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Criminal Law - Murder - Felony Murder Rule

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sional exemption regardless of their belief in an orthodox God, because this is the only way that the nation can benefit from their sincerity.

The *Welsh* decision does not represent an attempt to enforce the letter of the congressional will. Rather, it is an attempt to preserve the practical thrust of § 6(j) without interpreting it so narrowly as to raise grave first amendment doubts. The end result is a construction of the statute that is undoubtedly offensive to some. But one that is quite valid given the reason for exemptions based on conscientious objection.

William C. Bartley

CRIMINAL LAW—MURDER—FELONY MURDER RULE—The Pennsylvania Supreme Court, utilizing language indicating dissatisfaction with the felony murder rule,¹ has expressly overruled its prior decision in *Commonwealth v. Almeida*.²

Commonwealth ex rel. Smith v. Myers, 438 Pa. 218, 261 A.2d 550 (1970).

On January 30, 1947, James Smith, along with Edward Hough and David Almeida, engaged in the armed robbery of a Philadelphia supermarket. An off-duty police officer was shot and killed while attempting to frustrate the escape of the felons. Evidence as to whether one of the felons fired the shot resulting in the officer's death was conflicting at the trial level; the court however, charged the jury that the identity of the individual who fired the shot was irrelevant:

Even if you should find from the evidence that Ingling was killed by a bullet from the gun of one of the policemen, that policeman having shot at the felons in an attempt to prevent the robbery or the escape of the robbers, or to protect Ingling, the felons would be guilty of murder, or if they did that in returning the fire of the felons that was directed toward them.³

The jury returned a verdict of guilty of murder in the first degree, with punishment fixed at imprisonment for life.

1. In Pennsylvania, the felony murder rule punishes as first degree, all murders which shall be committed in the perpetration of, or in attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping. PA. STAT. ANN. tit. 18, § 4701 (1939).

2. 362 Pa. 596, 68 A.2d 595 (1949).

3. *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 220, 261 A.2d 550, 558 (1970).

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On an appeal *nunc pro tunc*⁴ the appellant asserted that he was denied due process of law by virtue of the trial court's charge that it was irrelevant who fired the fatal shot.

The court agreed with appellant overruling its decision in *Almeida*.⁵

The significance of the court's decision however, is not the expressed repudiation of its decision laid down twenty-one years previously, since *Commonwealth v. Redline* unquestionably limited the applicable scope of *Almeida* to the facts from which it arose.⁶

The significance of the decision is the language utilized by the court in discussing the felony murder rule generally and at arriving at a decision.

The court's language unquestionably indicates its discontent with the felony murder rule, the premises on which it rests, and its deterrent effect on crime.

The possible impact of this language will be subsequently considered.

The felony murder rule appears to have originated in 1536 when a group of men in attempting to steal certain property killed another in the attempt and were convicted of murder.⁷

Under a doctrine of constructive malice, the predecessor of the felony murder rule, malice was apparently imputed from the underlying felony to the homicide.

This principle of law was adopted by Pennsylvania in 1681,⁸ and on April 22, 1794, the Pennsylvania Assembly statutorily enacted what has come more popularly to be known as the felony murder rule.⁹

4. A phrase applied to acts allowed to be done after the time when they should be done, with retroactive effect.

5. 362 Pa. 596, 68 A.2d 595 (1949).

6. 391 Pa. 486, 137 A.2d 472 (1958).

7. Mansell and Herbert's Case, 2 Dyer 128b, 73 Eng. Rep. 279 (K.B. 1536).

8. CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA, PASSED BETWEEN THE YEARS 1682 AND 1700 at 84. (Commonwealth of Pennsylvania, 1879.)

9. "Sect. I. Be it enacted by the SENATE and HOUSE of REPRESENTATIVES of the commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That no crime whatsoever, hereafter committed (except murder of the first degree) shall be punished with death in the state of Pennsylvania.

Sect. II. And whereas the several offenses, which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness that it is unjust to involve them in the same punishment: *Be it further enacted by the Authority aforesaid*, That all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree; before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court shall proceed, by examination of wit-

The enacting portion of the original statute remains unchanged with the exception of the addition of kidnapping as an enumerated felony.¹⁰

Judicially, the felony murder rule in Pennsylvania was consistently interpreted and applied against defendants when the killing was done by either the defendant or an accomplice or by one acting in furtherance of the felonious undertaking.¹¹ However, in 1947, the court extended its prior application of the rule to encompass homicides committed by third persons in attempting to defend their property or themselves from the felonious scheme.¹²

In 1949, the court, relying on its decision in *Commonwealth v. Moyer*¹³ affirmed the first degree murder conviction of David Almeida. By applying the proximate cause concept of criminal liability the defendant's guilt for a killing possibly done not by himself or one of his co-felons but by a police officer in an attempt to frustrate the felony was held to constitute murder in the first degree.¹⁴

In 1955, and again in 1958, the court extended the reach of the felony murder rule to hold criminally liable the surviving felon for the death of a co-felon; caused directly by the victim of the felonious scheme,¹⁵ or by the co-felon himself.¹⁶

It is apparent from these decisions that Pennsylvania had created a felony murder rule that could easily encompass any homicide proximately connectable to an enumerated felony and the courts could therefore convict felons of murder in the first degree not only for the homicides which they themselves committed but for homicides committed by any other person who was attempting to oppose the felonious scheme simply by establishing a causal connection between the original felonious undertaking and the resultant death.

Whatever the court's motivation for creating such an all-encompassing doctrine, it was obviously not present when the court handed down its decision in *Commonwealth v. Redline*.¹⁷ The decision in the *Redline*

nesses, to determine the degree of the crime, and to give sentence accordingly." Act of April 22, 1794, ch. MDCCLXVI, §§ I & II.

10. PA. STAT. ANN. tit. 18, § 4701 (1939).

11. *Commonwealth v. Major*, 198 Pa. 290, 47 A. 741 (1901); *Commonwealth v. Grether*, 204 Pa. 203, 53 A. 753 (1902); *Commonwealth v. McManus*, 282 Pa. 25, 127 A. 316 (1925); *Commonwealth v. Tauza*, 300 Pa. 375, 150 A. 649 (1930); *Commonwealth v. Elliott*, 349 Pa. 488, 37 A.2d 582 (1944); *Commonwealth v. Wooding*, 355 Pa. 555, 50 A.2d 328 (1947).

12. *Commonwealth v. Moyer*, 357 Pa. 181, 53 A.2d 736 (1947).

13. *Id.*

14. 362 Pa. 596, 68 A.2d 595 (1949).

15. *Commonwealth v. Thomas*, 382 Pa. 639, 117 A.2d 204 (1955).

16. *Commonwealth v. Bolish*, 391 Pa. 550, 138 A.2d 447 (1958).

17. *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958).

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case expressly overruled the prior decision in *Commonwealth v. Thomas*.¹⁸ Both cases concerned the criminal liability of the surviving felon when his co-felon was killed by a third person.

The majority in *Redline* considered *Commonwealth v. Thomas* an unwarranted judicial extension of the felony murder rule. The court went on to say that the decision in *Commonwealth v. Almeida*¹⁹ was distinguishable from the *Thomas* and *Redline* factual situations since in the latter cases the felon was killed by a police officer and therefore the homicide was justifiable; whereas in *Almeida* an innocent third party was killed by the police officer and such a homicide is only excusable and continues to fall within the applicable reach of the rule.²⁰

Not until the case of note was *Almeida* expressly overruled. However, as stated previously, the significance of the decision is possibly more far-reaching than the expressed repudiation of *Almeida*.

Justice O'Brien, speaking for the majority, makes mention of the harsh criticism to which the felony murder rule has been subjected and concedes that most of the criticism is thoroughly warranted.

Using language borrowed from *Redline*, the majority stated that the most plausible explanation of the rule's origin was that at early common law many crimes, including practically all felonies were punishable by death; therefore it was of little significance whether the convicted defendant was punished for the initial felony or the homicide accidentally resulting from the felony.²¹

The court in its own language stated that "not only is the felony murder rule non-essential but it is very doubtful that it has the deterrent effect its proponents assert. On the contrary, it appears that juries rebel against convictions, adopting a homemade rule against fortuities, where a conviction must result in life imprisonment. If added deterrence is desired, the felony murder rule is not the right approach."²²

The court then stated that the purpose of this discussion was not to abolish the rule but to emphasize the weak premises on which it rests and to restrain it to its characteristic application.²³

This language, admittedly dictum, cannot however pass without

18. *Commonwealth v. Thomas*, 382 Pa. 639, 117 A.2d 204 (1955).

19. *Commonwealth v. Almeida*, 362 Pa. 596, 68 A.2d 595 (1949).

20. *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958).

21. *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 225, 261 A.2d 550, 554 (1970).

22. *Id.* at 226, 261 A.2d at 554.

23. *Id.* at 227, 261 A.2d at 555.

notice. Over a period of approximately 23 years the court has departed from the characteristic approach of applying the rule only to homicides committed by the felonious perpetrators themselves to a concept of imputing criminal liability under a concept of proximate causation and has with the decision of note finally returned to the characteristic application, and by dictum indicated its dissatisfaction with this application.

The felony murder rule characteristically applied, punishes as first degree murder those homicides committed by the perpetrators or attempted perpetrators of a proscribed felony²⁴ without the necessity of proving the relation between the homicide and the offender's mental state of mind. All other homicides punished similarly require the homicide be wilful, premeditated, and deliberate.²⁵

It is this aspect of the doctrine that has prompted much comment.

The doctrine has been criticized as broadening the scope of first degree murder by supplying the requisite mental state in law that may not exist in fact.²⁶ The phrase "constructive murder" is the essence of the rule. The felony murder rule is a tool for creating the *mens rea* of murder.²⁷

An obvious example of this is where the fleeing perpetrator of a bank robbery falls, *accidentally* discharging his revolver, resulting in the death of a bank teller. Had the same factual situation occurred, not in the perpetration of a statutorily enumerated felony but as the result of an *accidental* fall in the bank by an individual legally permitted to carry a weapon, the killing would constitute only excusable homicide. However, due to the felony murder doctrine the former situation would constitute murder in the first degree, punishable in Pennsylvania by death or imprisonment for life.²⁸

It has been stated that this undermines the principle of culpability based on mental state of mind and basic to our law is the principle that punishment, no matter what its theoretical justification, should be in proportion to culpability.²⁹

In contrast, the felony murder rule has been considered by certain

24. PA. STAT. ANN. tit. 18, § 4701 (1939).

25. *Id.*

26. Note, *Felony Murder as a First Degree Offense: An Anachronism Retained*, 66 YALE L.J. 427 (1957).

27. Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956).

28. PA. STAT. ANN. tit. 18, § 4701 (1939).

29. *Supra* note 26.

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members of the judiciary to be a necessary rule in the criminal prevention arsenal.

In *Almeida* the majority stated that when robbers arm themselves they indicate their expectations of forcible opposition and have prepared themselves to kill those in their way. If they do cause death they should be adjudged guilty of murder in the first degree.³⁰

In his dissenting opinion in *Redline*, Justice Bell, now Chief Justice Bell, expressed his opinion that the brutal crime wave sweeping our country necessitates that a broad rule of felony murder prevail in order to protect society from criminals.³¹

The problems presented by the felony murder rule and its concept of punishment, not commensurate, in most cases, with the perpetrator's mental state, has prompted legislative action in other jurisdictions in an attempt to remedy and more closely proportionate the perpetrators culpability with the punishment statutorily dictated.

England, the jurisdiction responsible for the creation of the doctrine of felony murder, in 1957, legislatively attempted to solve the problem.

The English Homicide Act of 1957 has abolished the concept of constructive malice. For a conviction of murder, the statute requires "the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offense."³²

In this country, Wisconsin has statutorily modified the common law

30. *Commonwealth v. Almeida*, 362 Pa. 596, 634, 68 A.2d 595, 614 (1949).

31. *Commonwealth v. Redline*, 391 Pa. 486, 514, 137 A.2d 472, 483 (1958): "The brutal crime wave which is sweeping and appalling our Country can be halted only if the courts stop coddling, and stop freeing murderers, communists and criminals on technicalities made of straw. The Courts seem to have forgotten that Justice is not a one-way street—law-abiding citizens and law-abiding communities are entitled, at least equally with criminals, to the protection of the law.

"The felony murder doctrine was clearly and well established in Pennsylvania by legal principles which are several hundred years old and in particular by five decisions of the Supreme Court of Pennsylvania handed down in the last ten years which are directly in point and sustain, without the slightest doubt, the conviction of this murder (*Redline*). Faith in Justice, and confidence and trust in our Courts are seriously impaired when these recent and notable decisions of the Court, as well as long established principles of law are repudiated and overruled or discarded—not for the protection of society or for any other worthy objective, but to give further protection to individuals who are defying our laws, destroying the peace and jeopardizing the welfare of our communities."

32. The English Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11 provides:

"1. *Abolition of 'constructive malice'*.—(1) Where a person kills another in the course or furtherance of some other offense, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offense.

"(2) For the purpose of the foregoing subsection, a killing done in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, shall be treated as a killing in the course or furtherance of an offense."

felony murder doctrine by preserving the basic concept of culpability for death caused in the perpetration or attempted perpetration of a felony, but has reduced the degree and punishment of the crime.³³

Similarly, Minnesota has statutorily reduced the degree and punishment for homicides committed in the perpetration or attempted perpetration of certain felonies.³⁴

The American Law Institute in its Model Penal Code has, however, retained felony murder of the first degree but the language of the Code creates only a presumption of the elements necessary for a first degree conviction. Such a presumption could apparently be overcome by evidence establishing the homicide as accidental.³⁵

Whether similar steps will be taken in Pennsylvania to alter or abolish entirely the felony murder rule is a question unanswerable at this time. Considering however, the steps taken in other jurisdictions and the criticism to which the rule in its characteristic application has been subjected, the dictum of the instant case may be an indication of the court's attitude toward the destiny of the felony murder rule in Pennsylvania.

J. Alan Johnson

33. THIRD-DEGREE MURDER. Whoever in the course of committing or attempting to commit a felony causes the death of another human being as a natural and probable consequence of the commission of or attempt to commit the felony, may be imprisoned not more than 15 years in excess of the maximum provided by law for the felony. WIS. STAT. § 940.03 (1967).

34. MURDER IN THE THIRD DEGREE. Whoever, without intent to effect the death of any person, causes the death of another by either of the following means, is guilty of murder in the third degree and may be sentenced to imprisonment for not more than 25 years:

(1) Perpetrates an act eminently dangerous to others and evincing a depraved mind, regardless of human life; or

(2) Commits or attempts to commit a felony upon or affecting the person whose death was caused or another, except rape or sodomy with force or violence within the meaning of Section 609.185. MINN. STAT. § 609.195 (1963).

35. MODEL PENAL CODE § 201.2 (Tent. Draft 8, 9, 10, 1960)

Murder.

(1) Except as provided in Section 201.3(1)(b), criminal homicide constitutes murder when:

(a) it is committed purposely or knowingly; or

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing robbery, rape by force or intimidation, arson, burglary, kidnapping or felonious escape.

(2) Murder is a felony of the first degree (but a person convicted of murder may be sentenced to death, as provided in Section 201.6).