St. John's Law Review

Volume 2, December 1927, Number 1 Article 15

# Criminal Law--Murder in First Degree--Contemporaneous Felony (People v. Moran, 246 N.Y. 100 (1927))

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classified directly under the heading of constructive contempt of court. An inherent power within the general jurisdiction of courts is to punish those who have been guilty of a contempt of court.[4]

In the well-written opinion in the instant case, it is stated that the report published, neither in its nature nor in its purpose, could be deemed to fall within the confines of fair criticism. It is settled that the constitutional guaranty of freedom of speech is not so broad as to permit publications which are of such a nature as to interfere with the due administration of justice.[5] Furthermore, "the power of the judiciary rests upon the faith of the people in its integrity and intelligence. Take away this faith and the moral influence of the courts is gone and the respect for the law is destroyed. * * * The one element in government and society which the people desire above all things else to keep from the taint of suspicion is the due administration of justice in the courts."[6]

CRIMINAL LAW—MURDER IN FIRST DEGREE—CONTEMPORANEOUS FELONY. Again the Court of Appeals has had occasion to reverse a verdict in a murder trial on the ground of an erroneous charge of the lower court. At the trial of this case, controverted evidence was introduced to show that the defendant, while riding in an automobile, was ordered to stop by two policemen who suspected him of being guilty of the commission of a crime; and that the defendant thereupon shot first one, and then the other, officer. The trial court sent the case to the jury with the single charge of murder in the first degree.[1] This charge was based on the mistaken theory that the defendant, in killing one policeman was committing the felony which supplied the intent necessary to make out first degree murder in the second killing. *Held,* judgment reversed and new trial granted. People *v.* Moran, 246 N. Y. 100, 158 N. E. 35 (1927).

It has long been the rule that where one, while engaged in the commission of a felony, kills another, he is guilty of first degree murder.[2] However, it is in the application of this doctrine that confusion has arisen. Before such theory ought to be relied on by the prosecution, it should be able to show that the felony complained of was not a part of the homicide and merged therein. It must show that while the felony upon which it relies may be a part of the homicide, yet, that the other elements thereof are so distinct from that of the homicide, as not to be an ingredient thereof.[3] Thus in People *v.* Wagner,[4] the defendant, while assaulting a woman, shot and killed the deceased who had come to the aid of the assailed. The conviction was affirmed, the court reiterating the rule: "The felony that eliminates the quality of the intent must be one that is independ-

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[4] Michaelson *v.* United States, 266 U. S. 42 (1924).

[5] People *v.* News-Times Pub. Co., 35 Colo. 253, 205 U. S. 454 (1907); State *v.* Morrill, 16 Ark. 384 (1855).

[6] *In re* Fite, 11 Ga. App. 665, 680, 76 S. E. 397, 404 (1912).

[1] N. Y. Penal Code, § 1044, Sub. 2.

[2] 4 Black. Com., §§ 178-201.

[3] People *v.* Spohr, 206 N. Y. 516, 100 N. E. 444 (1912).

[4] 245 N. Y. 143, 156 N. E. 644 (1927).

ent of the homicide and of the assault merged therein, as *e. g.*, robbery or larceny or burglary or rape."

In arriving at some conclusion it is best to divide the "felony" murders into two classes. The first, where the felony relied on is entirely different in nature from the homicide; the second, where the felony is some grade of assault and where, of necessity, the line of demarcation grows indistinct. In the first class are those cases where the inculpatory facts are susceptible of only one interpretation. Either the accused was engaged in an independent felony at the time of the killing or he did not murder at all. Here it is not required to give more than the single charge of first degree murder.[5] In the second class are those cases where the felony is some degree or grade of assault. Here the facts are susceptible of varying deductions and consequently there must be a charge of whatever form and grade of homicide comportable with the proof and indictment.[6]

The principal case falls within the second class. Here it was difficult to say where the first assault ended, and the second began, or that there were, in fact, two assaults. In such a situation it would save much trouble and expense for the state to give all six charges; for, most cases of this kind, proceeding on this theory, are reversed.[7]

MUNICIPAL CORPORATIONS—RIGHT OF BOARD OF ALDERMEN TO CHANGE STREET NUMBERS—WHEN EQUITY WILL INTERFERE.—An ordinance of the City of New York passed April 22nd, 1924, changed the name of two blocks on Fourth Avenue, Manhattan, between Thirty-second and Thirty-fourth Streets, to Park Avenue, and directed the borough president to renumber the buildings on the easterly added portion of Park Avenue. Until the ordinance directing the change was passed the street known as Park Avenue extended from Thirty-fourth Street, north, 140 feet wide and parked in the center. The number "One Park Avenue" had been allotted to the house of the plaintiff Martha W. Bacon, and had been used by her and previous owners for many years. The block front on the east side of Fourth Avenue between Thirty-second and Thirty-third Streets was acquired in 1923 for the defendant corporation, which erected thereon a large commercial structure which under the old numbering would be 461-477 Fourth Avenue. Prior to the adoption of the resolution to rename and renumber the two blocks, Fourth Avenue was a commercial street one hundred feet wide in its entire length, while Park Avenue was a residential street. Shortly after the purchase of the property by the defendant corporation, and at its instigation, a resolution was passed by the Board of Aldermen to widen the street on which its property fronted and it was subsequently physically widened so as to bring the east curb in line with the east curb of Park Avenue north of Thirty-fourth Street. This action was brought by the plaintiff to have the ordinance passed April 22, 1924, renam-

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[5] People *v.* Schleiman, 197 N. Y. 383, 90 N. E. 950 (1910).

[6] People *v.* Moran, *supra;* People *v.* Van Norman, 231 N. Y. 454, 132 N. E. 147 (1921); People *v.* Koerber, 244 N. Y. 147, 155 N. E. 79 (1927).

[7] People *v.* Huter, 184 N. Y. 237, 177 N. E. 6 (1906); People *v.* Spohr, *supra;* People *v.* Van Norman, *supra.*