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## Criminal Law—Confession—Requirement of Additional Proof

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Section 260 of the Penal Law<sup>16</sup> provides that a person may be convicted of an attempt to commit a crime even though the proof adduced on trial shows consummation of the crime itself. Attempts covered by this section are the general attempts of section 2.<sup>17</sup> However, even if section 260 doesn't literally pertain to section 2460 attempts, it is certainly analogous. It would be an anomaly if a conviction under a section 260 attempt could stand upon proof that the defendant had succeeded in his act, and a conviction under a section 2460 attempt could not so stand on the same proof. The Court, in answer to defendant's second contention, refused to accept such an irrational result. To gain a conviction for an attempt, the prosecution need prove only the necessary overt acts, amounting to more than mere preparation;<sup>18</sup> if it goes beyond, and shows completion of the acts, the defendant cannot be heard to complain.

### Confession—Requirement of Additional Proof

A confession alone, without additional proof that the crime charged has been committed, will not be sufficient to sustain a conviction.<sup>19</sup> *People v. Louis*<sup>20</sup> was an appeal from a conviction of the defendants of murder in the first degree on the basis of their confessions and the medical examiner's testimony that the deceased had been choked to death. The Court held, reversing the Appellate Division,<sup>21</sup> that this was sufficient basis to sustain a conviction and that the charge of the trial court<sup>22</sup> was not contradictory to the requirements of the Code of Criminal Procedure, section 395.<sup>23</sup>

Prior to the enactment of section 395, convictions based solely on confessions were sustained.<sup>24</sup> The object of the statute is to prevent a conviction where, in fact, no crime has been committed.<sup>25</sup> The Court has considered the policy

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16. N. Y. PENAL LAW, §260: A person may be convicted of the attempt to commit a crime although it appears on trial that the crime was consummated unless the court in its discretion discharges the jury and directs that the defendant be tried for the crime itself.

17. *People v. Casad*, 253 App. Div. 104, 1 N. Y. S. 2d 132 (4th Dep't 1937).

18. *People v. Graham*, 176 App. Div. 38, 154 N. Y. S. 1041 (3d Dep't 1916).

19. N. Y. CODE CRIM. PROC. §395. A confession of a defendant . . . is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed.

20. 1 N. Y. 2d 137, 134 N. E. 2d 110 (1956).

21. 286 App. Div. 792, 146 N. Y. S. 2d 779 (1st Dep't 1955).

22. "I think it is safe to say that Mr Brutofsky is dead . . . and it is not disputed that he was killed." 286 App. Div. 792, 793, 146 N. Y. S. 2d 779, 780 (1st Dep't 1955).

23. See note 19 *supra*.

24. *People ex. rel. Smith v. Bennett*, 37 N. Y. 117, 4 Abb. Prac., N. S. 89 (1867).

25. *People v. Brasch*, 193 N. Y. 46, 85 N. E. 809 (1908).

underlying this section to be in close proximity to those policies underlying that section of the Penal Law which governs proof of death in a murder trial.<sup>26</sup>

The statute is satisfied by additional proof that the crime charged has been committed.<sup>27</sup> Even if the crime charged was based on a felony murder rationale, it is reversible error to require additional proof of the underlying felony beyond that in the confession thereof. The only additional proof required is that there has been a death due to criminal means.<sup>28</sup>

A medical examiner's testimony that there is a corpse bearing marks of murder has been held to be sufficient additional proof that a murder has been committed.<sup>29</sup> Furthermore, where the fact of the murder has been accepted throughout the trial as an undisputed, established fact by the defendants, it is not reversible error for the judge to so charge, unless the defendants have requested the judge to submit the question to the jury.<sup>30</sup>

It would seem that the dissent has a valid objection to the opinion rendered by the majority in that the evidence as to the commission of the crime should have been given to the jury for its consideration. It is error for a judge to decide as a matter of law what should properly be decided as a matter of fact.<sup>31</sup>

Since the fact of the murder was treated as having been established throughout the trial, and since the defendants failed to request that it be submitted to the jury, the charge, albeit erroneous, did not prejudice the rights of the defendants to a fair trial.

### Confession—Right to Warning

Section 335-a of the Code of Criminal Procedure provides that a magistrate, upon arraignment in this state of a resident charged with a traffic law violation, and before accepting a plea, must instruct the defendant at the time of arraignment in substance that a plea of guilty is equal to a conviction after trial and that, in addition to penalizing the driver, his license to drive is subject to suspension and revocation as prescribed by law.<sup>32</sup>

26. N. Y. Penal Law §1041. No person can be convicted of murder . . . unless the death of the person alleged to have been killed and the fact of the killing by the defendant, as alleged are each established as independent facts, the former by direct proof and the latter beyond a reasonable doubt.

27. *People v. Lytton*, 257 N. Y. 310, 178 N. E. 290 (1931).

28. *People v. Gold*, 295 N. Y. 772, 66 N. E. 2d 176 (1946).

29. *People v. Lytton*, 257 N. Y. 310, 178 N. E. 290 (1931).

30. *People v. Jackerson*, 247 N. Y. 36, 159 N. E. 715 (1928).

31. See note 28 *supra*.

32. N. Y. CODE CRIM. PROC. §335-a.