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COMMENTS

TRIAL COURTS' POWER TO REDUCE PUNISHMENTS FIXED BY JURIES IN FIRST DEGREE MURDER TRIALS

By STEVE G. OBERG^o

HAS THE discretion of the jury in selecting the penalty to be imposed in first degree murder cases¹ been circumscribed by the trial courts' power to reduce punishment?²

In *People v. Moore*,³ the defendant had been convicted of first degree murder and his punishment fixed at death by the jury. The defendant's motion for a new trial or reduction in degree of the offense was denied on rehearing. The trial court, however, modified the verdict reducing the punishment to life imprisonment. On appeal, this action by the trial court was approved. The supreme court held that a trial court is empowered by the Penal Code, based upon its own independent view of the evidence, to reduce either the degree of the offense⁴ or the punishment fixed by the jury,⁵ in lieu of granting the defendant's motion for a new trial.

Bases for Reductions in Degree and Punishment

It is well established that trial courts may reduce the degree of the offense when, in their own independent view, the weight of the evidence does not support the finding as to degree made by the jury.⁶ It also seems clear that the power to reduce punishment may be exercised when the evidence does not support the penalty imposed.⁷ Such

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¹ CAL. PEN. CODE § 190: "Every person guilty of murder in the first degree shall suffer death or confinement, in the state prison for life, at the discretion of the court or jury trying the same. . . ."

² CAL. PEN. CODE § 1181(7): "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial . . . when the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial and this power shall extend to any court to which the case may be appealed."

³ 53 Cal. 2d 451, 348 P.2d 584, 2 Cal. Rptr. 6 (1960).

⁴ CAL. PEN. CODE § 1181(6).

⁵ CAL. PEN. CODE § 1181(7).

⁶ *People v. Matlock*, 51 Cal. 2d 682, 336 P.2d 505 (1959); *People v. Borchers*, 50 Cal. 2d 321, 325 P.2d 97 (1958); *People v. Sheran*, 49 Cal. 2d 101, 315 P.2d 5 (1957).

⁷ *People v. Jackson*, 44 Cal. 2d 511, 282 P.2d 898 (1955); see *People v. Odle*, 37 Cal. 2d 52, 57, 230 P.2d 345, 348 (1951).

error, as would justify the exercise of the power to reduce punishment, is well illustrated by the case of *People v. Jackson*.⁸ The jury had selected the death penalty after finding the defendant guilty of kidnaping. On appeal, the punishment was reduced to life imprisonment since the evidence did not show that any bodily harm had been inflicted. Penal Code section 209 provides that in kidnaping cases the jury is to have the discretion to choose either death or life imprisonment only when the victim has suffered bodily harm.

In first degree murder cases, however, the jury's determination of punishment is not based on the weight of the evidence or on any findings as to evidence.⁹ The jury need find no evidence of mitigation or aggravation in order to select either death or life imprisonment.¹⁰ The law does not prescribe any standard for the jury's selection of punishment in such cases.¹¹ No question is involved of the evidence not supporting the punishment selected by the jury, and therefore no error in this respect is possible. The supreme court has repeatedly stated that in first degree murder cases the jury's discretion as to punishment is sole and absolute.¹² Yet, in view of the statement by the court in *Moore* that the jury has absolute discretion as to choice of punishment in the first instance but that this does not affect the trial court's power to reduce the punishment,¹³ it would appear that the jury's absolute discretion is now more a discretion of form than of substance. It is difficult to see how the jury's discretion to select punishment for first degree murder can still be regarded as absolute when the trial court may disregard the jury's choice and reduce the punishment.

Penal Code Section 1181(7): *Judicial Interpretation v. Legislative Intent*

The Supreme Court of California has consistently refused to reduce the punishment imposed by the trier of fact in the absence of error in its selection and thus refused to reduce punishment in first degree murder cases.¹⁴ Yet, in *Moore* the court affirmed the trial court's action

⁸ 44 Cal. 2d 511, 282 P.2d 898 (1955).

⁹ See *People v. Feldkamp*, 51 Cal. 2d 237, 241, 331 P.2d 632, 634 (1958).

¹⁰ *People v. Brust*, 47 Cal. 2d 776, 787, 306 P.2d 480, 485 (1957); *People v. Friend*, 47 Cal. 2d 749, 767, 306 P.2d 463, 474 (1957).

¹¹ *People v. Friend*, *supra* note 10.

¹² *E.g.*, *People v. Friend*, *supra* note 10; *People v. Green*, 47 Cal. 2d 209, 302 P.2d 307 (1956).

¹³ 53 Cal. 2d at 453, 2 Cal. Rptr. at 8, 348 P.2d at 586.

¹⁴ *E.g.*, *People v. Rittger*, 54 Cal. 2d 720, 7 Cal. Rptr. 901, 355 P.2d 645 (1960); *People v. Brust*, 47 Cal. 2d 776, 306 P.2d 480 (1957) (court cannot substitute its judgment as to punishment for that of jury's even where appropriateness of death penalty is doubted); *People v. Byrd*, 42 Cal. 2d 200, 266 P.2d 505 (1954) (evidence sufficient for first degree murder then court cannot reduce the punishment); *People v. Thomas*, 37 Cal. 2d 74, 230 P.2d 351 (1951); *People v. Odle*, 37 Cal. 2d 52, 230 P.2d 345 (1951) (there being no error the court cannot substitute its judgment as to choice of punishment).

in reducing the punishment despite the fact that there could have been no error with regard to the evidence not supporting the determination of punishment made by the jury. In addition, there was no contention in *Moore* that there was any prejudicial error in the proceedings for selection of punishment.¹⁵ This would lead one to conclude that the supreme court construed section 1181(7) of the Penal Code as giving the trial court the power to reduce the punishment which the jury has fixed for first degree murder, regardless of whether there is error in the selection of the punishment.

It is of course true that the wording of section 1181(7) lends itself to such an interpretation but it is questionable whether the legislature intended this section to be so construed.¹⁶ Prior to the enactment of section 1181(7), appellate courts had been granted the power to reduce punishment by virtue of an amendment to section 1260 of the Penal Code.¹⁷ At the same time as this amendment to section 1260 was proposed and adopted, it was also proposed that section 1181 be amended so as to permit trial courts as well as appellate courts to reduce the punishment when it was not supported by law or evidence.¹⁸ The proposed amendment to section 1181 was not adopted at that time; but two years later, section 1181 was amended, granting trial courts the power to reduce punishment.¹⁹

Meanwhile, in the case of *People v. Odle*,²⁰ the amendment to section 1260 had been construed as granting to the appellate courts the power to reduce punishment only where there was error in the selection of the punishment. In so holding, the court stated:²¹

Section 1260 now makes clear that the court can reduce the punishment in lieu of ordering a new trial when the only error relates to the punishment imposed. It does not, however, vest power in the court

¹⁵ Even had there been prejudicial error in the selection of punishment this could not of itself have formed the basis for the trial court's reduction of the punishment. In *People v. Green*, 47 Cal. 2d 209, 235, 302 P.2d 307, 324 (1956), where there had been prejudicial error in the proceedings for selection of punishment, the court expressed the view that this error could not be corrected by the court reducing the punishment but rather the case must be reversed and the question of punishment remanded to the trier of fact.

¹⁶ See language of statute cited in note 2 *supra*.

¹⁷ CAL. PEN. CODE § 1260: "The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or the punishment imposed, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order and may, if proper, order a new trial." Italicized portion added by Cal. Stat. 1949, ch. 1309, § 1, p. 2297.

¹⁸ For a discussion of these proposed amendments see, *People v. Odle*, 37 Cal. 2d 52, 56-58, 230 P.2d 345, 347-48 (1951).

¹⁹ Cal. Stat. 1951, ch. 1674, § 117, p. 3850 (added subdivision (7) to section 1181 of the Penal Code as it now reads).

²⁰ *People v. Odle*, 37 Cal. 2d 52, 58, 230 P.2d 345, 348 (1951) (first degree murder case where the death penalty had been imposed).

²¹ *Id.* at 57, 230 P.2d at 347.

to modify a judgment in the absence of error in the proceedings. . . . It cannot be reasonably concluded that . . . the legislature intended . . . to permit the court in every case, regardless of error, to substitute its judgment for that of the trial court or jury.

The view was also expressed that to interpret this power otherwise would be to vest appellate courts with powers of clemency which have been granted by the California constitution exclusively to the governor.²² No reason appears why trial courts would not equally be vested with powers of clemency if they could reduce punishment when there is no error in its selection.²³ It would thus seem entirely logical to assume that the addition of subdivision 7 to section 1181 was intended only to extend to trial courts the same power, to reduce punishment where there was error in its selection, as had been granted to appellate courts. Furthermore, if one were to conclude that section 1181(7) granted the power to reduce punishment in first degree murder cases whether or not there was error in the determination of the punishment, as would seem to be the interpretation adopted in *Moore*, then it should follow that this power would extend to appellate courts as well as trial courts. This should be the case, because section 1181(7) specifically provides that the power granted therein is to extend to all courts to which the case may be appealed.²⁴

Yet, the supreme court, since the decision in *Moore*, has continued to refuse to reduce the punishment imposed for first degree murder; stating that it is not empowered to reduce the punishment in the absence of error in its selection.²⁵ In fact, this same view was expressed in *Moore*. Therefore, one is left to conclude, on the basis of the holding in *Moore*, that the legislature intended, when it enacted section 1181(7), that trial courts should be empowered to reduce punishment whether or not there was error in the determination of the punishment, but that appellate courts were not to be so empowered. If such was the intent, it is certainly not evidenced by the language used.²⁶ Nevertheless, even though it can be validly argued that the legislature did not intend section 1181(7) to be construed as it was in *Moore*, the fact remains that such is the interpretation which has apparently been adopted. As a result, the inescapable conclusion would seem to be that the trial judge in first degree murder cases, by being able to reduce the punishment selected by the jury even where there is no error in its selection, has virtually been substituted for the jury as the final and absolute arbiter of the punishment to be imposed.

²² *Id.* at 58, 230 P.2d at 348; see generally 23 C.J.S. *Criminal Law* § 1946 at 1091 (1941).

²³ Apparently this question was not even considered in *Moore*.

²⁴ See note 2 *supra*.

²⁵ *People v. Rittger*, 54 Cal. 2d 720, 734, 7 Cal. Rptr. 901, 909, 355 P.2d 645, 653 (1960).

²⁶ See note 2 *supra*.

Conclusion

One might well ask whether the holding in *Moore* is so liberal an interpretation of section 1181(7) that it nullifies and contradicts section 190 of the Penal Code which gives the jury discretion as to punishment in first degree murder cases; but at present this can be no more than a question.²⁷ It would, however, seem that the jury's discretion as to punishment in such cases has at least been circumscribed and in the future the trial judge may only be speaking figuratively when he instructs the jury that their discretion is absolute in the selection of the punishment for first degree murder.

Perhaps it is premature to venture any opinion as to the reasons for the decision in *Moore* or to attempt to predict the future interpretation of this decision. But, it might be pointed out that several writers have suggested that an absolute discretion in the jury to select punishment in first degree murder cases is highly undesirable and that some standards should be set up for such selection or some curbs put on the jury's discretion.²⁸ In line with this, one may note the decision in a recent case where it was held that, in first degree murder cases, the power of the trial judge to comment on evidence bearing solely on the question of punishment does not infringe on the jury's discretion to choose the punishment.²⁹ This decision has been viewed by some as a direct limitation on the jury's discretion³⁰ and it is far less circumscribing than the holding in *Moore*. It is entirely possible, therefore, that the decision in *Moore* is a step, by the court, in the direction of curbing and putting some type of restraint on this absolute discretion of the jury. One can only wait for future decisions to clarify and interpret the position taken in this case. It seems unlikely that the trial courts will take this decision at face value and overrule the jury's determination of punishment whenever they feel that the lesser penalty of life imprisonment is more appropriate. Still, one cannot help but recognize the fact that a power to disregard the jury's choice of punishment has, for all intents and purposes, been vested in the trial courts by judicial interpretation.

²⁷ See *People v. Moore*, 53 Cal. 2d 451, 2 Cal. Rptr. 6, 348 P.2d 584 (1960); *cert. denied*, 364 U.S. 895 (1961) (appeal taken by the People).

²⁸ Note, 6 U.C.L.A.L. REV. 149 (1959) (suggests adoption of portions of the MODEL PENAL CODE); Note, 31 So. CAL. L. REV. 200 (1958) (points out danger in giving jury absolute discretion in selecting punishment).

²⁹ *People v. Friend*, 50 Cal. 2d 570, 327 P.2d 97 (1958).

³⁰ *Id.* at 582, 327 P.2d at 104 (dissent); Note, 32 So. CAL. L. REV. 311 (1959).