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CONSTITUTIONAL LAW—JUVENILE DELINQUENCY—TO INSURE DUE PROCESS AND EQUAL PROTECTION, SUCH FACTS AS ARE NECESSARY TO ADJUDICATE A CHILD DELINQUENT MUST BE PROVED BEYOND A REASONABLE DOUBT RATHER THAN BY A PREPONDERANCE OF THE EVIDENCE. *Santana v. State*, 431 S.W.2d 558 (Tex. Civ. App.—Amarillo 1968) [After submission to printer, writ granted on motion for rehearing, April 19, 1969].

George Santana, a male fourteen years of age, was charged with assault with intent to rape. The case was tried in juvenile court before a jury, and in response to special issues submitted, the jury found Santana guilty of the crime charged and to be delinquent. Appeal was brought on the grounds that the district court committed error by its continued use of the standard of proof which required a "preponderance" of the evidence rather than proof "beyond a reasonable doubt." Appellant alleged this constituted a denial of due process and equal protection guaranteed by the Fourteenth Amendment to the Constitution. Held—*Reversed* and *remanded*. The standard of proof necessary in making a determination of delinquency was vital to the proceeding; the underlying reasoning of *In re Gault*,¹ 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) required proof beyond a reasonable doubt.

The first Juvenile Court Act in the United States was enacted in Illinois in 1899.² This system of dealing with juvenile offenders was eventually adopted by every state. The conscience of society demanded that the child be afforded the opportunity for full social development. The methods employed in the social reformation of a misdirected child are a combination of science and law directed toward the adequate treatment of delinquency and crime.³

Pursuant to the objective of rehabilitation, Texas enacted the Juvenile Act in 1943.⁴ This Act set forth the purposes and criteria for handling minors within the jurisdiction of the Juvenile Court. To remain within the framework and purpose of the Act, the Legislature

¹ The decision in *Gault* did not pass directly upon the question of quantum of proof required by due process. *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

² Judge Julian Mack, a pioneer proponent of the new system, wrote of the duties and responsibilities of the juvenile court judge. He spoke of the juvenile adjudication process, not in terms of the specific offense committed by the boy or girl, but, "what is he now, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career?" Mack, *The Juvenile Law Court*, 23 *Harv. L. Rev.* 104 (1909).

³ F. Allen, *The Borderland of Criminal Justice*, 48-49 (1964).

⁴ Tex. Rev. Civ. Stat. Ann. art. 2338-1 § 1 (1943). "The purpose of this act is to secure for each child under its jurisdiction such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interest of the state; and when such child is removed from his own family, to secure for him custody, care and discipline as nearly possible equivalent to that which should have been given him by his parents. . . . The principal is hereby recognized that children under the jurisdiction of the court are wards of the state, . . ."

and the courts have made it more than clear that a proceeding whereby a juvenile may be declared delinquent is a civil proceeding and as such will follow the Texas Rules of Civil Procedure.⁵ There was a dual purpose in this reasoning: First, it was felt that the child should not be subjected to the rigorous technicalities of the criminal proceeding and the stigma attached; and second, the flexibility in disposition allowed by the civil proceeding was considered desirable.⁶ The courts have not held the State to the strict technical proof required in criminal proceedings. The evidence necessary to adjudicate a child delinquent need not be "beyond a reasonable doubt," but rather the State is only required to prove the act of delinquency by a "preponderance" of the evidence.⁷ The philosophy and basic concept of the Texas juvenile proceeding has not been one of indignation. To the contrary, the idea of punishing the child for his criminal acts was abandoned on the theory that children should not be handled under the same procedures and processes as adult offenders.⁸ A child would not be adjudicated criminal under this theory, but in the interest of society he would be rehabilitated.⁹ Texas Juvenile Courts merely performed the duty of seeing that the child was properly cared for using the doctrine of *Parens Patriae*.¹⁰ The juvenile courts must necessarily deal with the child more on the basis of his age and social status than on the basis

⁵ The Legislature should have spelled out the procedure to be followed in the trial of a delinquent. Juvenile cases have been considered, in accordance with Tex. Rev. Civ. Stat. Ann. art. 2338-1, § 18, a civil proceeding. As such, all proceedings are conducted under rules established for civil cases. *Collins v. State*, 429 S.W.2d 650 (Tex. Civ. App.—Houston 1968, no writ); *Yzaguirre v. State*, 427 S.W.2d 687 (Tex. Civ. App.—Corpus Christi 1968, no writ). The defendant, a minor, was found to be delinquent and committed to the Texas Youth Council for custody. The court held that a juvenile delinquency proceeding is a civil matter and statutes and rules relating to civil actions should govern when practicable. State legislatures and courts have the power, and right, to determine rules of procedure in juvenile trials so long as such rules do not violate basic requirements of due process. *See also Gamble v. State*, 405 S.W.2d 384 (Tex. Civ. App.—El Paso 1966, no writ); *The New Juvenile Delinquent Law*, by Robert Billings, Vol. 31, Tex. B.J. 203 (1968).

⁶ *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269 (1944), the landmark decision holding the Juvenile Act to be constitutional. In this decision, the Court gave its opinion as to the purposes of the act and the intent of the legislature.

⁷ *In re Gonzalez*, 328 S.W.2d 475 (Tex. Civ. App.—El Paso 1959, writ ref'd, n.r.e.). The court held that the evidence necessary to adjudicate a juvenile delinquent need not be that sufficient beyond a reasonable doubt, but must be of probative value in accordance with rules of civil procedure. *See also State v. Ferrell*, 209 S.W.2d 642 (Tex. Civ. App.—Ft. Worth 1948, writ ref'd, n.r.e.); *Cantu v. State*, 207 S.W.2d 901 (Tex. Civ. App.—San Antonio 1948, writ ref'd, n.r.e.).

⁸ *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269 (1944).

⁹ *Solis v. State*, 418 S.W.2d 265 (Tex. Civ. App.—San Antonio 1967, no writ). The court recited the fact that the Juvenile Delinquency Act does not undertake to convict and punish a child for the commission of a crime. *See also In re Gonzalez*, 328 S.W.2d 475, 477 (Tex. Civ. App.—El Paso 1959, writ ref'd, n.r.e.), the court said that a proceeding under the Juvenile Court Act, Tex. Rev. Civ. Stat. Ann. art. 2338 (1943), to determine whether a child was delinquent was a civil proceeding, not criminal, and that the purpose was to protect the child at a most critical time in his life, and not intended to convict and punish the juvenile, but to guide and direct; *State v. Thomasson*, 154 Tex. 151, 275 S.W.2d 463 (1955).

¹⁰ The doctrine of *Parens Patriae* refers to the sovereign power of guardianship over person under disability.

of the offense committed.¹¹ Because of the possible results from a finding of delinquency, this proceeding could be harsher on the juvenile than would a criminal proceeding for an adult who committed the same crime.¹²

This unequal situation prevailed in nearly every state jurisdiction until the Supreme Court of the United States decided *Kent v. United States*.¹³ In this case the Court pointed out the two basic infirmities of the juvenile proceeding: First, that there was evidence many juvenile courts lacked the facilities and techniques to adequately assume the State's role of *Parens Patriae*; and second, that there was evidence the juvenile received the worst of both worlds, getting neither the protections afforded adults nor the solicitous care and rehabilitative treatment postulated for children. In *Kent*¹⁴ the Court held that the "basic requirements of due process and fairness" must be satisfied in certain aspects of the juvenile proceeding; this requirement was extended in *Gault* to all aspects.¹⁵ *Gault* provided that juveniles be afforded the basic rights of: (1) notice of charges;¹⁶ (2) right to counsel;¹⁷ (3) right to confrontation and cross-examination;¹⁸ (4) privilege against self-incrimination.¹⁹ The Court pointed out that although they would not pass upon the right to a transcript of the proceeding, or the right to appellate review, . . . a failure to provide a transcript of

¹¹ *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527; *In Parker v. Las Vegas Municipal Judge—Nev.*, 427 P.2d 642 (1967), a city ordinance prohibiting persons of "evil reputation" from meeting one another was held in violation of the Constitution because it punished status, rather than act plus intent. Those violations in the Juvenile Act which do not involve a violation of a penal statute would be of the same character. Tex. Rev. Civ. Stat. Ann. art. 2338-1 § 3 (1965), "The word 'child' means any person, female, over the age of ten years and under the age of eighteen years and any male person over the age of ten years and under the age of seventeen years. The term 'delinquent child' means any child who (a) violates any penal law of this state of the grade of felony; or (b) violates any penal law of this state of the grade of misdemeanor where the punishment prescribed for such offense may be confinement in jail; or (c) habitually violates any penal ordinance of a political subdivision of this state; or (d) habitually violates any penal law of this state of the grade of misdemeanor where the punishment prescribed for such offense is by pecuniary fine only; or (e) habitually violates a compulsory school attendance law of this state; or (f) habitually so deports himself as to injure or endanger the morals or health of himself or others; or (g) habitually associates with vicious and immoral persons."

¹² *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269 (1944); Tex. Rev. Civ. Stat. Ann. art. 5143a §§ 1, 2 provide that a child found to be delinquent by a jury or the court can be committed to a training school for delinquent children and held there until his twenty-first birthday. The result is that a child could spend half of the first twenty-one years of his or her life in such an institution for violating laws which if violated by an adult would result in only a fine or short jail sentence.

¹³ *Kent v. United States*, 383 U.S. 541, 556, 86 S. Ct. 1045, 1058, 16 L. Ed. 2d 84, 97 (1966).

¹⁴ *Id.* at 541, 555.

¹⁵ *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); *Implications of In re Gault*, B. J. George, Jr., *Family L.Q.* 2:182 68.; *Juvenile Courts and Due Process*, W. O. Douglas, *Juvenile Court Judges J*, SP 68.

¹⁶ *In re Gault*, 387 U.S. 1, 31, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

¹⁷ *Id.* at 34.

¹⁸ *Id.* at 42.

¹⁹ *Id.* at 46.

the proceeding or appellate review would saddle a reviewing process with the burden of attempting to reconstruct a record and compel the juvenile judge to testify under cross-examination as to what took place in the hearing before him.²⁰ Mr. Justice Black said in his concurring opinion:

Where a person, infant or adult, can be seized by the state, charged, and convicted for violating a state criminal law, and then ordered by the state to be confined for six years, I think the Constitution requires that he be tried in accordance with all the guarantees of the Bill of Rights made applicable to the states by the Fourteenth Amendment. Undoubtedly this would be true of an adult offender, and it would be a plain denial of equal protection of the law . . . an invidious discrimination . . . to hold that others subject to heavier punishments could, because they were children, be denied the same constitutional safeguards.²¹

Mr. Justice Fortas writing for the majority of the Court stated, “. . . neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”²² State legislatures and courts still retain the right and power to determine rules of procedure in juvenile trials, as long as such rules do not violate the basic requirements of due process.

Affording a juvenile due process and equal protection does not convert a juvenile delinquency proceeding into a criminal proceeding. In *Gault*, the court said:

Further we are told that one of the important benefits of the special juvenile court procedure is that it avoids classifying the juvenile a “criminal.” The juvenile offender is now classified a “delinquent.” There is of course, no reason why this should not continue. . . . It is also emphasized that in practically every jurisdiction, statutes provide that an adjudication of the child as a delinquent shall not operate as a civil disability or disqualify him from civil service appointment. There is no reason why the application of due process requirements would interfere with these provisions.²³

The basic philosophy of the juvenile proceeding is thus not lost. In demanding due process in juvenile trials, the Supreme Court has sought to insure that the principal of fundamental fairness be applied to children as well as adults.²⁴

²⁰ *Id.* at 58.

²¹ *Id.* at 61.

²² *Id.* at 13.

²³ *Id.* at 23.

²⁴ *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); *Kent v. United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966); *Galegas v. Colorado*, 370 U.S. 49, 82 S. Ct. 1209, 8 L. Ed. 2d 325 (1962).

Due process has been held to place the burden on the prosecution to prove the guilt of the accused beyond a reasonable doubt; the burden of the accused is to merely raise a question of reasonable doubt.²⁵ Recent cases involving juvenile proceedings have followed this rule and applied the quantum of proof required by due process and explained equal protection to be that of "beyond a reasonable doubt."²⁶ This is the majority rule. There are, however, jurisdictions which still maintain that the only quantum of evidence necessary to find delinquency is a preponderance.²⁷

In the instant case, the court of civil appeals held that the quantum of proof required to make a determination of the alleged delinquency is a vital element of that proceeding, and that the underlying reasoning of *Gault* requires proof beyond a reasonable doubt.²⁸

It would be a patent violation of the Fourteenth Amendment if a child was found to have committed a crime on less evidence than that necessary for the conviction of an adult.²⁹ This is particularly true when the consequences of the adjudication are essentially the same.³⁰ It is fundamental to American criminal jurisprudence that the accused is innocent until proven guilty beyond a reasonable

²⁵ In criminal cases, due process of law places the burden on the prosecution to prove the guilt of the accused beyond a reasonable doubt by evidence which it offers and inferences which may be drawn; but if prosecution proves facts from which inferences relevant to question of the accused's guilt may reasonably be drawn, burden is necessarily cast upon the accused of going forward with evidence upon particular points to which the inference relates if he desires to rebut it. . . . The burden upon the accused is to merely raise a question of reasonable doubt. *Government of Virgin Islands v. Lake*, 362 F.2d 770 (3d Cir. 1966). Evidence creating mere probability of guilt or giving rise to mere suspicion or conjecture of guilt is not sufficient to justify conviction. *United States v. Freeman*, 286 F.2d 262 (4th Cir. 1961). There are no presumptions against one accused of a crime, all presumptions are in favor of the accused. *Stallings v. State*, 159 Tex. Crim. 74, 252 S.W.2d 939 (1952). The state must make out a case by sufficient proof. *Boeckel v. State*, 102 Tex. Crim. 641, 279 S.W. 472 (1926).

²⁶ Where the jury is instructed to respond on the issue of delinquency not beyond a reasonable doubt, but on a preponderance of the evidence, the child is denied due process and equal protection. *United States v. Castanzo*, 395 F.2d 441 (4th Cir. 1968). See also, *Leach v. State*, 428 S.W.2d 817 (Tex. Civ. App.—Houston 1968, no writ), (concurring opinion); *Rodello v. District Court in and for City & County of Denver*, 436 P.2d 672 (S. Ct. Colo. 1968); *In re Vrbasek*, 232 N.E.2d 716, 719 (1967).

²⁷ *The People of the State of California v. J.F.*, 74 Cal. Rptr. 464 (1969). The California Court of Appeals held that a youth was not entitled to the protection of the burden of proof applicable in criminal cases, that is proof beyond a reasonable doubt, and that the proper standard, was the preponderance of the evidence standard, and that the application of such standard did not deprive the youth of equal protection of the law. See also *Michael and Cunningham, For the Young the Best of Both Worlds*, 49 Chi. B. Rec. 162 (1968); *DeBaker v. Brainard*, 161 N.W.2d 508 (S. Ct. Neb. 1968), the statute that provided for the adjudication of juveniles on a preponderance of the evidence was affirmed because in order to rule a statute unconstitutional in Nebraska, five judges of the Nebraska Supreme Court must concur and this was a seven member court with four holding the statute unconstitutional and three holding it constitutional.

²⁸ Cases cited *supra* note 26.

²⁹ *United States v. Castanzo*, 395 F.2d 441 (4th Cir. 1968); *In re Gault*, 387 U.S. 1, 61, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (concurring opinion).

³⁰ Cases cited *supra* note 11.

doubt.³¹ Only proof of guilt by such a standard will overcome this presumption. It is the duty of the court to explain to the jury the meaning and application of the standard "reasonable doubt."³² In any criminal action, the burden of proof rests on the state to show such a degree of guilt.³³ The term "burden of proof" refers to the duty of the state, on whom the affirmative burden of the issue of guilt rests, to establish the issue to the satisfaction of the court or jury by the evidence presented.³⁴ This is one element of due process and equal protection guaranteed by the Fifth Amendment and made applicable to the states by the Fourteenth Amendment.³⁵

The Court in deciding *Gault* made reference to the motive of the juvenile proceeding in providing "custody" to which the child is entitled if his parents do not so provide.³⁶ The Court expressed its feelings about the "custody," stating: "The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school,' for juveniles, it is an institution of confinement in which the child is incarcerated for a greater or lesser time."³⁷

Gerald Gault was charged with having made "lewd phone calls," a misdemeanor under the Arizona Penal Statutes, and was adjudicated a delinquent and confined in the State Industrial School for Boys.³⁸ The procedure of the juvenile trial was attacked because of the resulting confinement. The Court did not make issue of the crime allegedly committed by Gerald Gault, and for which he was tried, but simply stated that in a proceeding whereby a child might be adjudicated delinquent and *deprived of his freedom*, due process and equal protection guaranteed by the Fourteenth Amendment must be afforded.

If the facts necessary to determine delinquency must be proved beyond a reasonable doubt, and other privileges and immunities of due process extended to the juvenile, it follows that the child must

³¹ Tex. Penal Code Ann. art. 9.11 (1916). "Every person accused of an offense shall be presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt." *Holland v. United States*, 348 U.S. 121, 138, 75 S. Ct. 127, 137, 99 L. Ed. 150 (1954); *United States v. Fleischman*, 339 U.S. 349, 70 S. Ct. 739, 94 L. Ed. 906 (1949); *Holt v. United States*, 218 U.S. 245, 31 S. Ct. 2, 54 L. Ed. 1021 (1910).

³² *Williams v. United States*, 271 F.2d 703 (4th Cir. 1959). A "reasonable doubt" must be a doubt arising out of the evidence for which a reason can be given, and as such would exist in the mind of a reasonable man after careful deliberation. It need not amount to an absolute certainty. *United States v. Guthrie*, 171 F. 528 (S.D. Ohio 1909).

³³ Cases cited *supra* note 25.

³⁴ In its fundamental or true sense, the term "burden of proof" refers to the duty of a party on whom the affirmative of an issue rests to establish the issue to the satisfaction of a court or jury. *Cameron v. Kubecka*, 283 S.W. 285 (Tex. Civ. App.—Austin 1926, no writ).

³⁵ Cases cited *supra* note 25.

³⁶ Tex. Rev. Civ. Stat. Ann. art. 2338-1 § 1 (1943); *In re Gault*, 387 U.S. 1, 14, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

³⁷ *In re Gault*, 387 U.S. 1, 27, 87 S. Ct. 1428, 1443, 18 L. Ed. 2d 527, 546 (1967).

³⁸ *In re Gault*, 387 U.S. 1, 7, 87 S. Ct. 1428, 1443, 18 L. Ed. 2d 527, 535 (1967).

have committed some offense that would require a criminal action were the defendant an adult.³⁹ It appears inconsistent that the court of civil appeals required equivalent procedural safeguards for juveniles and adults, yet failed to comment on those sections of the Juvenile Act which plainly deny such equality.⁴⁰ If in fact it is the intent of the Court that juveniles be guaranteed all of the constitutional safeguards of due process and equal protection, how then could they fail to rule on statutes, which if violated would permit the juvenile to be found delinquent and incarcerated, but if violated by an adult would result only in a fine?⁴¹ We look to *Gault* to determine whether the Court based their opinion on the "crime" or the "punishment." The courts will have to eventually rule on those sections of the Juvenile Act which discriminate against the juvenile offender. The Legislature, in order to meet the standards set forth by the Supreme Court, should enact a new statute eliminating such discrimination. A method must be devised, within the framework of due process and equal protection, for the constitutional adjudication of delinquent children, without compromising the welfare of the child or society.

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³⁹ Tex. Rev. Civ. Stat. Ann. art. 2338-1 § 3 (1965) defines delinquent in terms of both penal offenses and social and age offenses. The application of the standards required in a criminal proceeding to a proceeding where the child has not violated a penal statute would work a hardship on the purpose of the proceeding which is to see that the child is properly cared for.

⁴⁰ Tex. Rev. Civ. Stat. Ann. art. 2338-1 § 3(b), (c), (d), (e), (f), (g).

⁴¹ Cases cited *supra* note 11.