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CASE NOTES

CRIMINAL LAW—APPLICATION OF FELONY MURDER RULE SUSTAINED WHERE ROBBERY VICTIM KILLED DEFENDANT'S ACCOMPLICE

Defendant and a confederate entered the grocery store of one Cecchini and there committed an armed robbery. As the felons were fleeing the scene of the crime, Cecchini drew his own pistol and killed the confederate. Defendant was indicted for murder and the trial court entered a judgment sustaining a demurrer to the Commonwealth's evidence in the trial. The Supreme Court of Pennsylvania, in reversing the trial court, and ordering a new trial, held that where the victim of a robbery kills one of the co-felons the surviving co-felon may be convicted of felony murder. *Commonwealth v. Thomas*, 382 Pa. 639, 117 A. 2d 204 (1955).

The origin of the "felony murder rule" is shrouded in antiquity. Coke considered that any killing in connection with an unlawful act was murder.¹ A modified view was accepted by Blackstone who asserted: "If one intends to do another felony, and undesignedly kills a man, this is also murder."² Blackstone's position has been further refined by the English courts which have held the felony murder doctrine applicable only to felonies which involve a substantial or foreseeable risk of human injury in their commission.³

The felony murder doctrine is controlled by statute in all but three states.⁴ Eight states provide that a homicide which occurs in the commission of any felony is murder.⁵ As can be seen, such a provision is, in fact, harsher than the "foreseeable risk of human injury" view as expressed in the English cases. There is general agreement that such felonies as arson, burglary, rape and robbery are of sufficient magnitude to warrant the application of the felony murder rule under appropriate circumstances.⁶

Various conclusions have been reached as to criminal liability for a

¹ 3 Co. Inst. 56 (1797). "If the act be unlawful, it is murder."

² 4 Bl. Comm. 201 (6th ed. 1775).

³ *Rex v. Lumley*, 22 Cox C. C. 635 (1911); *Regina v. Whitmarsh*, 62 Just. P. 711 (1898); *Regina v. Serne*, 16 Cox C. C. 311 (1887).

⁴ Kentucky, Maine, South Carolina.

⁵ Kansas, Minnesota, New York, New Mexico, North Carolina, North Dakota, Oklahoma, South Dakota.

⁶ 26 Am. Jur. § 195. *Perkins, Cases and Materials on Criminal Law and Procedure* 776 (1952).

homicide occurring in the commission, or the attempt to commit, a felony where the fatal injury is inflicted by one not a participant in the felony. A divergence of opinion as to the theoretical approach to this problem has combined with a wide variation in factual situations to create a lack of uniformity among the decisions in this area.

The court in the instant case utilizes reasoning quite similar to the theory of proximate cause in tort liability in reaching its conclusion.⁷ As a basis for its finding, the court relies, in part, on a prior Pennsylvania case which stated: "For whatever results follow from that natural and legal use of a retaliating force, the felon must be held responsible."⁸

Though the interpretation of the felony murder rule presented in the instant case is unique because the exact factual situation had never previously come before the court, the proximate cause approach to the application of the felony murder doctrine has, in recent years, been repeatedly relied upon by the Supreme Court of Pennsylvania.⁹

Other courts, in resolving some of the many problems which have arisen in applying the felony murder rule to situations involving co-felons, have adopted agency principles and hold that unless the homicide was committed by a co-felon in the successful furtherance of the felony, the other co-felons are not responsible.¹⁰

Commonwealth v. Almeida,¹¹ which is relied upon as authority for the decision in the instant case, held that where a police officer was killed while attempting to prevent the escape of robbers, all the robbers were guilty of felony murder even though the fatal shot was not fired by one of the robbers. The proximate cause rationale was the basis for the court's conclusion, the court in part stating:

If one or more persons set in motion a chain of circumstances out of which death ensues, those persons must be held responsible for any death which by direct, by almost inevitable sequence, results from such unusual criminal act.¹²

In *Commonwealth v. Bolish*,¹³ the Supreme Court of Pennsylvania reiterated its inclination to follow the proximate cause theory in holding

⁷ "The felon's robbery set in motion a chain of events which were or should have been within his contemplation when the motion was initiated. He therefore should be held responsible for *any death* which by direct or almost inevitable sequence results from the initial criminal act." 382 Pa. 639, 642, 117 A. 2d 204, 205 (1955).

⁸ *Commonwealth v. Moyer*, 357 Pa. 181, 191, 53 A. 2d 736, 742 (1947).

⁹ *Commonwealth v. Bolish*, 381 Pa. 500, 113 A. 2d 464 (1955); *Commonwealth v. Almeida*, 362 Pa. 596, 68 A. 2d 595 (1949); *Commonwealth v. Moyer*, 357 Pa. 181, 53 A. 2d 736 (1947); *Commonwealth v. Kelly*, 333 Pa. 280, 4 A. 2d 805 (1939).

¹⁰ *Butler v. People*, 125 Ill. 641, 18 N.E. 338 (1888); *Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085 (1905); *People v. Udwin* 254 N.Y. 255, 172 N.E. 489 (1930) *State v. Oxendine*, 187 N.C. 658, 122 S.E. 568 (1924).

¹¹ 362 Pa. 596, 68 A. 2d 595 (1949).

¹² *Ibid.*, at 560 and 598.

¹³ 381 Pa. 500, 113 A. 2d 464 (1955).

that where two co-felons conspire to commit arson and one of them is killed by his own act in setting the fire, the other is guilty of felony murder.¹⁴

In separate dissents written by Justice Jones, and Justice Musmanno, vigorous protest is made to the conclusion reached by the majority of the court in the *Thomas* case. Both dissents point out that the result of the court's holding is to convict a felon for murder when the homicide committed was justifiable. Justice Jones advances the position taken in *Commonwealth v. Moore*,¹⁵ wherein the Kentucky court concluded:

In order that one may be guilty of homicide, the act must be done by him actually or constructively, and that cannot be, unless the crime be committed by his own hand, or by the hands of some one acting in concert with him, or in furtherance of a common object or purpose.¹⁶

This, of course, is merely a statement of the agency approach to the application of the felony murder rule. However, the court in the *Moore* case, by way of dictum, specifically raised and rejected the proposition that one felon may be held criminally liable under the felony murder doctrine for the justifiable killing of his co-felon by the intended victim of the felony.

Justice Musmanno, in his dissent in the instant case, quotes the Pennsylvania statute which provides:

(a) All murder . . . which shall be committed in the perpetration of . . . any . . . robbery . . . shall be murder in the first degree.¹⁷

This, he reasons, exempts the defendant from liability for felony murder because the killing of his co-felon was not murder, but justifiable homicide. However, a majority of the court takes the position that the provision ". . . does not define 'murder,' but merely fixes the degree of the crime."¹⁸

The dissent of Justice Musmanno distinguishes the instant case from the *Almeida* case on the facts, pointing out that there the deceased was an innocent third party rather than one of the co-felons. This differentiation does not, however, rebut the proximate cause theory adhered to by the majority of the court. But, as this opinion points out, the killing of the deceased co-felon was right and that therefore, if the killing is to be attributed to the surviving co-felon, the homicide perpetrated by him was justifiable. Justice Bell, in a separate concurring opinion, responds to this argument by pointing out:

¹⁴ *Contra*: *People v. Ferlin*, 203 Cal. 587, 265 P. 230 (1928), and *People v. La Barbera*, 159 Misc. 177, 287 N.Y.S. 257 (1936).

¹⁵ 121 Ky. 97, 88 S.W. 1085 (1905). ¹⁶ *Ibid.*, at 100 and 1086.

¹⁷ Penn. Stat. Ann. (Purdon Supp., 1954) tit. 18, § 4701.

¹⁸ 382 Pa. 639, 639, 117 A. 2d 204, 204. (1955).

. . . the killing of a robber may be (and usually is) a justifiable killing so far as the intended victim or a police officer is concerned, but that does not make it a justifiable killing qua the co-felon who cause the shooting.¹⁹

The proximate cause doctrine has been employed repeatedly by the courts of other states when confronted with problems in the application of the felony murder rule.²⁰

It appears that, at present, the Illinois court is adhering to the view adopted by it in *Butler v. People*.²¹ In that case, the defendant was a member of a gang who attacked a police officer who was attempting to arrest another member of the group for disorderly conduct. In defending himself, the officer accidentally killed an innocent third party. The court held the defendant was not guilty of the homicide and, in language strikingly similar to that employed in *Commonwealth v. Moore*,²² stated:

No person can be held responsible for a homicide unless the act was either actually or constructively committed by him. And in order to be his act it must be committed by his hand, or by someone acting in concert with him, or in furtherance of a common design or purpose. Where the criminal liability arises from the act of another, it must appear that the act was done in the furtherance of a common design, or in prosecution of a common purpose, for which the parties were assembled or combined together. . . .²³

The position taken in the *Butler* case was re-affirmed in *People v. Garippo*,²⁴ where the defendant was one of a group of co-felons who committed a robbery during the course of which one of the co-felons was killed by a person or persons unknown. The court held that since it was not proven beyond reasonable doubt that the deceased had been killed by one of his co-felons, the defendant could not be convicted of felony murder.²⁵

The felony murder doctrine has been vigorously and repeatedly applied by the Illinois court,²⁶ but thus far it has not been applied to the situation confronting the court in the instant case, i.e., the justifiable killing of a

¹⁹ *Commonwealth v. Thomas*, 382 Pa. 639, 647, 117 A. 2d 204, 207 (1955).

²⁰ *Johnson v. State*, 142 Ala. 70, 38 So. 182 (1905); *Wilson v. State*, 188 Ark. 864, 68 S.W. 2d 100 (1934); *People v. Manriquez*, 188 Cal. 602, 206 Pac. 63 (1922); *State v. Leopold*, 110 Conn. 55, 147 Atl. 118 (1929); *State v. Block*, 87 Conn. 573, 89 Atl. 167 (1913); *Letner v. State*, 56 Tenn. 68, 299 S.W. 1049 (1927); *Taylor v. State*, 41 Tex. Cr. R. 564, 55 S.W. 961 (1900).

²¹ 125 Ill. 641, 18 N.E. 338 (1888).

²² 121 Ky. 97, 88 S.W. 1085 (1905).

²³ *Butler v. People*, 125 Ill. 641, 645, 18 N.E. 338, 339 (1888).

²⁴ 292 Ill. 293, 127 N.E. 75 (1920).

²⁵ Citing as authority *Butler v. People*, 125 Ill. 641, 18 N.E. 338 (1888), and *Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085 (1905).

²⁶ *People v. Woods*, 2 Ill. 2d 240, 118 N.E. 2d 248 (1954); *People v. Goldvarg*, 346 Ill. 398, 178 N.E. 892 (1931); *People v. Rudecki*, 309 Ill. 125, 140 N.E. 832 (1923); *People v. Rischio*, 262 Ill. 596, 105 N.E. 8 (1914).

felon during the commission of a felony. Whether the doctrine will be applied in such a situation is problematical in light of the reasoning expressed in the *Butler* and *Garippo* cases.

Little difficulty has been encountered in the several jurisdictions in situations where the defendant has killed the victim while in the commission of a felony. It is when this pattern is varied that divergence of opinion arises as to the applicability of the felony murder rule. It well may be that the proximate cause approach as expressed in the instant case best serves the public policy which militates so vehemently against any action which endangers the life of another man.

DOMESTIC RELATIONS—ILLINOIS PUBLIC POLICY DOES NOT PREVENT CHILD FROM SUING PARENT FOR WILFUL AND WANTON CONDUCT

The wife and a son of defendant were killed and another son was severely injured as passengers in an automobile driven by defendant. The administrator of the estate of the deceased wife and minor child brought suit under the Illinois wrongful death statute charging defendant father with wilful and wanton conduct. The surviving minor son, through his next friend, proceeded against the defendant father for personal injuries alleging wilful and wanton misconduct. Motions to dismiss these actions were filed and sustained by both the trial and appellate courts. The Illinois Supreme Court reversed the lower court declaring that the contributory negligence of one beneficiary does not bar an action for wrongful death by the innocent beneficiaries. It was further held that the public policy of Illinois does not prevent a minor from suing a parent for injuries caused by the parents wilful and wanton misconduct. *Nudd v. Matsoukas*, 7 Ill. 2d 608, 131 N.E. 2d 525 (1956).

The impact of the decision in so far as it permits an innocent beneficiary to recover under the Illinois wrongful death act where other beneficiaries were contributorily negligent has been diminished because, in 1955, the legislature amended the act to provide for this result. However, the recognition of a cause of action in a child for wilful and wanton conduct of the parent definitely provides new fuel for litigation in Illinois.

The Illinois amendment to the wrongful death act is as follows:

In any such action to recover damages where the wrongful act, neglect or default causing the death occurred on or after the effective date of this amendatory act of 1955, it shall not be a defense that the death was caused in whole or in part by the contributory negligence of one or more of the beneficiaries. . . . Provided, however, that the amount of damages given shall not include any compensation with reference to the pecuniary injuries resulting from such death, to such contributorily negligent person or persons; and pro-