, 23-24 (1897).

It appears from the record that Hedgpeth testified that he knew the accused by sight at the time of the capture of the car (R., p. 15).

The same point made under this assignment of error as to the sufficiency of the identification of the accused was made in *Commonwealth* v. *Cunningham,* 104 Mass. 545, 547 (1870). In that case, which was an indictment for larceny of a horse and wagon, the only question was one of identity, whether the prisoner was the person who stole the horse and wagon. The witnesses for the Commonwealth testified that they saw a man driving off the stolen wagon on the day the theft took place; that they did not notice that the man had an imperial; and that a few days afterwards they separately and without any suggestion picked out the prisoner from among others in the station house as the man they thought was on the wagon; but that they were not positive, as the prisoner had then an imperial and different clothes; and that they would not swear that the prisoner was the man they saw on the wagon; but that he resembled him. At the close of the case the defense requested the court to direct an acquittal, which the court declined to do. The defense then asked the judge to instruct the jury "that as no witness sworn in the case had given evidence that the defendant was the man who committed the crime set forth in the indictment, or the man who was seen in the possession of the stolen property, the jury would not be justified to find the defendant guilty."

The judge refused this instruction, but instructed the jury that they must be satisfied beyond a reasonable doubt of the identity of the defendant with the person seen to drive off the wagon; that there was no rule of law defining the manner in which this identity was to be proved, or describing the terms in which witnesses must testify to it to produce conviction in the minds of the jury; that the whole question was one of fact for them to pass upon; that if, from the testimony of the witnesses, taken in connection with their means of knowledge, their acts at the station house, and their present appearance and manner upon the stand, together with any other evidence in the case, the jury were satisfied of the fact of identity beyond a reasonable doubt, then they might convict; that there were cases where the concurrence of separate and independent impressions as to identity might be as convincing as the positive opinion of a single witness; but that on the other hand, if the evidence fell short of producing a belief in their minds beyond a reasonable doubt, no mere probability would justify a verdict of guilty. Exception was taken and error assigned.

In passing on this question the court said, speaking through Ames, J., p. 547:

> "The only question that appears to have been in controversy was whether the defendant was sufficiently identified as the person who committed the crime charged in the indictment. The general circumstances of the transaction were not in dispute. Upon this question of identity, the evidence offered was all of it competent and proper for the consideration of the jury. It is impossible to say that it had no tendency to convict the defendant. Its sufficiency was to be estimated and weighed exclusively by them. It is not necessary that any one witness should dis-

> tinctly swear that the defendant was the man, if the result of all the testimony, on comparison of all its details and particulars, should identify him as the offender. The principle which allows evidence to go to the jury necessarily involves a right, on their part, to believe it, and if its effect upon their minds should be to prove the defendant's guilt beyond reasonable doubt, their verdict will be rendered accordingly."

It will be seen that the evidence of the identification in the case at bar is much stronger than was the evidence of the identification in *Commonwealth* v. *Cunningham, supra.*

It is therefore respectfully submitted, first, that the motion to dismiss the writ of error as improvidently awarded should be sustained, and, second, that if this motion should be overruled that the judgment of the Circuit Court of Henrico is correct and should be affirmed.

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