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Proximate Cause and Furtherance of Design - Felony-murder and Guilt of One Felon for the Death of His Accomplice - Commonwealth v. Thomas

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Proximate Cause And Furtherance Of Design — Felony-Murder And Guilt Of One Felon For The Death Of His Accomplice

Commonwealth v. Thomas[1]

The defendant and Jackson held up and robbed a butcher shop of a sum of money. Jackson was armed. When the two men had gotten the money, they fled from the shop, each going in a different direction. The proprietor of the shop obtained his own gun and chased Jackson, and in an exchange of gunfire, killed the fleeing felon. The defendant was subsequently apprehended and indicted for the murder of his slain accomplice. At the trial, the defendant

[1] 382 Pa. 639, 117 A. 2d 204 (1955)

demurred to the Commonwealth's evidence, and the court sustained the demurrer. On appeal by the Commonwealth to the Supreme Court of Pennsylvania, the Court posed the question: ". . . can a co-felon be found guilty of murder where the victim of an armed robbery justifiably kills the other felon as they flee from the scene of the crime?"[2] Reversing the judgment of the trial court and ordering a new trial, the Court, in a four to three decision, answered the question in the affirmative.

The statute governing the case provided that "All murder . . . which shall be committed in the perpetration of . . . any . . . robbery . . . shall be murder in the first degree . . ."[3] The Court reasoned as follows: (1) Common law murder is a killing with malice aforethought;[4] (2) the malice might be expressed or implied; (3) the malice of the initial act of robbery attached to all that followed;[5] (4) the defendant set in motion a chain of events which ended in the death of his accomplice;[6] (5) the robbery was the proximate cause of the death;[7] (6) the *killing* was committed during the perpetration of a robbery; (7) the defendant, therefore, was guilty of murder in the first degree. On the basis of its prior decisions, the Court decided that the fact that the victim of the homicide was a co-felon was immaterial,[8] and the fact that the killing itself was a justifiable one on the part of the butcher was irrelevant, the important factor being that at the outset it was readily foreseeable that the robbery victim would have to defend himself, and that it was likely that someone would be killed.

In a concurring opinion (in rebuttal of the dissents) Justice Bell reasoned, in a manner similar to that of the Court's opinion, that defendant was guilty of murder, the justifiability of the homicide being no more tenable than the defense of accidental or unintentional killing of the victim during the perpetration of other felonies. Justice Bell reasoned further that as respects the defendant, the killing was not justifiable, that in light of the reason for the "origin, development and application to modern con-

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[2] *Ibid*, 204.
[3] 18 Purdon's Statutes (Pa., 1939), Sec. 4701.
[4] Citing Commonwealth v. Drum, 58 Pa. St. Rep. 9, 15 (1868).
[5] Citing Commonwealth v. Guida, 341 Pa. 305, 310, 19 A. 2d 98, 100 (1941).
[6] *Supra*, n. 1, 205.
[7] Citing Commonwealth v. Moyer, 357 Pa. 181, 191, 53 A. 2d 736, 741 (1947), noted: 17 Ford. L. Rev. 124 (1948); 22 Tulane L. Rev. 325 (1947); 96 Univ. Pa. L. Rev. 278 (1947).
[8] Commonwealth v. Bolish, 381 Pa. 500, 113 A. 2d 464 (1955), noted 17 Univ. of Pitt. L. Rev. 101 (1955); 10 Rutgers L. Rev. 446 (1955); 40 Minn. L. Rev. 267 (1956).

ditions" of the felony-murder doctrine which "was and is 'the *protection of society*' " it made no difference who in fact pulled the trigger or who was killed "if the killing occurred in a robbery".[9]

In a lengthy dissenting opinion,[10] Justice Jones pointed out that the Court imputed an *act* to the defendant, whereas, the commonly imputed factor is *malice* where the defendant is actually the actor. He stated, further, that (1) the mere coincidence of a *killing* with a felony is insufficient, (2) there must be causation in furtherance of the felonious design, (3) the analogy of proximate cause to tort law is inadequate here because it raises necessary considerations of superseding causes which the Court avoided, (4) the Court infringes on the legislative domain by creating crimes and punishments, (5) the statute creates no crimes, but merely categorizes the common law crime of *murder* into two degrees, and does not refer to mere homicide or *killing* as the court's decision implies it does, (6) the cases upon which the Court relied are inconsistent with prior Pennsylvania law, and with the law of other jurisdictions, and that (7) this was justifiable homicide. Another dissenting opinion took the same approach.[11]

THE DOCTRINES INVOLVED

The basic doctrine involved in all cases of this sort is that of felony-murder or constructive murder. If a felon, in the perpetration of a felony, commits an unjustifiable homicide, he is guilty of murder at the common law.[12] While this doctrine underlies the discussion of the principal case, it is not directly in issue. Consideration should be directed, rather, to the question of whether, granting the validity of the felony-murder doctrine, it should be extended to apply to the instant situation. In other words, by what tests should the felony-murder doctrine be applied? In attempting to answer this question, two doctrines will

[9] *Supra*, n. 1, *conc. op.* 206, 207.

[10] *Supra*, n. 1, *dis. op.* 213.

[11] *Supra*, n. 1, 221.

[12] At common law there were no degrees of murder. All *murder* was treated equally in this regard. Statutes enacted in comparatively recent times distinguish between two degrees of murder. Felony murder statutes, then, in effect do no more than codify the common law by providing that felony *murder* is first degree murder. For excellent discussions of the felony murder doctrine see: Corcoran, *Felony Murder in New York*, 6 Ford. L. Rev. 43 (1937); Arent and MacDonald, *The Felony Murder Doctrine and Its Application under the New York Statutes*, 20 Cornell L. Q. 288 (1935); Mosel, *A Survey of Felony Murder*, 28 Temple L. Q. 453 (1955); Perkins, *The Law of Homicide*, 36 J. Crim. L. and Criminology 391, 401, 405 (1946).

be considered, *i.e.*, the doctrine of proximate-cause[13] and, the furtherance doctrine.[14]

The Court in the instant case applied the doctrine of proximate cause, the concurring opinion there adopting the following statement of Pennsylvania law set forth in *Commonwealth v. Bolish.*[15]

> "If a person with legal malice commits an act or sets off a chain of events from which, in the common experience of mankind, the death of another is a natural or *reasonably foreseeable result,* that person is guilty of murder, if death results from that act or from the events which it naturally produced."

Under the furtherance doctrine, however, "the accomplice in the felony is responsible, as at common law, for only those acts of his associate which are committed in pursuance to the common design, . . .",[16] so that, if the killing is not done in furtherance of the plan, the felony-murder doctrine does not apply, and the defendant accomplice is not guilty of murder. If, on the other hand, the killing occurs in furtherance of the felony, as where the felon kills an intended victim who resists, the felony-murder doctrine does apply. These two doctrines, will be given further consideration, below, in connection with cases in which they were held to apply.

THE CASES IN PENNSYLVANIA

In his dissent, Justice Jones pointed out that until the decision in *Commonwealth v. Almeida,*[17] the rule uniformly followed in Pennsylvania was that "the killing must have been done *by the defendant or by an accomplice or confederate or by one acting in furtherance of the felonious*

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[13] McLaughlin, *Proximate Cause,* 39 Harv. L. Rev. 149 (1925). See also: Beale, *The Proximate Consequences of an Act,* 33 Harv. L. Rev. 633 (1920); Edgerton, *Legal Cause,* 72 Univ. Pa. L. Rev. 211 and 343 (1924), and the cases cited in the following discussion.

[14] Arent and MacDonald, *supra,* n. 12, 307; and see the cases cited in the discussion that follows below.

[15] *Supra,* n. 8, 474. Italics added.

[16] Arent and MacDonald, *supra,* n. 12, 307.

[17] 362 Pa. 596, 68 A. 2d 595, 12 A. L. R. 2d 183 (1949); noted: 98 Univ. of Pa. L. Rev. 431 (1950); 40 J. Crim. L. and Criminology 617 (1950); 30 B. Univ. L. Rev. 423 (1950). See also: People v. Podolski, 332 Mich. 508, 52 N. W. 2d 201 (1952), *cert. den.* 344 U. S. 845 (1952), *reh. den.* 344 U. S. 888 (1952); and Hornbeck v. State, 77 So. 2d 876 (Fla., 1955), both in accord with the Almeida case. In the Hornbeck case, the statute referred to all *unlawful* killing.

undertaking";[18] but, the majority was not persuaded that such was the law. In the *Almeida* case, in which a police officer was killed while attempting to apprehend escaping robbers, it was held immaterial whether the fatal shot came from a gun of the felons, police, or even the victim's wife, since the death was the proximate result of the robbery. Pennsylvania cases prior to the *Almeida* case had held that a felon was guilty of murder: when his accomplice killed a policeman, even where the defendant had been apprehended and was in custody prior to the shooting;[19] when a maid in a house which was being burglarized died as the result of having been gagged by the felons;[20] when a gas station attendant died as a result of a bullet wound which the court found had been inflicted by one of the felons;[21] and when the death arose out of a riot between two groups of men.[22] Two cases prior to *Almeida* indicated that the defendant might not have been guilty of murder had the death been accidentally caused by a third person trying to apprehend the felon.[23]

The first case in Pennsylvania in which defendant was held guilty of the murder of an accomplice was *Commonwealth v. Bolish.*[24] In that case the felons conspired to burn down a house, and the victim, one of the felons, and the one who had actually set the fire was killed in the resulting conflagration. The Court held that there was no distinction between that case and a case in which an innocent person is killed, since in either event the loss of life is "readily foreseeable", and the death is the proximate and natural result of the arson. In at least one important respect, the instant case carries the felony-murder doctrine beyond all prior Pennsylvania decisions. In all, save the *Almeida* case, the defendants either were the actors or were in concert with the actors. In *Almeida*, while the evidence was not conclusive, the victim's famiy did testify that the fatal shot came from the gun of one of the felons, and one of the

[18] 382 Pa. 639, 117 A. 2d 204, *dis. op.* 213, 215; citing *inter alia:* Commonwealth v. Wooding, 355 Pa. 555, 50 A. 2d 328 (1947); Commonwealth v. Pepperman, 353 Pa. 373, 45 A. 2d 35 (1946); Commonwealth v. Elliott, 349 Pa. 488, 37 A. 582 (1944).

[19] Commonwealth v. Doris, 287 Pa. 547, 135 A. 313 (1926).

[20] Commonwealth v. Guida, 341 Pa. 305, 19 A. 2d 98 (1941).

[21] Commonwealth v. Moyer, 357 Pa. 181, 53 A. 2d 736 (1947), noted: 17 Ford. L. Rev. 124 (1948); 22 Tulane L. Rev. 325 (1947); 96 Univ. Pa. L. Rev. 278 (1947).

[22] Commonwealth v. Hare, 2 Pa. L. J. R. 467 (1844).

[23] Commonwealth v. Thompson, 321 Pa. 327, 184 A. 97 (1936); Commonwealth v. Mellor, 294 Pa. 339, 144 A. 534 (1928).

[24] 381 Pa. 500, 113 A. 2d 464 (1955), noted 17 Univ. of Pitt. L. Rev. 101 (1955); 10 Rutgers L. Rev. 446 (1955); 40 Minn. L. Rev. 267 (1956).

felons did plead guilty. The possibility that the shot came from the gun of another was raised by defendant only as a possible inference. In *Thomas*, the principal case, there was no question about the defendant's action. He did not participate in any of the shooting, and apparently wasn't even around to watch it.

THE CASES IN OTHER JURISDICTIONS

The earliest case dealing with this question is *Commonwealth v. Campbell*,[25] a Massachusetts case. In that case it was held that where a death arose out of a gun battle between the National Guard inside an armory and a mob protesting conscription outside the armory, it had to be proved that the fatal shot came from outside the armory in order to hold members of the rioting mob guilty of murder. The ruling was on an instruction of the trial Court, and the Court was not *en banc* at the time. The jury acquitted the defendant. The Court stated that:

> "There can be no doubt of the general rule of law, that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which may naturally or necessarily flow from it, and that, if he combines and confederates with others to accomplish an illegal purpose, he is liable *criminaliter* for the acts of each and all who participate with him in the execution of the unlawful design. As they all act in concert for a common object, each is the agent of all the others, and the acts done are therefore the acts of each and all. [This] is subject to the reasonable limitation that the particular act of one of a party for which his associates and confederates are to be held liable must be shown to have been done for the furtherance . . . of the common object and design for which they combined together. . . . No person can be held guilty of homicide unless the act is either actually or constructively his, and it can not be his act in either sense unless committed by his own hand or by someone acting in concert with him or in furtherance of a common object or purpose. Certainly that cannot be said to be an act of a party in any just sense, or on any sound legal principle, which is not only not done by

[25] 7 Allen (89 Mass.) 541 (1863).

> him, or by any one with whom he is associated . . . but is committed by a person who is his direct and immediate adversary, . . ."[26]

The Pennsylvania Court in the *Almeida* case distinguished the *Campbell* case, held it to be an incorrect statement of the law, and then relied on the *Hare* case,[27] which appears to be factually distinguishable from *Campbell* and *Almeida* in that both groups in *Hare* were engaged in unlawful conduct.

The next case which dealt with the question was an Illinois case, *Butler v. People*.[28] There, it was held that where an officer was being assaulted, and in attempting to defend himself, shot and killed an innocent bystander, the conviction of the officer's assailants had to be reversed since the slaying was not in furtherance of the common design. In *Commonwealth v. Moore*,[29] a Kentucky case, the owner of a house, the victim of a robbery, in attempting to defend himself, shot and killed an innocent third person. The Court, in affirming the dismissal of the indictment of the robber, held that since the robber did not aid and abet the slaying, and since it was not in furtherance of the felony, he could not be tried for murder. In a case nearly on all fours with *Thomas* factually, the Illinois Court held that where one of a group of robbers was mysteriously killed during the course of the robbery, the remaining robbers could not be convicted of his murder unless it was proved that one of them fired the fatal shot. The Court held that there was no evidence to show that the plan of robbery included the killing of an accomplice, and the killing was plainly not in furtherance of the felony.[30] In *People v. Ferlin*,[31] involving arson, similarly to the *Bolish*[32] case, a California court held that since the death of a co-conspirator in the execution of a plan of arson was not within the scope of the felony, and not in furtherance of its execution, the trial court was correct in granting defendant's motion

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[26] *Ibid*, 543-545. Parenthetical word supplied.

[27] *Supra*, n. 22.

[28] 125 Ill. 641, 18 N. E. 338 (1888).

[29] 121 Ky. 97, 88 S. W. 1085 (1905).

[30] People v. Garippo, 292 Ill. 293, 127 N. E. 75 (1920).

[31] 203 Cal. 587, 265 P. 230 (1928); *Cf.* People v. Cabaltero, 31 Cal. App. 2d 52, 87 P. 2d 364 (1939), where in affirming the conviction of defendants for the murder of a co-felon, the Court relied on the fact that the victim was killed by his confederates, thus distinguishing *Ferlin*.

[32] *Supra*, n. 24.

for a new trial.[33] However, in 1952, in *People v. Podolski*,[34] the Supreme Court of Michigan, after referring, *inter alia*, to the above Massachusetts, Illinois and Kentucky cases, adopted the proximate cause approach to sustain a murder conviction of the defendant who had participated in the armed robbery of a bank when, during his attempt to escape and the ensuing gun battle with officers, one of the officers was killed by a bullet from the weapon of a fellow officer. The court said: "We think the better reasoning appears in a Pennsylvania case, *Commonwealth v. Moyer*[35] . . .", and relied upon a quotation of proximate cause from that case.

It may thus be seen that there are two distinct lines of cases dealing with the question of guilt under the felony-murder doctrine: the one, espousing proximate cause; the other, espousing furtherance. The former finds guilt when there is proximate cause, the latter when there is furtherance. Some, of course, require both. The grounds for the adoption of either idea, or both, appear to be manifold: theories of punishment;[36] construction of statutory language;[37] and public policy as manifest in statutes;[38] or, possibly personal predilections.

Certainly, the principal case is what might be termed *borderline*. It presents an opportunity for the application of either or both the proximate cause or furtherance ideas. It would appear that while local theories of punishment, and gravity of accompanying felony, etc., might be important, more critical guides for the application of doctrine would be local public policy as expressed in legislation or existing case law, and judicial construction. Some Courts might be governed by whether the statutes refer to "killing" or "homicide" or "murder". In a case such as *Thomas*, it would be easier to apply the felony murder doctrine by

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[33] See also: People v. Udwin, 254 N. Y. 255, 172 N. E. 489 (1930); State v. Oxendine, 187 N. C. 658, 122 S. E. 568 (1924); People v. Sobieskoda, 235 N. Y. 411, 139 N. E. 558 (1923); Shockley v. United States, 166 F. 2d 704 (9th Cir., 1948); United States v. Boyd, 45 F. 851 (C. C. W. D. Ark., 1890), reversed on other grounds 142 U. S. 450 (1892).

[34] 332 Mich. 508, 52 N. W. 2d 201, 204 (1952), *cert. den.* 344 U. S. 845 (1952), *reh. den.* 344 U. S. 888 (1952).

[35] 357 Pa. 181, 53 A. 2d 736, 741 (1947), noted: 17 Ford. L. Rev. 124 (1948); 22 Tulane L. Rev. 325 (1947); 96 Univ. Pa. L. Rev. 278 (1947), and followed by the Almeida case, *supra, circa*, ns. 17, 18.

[36] See the concurring opinion in the instant Thomas case, 382 Pa. 639, 117 A. 2d 204, 206 (1955).

[37] See the dissenting opinion of Justice Jones in Thomas, *ibid*, 213.

[38] See the majority and concurring opinions in Thomas, *ibid*. In this regard, see also Strahorn, *Criminology and the Law of Guilt*, 15 Md. L. Rev. 287 (1955).

way of the proximate cause idea if the statute referred to "killing" or "homicide".[39]

By using proximate cause in *Thomas*, the Pennsylvania Court has extended the felony murder doctrine beyond the point at which it is no longer applied under some decisions in other jurisdictions, and in one respect (that defendant was a co-felon) beyond all prior Pennsylvania decisions. Whether added to *Podolski*,[40] it indicates a modern trend toward the proximate cause approach in jurisdictions where this is not precluded by prior decision remains to be seen. The sharp division in the Pennsylvania Court emphasizes that the question for the time being is a close one.

The Law In Maryland

The Maryland Court of Appeals does not appear to have been faced with the question of the *Thomas* case. In fact, beyond general discussions defining common law murder, etc., the Court has only stated that the Maryland statute[41] does not create a new crime, but merely establishes two degrees of common law murder.[42] The Maryland statute is substantially the same as Pennsylvania's, providing that "all murder which shall be committed in the perpetration of, or attempt to perpetrate, . . . robbery, . . . shall be murder in the first degree".

There have been cases in which murder was committed in the perpetration of a felony,[43] and the Court has held, thus adopting the felony-murder doctrine, that a killing in the perpetration of a robbery is murder in the first degree.[44] There is every reason to believe that a co-felon would be liable for the acts of his accomplices.[45]

There has been one case at the *nisi prius* level in which the question was considered. — *State v. Biggue*,[46] tried before the late Judge Adams in the Criminal Court of Baltimore City. The defendant had attempted a robbery at the Bayview yards of the Baltimore and Ohio Railroad in Balti-

[39] For an example of a case applying Pennsylvania doctrine under a statute referring to "killing", see Hornbeck v. State, 77 So. 2d 876 (Fla., 1955).

[40] *Supra*, n. 34.

[41] Md. Code (1951) Art. 27, Sec. 497.

[42] Abbott v. State, 188 Md. 310, 52 A. 2d 489 (1947); Wood v. State, 191 Md. 658, 62 A. 2d 576 (1948).

[43] Wood v. State; *ibid*, Insurance Co. v. Prostic, 169 Md. 535, 182 A. 421 (1936).

[44] Bozman v. State, 193 Md. 196, 66 A. 2d 401 (1949).

[45] Beall v. State, 203 Md. 380, 101 A. 2d 233 (1953); Watson v. State, ... Md. ..., 117 A. 2d 549 (1955).

[46] Criminal Court of Baltimore City, No. 2191, July 25, 1938.

more and one of two guards, who had engaged the defendant in a gun battle, was slain. The defendant, indicted for the guard's murder, pleaded that the fatal shot came from the gun of the victim's fellow officer. The State demurred to the plea. Judge Adams overruled the demurrer, holding that the plea set up a valid defense to the charge of murder, and dismissed the charge.

There being no binding Court of Appeals precedent in Maryland, the door is open for the Court to approach the question of the application of the Maryland statute, with an eye to local policy, and with proper consideration of the purposes and policies of the criminal law.[47] The Court might well be governed by what it considers to be the proper weight to be given the three basic elements of any criminal act: an *intent;* an *act;* and a *corpus delicti;*[48] and to the fact that the statute speaks not of *killing,* but of *murder.*[49]

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[47] Strahorn, *op. cit., supra,* n. 38.

[48] *Ibid.*

[49] This necessarily raises such questions as the extent to which the Maryland statute codifies or modifies the common law felony-murder doctrine, and whether the legislative use of the word murder, rather than killing was intentional, or merely fortuitous.