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Criminal Law: Arson--Strict Application of the Felony-Murder Doctrine

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The power to immediately punish an offender for a direct contempt is accepted as an inherent power of the courts. It arises from the courts' necessity of preventing obstruction to their due administration of justice.[13] On the other hand, such power is necessarily of an arbitrary nature, and should therefore be used with great prudence and caution.[14]

In the instant case, as we have seen, none of the essential elements constituting the contempt, viz., the reasons for the absence, were within the immediate view and presence of the court. Furthermore, where the court is not in full knowledge of all the essential elements constituting the contempt, it must give the accused notice and a hearing so that he may reasonably have the opportunity of presenting all the facts to the court before the latter renders judgment. To deny him this opportunity, as was done in the instant case by summarily finding the accused in contempt, is to deny to him his constitutional guaranty of due process of law.

—*Joseph H. Radensky.*

CRIMINAL LAW: ARSON—STRICT APPLICATION OF THE FELONY-MURDER DOCTRINE.—By common law, and in many states by statute,[1] homicide committed in the perpetration of at least the more dangerous felonies is murder. The case law on the subject broadly states that criminal responsibility for homicide committed during the perpetration of one of the enumerated felonies extends not only to the person doing the killing, but also to all his accomplices in the underlying felony.[2] In spite of this oft-quoted statement of the rule, certain limitations of the principle have been recognized. In the first place, it appears to be settled that the homicide and felony must not be associated merely in point of time, but they must be integrated and related in a causal way.[3] Secondly, in the case of a conspiracy, the act of one conspirator must be in furtherance of the conspiracy.[4] The Pennsylvania case of *Commonwealth v. Bolish*[5] rejected a possible third exception, to wit, the accidental killing of an accomplice *by his own hand.*

The defendant, for the purpose of collecting insurance, induced one Robert Flynn to set fire to the insured building. While perpetrating the arson Flynn was badly burned and died 19 hours later as a result thereof. The court felt it immaterial that defendant's presence at the scene was not established. Defendant was indicted for murder and was convicted of murder in the first degree. Although a new trial was granted on other grounds, the Supreme Court of Pennsylvania affirmed the felony-murder rule. The main contention of the defendant was that the felony-murder doctrine could not be applied where the deceased was the substantial or proximate cause of his own death. By what appears to be begging the question the court answered the defendant thusly:

". . . Yet this court has uniformly held that an accidental killing in the perpetration

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[13] In re Terry, 128 U.S. 289 (1888); *The Summary Power to Punish for Contempt,* 31 COL. L. REV. 959 (1931); see also CALIF. CODE OF CIV. PROC. §§ 128, 1209.

[14] 43 Cal.2d at 762, 278 P.2d at 685.

[1] Some typical statutes are: CONN. GEN. STATUTES § 6043; IND. STATS. ANN. § 10-3401; IOWA CODE § 12,911; CALIF. PENAL CODE § 189.

[2] People v. Olsen, 80 Cal. 122, 22 Pac. 125 (1889); People v. Witt, 170 Cal. 104, 148 Pac. 928 (1915).

[3] State v. Glover, 330 Mo. 709, 50 S.W.2d 1049 (1932).

[4] People v. Faught, 343 Ill. 312, 175 N.E. 446 (1931); People v. Basile, 356 Ill. 171, 190 N.E. 307 (1934); People v. Sobieskoda, 235 N.Y. 411, 139 N.E. 558 (1923).

[5] 381 Pa. 500, 113 A.2d 464 (1955).

> of or attempt to perpetrate a robbery or burglary or any other of the enumerated felonies is murder in the first degree. The reason is that any person committing or attempting to commit any of these major felonies is motivated by malice and when the killing of a human being directly results, even though not intended, from his malicious act, it is murder because malice, the essential element of murder, is present. The felon's malicious act in perpetrating or attempting to perpetrate, his planned major crime is justly regarded by the law, as the causative antecedent of the homicide."[6]

However, in less legalistic terms, the court later rationalized its answer on the ground of foreseeability. The facts would seem to substantiate such a theory.

It is foreseeable that people are dwelling within a building. It is also possible to foresee others attempting to extinguish the fire and to save lives and property. No one would argue that the death of any of the above-mentioned persons came from a superseding cause. Based on this reasoning, it is also foreseeable that one who is induced to commit the act will himself be killed while setting fire to the building.

There is a scarcity of authority on the precise question with apparently only two other cases in point. The first case was a California case, *People v. Ferlin.*[7] There, as in the principal case, the defendant and another set fire to a building for the purpose of collecting insurance. The defendant's co-conspirator was accidentally burned to death. On the original hearing[8] the California Supreme Court held that the defendant was properly convicted of murder in the first degree committed during the perpetration of arson. But, on rehearing,[9] the court reversed and decided that the perpetrator of a felony is not guilty of murder because of the accidental death of his co-conspirator who caused his own death. Although the applicable California statute[10] is identical with the Pennsylvania statute[11] the reasoning of the California court differed greatly from that of the case under discussion. Whereas the court in the *Bolish* case based its decision on the question of foreseeability, this was ignored in the *Ferlin* case. Illustrative of the California approach is this:

> "It cannot be said from the record in the instant case that defendant and deceased had a common design that deceased should accidentally kill himself. Such an event was not in furtherance of the conspiracy, but entirely opposed to it."[12]

The truth of this statement is not doubted. But is it an answer to the question? True, the accidental killing of the co-conspirator was not in furtherance of the plan to commit arson. But this does not inevitably mean that the deceased's act was a superseding cause that would relieve the defendant of liability.

Another statement by the majority would appear to be even less informative:

> "If the defendant herein is guilty of murder because of the accidental killing of his co-conspirator then it must follow that Skala (deceased) was also guilty of murder, and if he had recovered from his burns that he would have been guilty of an attempt to commit murder."[13]

At best, this decision can be said to be based on something less than the application of legal principles.

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[6] *Id.* at 513, 113 A.2d at 474.
[7] 203 Cal. 587, 265 Pac. 230 (1928).
[8] 257 Pac. 857.
[9] See note 7 *supra.*
[10] CALIF. PENAL CODE § 189: "All murder . . . which is committed in the perpetration of, or attempt to perpetrate arson . . . is murder of the 1st degree. . . ."
[11] Act of June 24, 1939, P.L. 872 § 701; PURDON'S PA. STAT. ANN. tit. 18, § 4701 (1945).
[12] See note 7 *supra* at 597, 265 Pac. at 235.
[13] *Id.* at 596, 265 Pac. at 234.

The New York case of *People v. La Barbera*[14] also involved similar facts and there it was held, as in the California decision, that the felony-murder doctrine did not apply to a conspirator causing his own death. But rather than face the problem squarely the court sought to justify its decision on an interpretation of murder. Under the New York statute murder is a criminal homicide.[15] Under another statute homicide is defined as "the killing of one human being by act, procurement, or omission *of another*."[16] The court concluded that in view of the fact that deceased killed himself, he did not commit homicide as defined by the statute, and therefore, if *he* did not commit homicide, his associates could not be held for homicide. The case affords no help in solving the problem based as it is on statutory interpretation. It is submitted, however, that the facts still come within the statute. Deceased was a *human being;* he was *killed,* and the requisite "act . . . of another" can be considered to be the inducement by his (deceased's) associates to commit the crime of arson.

The common law definition of murder is the killing of one human being by another with malice aforethought or without legal justification or excuse, under circumstances insufficient to reduce the crime to manslaughter.[17] Malice aforethought was the essential ingredient. But the ordinary meaning of malice aforethought was not always the same as its legal sense. Express or actual malice aforethought existed when a homicide was intentionally committed without excuse, justification, or provocation. But there was also "implied malice aforethought" which was applied not merely to cases in which the existence of the intent to kill could be inferred from the nature of defendant's conduct, but also applied to cases where the homicide was unintentional but committed during the perpretration of some collateral felony.[18] From this latter extension emerged the felony-murder doctrine. The theory behind the doctrine was that murder required only a killing based on malice; a common law felony contained malice; the transposition of intent from the felony to the homicide made the killing murder.

It is apparent that the common law theory was more a deterrent than a logical extension of the implied malice rule. Looked upon as a deterrent the rule is desirable. Why then did the California court set forth a limitation? No valid reason was given as to why the felon is not responsible when his partner in crime is killed, yet subject to the death penalty when the victim is an innocent party.

It is not improbable that not all of this criticism is warranted. As stated before, the common law application of the rule was a strict and inflexible one. Perhaps the *Ferlin* decision is an expression on the part of the California court to set down what it believes to be a proper limitation to the rule. For the sake of legal principles let us hope this was the court's intention.

One may quarrel with the result of the Pennsylvania holding but it is to be commended for one thing. The court was confronted with a unique factual situation. Rather than arbitrarily rule one way or the other, as many courts are prone to do, the court applied to the facts solid legal principles in reaching their conclusion.

—*George R. Moscone.*

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[14] 159 Misc. 177, 287 N.Y. Supp. 257 (1936).
[15] N. Y. PENAL LAW § 1044.
[16] N. Y. PENAL LAW § 1042.
[17] Com. v. Webster, 59 Mass. 295, 304 (1850).
[18] Corcoran, *Felony Murder in New York* (1937), 6 FORDHAM L. REV. 45.