

SENATE JUDICIARY COMMITTEE

MINUTES

February 9, 1971

Chairman Monroe called the meeting to order at 9:30 a.m.

Committee Members Present: Chairman Monroe
Senator Dodge
Senator Foley
Senator Swobe
Senator Wilson
Senator Young

Guests: Grant Davis - Legislative Counsel
Bureau
Press

S.B. #116 - Requires father's consent in certain cases for adoption of child born out of wedlock.
Senator Walker

Committee amended Section 1, Line 10, by inserting after the word "child", "Pursuant to NRS 415.030." Senator Swobe made a motion to amend and "do pass". Senator Wilson second the motion. Motion carried.

S.B. #16 - Permits court-decreed adoption without consent of parent, guardian or agency accepting relinquishment.
Senators Swobe and Young

Grant Davis submitted a re-draft of this bill. There was a discussion regarding whether there should be any exemptions to the confidentiality of the report, and if the confidentiality should be up to the discretion of the judge.

Senators Foley and Wilson were asked to make recommendations for different language.

S.B. #3 - Provides for investigation by real estate advisory commission of out-of-state subdivisions before being offered for sale or lease in this state.
Senator Herr

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Senator Wilson felt that maybe this bill was not effective enough to handle the problem. Senator Dodge agreed and pointed out that it just deals with granting an original permit, and that there could be misrepresentation after the permit was granted. Chairman Monroe stated that the bill provides for investigation of the property, and financial status of the persons promoting the property, by two members of the commission. However, Senator Dodge noted that the investigation is only at the outset, and there is no continuing surveillance. Senator Wilson suggested adopting the California commission's procedure.

Senator Foley felt the committee should hear from real estate people. Senator Swobe pointed out that there are several of this type bill coming into the legislature, and perhaps we could handle several at that time.

The committee will take further action after further discussion with real estate people.

S.B. #11 - Prohibits illegal use of credit and identification cards.
Senators Fransway, Lamb, and Hecht

Senator Dodge suggested considering this bill together with other bills coming in on this subject. Grant Davis will find out how many bills on this subject were introduced.

S.J.R. #8 - Proposes constitutional amendment to deny bail to persons charged with felony while admitted to bail on separate charge.
Senators Hecht and Lamb

Grant Davis brought in the provisions covering this in Arizona and Texas (attached). Senator Dodge expressed his approval of the Arizona provision, but brought up the question of whether to make it discretionary.

Senator Foley mentioned that Mr. Woofter cited certain crimes and wondered if we shouldn't specify certain crimes rather than make it broad. He also suggested doing so by statute, and to change the bill from no bail to very high bail so it would not be unconstitutional. He volunteered to draft something to include these changes and bring it back to the committee.

Meeting adjourned at 10:00 for the hearing on S.B. #32, S.B. #43, and S.B. #11.

Respectfully submitted,
Eileen Wynkoop
Eileen Wynkoop, Secretary

Art. 2, § 22 CONSTITUTION

§ 22. Bailable offenses

Section 22. All persons charged with crime shall be bailable by sufficient sureties, except for:

1. Capital offenses when the proof is evident or the presumption great.
2. Felony offenses, committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge. As amended, election Nov. 3, 1970.

Amendment proposed by Laws 1969, H.C.R. No. 2, filed April 11, 1969.

Supplementary Index to Notes

Habeas corpus 3

1. Construction and application

There is no absolute right to remain on bond following a conviction, but it is within discretion of trial judge whether to permit a defendant after conviction to remain on bond pending judgment and appeal. *State v. Quinn* (1969) 10 Ariz. App. 552, 460 P.2d 658.

2. In general

Evidence that defendant saw his recently divorced wife out with another man and was turned down when he asked her to dance and that he followed former wife and other man to her home which was a distance of about three miles and then got out of his truck with a loaded gun and shot and killed

§ 23. Trial by jury; jury of less than twelve; verdict by nine or more in civil cases; waiver of jury in civil cases

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1. In general

Clerk's inadvertence, after he was instructed by court to call first 12 names on jury list, in skipping over name of one juror and calling, instead, name of a thirteenth juror did not constitute prejudicial error, so as to warrant granting of motion for mistrial, where there was nothing in record to show that thirteenth juror was in any way objectionable to defendant. *State v. Zimmer* (Sup.1970) 472 P.2d 35.

Rules of law regarding formation of a jury are intended to secure a fair and impartial jury for trial, but defendant is not entitled to be tried by any particular jury, and, unless record affirmatively shows that such a jury was not secured, even though some formal provisions regarding manner of selection may have been disregarded, case must be affirmed. *Id.*

There is no distinction between right to jury trial in condemnation case and right to jury trial in other civil actions. *Austin v. State ex rel. Herman* (1969) 10 Ariz. App. 474, 459 P.2d 753.

A person has a constitutional right to be put on trial for a single offense, and he has a right to a unanimous jury verdict with reference to the criminal act for which he was tried. *State v. Counterman* (1968) 8 Ariz. App. 526, 448 P.2d 96.

That a juror did not deliberate for some 30 minutes in a total deliberation

the other man, was sufficient to show "probable cause" that defendant had committed the offense of murder in the first degree and warranted his detention without bail. *Hafenstein v. Burr* (1963) 92 Ariz. 321, 376 P.2d 782.

Magistrates must admit to bail persons charged with traffic violations not involving capital offenses and, upon receipt of such bail, order release of the accused, but, in case of release of person suspected of operating of motor vehicle while under influence of alcohol, such person will be subject to re-arrest if he repeats the offense within same period of intoxication, even though then at large on bail. *Op. Atty. Gen. No. 59-131.*

3. Habeas corpus

Accused was not entitled to bail pending appeal from denial of petition for writ of habeas corpus he sought following issuance of extradition warrant directing sheriff to deliver accused to authorized agents of sister state. *Burr v. Frey* (1965) 2 Ariz. App. 238, 407 P.2d 779.

period of several hours would constitute basis of error. *LeRoy v. Phillips* (1968) 8 Ariz. App. 524, 448 P.2d 94.

Constitutional and statutory regulation of number of jurors in court of record indicates that trial jury in court of record shall be composed of 12 persons and does not distinguish between appellate and original jurisdiction. *Porter v. Superior Court In and For Yavapai County* (1968) 104 Ariz. 36, 448 P.2d 92.

Constitutional section allowing for provision by law for jury of number less than 12 in courts not of record by natural and necessary implication precludes provision by law for jury of number less than 12 in courts of record. *Id.*

There is statutory right to jury trial in all civil actions, no matter how petty. *Tsipai v. State* (1968) 8 Ariz. App. 3, 442 P.2d 167.

Defendant had statutory right to jury trial in municipal police court prosecution for violation of statute prohibiting sale of liquor to minors. *Id.*

Jury's verdict in a condemnation suit is accorded no greater respect by trial judge than jury verdict in an ordinary case. *State ex rel. Herman v. Southern Arizona Land Co.* (1967) 5 Ariz. App. 139, 424 P.2d 181.

This section does not give right to jury trial but guarantees preservation of such right; right is applicable only where it existed anciently under common law. *Rothweiler v. Superior Court of Pima County* (1966) 100 Ariz. 37, 410 P.2d 479, 16 A.L.R.3d 1362.

Where petitioner had right to jury trial, prohibition lay to enforce such right. *Rothweiler v. Superior Court of Pima County* (1965) 1 Ariz. App. 334, 402 P.2d 1010, rehearing denied 1 Ariz.

App. 487, Ariz. 37, 4

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involved. Ie This sec trial by ju not give t but does g right. Sta 105, 397 P.

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2. Nature

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Right to Constitution offenses. 12

Existing s provide in a Superior Cou except as to of city ordi was no right law. Rothw Pima County P.2d 1010, re 487, 404 P.2d 410 P.2d 479

Defendant 28-692 prehu ence of Intev to jury trial waiver. *Id.*

Guarantee stitution is of Sixth App tution. *Id.*

7. Burden on proof

In proceedings on murder indictee's application for bail, burden was upon state to establish that the proof was evident; and, on record presented, it was error to find that such burden had been sustained. Ex parte Thrash, 167 Cr.R. 409, 320 S.W.2d 357.

Indictment of murder with malice attached to record did not discharge state's burden of proving that accused was not entitled to bail under this section authorizing refusal of bail in capital cases when proof is evident. Ex parte Perez (Cr.App.1968) 423 S.W.2d 323.

Burden is upon state to establish that "proof is evident". Ex parte Colbert (Cr.App.1970) 452 S.W.2d 454.

In denying bail, Court of Criminal Appeals must find that facts show case of "proof is evident" including fact that upon trial of case dispassionate jury would not only convict but would assess death penalty. Id.

8. — Circumstantial and conflicting evidence

Bail may be denied upon circumstantial evidence. Ex parte Washburn, 161 Cr.R. 651, 280 S.W.2d 257.

Where it appeared that defensive evidence, if properly developed as part of *res gestae*, could reasonably well support defense of self-defense in murder prosecution, there was no such "proof evident" as would justify denial of bail. Ex parte Collins, 168 Cr.R. 500, 330 S.W.2d 194.

9. — Evidence showing capital offense

For purposes of this section, "proof evident" exists when accused, with cool and deliberate mind and formed design, maliciously killed decedent, and, upon hearing of facts before court, a dispassionate jury would upon such evidence, not only convict but would assess death penalty. Ex parte Thrash, 167 Cr.R. 409, 320 S.W.2d 357.

To affirm order denying bail to murder indictee, reviewing court would have to find that facts showed a case of "proof evident" and, among other things, that upon trial of case death penalty would in all probability be inflicted upon indictee. Id.

To affirm an order denying bail, the court of criminal appeals must find that the facts show a case of proof evident, including the fact that upon a trial of the case dispassionate jury would not only convict but would assess the death penalty. Ex parte Hart (Cr.App.1967) 422 S.W.2d 446.

Order denying bail to petitioner charged with murder and robbery was reversed in absence of proof that a dispassionate jury would convict her and assess the death penalty. Id.

14. Review

There was no denial of pretrial bail in absence of any evidence that defendant sought bail before or subsequent to return of second indictment upon which he was convicted after first conviction had been reversed. Jackson v. State (Cr.App.1970) 454 S.W.2d 733.

Fact that defendant was granted or denied pretrial bail is not, standing alone, ground for reversal of a conviction. Id.

§ 11a. Multiple convictions; denial of bail

Sec. 11a. Any person accused of a felony less than capital in this State, who has been theretofore twice convicted of a felony, the second conviction being subsequent to the first, both in point of time of commission of the offense and conviction therefor may, after a hearing, and upon evidence substantially showing the guilt of the accused, be denied bail pending trial, by any judge of a court of record or magistrate in this State; provided, however, that if the accused is not accorded a trial upon the accusation within sixty (60) days from the time of his incarceration upon such charge, the order denying bail shall be automatically set aside, unless a continuance is obtained upon the motion or request of the accused; provided, further, that the right of appeal to the Court of Criminal Appeals of this State is expressly accorded the accused for a review of any judgment or order made hereunder. Adopted Nov. 6, 1956.

Library references

Bail § 42 et seq.
C.J.S. Bail § 33 et seq.

§ 12. Habeas corpus**Supplementary Index to Notes****Adoption 18.5****1. Nature of writ and scope of remedy**

Very nature of a procedure by writ of habeas corpus dictates that it would be inconsistent to recognize on the one hand that purpose of the writ is to obtain a speedy adjudication of person's right to be free

from illegal restraint, and on the other hand to compel the person to await service of notice of the proceedings upon some private party before judge could proceed with the investigation. Ex parte Ramzy (Sup. 1963) 424 S.W.2d 220.

Purpose of writ of "habeas corpus" is to obtain a speedy adjudication of a person's right to liberation from illegal restraint. Id.