

## Recent Penal Law Provisions in Relation to Punishment for Felony Murder

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of the right to waive the jury trial generally.<sup>26</sup> New York, although denying the right, has also regarded the problem as being much the same in both cases.<sup>27</sup>

The actual operation of the waiver has been left to the legislature. At the present writing no legislation has been proposed or enacted. It must be decided whether it shall extend to both felony and misdemeanor cases or confined to the latter. There is no good reason why it should not be applied to both, although other states in some instances have refused to do so. Limiting the amendment to crimes not punishable by death is, on the other hand, reasonable, for the forfeiture of a human life is a serious thing and would tend to place too great a strain on the trial judge.

The correct mode of waiver will have to be determined. It may take the form of a writing, or a statement in open court entered in the record, or both.

On the whole the amendment is a step forward in loosening the fetters on our criminal procedure, and a practical effort to lessen the congestion in the courts.

Whether or not accused persons will take advantage of the new procedure remains to be seen, but if statistics<sup>28</sup> available in other states are any criterion, the answer seems to be that they will do so, especially in certain types of crimes.

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RECENT PENAL LAW PROVISIONS IN RELATION TO PUNISHMENT FOR FELONY MURDER.—By the enactment of Chapter 67 of the Laws of 1937,<sup>1</sup> the legislature took the first important step in the history of the state of New York to ameliorate the punishment for murder in the first degree.<sup>2</sup> The statute was passed by the legislature in the form of an amendment to Section 1045 of the Penal Law, and by the addition thereto of a new section, 1045-a.<sup>3</sup>

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<sup>26</sup> *Patton v. United States*, 281 U. S. 276, 50 Sup. Ct. 253 (1930).

<sup>27</sup> *Cancemi v. People*, 18 N. Y. 128 (1858).

<sup>28</sup> Recent reports show that in Connecticut 70% of the cases were tried by the court; in Maryland, 87.7%; in Michigan, 55.6%; in Ohio, 17.8%; Rhode Island, 11.4%. In California figures from the Superior Court of Los Angeles County as of 1934 show 65% of the defendants waived their right to be tried by a jury. This resulted in an estimated saving of \$60,000 a year. JUDICIAL COUNCIL, Second Report (1936).

<sup>1</sup> SEN. DOC. No. 28 passed March 17, 1937.

<sup>2</sup> The Duke of York's Laws, 1665-75 (1 Colonial Laws of New York 20) § 2, was the first statute to provide for capital punishment in New York. The provisions of this act were incorporated in the Revised Statutes and have continued to the present day. REV. STAT., pt. 4, c. 1, tit. 1, p. 655.

<sup>3</sup> N. Y. Consol. Laws, c. 39.

Section 1 of the Act provides that Section 1045 of the Penal Law, "is hereby amended to read as follows:

"§ 1045. Punishment for murder in the first degree. Murder in the first degree is punishable by death, *unless the jury recommends life imprisonment as provided by § 1045-a.*"

This provision obviously was merely a necessary addition in view of the succeeding section, which reads as enacted:

"§ 1045-a. Life imprisonment for felony murder; jury may recommend. A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred and forty-four, may, as part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life."

In connection with the enactment of this statute some interesting questions are presented. In the first place it would seem that the new amendment will eradicate, to some extent at least, a difficulty that has long existed in the application of our felony murder doctrine.

Prior to the enactment of Section 1045-a, if *X* and *Y* joined in the commission of a robbery on *A*, and in the course of fulfilling the crime, *X* killed *A*, then upon the trial for murder, *X*, the actual slayer, would be entitled to a charge to the jury on the lower degrees of homicide,<sup>4</sup> while *Y*, the accomplice, would not, in most instances, have the advantage of such a charge.<sup>5</sup> Although this is warranted, because obviously the accomplice could not be guilty of the lower degrees, it results in the anomaly of making compromise verdicts more frequent for the slayer than for the accomplice. This situation has frequently been discussed and criticized by the Court of Appeals,<sup>6</sup> and their views

<sup>4</sup> *Peo. v. Van Norman*, 231 N. Y. 454, 132 N. E. 147 (1921); *Peo. v. Smith*, 232 N. Y. 239, 133 N. E. 574 (1921); *Peo. v. Koerber*, 244 N. Y. 147, 155 N. E. 79 (1926); *Peo. v. Moran*, 246 N. Y. 100, 158 N. E. 35 (1927). But see *Peo. v. Schleiman*, 197 N. Y. 383, 90 N. E. 950 (1910).

<sup>5</sup> Communication of the Law Revision Commission to the Legislature Relating to Homicide (LEGIS. DOC. NO. 65(P), 1937) pt. IV(C), p. 169, *et seq.*; *Peo. v. Seiler*, 246 N. Y. 262, 158 N. E. 246 (1927). But *cf.* *Peo. v. Cummings and Lewis*, 274 N. Y. 336, 8 N. E. (2d) 882 (1937), in which Chief Judge Crane cautions the trial courts that the lesser degrees of homicide may be omitted from the charge only where the case has been tried solely on the theory of felony murder, with no evidence of premeditation having been offered.

<sup>6</sup> In *Peo. v. Seiler*, 246 N. Y. 262, 268, 158 N. E. 615, 617 (1927), the court said: "It is said that the result is that the law treats with greater harshness the accessory to the murder than the murderer himself. Doubtless there are cases where a jury, instructed that it has the power to find the defendant guilty of a lesser degree of homicide than charged, will exercise that power, although it would bring in a verdict of guilty as charged if no other alternative were presented. On the other hand, a jury may at times bring in a verdict of not

have undoubtedly been instrumental in effecting the enactment of the legislation under consideration.<sup>7</sup> What effect, then, would the new statute have upon the case above mentioned? If the jury found *X* guilty of murder in the first degree, or felony murder, they probably would not hesitate to mete out similar punishment to his accomplice. However, if the jury found *X* guilty of a lower degree of homicide, they would not be forced to choose between condemnation and freedom for *Y*. The new section would remove the dilemma by permitting the jury to convict and recommend life imprisonment.<sup>8</sup>

The next interesting point in this statute is the discretionary power given to the jury and the court as regards its application. The jury "\* \* \* may recommend;" and "\* \* \* the court may sentence \* \* \*." The use of "may" in the statute seems to bring out more forcibly the fact that the enactment was designed to assist the court and jury in cases involving felony murder with an accomplice.

From the text of the section it is obvious that the court is powerless to act without the recommendation of the jury. If the jury makes such recommendation, it is mandatory upon the court to sentence the defendant to life imprisonment.<sup>9</sup> This interpretation is in conformity with the rule of construction that where the statute invests a public body with a power or authority which concerns the public interests or the rights of individuals its permissive form will be construed as mandatory.<sup>10</sup>

The next important point of the statute to be noted is an apparent discrepancy contained therein. The preamble of the law, as enacted, is, "An act to amend the Penal Law in relation to punishment for

guilty though it is convinced of guilt if it quails before the responsibility of bringing in a verdict which carries with it the penalty of death. Where the evidence proves the defendant guilty of murder in the first degree, and the jury believes that evidence, the defendant may be helped or harmed by a charge that the jury has power to convict of a lesser degree of homicide, according to the steadfastness and conscientiousness of the particular jury sitting in that case. If sometimes as a result the guilty escape, or juries mete out unequal justice, it lies with the legislature to determine whether these considerations should dictate some change in the law. Certainly if the defendant is not guilty of the crime charged, he may not be convicted of a lesser degree of crime he did not commit."

<sup>7</sup> See also Governor Lehman's message to the legislature, Jan. 6, 1937, wherein he called attention to the need for such legislation.

<sup>8</sup> *Peo. v. Smith*, 163 Misc. 469, 297 N. Y. Supp. 489 (1937).

<sup>9</sup> *Peo. v. De Renna*, N. Y. L. J., March 5, 1938, p. 1, col. 4, citing *Chicago v. McClaughry*, 148 Ill. 372, 36 N. E. 88 (1894); *Peo. v. Smith*, 253 Ill. 283, 97 N. E. 649 (1912); *State v. Barry*, 14 N. D. 316, 103 N. W. 637 (1905); *Buck v. Danzanbacker*, 37 N. J. L. 359 (1875); *Ex parte Doyle*, 62 W. Va. 280, 57 S. E. 824 (1907). In Pennsylvania the jury is required by statute to fix the penalty of death or imprisonment for life at its discretion, on conviction for murder in the first degree. P. L. 759 (1925), Pa. St. Supp. (1928) § 7975; *Commonwealth v. Parker*, 294 Pa. 144, 143 Atl. 904 (1928). *Contra: Peo. v. Smith*, 163 Misc. 469, 297 N. Y. Supp. 489 (1937).

<sup>10</sup> BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS (Hornbook Series, 1896) c. 12, p. 341; *Peo. v. De Renna*, N. Y. L. J., March 5, 1938, p. 1, col. 4; *State v. Barry*, 14 N. D. 316, 103 N. W. 637 (1905); *Ex parte Doyle*, 62 W. Va. 280, 57 S. E. 824 (1907).

murder committed by a person engaged in the commission or attempted commission of a felony."<sup>11</sup> (Italics ours.) This heading clearly shows the intended scope of the enactment. It was apparently meant to apply only in felony murder cases. This limitation is further borne out by the title of Penal Law, Section 1045-a, which reads, "Life imprisonment for *felony murder*; jury may recommend." (Italics ours.) These captions indicate an apparent conflict with the body of the new section which provides for the recommendation of life imprisonment by a jury finding a person guilty of murder in the first degree "as defined by subd. 2 of Section 1044."

It will be seen from a cursory reading of subdivision 2 of Section 1044 that that subdivision is not concerned solely with felony murder.<sup>12</sup> The question arises then, whether the legislature intended Section 1045-a to include within its scope the first clause of subdivision 2 of Section 1044, which provides that the killing of a human being "by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without the premeditated design to effect the death of any individual," is murder in the first degree. It would seem that the new statute goes beyond the legislative intent in this regard.

The law with regard to murder "by an act imminently dangerous, etc." has been the subject of varied interpretation and conflicting opinion throughout the history of criminal jurisprudence.<sup>13</sup> Save for a two-year interval, this provision has continued almost without change in the law of this state from the time of the Revised Statutes.<sup>14</sup> The chief difficulty with the provision seems to have been in deciding what acts are "imminently dangerous to others." This difficulty has been to a great extent removed by a long series of well decided cases.<sup>15</sup> Hence it will be seen that the reasons for an amendment to the Penal

<sup>11</sup> Laws of 1937, c. 67.

<sup>12</sup> PENAL LAW (Consol. Laws, c. 39) § 1044; "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed: \* \* \*

"2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or, without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon the person killed or otherwise."

<sup>13</sup> 4 BL. COMM. (1897) \*200; FOSTER, CROWN LAW (3d ed., 1809) 263; 1 HALE, PLEAS OF THE CROWN (1st Am. ed., 1847) 475. In 1 HAWKINS, PLEAS OF THE CROWN (8th ed., 1824), cases cited in § 4, at p. 85, and § 9, at p. 86, are directly in conflict with those cited in § 68, at p. 104.

<sup>14</sup> REV. STAT. § 5 (Laws of 1829). The Laws of 1860, c. 410 eliminated the "depraved mind" rule, but it was re-enacted by c. 197, Laws of 1862.

<sup>15</sup> Peo. v. Fuller, 2 Park. Crim. Rep. 16 (N. Y. 1823); Peo. v. Rector, 19 Wend. 569 (N. Y. 1838); Peo. v. White, 22 Wend. 167 (N. Y. 1839); Darry v. People, 10 N. Y. 120 (1854); Yates v. People, 32 N. Y. 509 (1865); Peo. v. Gallo, 149 N. Y. 106, 43 N. E. 529 (1896); Peo. v. Jernatowski, 238 N. Y. 188, 144 N. E. 497 (1924); Peo. v. Voelker, 220 App. Div. 528, 221 N. Y. Supp. 760 (4th Dept. 1927).

Law that exist with respect to felony murder do not apply to this other type of homicide.

How the courts will construe the statute is problematical.<sup>16</sup> They will, however, be guided by the rules of construction laid down by the Consolidated Laws,<sup>17</sup> and the cases.<sup>18</sup> The statute provides that the title, strictly speaking, is not part of the act.<sup>19</sup> Indeed, except in the enactment of private and local laws, a title is unnecessary.<sup>20</sup> The courts may resort to the title as an aid to interpretation only when the legislative intent is not clearly expressed in the enactment. The substance of a plain act cannot be restricted or extended by the language of the title.<sup>21</sup> Applying these principles to Section 1045-a, it may be pointed out that the language of the section is clear and unambiguous. It seems, therefore, that the courts will be constrained to apply the statute to cases arising under either of the clauses in subdivision 2 of Section 1044.

Since the hands of the courts are apparently tied, the cure for the defect that has been pointed out seems to lie in legislative action. An amendment to the Penal Law, providing for a division of subdivision 2 of Section 1044 into two subdivisions, numbered 2 and 2-a, with the former containing the felony murder clause only, would serve to fulfill the intent of the legislature in enacting Section 1045-a as it is now written.

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<sup>16</sup> In *Peo. v. Smith*, 163 Misc. 469, 297 N. Y. Supp. 489 (1937), Justice Harris, writing the first opinion officially reported in a case involving this statute, points out the intent of the legislature, and the reasons for its enactment.

<sup>17</sup> N. Y. Consol. Laws, c. 1 and c. 21.

<sup>18</sup> *Furman v. New York*, 5 Sandf. 16, *aff'd*, 10 N. Y. 567 (1853); *Peo. v. Sharp*, 107 N. Y. 427, 14 N. E. 319 (1887).

<sup>19</sup> N. Y. Consol. Laws, c. 1, § 94; *Peo. v. Molyneux*, 40 N. Y. 113 (1869); *Neumann v. New York*, 137 App. Div. 55, 122 N. Y. Supp. 62 (2d Dept. 1910).

<sup>20</sup> N. Y. Consol. Laws, c. 1, §§ 38, 39.

<sup>21</sup> *Peo. v. McCann*, 16 N. Y. 58 (1857); *Peo. v. Columbia Co.*, 43 N. Y. 130 (1870); *Peo. v. O'Brien*, 111 N. Y. 1, 18 N. E. 692 (1888); *Peo. v. Van Wyck*, 157 N. Y. 495, 52 N. E. 559 (1899).