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# CLARIFICATION OF HOMICIDE LAW IN CALIFORNIA FROM RECENT DECISIONS

BY WILLIAM W. COSHOW

In 1936, James Pike, writing on homicide in California,<sup>1</sup> expressed himself in substance that although the law involving homicide should be of maximum clarity, it was in fact in great confusion. Since that time, beginning with *People v. Albertson* 23 Cal 2/550 and culminating in *People v. Wells* 33 Cal 2/330, the California Supreme Court has handed down several decisions which have done much to clarify the law on those aspects of homicide which had created the most confusion. This article will attempt to relate certain changes and reconsiderations which have occurred in the past five or six years.

## THE DISTINCTION BETWEEN THE DEGREES OF MURDER

Commencing with *People v. Holt* 25 Cal 2/59 and continuing through several subsequent cases the Court established that for a homicide to be murder in the first degree it must fit into one of three categories.

A - Any killing committed in the perpetration or attempt to perpetrate arson, robbery, rape, burglary, or mayhem is murder in the first degree. Penal Code 189. These killings need not be intentional, in fact may be accidental, but by force of the statute are first degree murder.<sup>2</sup>

B - ". . . all murder which is perpetrated by means of poison, or lying in wait, torture . . . is murder in the first degree." Penal Code 189.

This differs from the former category in that the killing cannot be accidental. "There must be an intent to inflict suffering, though not necessarily death, by means of poison or torture which results in the death of the one poisoned or tortured."<sup>3</sup> Apparently to sustain a conviction of murder in the first degree on the basis

1 - See James A. Pike "What Is Second Degree Murder in California?" 9 S. Cal. Law Rev. /12. *People v. Holt* 25 Cal. 2/59 at 84 - 92.

2 - *People v. Holt* 25 Cal. 2/59 at 83 - 92. *People v. Lindley* 26 Cal. 2/780 at 791. *People v. Bender* 27 Cal. 2/164 at 182. *People v. Vallentine* 28 Cal. 2/121 at 135-6.

3 - *People v. Bender* 27 Cal. 2/164 at 182. *People v. Vallentine* 28 Cal. 2/121 at 136.

of "lying in wait" it must be shown that the defendant lay in wait with the intent to kill. The bare fact that he lay in wait and then killed is not sufficient unless the jury reasonably infers that the intent was already formed.<sup>4</sup>

C - The third and last category of first degree murder is a willful, deliberate and premeditated killing. The intent to kill must be formed with deliberation and premeditation to constitute first degree murder with the lay definitions of deliberation and premeditation being applied.<sup>5</sup>

Murder is described in Section 187 of the Penal Code as the ". . . unlawful killing of another human being with malice aforethought." Penal Code 189 describes murder in the first degree in the three categories described above, and further states ". . . "all other kinds of murder are of the second degree." Consequently, one category of second degree murder is an unlawful killing of a human being with malice aforethought without deliberation and premeditation. This is the natural interpretation of a combined reading of the two statutes, and this interpretation is now supported by the decisions.<sup>6</sup>

#### JURY INSTRUCTIONS ONCE STANDARD THAT ARE NOW ERRONEOUS

With the new distinctions drawn between the degrees of murder has come a new attitude toward proper jury instructions. Instructions which had been used repeatedly to juries for years are now considered erroneous and there have been several reversals on that ground. The trial courts had traditionally instructed the juries as follows:

"There are certain kinds of murder which carry with them conclusive evidence of premeditation . . . These cases are of two classes . . . First - by means of poison, lying in wait, torture . . . here the means used is conclusive evidence of premeditation; Second - one of the felonies enumerated in the statute (P.C. 189) . . . here the occasion is made conclusive evidence of premeditation. When

4 - People v. Thomas 25 Cal. 2/880 at 890-1

5 - People v. Thomas 25 Cal. 2/880 at 898. People v. Bender 27 Cal. 2/164 at 183.  
People v. Vallentine 28 Cal. 2/121 at 134. People v. Honeycutt 29 Cal. 2/52 at 60.

6 - People v. Thomas 25 Cal. 2/880 at 903. People v. Bender 27 Cal. 2/164 at 181 - 2  
People v. Vallentine 28 Cal. 2/121 at 131 - 2

the case comes within either of these classes the test question: 'Is the killing willful, deliberate and premeditated?' is answered by the statute itself . . . But there is another and much larger class of cases included in the definition of murder in the first degree . . . In this class the legislature leaves the Jury to determine from the evidence before them, the degree of the crime, but prescribes for the governing of their deliberations the same test which has been used by itself in determining the degree of the other two classes: to wit: The deliberate and preconceived intent to kill."<sup>7</sup>

The effect of this is to state that the jury should apply the same test in a case of a premeditated killing as it applies in a means or occasion killing. This instruction is now considered error. To say that the same test applies to the first two categories also applies to the third is incorrect. The quoted instruction evolved from an attempt to fit the rationalization for the common-law interpretation of the means (poison, etc.) and occasion (five felonies) classes of murder into the statute. The statute itself determines the degree of murder in the first two categories, thereby making consideration of premeditation superfluous. Jurymen are laymen and are often confused by instructions which are worded by and for legally trained minds. As the present court states:

"Attempts to explain the statute to the jury in terms of non-existent 'conclusive presumptions' tend more to confuse than to enlighten a jury unfamiliar with the inaccurate practice of stating rules of substantive law in terms of rules of evidence."<sup>8</sup>

A second instruction which has been declared to be erroneous is the instruction often given to juries in an attempt to define murder and clarify the distinction in the two degrees of murder. The usual instruction formerly included the following:

". . . unless the evidence proves the existence in the mind of the slayer of the specific intent to take life. If such specific intent exists at the time of such unlawful killing, the offense committed would of course be murder of the first degree."<sup>9</sup>

7 - People v. Vallentine 28 Cal. 2/121 at 135. People v. Bernard 28 Cal. 2/207 at 210 - 1. People v. Honeycutt 29 Cal. 2/52 at 59.

8 - People v. Vallentine 28 Cal. 2/121 at 136.

9 - People v. Thomas 25 Cal. 2/880 at 898. People v. Bender 27 Cal. 2/164 at 178. People v. Vallentine 28 Cal. 2/121 at 131.

This is error because specific intent is an element of voluntary manslaughter and murder of the second degree as well as murder of the first degree. Voluntary manslaughter is an intentional killing with sufficient provocation existing to remove the element of malice aforethought, which is of course necessary in murder of either degree. Penal Code 187. Murder of the second degree is an unlawful killing with malice aforethought which is not deliberate and premeditated. Therefore to instruct the jury that if they find specific intent they must find murder in the first degree is prejudicially erroneous.<sup>10</sup>

Generally these instructions would also contain another statement:

" . . . but still if you entertain a reasonable doubt whether the said killing was willful, deliberate and premeditated, then in such case you cannot find the defendant guilty of murder in the first degree."

The present Court approves this instruction, but the Court does not consider it to be corrective of the above error. The two instructions together are conflicting, contradictory, and confusing. They treat "specific intent" and willful, deliberate and premeditated as if they are synonymous. This is not the case and since it is not, then the second instruction does not cure the ill of the first. Therefore these instructions, once stock, now constitute reversible error.<sup>11</sup>

Section 1105 of the Penal Code reads as follows:  
"Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecuting tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

It was customary for the trial courts to quote this code section to the jury. This is now considered error for two reasons. The statute distinguishes between murder, manslaughter, justifiable and excuseable homicide and not between murder in the first degree and second degree. In addition such an instruction can be

10 - People v. Thomas 25 Cal. 2/880 at 898. People v. Bender 27 Cal. 2/164 at 178.  
People v. Vallentine 28 Cal. 2/121 at 131 - 2.

11 - People v. Thomas 25 Cal. 2/880 at 901.

misconstrued by the jury as indicating that the defendant must prove the mitigating circumstances by a preponderance of the evidence; whereas the true burden placed on the defendant is merely to raise a reasonable doubt.

By reading the statute verbatim to the jury, the trial courts placed the burden of interpreting the statute upon the jury. Statutory interpretation is not a function of the jury but rather a duty of the court.

The Court now treats Section 1105 as a rule of procedure to prevent the trial court from erroneously giving a directed verdict in favor of the defendant and has indicated that even with explicit explanations as to the effect of the statute, it would be better left unread.<sup>12</sup> This position is taken because the burden of proof in fact remains with the prosecution to establish the crime and its degree. A reading of the statute with even a proper explanation, would be confusing to the laymen on the jury, because a proper explanation conflicts with the wording of the statute. The Court has held that, although the jury may reasonably infer that murder has been committed under the circumstances described in the statute (Penal Code 1105) where the prosecution has not offered evidence reasonably proving, or from which a reasonable inference may be drawn, establishing deliberation and premeditation, then the degree of murder is that of the second and not of the first.<sup>13</sup> This is because the statute states murder without specifying the degree and where such ambiguity exists in a statute it will be interpreted in the light most favorable to the defendant.

Another instruction which attempted to apply the common law to the statutes was one which stated:  
"There need be . . . no appreciable space of time between the intention to kill and the act of killing . . . a man may do a thing deliberately from a moment's reflection as well as pondering over the subject for a month or year." And a man, " . . . can premeditate, that is think before doing the act the moment he conceives the purpose,

12 - People v. Albertson 23 Cal. 2/550 at 586 - 7 (concurring opinion). People v. Thomas 25 Cal. 2/880 at 895 - 6. People v. Lindley 25 Cal. 2/780 at 793 - 4. People v. Valentine 28 Cal. 2/121 at 132 - 4. People v. Cornett 33 Cal. 2/33 at 42 - 45.

13 - People v. Bender 27 Cal. 2-164 at 178 - 181.

as well as if the act were the result of long preconcert or preparation." 14

This is error, the Court says, because it would eliminate virtually the only distinction between first and second degree murder. As we have already seen (excepting of course the "means" and "occasion" categories) first degree murder is willful, deliberate and premeditated, whereas second degree murder is with malice aforethought but is not deliberate and premeditated. If deliberation and premeditation can occur in a "flick of an eyelash," how can there ever be a case of second degree murder? The statute has provided for two degrees of murder, and since the logical distinction between the two rests on deliberation and premeditation, this sole distinction should not be destroyed by giving connotations to deliberation and premeditation which are contradictory to the ordinary meaning of the two terms. The Court has laid down the rule that deliberation and premeditation are to be given the definitions as expressed in Webster's International Dictionary and as such presented to the jury. Then it is for the jury to apply the terms thus defined to the facts presented in the case and therefrom determine the class and degree of the homicide. 15

These stock instructions, which are now disapproved, are not all of the instructions attempting to distinguish the classes and degrees of homicide which are now considered error. These are probably the most important and are typical of instructions which would be held to be objectionable. To generalize it could be stated that instructions must be clearly stated in lay terms; they must be completely consistent with one another; and they must distinguish the classes and degrees of unlawful, intentional homicide as have been set forth herein.

#### HARMLESS ERROR<sup>16</sup>

The Constitution of California (Article VI, Section 4 $\frac{1}{2}$ ) states:

"No judgment shall be set aside, or new trial granted, in

14 - People v. Vallentine 28 Cal. 2/121 - at 134. People v. Thomas 25 Cal. 2/880 at 892 - 3. People v. Bender 27 Cal. 2/164 at 182. People v. Bernard 28 Cal. 2/207 at 212 - 3. People v. Honeycutt 29 Cal. 2/52 at 59 - 60. People v. Cornett 33 Cal. 2/33 at 40 - 1.

15 - People v. Thomas 25 Cal. 2/880 at 900. People v. Bender 27 Cal. 2/164 at 182 - 6. People v. Vallentine 28 Cal. 2/121 at 134 - 5. People v. Bernard 28 Cal. 2/207 at 211. People v. Honeycutt 29 Cal. 2/52 at 60 - 1. People v. Cornett 33 Cal. 2/33 at 41 - 2.

16 - For a discussion of an instruction disapproved but not held erroneous see People v. Koles 23 Cal. 2/670. People v. Lindley 26 Cal. 2/780 at 794 co. 36 Cal. Law Rev. 628 - 34.

any case, on the grounds of misdirection of the jury . . . unless . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Under this section of the Constitution the Court has found in some cases that, while the instructions were erroneous, they did not under the facts of the case operate to materially prejudice the defendant and therefore are not reversible error. There are two types of cases under consideration herein controlled by this application of the Constitution by the Court. The first group are the cases where the occasion (five felonies) or the means (poison, etc.) determines the degree of the crime. In these cases the trial court has instructed the jury that the occasion or the means carries with it a "conclusive presumption" of deliberation and premeditation. This is error as we have already seen. However, since the statute determines by its own authority the degree of the murder, and the jury could have come to no other conclusion as to the degree or class of homicide had proper instructions been given, there is no miscarriage of justice and the conviction will not be set aside.<sup>17</sup>

However, if the same instruction is given in a case where a first degree murder verdict is dependent upon finding of deliberation and premeditation, the error would no longer be harmless. The statement in the instruction that the "same test" is applied to a willful, deliberated and premeditated killing is applied to an occasion or means killing is prejudicial because of the confusion created in the minds of the jury.

The second group are those cases wherein the defendant was convicted of first degree murder on the basis of the third category; i.e. a willful, deliberate and premeditated killing. In these cases the relevant error consists of the erroneous instructions relating to the degree and class of homicide and provocation. The Court has found that though the errors would normally be reversible, in some cases they are not prejudicial because the particular facts of the case show that the jury acting as reasonable men could have come

17 - People v. Bernard 28 Cal. 2/207 at 214. People v. Honeycutt 29 Cal. 2/52 at 62. People v. Peterson 29 Cal. 2/69 at 78 - 9. People v. Sanchez 30 Cal. 2/560 at 570.



to no other conclusion had the instructions been correct.<sup>18</sup> The latest cases indicate that the trend is to reverse unless the evidence supporting a finding of deliberation and premeditation is unusually strong.<sup>19</sup>

## WHAT IS PROVOCATION

Generally speaking, under the facts of most homicide cases, where the elements of malice aforethought, deliberation, and premeditation control, provocation is considered by the jury in determining those necessary elements. Sufficient provocation can remove the element of malice aforethought thus reducing the crime to voluntary manslaughter since malice aforethought is a necessary part of murder of either degree. But if the provocation is not sufficient to preclude malice aforethought, it might show lack of deliberation and premeditation, reducing the crime to murder in the second degree. Prior to *People v. Vallentine* 28 Cal. 2/121, there were two conflicting lines of cases in California concerning provocation. One line held that:

" . . . neither provocation by words only, however opprobrious, nor contemptuous gestures without an assault upon the person, nor any trespass upon land or goods are of themselves sufficient to reduce the offense of an intentional homicide with a deadly weapon from murder to manslaughter."<sup>20</sup>

The other line of cases stated that provocation need not be of a particular type, but rather -

" . . . when it is committed under the influence of passion caused by an insult provocation sufficient to excite an irresistible passion in a reasonable man . . ."<sup>21</sup>

The conflict between the two lines of cases is apparent. In the latter group, any provocation which would excite a reasonable man into a "heat of passion" is sufficient to reduce the class or degree of the homicide. The other line requires more than mere words, etc., that is, an actual assault or something similar. Neither line of cases contained a reference

18 - *People v. Hilton* 29 Cal. 2/217 at 222-3. *People v. Tutthill* 31 Cal. 2/92 at 102-3.

19 - Compare *People v. Hilton* 29 Cal. 2/217 with *People v. Cornett* 33 Cal. 2/33.

20 - *People v. Turley* 50 Cal. 469 at 471. *People v. Bruggy* 93 Cal. 476 at 481.  
*People v. Manzo* 9 Cal. 2/594 at 599. *People v. French* 12 Cal. 2/720 at 744.  
*People v. Chutuk* 18 Cal. App. 768 at 771. *People v. Jackson* 78 Cal. App. 442 at 448.

21 - *People v. Hurtado* 63 Cal. 288 at 292. *People v. Logan* 175 Cal. 45.  
*People v. Golsh* 63 Cal. App. 609 at 614. *People v. Davis* 92 Cal. App. 192 at 198.

to the other, and in *People v. Vallentine* the Court felt the need for making a decision in favor of one or the other and selected the more liberal view. The cases supporting the stricter rule were based upon the common law as embodied in the Crime and Punishments Act of 1850:

"In cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing.

The Penal Code of 1872 carried no such limitation though the Code Commissioner's notes included:

"No words of reproach, however grievous, are sufficient provocation to reduce an intentional homicide from murder to manslaughter."

The Court held that in spite of the Commissioner's notes, the deletion from the code itself of the express limitation of the Crime and Punishments Act should be interpreted as an intent on the part of the legislature to remove the preexisting qualification. The Court is not bound to apply common law concepts to the statute when the latter is not merely a codification of the former. Here there was an omission from the statute, which, when considered in relation to the prior statute, would appear to be a modification of the common law. Consequently it is now established that provocation may be anything which would excite an "ordinarily reasonable man" to a "heat of passion."<sup>22</sup>

## OBJECTIVE OR SUBJECTIVE

The reader has probably noted the customary legal phrase "ordinarily reasonable man" in the preceding paragraph. The common law was fairly well settled as favoring the objective view when considering provocation. The mere fact that the defendant was in fact aroused to a heat of passion was no defense unless an average man of normal self control could have been aroused by the same provocation. In the discussion of provocation in *People v. Vallentine supra* at 136-144, the Court repeatedly used expressions indicating an adherence to the reasonable man standard. The point was not in issue however, and later cases do not follow a truly objective approach. In *People v. Wells* 33 Cal. 2/330 at 345, the Court held that evidence of a state of mind in the defendant which would cause an abnormal reaction was not admissible as pertaining to self defense for there the reasonable man standard must apply. However, the

22 - *People v. Vallentine* 28 Cal. 2/121 at 136 - 44.

evidence was admissible as a fact to be considered by the jury in determining whether malice aforethought and premeditation were in fact present. In *People v. Danielly*, 33 Cal. 2/362, the Court held otherwise on what appears to be a similar fact situation. The Court distinguishes the two cases because in the *Danielly* case the proffered evidence of high nervous tension and a psychoneurotic personality was not offered as affecting the elements of malice aforethought, etc., and there was no indication that the crime was committed in a heat of passion. The Court affirmed the holding in *People v. Wells* that evidence of the extraordinary state of mind of the defendant is admissible in determining malice aforethought, deliberation and premeditation. To that extent at least California has dropped the reasonable man standard and adopted the subjective view.

From the foregoing it can be seen that the common law concept of homicide is no longer the law in California. Few, if any, of the old views remain. Criticism may be levelled at the Court from some quarters on the grounds that the decisions are judicial legislation. However, it might be more accurate to consider these decisions as merely repealing the judicial legislation of the earlier courts that first attached the common law concepts to the statutes. Certainly the confusion which was so troublesome to Mr. James Pike is to a great extent alleviated, and regardless of approval or disapproval, the fact remains that the California homicide law is changed.