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in a criminal system such as New York's. When nothing constitutes a crime unless it is so designated by statute,[81] the Legislature in attempting to cover all areas of prospective criminal activity will of necessity overlap areas in order to avoid creating loopholes. Thus situations will arise, as in the present case, where the defendant's activity is covered by two different sections.[82] Had the Court of Appeals decided conversely we would have the anomalous result of the defendant picking, in these areas of overlap, the section under which he preferred to be charged. This would undoubtedly be the more difficult under which to obtain a conviction and would consequently seem out of line with the accusatory process. The Court of Appeals might have also been influenced by the possibility of a requirement of showing a breach of the peace in order to obtain a conviction for disorderly conduct,[83] and perhaps did not wish to impose this formidable burden on the prosecutor.

CHARGE TO JURY CONCERNING SECOND DEGREE MANSLAUGHTER

The seventeen year old defendant fatally stabbed another youth with a paring knife in a pool hall fracas. In *People v. Drislane*,[84] his conviction of first degree manslaughter which was affirmed by the Appellate Division,[85] was reversed by the Court of Appeals.

The instructions of the trial court concerning the first degree were correct.[86] As to the second degree, however, the court only instructed the jury as to Section 1052(2) of the Penal Law which reads in part: "Such homicide is manslaughter in the second degree, when committed without design to effect death: (2). In the heat of passion, but not by a dangerous weapon . . .". The court failed to give any instructions under Section 1052(3), the so-called omnibus clause, which reads in part: "By any act, procurement or culpable negligence . . . which, . . . does not constitute the crime of murder in the first or second degree nor manslaughter in the first degree." The Court of Appeals interpreted the trial court as also charging that the paring knife was a dangerous weapon.[87]

The jury became perplexed as to what constituted manslaughter in the second degree and returned for further instructions. Prompted by the jury's question, the court flatly charged that the second degree could not be found where a dangerous weapon was used. Since it failed to instruct the jury concerning the omnibus clause, and since it had previously charged that this paring

81. Supra note 78.
82. People v. Florio, 301 N.Y. 46, 92 N.E.2d 881 (1950); People v. Hines, 284 N.Y. 93, 29 N.E.2d 483 (1940); People v. Bord, 243 N.Y. 595, 154 N.E. 620 (1926).
83. People v. Evans, — Misc. —, 192 N.Y.S.2d 144 (Ct. Spec. Sess. 1959).
84. 8 N.Y.2d 67, 201 N.Y.S.2d 756 (1960).
85. 9 A.D.2d 932, 196 N.Y.S.2d 1022 (2d Dep't 1959).
86. N.Y. Penal Law § 1050.
87. A search of the Record on Appeal does not clearly establish that the Trial Court instructed the jury that the knife was a dangerous weapon, although the instructions could be read with that interpretation.

knife was a dangerous weapon, the court entirely precluded the jury from finding the second degree.

In holding this charge to be erroneous, the Court of Appeals relied on the "somewhat analogous" case of *People v. Heineman*.[88] In that case, the homicide was committed by the use of a revolver, clearly a dangerous weapon. Yet that court held that the omnibus clause should have been submitted to the jury, leaving the jurors free to find the lesser degree if they were so inclined. While that case has some factual distinctions from the present one in that the defendant had a permit for the gun and there was evidence that he thought the assault was an attempted robbery, it does establish that second degree manslaughter can be found even if a dangerous weapon is used and therefore the omnibus clause should not be withheld simply because a dangerous weapon is involved. The present case also adopts that position.

Section 420-a of the Code of Criminal Procedure provides that an exception to a jury charge "shall not be deemed to have been taken unless expressly noted by the party adversely affected before the jury have rendered their verdict." At the close of the charge, defendant's counsel excepted by saying, "I wish also, your honor, to take exception to the charging of the possibility of finding the defendant guilty in the lower degree."[89] The People argued that even if the trial court's charge was in error, the above did not constitute an adequate exception. The Court of Appeals rejected this argument and held that while the objection was ineptly phrased, in view of the circumstances of the case it must be given a broad construction.

Felony Murder Conviction Requires Homicide be Committed by Felon

An indictment for felony murder will be sustained in New York only if the homicide is committed by the felon, or by one acting in concert with him. In the case of *People v. Wood*,[90] defendant had been engaged in a felonious assault upon one Vernon Gray and a police officer. During defendant's attempted escape a third party came to the assistance of the police officer with a rifle; and while firing after the fleeing felon, he shot and killed a companion of the felon, and an innocent bystander. Defendant was indicted for first degree assault and the wilful and felonious murder of the bystander and companion; the murder charge being based upon Section 1044(2), N.Y. Penal Law, i.e., felony murder.[91] The defendant moved for an inspection of the Grand Jury minutes, and the motion was granted, with the Court taking it upon itself to inspect the minutes. Thereupon the Nassau County Court dismissed the murder indictment and

88. 211 N.Y. 475, 105 N.E. 673 (1914).
89. Supra note 84 at 70, 201 N.Y.S.2d 758 (1960).
90. 8 N.Y.2d 48, 201 N.Y.S.2d 328 (1960).
91. N.Y. Penal Law § 1044:
The killing of a human being . . . is murder in the first degree, when committed . . . (2) . . . without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise.