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Criminal Law—Felony Murder Conviction Requires Homicide be Committed by Felon

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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.

the Appellate Division affirmed.[92] The Court of Appeals unanimously affirmed, stating that felony murder in New York State shall, "be confined to certain homicides committed *by the felons.*"[93]

Under the doctrine of felony murder as it first developed in the common law, the commission of a felony was generally considered to supply the intent necessary for charging a felon with murder when a homicide occurred during a felony in which he had been engaged. This was based on a legal fiction which determined that if a person had the intent to commit the felony and a homicide resulted from the commission of the felony, then the malice necessary for the charge of murder was imputed to him.[94] Under the common law rule the killing must have been done by the felon or an accomplice acting in furtherance of the underlying felony.[95] Those states which have held a felon liable for homicide where the killing was the act of someone not engaged in the commission of the felony have done so on either of three theories. (1) Proximate cause, i.e., it was the felon who began the chain of events which eventually resulted in the homicide, therefore he should be responsible for it.[96] This view has since been rejected by the Pennsylvania Court.[97] (2) Shield cases, i.e., felon uses victim of the felony as a shield in an attempted escape, and the victim is killed by one other than the felon. However, in these cases the respective courts have found that the factual situation justified a finding of express rather than implied malice,[98] and they affirmed the felony murder doctrine as set out in the *Campbell* and *Moore* cases.[99] (3) When the victim of the underlying felony attempts to escape danger and directly or indirectly causes his own death.[1]

In most states, however, the tendency has been to restrict the application of felony murder either by limiting the underlying felonies to those imminently dangerous to life, or restricting it to those homicides committed by the felon or an accomplice. New York has adopted the latter position. This precise question was considered in the case of *People v. Udwin*[2] where, during an escape from prison, one of the convicts was killed and defendant was charged with felony murder. The Court of Appeals, while ruling on the sufficiency of the evidence, found that the jury was justified in reasoning that the deadly shot was fired by the defendant, or one acting in concert with him; but the Court also stated, "it must be established beyond a reasonable doubt that the shot

92. 9 A.D.2d 433, 195 N.Y.S.2d 133 (2d Dep't 1959).
93. Supra note 90 at 50, 201 N.Y.S.2d 330 (1960).
94. Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958).
95. Commonwealth v. Moore, 121 Ky. 97, 88 S.W.2d 1085 (1905); Commonwealth v. Campbell, 7 Allen (Mass.) 541 (1863).
96. People v. Padolski, 332 Mich. 508, 52 N.W.2d 201 (1952); Commissioner v. Mayer, 351 Pa. 181, 53 A.2d 736 (1947).
97. Supra note 94.
98. Wilson v. State, 188 Ark. 846, 68 S.W.2d 100 (1934); Taylor v. State, 41 Tex. Crim. 564, 55 S.W. 961 (1900).
99. Supra note 95.

1. People v. Payne, 359 Ill. 486, 194 N.E. 539 (1935).
2. 254 N.Y. 255, 172 N.E. 489 (1930).

which killed Sullivan was fired by one of the convicts engaged with the defendants, or some of them, in a common purpose or design to unlawfully and feloniously escape."[3] In the instant case the Court has removed any doubts whatsoever, as to the interpretation of Subdivision 2 of Section 1044 of the New York Penal Code, and laid to rest any possibility that one may be charged with felony murder where the homicide involved has been committed by someone other than the felon, or one acting in concert with him. The words of the statute, "by a person engaged in the commission of a felony" are to be found only in the New York statute and are determinative of the scope of the statute as intended by the Legislature.

It was the Peoples' contention that the words of the statute "engaged in" may also be defined as "involved in," thereby making it possible to apply in effect a proximate causation test. Though the application of such a test might not have been patently unjust in the present case, the Court's decision was undoubtedly correct in light of the original common law concept of felony murder, the unfortunate experience of Pennsylvania with the proximate cause rationale, and the obvious intent of the New York Legislature.

WAIVER OF RIGHT TO DISMISSAL FOR FAILURE TO PROSECUTE

Seventeen months after he was indicted the defendant was arraigned. Then the defendant delayed the trial himself for 6 months requesting adjournments, while the district attorney was ready to prosecute. This was followed by an additional delay of 12 months, caused by adjournments agreed to by the defendant. 35 months after he was indicted, the defendant moved for a dismissal of the indictment pursuant to Section 668 of the Code of Criminal Procedure. Defendant's motion was denied by the trial court. The Appellate Division affirmed,[4] but on appeal in *People v. Piscitello,* the Court of Appeals reversed, granting a dismissal.[5]

> Section 668 of the Code of Criminal Procedure provides:
> If a defendant, indicted for a crime, whose trial has not been postponed upon his own application, be not brought to trial at the next term of the court in which the indictment is triable, after it is found, the court may, on application of the defendant order the indictment dismissed, unless good cause to the contrary be shown.

The issue presented by the instant case was whether or not the defendant waived his right to a dismissal after a 17 months delay, by thereafter requesting adjournments. The court held that the motions made by the defendant after the 17 month period were broad enough to indicate that any rights enjoyed by the defendant, then existing, were being preserved and protected.

This decision seems to mark a change in the attitude of the court in han-

3. People v. Udwin, supra note 2 at 262, 172 N.E. 492 (1930).
4. People v. Piscitello, 8 A.D.2d 696, 185 N.Y.2d 745 (1st Dep't 1959).
5. 7 N.Y.2d 387, 198 N.Y.S.2d 273 (1960).