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Criminal Law - Felony - Murder-Guilt of Robber for the Justifiable Killing of His Accomplice by a Policeman

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CRIMINAL LAW—FELONY-MURDER—GUILT OF ROBBER FOR THE JUSTIFIABLE KILLING OF HIS ACCOMPLICE BY A POLICEMAN—The defendant was convicted of murder in the first degree for the death of his co-felon resulting from a wound inflicted by a policeman while the felons were fleeing the scene of a robbery. On appeal to the Supreme Court of Pennsylvania, *held,* reversed, one judge dissenting.[1] For conviction in felony-murder, the killing must be done by the defendant or by one acting in furtherance of the felonious undertaking. One cannot be convicted for the consequences of lawful conduct of another person. *Commonwealth v. Redline,* 391 Pa. 486, 137 A. (2d) 472 (1958).

In Pennsylvania, murder is governed by the common law and is loosely defined as homicide with malice aforethought.[2] This suggests the concurring elements necessary to establish criminality—the objective fact of homicide, the *actus reus,* and a subjective intent, the *mens rea.*[3] The felony-murder rule, a hold-over from the period of strict liability existing in the old common law when intent was relatively unimportant and defined as homicide committed in the perpetration of any felony, draws within its ambit cases in which the killing was wholly unexpected and

[1] The dissenting opinion by Justice Bell expresses the idea that the court stop coddling criminals. The concurring opinion by Justice Cohan states that the court should have overruled the cases it distinguished. See notes 10, 11, 12, and 15 infra.

[2] Pa. Stat. Ann. (Purdon, 1945) tit. 18, §4701, accepts the common definition of murder but dichotomizes the crime into first and second degree murder. Included in the first degree is murder committed during the perpetration or attempted perpetration of arson, burglary, rape, and robbery. For a thorough discussion of the origin of the Pennsylvania statute and its adoption by other jurisdictions, see Keedy, "History of the Pennsylvania Statute Creating Degrees of Murder," 97 UNIV. PA. L. REV. 759 (1949).

[3] See Perkins, "The Law of Homicide," 36 J. CRIM. L. AND CRIM. 391 (1946); Perkins, "A Re-Examination of Malice Aforethought," 43 YALE L. J. 537 (1934).

accidental.[4] Although an intent to kill must be established, the felony-murder rule operates to construct this from the basic intent to commit the underlying felony. The troublesome area is reached when more than one felon participates in the crime, for here the principles of accessory and conspiracy merge into the felony-murder rule. Thus all participants become responsible for a killing by any of their number.[5] With the requisite intent imputed from the underlying felony and the homicide imputed from the act of another felon, conviction for murder results even though the defendant is far removed from the scene of the crime and completely unaware of the resulting death.[6] To limit the harshness which may result from the application of these combined principles, many legislatures have categorized felony-murder into various degrees restricting the heavy penalties to those murders resulting from felonies involving great human risk. Further restraints have been developed in the courts by requiring that the underlying felony be *mala in se* rather than *mala prohibita*,[7] that the homicide be independent and distinct from the underlying felony, that the homicide result from an act in furtherance of and not collateral to the felony, and that the homicide be committed within the *res gestae* of the original felony.[8] Basic to a conviction is the need for finding a significant causal relationship between the act of the felons and the resulting death, for there is a point beyond which the law will not trace the consequences of an act.[9]

The decision of the principal case seeks to arrest a trend which had extended culpability in felony-murder far beyond a line which other courts had declined to cross. In successive decisions, the Pennsylvania court had held that a prisoner could be convicted of murder when the fatal shot

[4] Tincher v. Commonwealth, 253 Ky. 623, 69 S.W. (2d) 750 (1934); Commonwealth v. Lessner, 274 Pa. 108, 118 A. 24 (1922); People v. Friedman, 205 N.Y. 161, 98 N.E. 471 (1912); 1 RUSSELL, CRIME, Turner ed., 24 et seq. (1950); Moesel, "A Survey of Felony-Murder," 28 TEMP. L. Q. 453 (1955).

[5] Commonwealth v. Lowry, 374 Pa. 594, 98 A. (2d) 733 (1953); Miller v. State, 25 Wis. 384 (1870).

[6] See Commonwealth v. Doris, 287 Pa. 547, 135 A. 313 (1926), where the defendant had already been arrested when the killing occurred and he was convicted. See Morris, "The Felon's Responsibility for the Lethal Acts of Others," 105 UNIV. PA. L. REV. 51, (1956); Hitchler, "The Killer and His Victim in Felony-Murder Cases," 53 DICK. L. REV. 3 (1948); Sayre, "Criminal Responsibility for the Acts of Another," 43 HARV. L. REV. 689 (1930).

[7] This restriction may be employed when the legislature had not done so.

[8] See Ludwig, "Foreseeable Death in Felony Murder," 18 UNIV. PITT. L. REV. 51 (1956), for a brief summary of the legislative and judicial limitations placed on the felony-murder rule.

[9] See People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924); Buel v. People, 78 N.Y. 492 (1879); Crum, "Causal Relations and the Felony-Murder Rule," 1952 WASH. UNIV. L. Q. 191; KENNY, OUTLINES OF CRIMINAL LAW, 12th ed., 127 (1926). On problems of causation in general, see Levitt, "Cause, Legal Cause and Proximate Cause," 21 MICH. L. REV. 34 (1922); Beale, "The Proximate Consequences of an Act," 33 HARV. L. REV. 633 (1920).

was fired by the victim in retaliation against a robbery and an innocent third party was killed,[10] when the shot was fired by a policeman and another policeman was killed,[11] and finally when the shot was fired by a policeman and a co-felon was killed.[12] Their underlying theory was that one should be responsible for all the foreseeable consequences of his acts. Since the felons had precipitated the situation creating the risk and since they should have foreseen that some person might be killed, they were held guilty of murder,[13] despite the fact that one not a party to the crime unleashed the fatal force. The principal case discards this theory, specifically overrules the third case listed above, and holds that conviction for felony-murder can result only when the fatal blow was struck by one acting in furtherance of the felonious design.[14] This was certainly a correct result. But in a decision handed down shortly after the principal case, the Pennsylvania court applied the general rule announced in the principal case and affirmed its earlier holding that an arsonist could be convicted for murder when his accomplice died as a result of injuries received in a fire which the accomplice himself had ignited.[15] The problem in the principal case differs markedly from that of the arson case. In the former, the question is whether or not the act of any of the felons was the cause of death. In the latter, the act of the dead arsonist was unmistakably the cause of death. At this point a question beyond that presented in the principal case must be answered. Granting that an act of a felon caused death and granting that under the test of the principal case the act will be imputed to a surviving felon, should the felony-murder rule be used by the court to construct an intent to kill under these circumstances?[16] The answer

[10] Commonwealth v. Moyer and Byron, 357 Pa. 181, 57 A. (2d) 736 (1947), distinguished in the principal case on the ground that the verdict of the trial court indicated a finding that a felon triggered the fatal bullet. See Wilson v. State, 188 Ark. 846, 68 S.W. (2d) 100 (1934).

[11] Commonwealth v. Almeida, 362 Pa. 596, 68 A. (2d) 595 (1949), laid aside in the principal case for future determination. *Contra:* People v. Udwin, 254 N.Y. 255, 172 N.E. 489 (1930); Commonwealth v. Campbell, 89 Mass. (7 Allen) 541 (1863). *Accord,* People v. Podolski, 332 Mich. 508, 52 N.W. (2d) 201 (1952). Approved in dictum, Hornbeck v. State, (Fla. 1955) 77 S. (2d) 876.

[12] Commonwealth v. Thomas, 382 Pa. 639, 117 A. (2d) 204 (1955), specifically overruled in the principal case at 508.

[13] See Commonwealth v. Almeida, note 11 supra.

[14] Principal case at 496.

[15] Commonwealth v. Bolish, 391 Pa. 550, 138 A. (2d) 447 (1958). *Accord,* State v. Morran, (Mont. 1957) 306 P. (2d) 679. *Contra:* People v. Ferlin, 203 Cal. 587, 265 P. 230 (1928); People v. La Barbera, 159 Misc. 177, 287 N.Y.S. 257 (1936). The earlier case, Commonwealth v. Bolish, 381 Pa. 500, 113 A. (2d) 464 (1955), was reversed for a new trial because improper evidence had been introduced. The recent case, raising the same question on felony-murder, was an appeal from the new trial.

[16] When it was held that the defendant in Commonwealth v. Thomas, note 12 supra, was causally responsible for the death of his co-felon, the problem then approximated that of Commonwealth v. Bolish, note 15 supra. The Thomas case and the principal case offer a convenient place to stop tracing the causal chain, i.e., the intervention of an innocent third party. The Bolish case does not.

would seem to be no. Originally employed to achieve desired ends, the felony-murder rule is only a fiction which should not be extended to cover the killing of participating felons. The common undertaking, as among the felons, should be viewed as a legitimate enterprise. In other words, if the cause of death is attributable to the surviving felon, the degree of his guilt should depend upon the presence or the absence of an *actual* intent to kill the other felon.[17] While *stare decisis* may answer a plea for the abolition of the felony-murder rule in its entirety,[18] it does not call for the extension of the rule into this limited area.

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[17] In the two cases under consideration, it is obvious that no intent to kill was present. A conviction of manslaughter would appear to be the correct result. See 1 ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE 606 (1957); Morris, "The Felon's Responsibility for the Lethal Acts of Others," 105 UNIV. PA. L. REV. 51 (1956).

[18] See RUSSELL, CRIME, Turner ed., 562 et seq. (1950); KENNY, OUTLINES OF CRIMINAL LAW, 13th ed., 127 et seq. (1929).