Journal of Criminal Law and Criminology

Volume 25
Issue 1 *May-June*

Article 12

Summer 1934

Recent Criminal Cases

RECENT CRIMINAL CASES

Edited by the
LEGAL PUBLICATIONS BOARD OF
NORTHWESTERN UNIVERSITY SCHOOL OF LAW

STUART G. TIPTON, Case Editor NEWMAN F. BAKER, Faculty Adviser

MALICIOUS PROSECUTION — IMMUNITY OF FEDERAL DISTRICT ATTORNEY. — [Federal] Wilburn P. Hughes, U. S. District Attorney for the Southern District of Florida, and others instituted prosecution against the plaintiff, a warrant was issued and the plaintiff was brought before the United States Commissioner for a hearing, the result of which was the discharge of the plaintiff for lack of evidence of guilt. Later the defendant maliciously procured an indictment against the plaintiff, charging the same offense and again the plaintiff was discharged. After an appeal from this judgment had been dismissed, the plaintiff sued for malicious prosecution but was met by the defendant's demurer. The plaintiff argued that the defendant's acts were prompted by malice and constituted a perversion of his office which stripped him of his immunity as a public officer. *Held:* demurrer sustained. A public officer is not liable for instituting a prosecution, although he acts with malice and without probable cause, provided the matter acted upon is among those generally committed by law to the control or supervision of the office in question and is not manifestly or palpably beyond the authority of such office: *Anderson* v. *Rohrer* (D. C. Fla., 1933) 3 F. Supp. 367.

The court in the present case relied upon *Spalding* v. *Vilas* (1895) 161 U. S. 483, 16 S. Ct. 631, where the Postmaster-General of the United States having acted pursuant to an Act of Congress and in respect of matters within his authority was held not responsible in a civil suit for libel based on official communications made by him even though personal motives prompted his action. Other cases relied upon by the court were *Mellons* v. *Brewer* (1927) 57 App. D. C. 126, 18 F. (2d) 168 and *Dizazzo* v. *Pitach* (C. C. A. 2d, 1930) 40 F. (2d) 500. All of these cases are libel actions and not cases of malicious prosecution. It is well settled that words published in the course of judicial or quasi-judicial proceedings and relevant thereto are absolutely privileged: *Pecue* v. *West* (1922) 233 N. Y. 316, 135 N. E. 515, but it may be doubted whether the same immunity should exist in respect to malicious prosecution. It is equally well settled, however, that quasi-judicial officers are not so liable while acting within the scope of their official duties. The leading case on this point is *Griffith* v. *Slinkard* (1896) 146 Ind. 117, 44 N. E. 1001, where a prosecuting attorney maliciously included in an indictment as a co-defendant one against whom no evidence was produced before the grand jury. The same doctrine was enunciated

in *Yaselli* v. *Goff* (C. C. A. 2d, 1926) 12 F. (2d) 396, where a duly appointed special assistant to the Attorney-General of the United States in procuring an indictment against the plaintiff for conspiracy was held to be immune from civil suit for malicious prosecution. A review of the authorities may be found in *Watts* v. *Gerking* (1924) 111 Ore. 641, 222 Pac. 318, where the court chiefly relied upon *Griffith* v. *Slinkard, supra.* There the district attorney instituted criminal proceedings against the plaintiff causing him to be arrested, his home searched and his property taken, maliciously and without probable cause, upon a charge which the district attorney at the time knew to be false. An action for damages for malicious prosecution was brought against the official but the court followed the general rule. Similar cases are *Smith* v. *Parman* (1917) 101 Kan. 115, 165 Pac. 663 (city attorney, acting in pursuance of an ordinance held not liable in a civil suit for malicious prosecution for instituting an action maliciously and without probable cause) and *Semmes* v. *Collins* (1919) 120 Miss. 265, 82 So. 145 (attorney general acting under authority of law wilfully and maliciously instituted a suit but held not civilly liable for damages). See also Note (1924) 38 Harv. L. Rev. 262.

Under the general rule, the only limitation placed on a prosecuting attorney's immunity is the case where he acts palpably beyond the scope of his official duties. He is selected to preserve the peace and enforce the law by bringing offenders to justice. Therefore, if he prosecutes maliciously, knowing the charge to be false, he is clearly stepping beyond his authority: *Yau* v. *Carden* (1916) 23 Hawaii 362. On the other hand, public policy demands that prosecutors be unrestricted by fear of civil liability. To hold otherwise would detract from the aggressiveness which the proper discharge of his duties demands but this does not mean that there should be no restraint whatever. The present case may indicate a possible line of distinction, for here there were two prosecutions against the plaintiff for the same offense, both unfounded. The repeated attempts to prosecute with insufficient evidence seem palpably beyond the dictates of policy, and its sanction in the instant case seems to be a misapplication of a salutary rule.

SHERMAN ALLEN PERLSTEIN.

EVIDENCE—DYING DECLARATIONS —MULTIPLE ADMISSIBILITY.—[Federal] The defendant, Charles A. Shepard, a major in the medical corps of the United States Army, was convicted of the murder of his wife by poisoning her with bichloride of mercury. At the trial, the government offered in evidence as a dying declaration, the following statement made by the deceased to her nurse: "Dr. Shepard has poisoned me." The lower court held the statement inadmissible as a dying declaration in that the government failed to show "a settled, hopeless expectation of death in deceased." However, the statement was admitted in evidence as showing deceased's state of mind, to rebut the inference of suicide which might be made from other statements offered by the defendant. No instruction was either requested or given as to the purpose for which the jury might use this declaration. *Held:* on appeal, reversed. The trial court should have instructed the jury that the statements of de-

ceased were offered to rebut evidence of declarant's suicidal intent, but that they were inadmissible as dying declarations: *Shepard* v. *United States* (1933) 289 U. S. 721, 54 S. Ct. 22.

From the facts surrounding the statement in question there would seem to be little doubt that it was inadmissible as a dying declaration. It was made after two days of total collapse and delirium, but when deceased's condition was much improved, and there was as yet no thought by any of her physicians that she was dangerously ill, still less that her case was hopeless. The evidence was properly excluded on this ground, if offered as a dying declaration, since an essential element of such admission is a belief on the part of the declarant in the immediate certainty of impending death: 3 *Wigmore* "Evidence" (2d ed. 1924) §§1440-1.

While it is true that deceased's statements could not be admitted as dying declarations, yet, since there was present the issue of suicide, the declaration very properly comes under the general rule that a state of mind, if relevant, may be proved by contemporaneous declarations of feeling or intent: *Wigmore, op. cit. supra,* §§1725-26; *Commonwealth* v. *Trefethen* (1892) 157 Mass. 180. 31 N. E. 961; *Mutual Life Ins. Co.* v. *Hillman* (1892) 145 U. S. 285, 12 S. Ct. 909. When the statement of the deceased—"Dr. Shepard has poisoned me"—was admitted as evidence to rebut a suicidal intent, or as indicative of a will to live, it should have been used to prove merely the deceased's future intent; but since the jury were not instructed as to its use they could equally as well have used it as proof of an act done by the defendant. As Mr. Justice Cardozo pointed out in the opinion, the latter purpose could not be achieved by the use of hearsay evidence, but direct proof was necessary. He refused to allow the jury to make such a subtle discrimination as to the use of the evidence unaided by instructions.

The general rule in cases of multiple admissibility is that the complaining party must call the attention of the court to any improper use of evidence and request instructions on that point at the time it occurs. If he fails to do so, an appellate court usually will not consider such error even though it be prejudicial: *Bogileno* v. *United States* (C. C. A. 10th, 1930) 38 F. (2d) 584, 587. But as the significant dissent of the lower court in the present case points out, *Shepard* v. *United States* (C. C. A. 10th, 1933) 62 F. (2d) 683, there is an important exception to this rule. Namely, in the *Bogileno* case, *supra,* it is said that in criminal cases involving the life or liberty of the accused, the federal appellate courts may notice and correct, in the interest of a just enforcement of the law, serious errors affecting the defendant's rights, although these errors were *not* challenged or reserved by objections, exceptions, or assignments of error. Accord: *Van Gorder* v. *United States* (C. C. A. 8th, 1927) 21 F. (2d) 939; *Lamento* v. *United States* (C. C. A. 8th, 1925) 4 F. (2d) 901; *New York Cent. R. R.* v. *Johnson* (1929) 279 U. S. 310, 49 S. Ct. 300.

Cardozo, J., discussed and approved the vigorous dissent of Phillips, J., in the lower court, though putting the reversal on other grounds as well. However, it may be said that this case is another step in building up effective safeguards against "railroading prosecutors." Too often today prosecu-

tors are more desirous of obtaining a large number of convictions than of serving the ends of justice. Often evidence is introduced with knowledge of its certain inadmissibility merely to get it temporarily before the jury. The tendency on the part of courts to abolish such practices is in accord with the fundamental public policy underlying the instant case. As was said by the dissent below, "that a defendant may be 'waived' into the penitentiary for life is repugnant to my conception of justice."

It would be far better for judges to protect the accused from the failure of his counsel to assert all his rights, and to take an affirmative stand to avoid flagrant miscarriages of justice than to preside as mere umpires in a game bitterly fought between ambitious state's attorneys and attorneys for the defense—a struggle in which a premium is placed on personal aggrandizement rather than on a just result.

F. R. FITZSIMONS.

RAPE—BLOOD TEST TO DETERMINE PATERNITY.—[South Dakota] Defendant, Clement Damm, and his wife were married in 1913 and in 1925 adopted twin girls who were then about seven years of age. One of the girls became pregnant and gave birth to a female child on September 25, 1931. The defendant was arrested upon a charge of second degree rape, and upon trial was convicted and sentenced to sixteen years imprisonment: *State* v. *Damm* (S. Dak. 1933) 252 N. W. 7.

The defendant offered to submit himself to a blood test and asked the court to require the prosecutrix and her infant child to submit thereto, but the motion was denied by the court and upon appeal the defendant assigns this as error. The Bernstein Blood Test here in question is based on Mendel's law of heredity. The human blood is divided into four recognized types or groups: AB, A, B, and O, so grouped because the blood agglutinates differently in the four classes. If the blood groups of the father and mother are known, the blood group of the child can be predicted to a certain extent. Conversely, if the blood group of the mother and child are known it can be determined what must have been the blood group of the father, and consequently the impossibility of certain paternity may be effectively demonstrated. Thus if the blood of both parents falls into group AB, then the child may be AB, A or B, but cannot be O; if the parents are AB and O, the offspring may be A or B, but cannot be AB or O; if the parents are B and O, the offspring may be B or O, but not AB or A. Likewise in any other possible blood grouping in the parents, it has been determined by scientific experimentation which group the offspring may be and cannot be: *Lee,* "Blood Tests For Paternity" (1926) 12 Am. Bar. Ass'n J.; *Ottenberg,* "Medico-legal Application of Human Blood Grouping" (1921) 77 J. Amer. Med. Ass'n 682; (1922) 78 J. Amer. Med Ass'n 873; (1922) 79 J. Amer. Med. Ass'n 2137. The blood test itself is a laboratory procedure and requires that a few drops of blood be taken from the subject, which can be done without pain or danger. From the nature of the test it cannot be determined with finality that a particular person is the father, but it is possible to exclude certain individuals whose blood falls within a given group.

The actual use of the test is dependent upon the power of the

courts to compel the defendant, the prosecutrix and the child to submit to the drawing of the few drops of necessary for the laboratory analysis. Examination of the body of the plaintiff is now frequent in civil cases. Although such an examination was not allowed in England, and the American jurisdictions are divided on the question at common law, statutes in many states now allow the defendant in personal injury cases to require the examination of the plaintiff by a competent physician. Under such a statute, it has been held that the court had the power to require a sample of the plaintiff's blood to be taken for the purpose of examination and analysis: *Hayt* v. *Brewster, Gordon & Co.* (1921) 199 App. Div. 68, 191 N. Y. Supp. 176.

No uniformity of decision can be found among the state courts as to the power of the courts in criminal cases to compel the defendant to submit to a physical examination. Some courts have excluded the testimony of physicians where the defendant was forced to submit to the examination on the ground that it is a violation of the constitutional privilege against self-incrimination: *State* v. *Height* (1902) 117 Iowa 650, 91 N. W. 935; *State* v. *Newcomb* (1909) 220 Mo. 54, 119 S. W. 405; 4 *Wigmore,* "Evidence" (2d ed. 1923) §2265. However, courts have universally held it was not a violation of the privilege to force a person to be photographed, fingerprinted, or subjected to the Bertillon measurements: *Downs* v. *Swann* (1909) 111 Md. 53, 73 Atl. 653; *Kidd,* "The Right to Take Fingerprints, Measurements and Photographs," (1919) 8 Calif. L. Rev. 25. In the light of the latter view, it would seem that the courts would have ample power to compel the taking of blood for the test. From a practical standpoint, however, the defendant will not object because, due to the nature of the test, it cannot furnish conclusive evidence as to his guilt, but, assuming the accuracy of the test, it may absolutely prove his innocence.

A different question arises, however, as to the prosecutrix and the child, who are not parties to the suit, the prosecutrix being a mere witness in a suit by the state. Some courts have refused to force the prosecutrix in rape cases to be subjected to a physical examination on the ground that by so doing many women would be deterred from becoming witnesses: *McGuff* v. *State* (1889) 88 Ala. 147, 7 So. 35; *McArthur* v. *State* (1894) 59 Ark. 436 27 S. W. 628; *Thomas* v. *Commonwealth* (1920) 188 Ky. 509, 222 S. W. 591. Other courts have held that the examination of the prosecutrix is discretionary and the abuse of this power will not be reviewed by the court on appeal: *State* v. *Pucca* (1902) 14 Del. 71, 55 Atl. 831; *Walker* v. *State* (1915) 12 Okl. Cr. 179, 153 Pac. 209; 4 *Wigmore,* "Evidence" (2d ed. 1923) §2216. The same reasoning used by the courts which refuse to subject the prosecutrix to an examination could hardly be applied to the simple matter of taking the blood test.

The accuracy of the test is generally accepted among medical authorities. Such evidence has never been used by the courts of this country, although in the German, Austrian, and to some extent in Scandinavian courts the medical report of such a test is admissible. The test was accepted as evidence in the British Isles for the first time on January 24, 1932, by Judge Shannon of the Dublin Circuit Court: 66 Irish Law Times 64 (1932), 111

(1932). Keeping in mind the famous saying of Sir Matthew Hale that rape "is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, though never so innocent," no reason can be found why the courts should fail to accept this advance of science in aiding them to determine paternity. The constitutional plea of self-incrimination has not prevented the use of fingerprints, the X-ray, and photographs; courts have required physical examinations in civil cases, and the same progress can now well be made in regard to the use of the blood test in criminal prosecutions.

WILL T. WRIGHT.

FIREARMS IDENTIFICATION—"BALLISTICS"—ADMISSIBILITY AS EVIDENCE.—[Missouri] At the trial of the defendant, which resulted in a conviction of murder in the first degree, a qualified expert (Major Seth Wiard of the Scientific Crime Detection Laboratory of Northwestern University School of Law) was permitted to testify as to the similarity between the bullet removed from the body of the deceased and one fired from the rifle belonging to the defendant. Upon appeal the admission of such testimony was assigned as reversible error. *Held:* on appeal, affirmed. The rights of the defendant were not prejudiced by the admission of the "ballistics" testimony: *State* v. *Shawley* (Mo. 1933) 67 S. W. (2d) 74.

This decision is the first one involving firearms identification testimony rendered by an appellate court of the state of Missouri, and it signifies the addition of that state to the list of eleven other jurisdictions whose superior courts have approved the use of such evidence in criminal cases. The superior courts of Illinois, Iowa, Kentucky, Massachusetts, Montana, New Jersey, Ohio, Oregon, Texas, Wisconsin—and a Federal Circuit Court of Appeals—have definitely held such evidence admissible. See *People* v. *Fisher* (1930) 340 Ill. 216, 172 N. E. 743; *State* v. *Campbell* (1931) 213 Iowa 677, 239 N. W. 715; *Evans* v. *Commonwealth* (1929) 230 Ky. 411, 19 S. W. (2d) 1091; *Commonwealth* v. *Best* (1902) 180 Mass. 492, 62 N. E. 748; *State* v. *Vuckovich* (1921) 61 Mont. 480, 203 Pac. 491; *State* v. *Boccadoro* (1929) 105 N. J. L. 352, 144 Atl. 612; *Burchett* v. *State* (1930) 35 Ohio App. 463, 172 N. E. 555; *State* v. *Clark* (1921) 99 Ore. 629, 196 Pac. 360; *Kent* v. *State* (1932) 242 Ky. 80, 45 S. W. (2d) 824; *Galenis* v. *State* (1929) 198 Wis. 313, 223 N. W. 790; *Laney* v. *United States* (1923) 54 App. D. C. 56, 194 Fed. 412. There is only one decision to the contrary—*Matthews* v. *People* (1931) 89 Colo. 421, 3 Pac. (2d) 409. The reason for the rejection of the testimony there was the improper presentation of the evidence for the witness had professed to be able to match fatal and test bullets by means of a magnifying glass.

The appellate courts of several other jurisdictions (e. g., California, Connecticut, Oklahoma, Virginia) have indicated their approval of the use of such evidence, although definite holdings to this effect are lacking. Moreover, it must be remembered that "ballistics" testimony is not confined to the foregoing jurisdictions. Hundreds of trial cases in other states are never appealed upon that ground, presumably for the reason that its admissibility is not seriously questioned, in view of the decided cases in other jurisdictions. See extended

discussion of previous decisions and of the science itself in (1933) 24 JOURNAL OF CRIMINAL LAW AND CRIMOLOGY 825.

The following extract from the opinion of the court in the *Shawley* case indicates the importance of testimony of this type where circumstantial evidence must be relied upon to establish the guilt of an accused individual: "The strongest evidence against the defendant, we think, is the ballistics testimony. The defendant admitted the rifle was his. A microscopic examination of the bullet which killed Barnet Baxter indicated it had been fired through that gun. Six photographs of part of the fatal bullet brought into visual juxtaposition with parts of test bullets were introduced in evidence. We have examined them carefully. Owing to the distorted condition of the fatal bullet there is not a coincidence of the ridges and groves clear around its circumference, but at various points the markings do correspond, and at others a relation is indicated as in the case of faults in stratified rock. We cannot, of course, pass independent, expert judgment on these photographs no more than we could interpret X-ray photographs. But a qualified expert has testified any given rifle will leave its own peculiar, individual, microscopic markings on any bullet fired through it, no two rifles the same, and that in his opinion the fatal bullet was fired through the defendant's rifle. That rifle was found in the defendant's bedroom the morning after the homicide with fresh smudge on it, and the defendant then said, and has never since denied, no one had fired but him. Nor did he explain at the trial why the rifle gave evidence of recent firing. Certainly this evidence in connection with the other facts was sufficient to take the case to the jury."

FRED E. INBAU.

MURDER—HOMICIDE IN THE COMMISSION OF AN UNLAWFUL ACT—SUICIDE.—[Iowa] The defendant called at the home of the deceased to ask her to go out with him, and upon her refusal he reached for his revolver intending to "end it all." She started to struggle with him, the revolver was discharged and she fell with two bullets in her body from which she later died. An instruction to the jury stated that in the eye of the law suicide was an offense, an unlawful act, and if a man with a deadly weapon undertakes to take his own life and in the commission or attempted commission of that act takes the life of an innocent party then in the eye of the law that is murder. On this instruction the defendant was convicted of murder in the second degree. *Held*: on appeal, reversed. An attempt to commit suicide, not being made unlawful by statute, is not an unlawful act, and if the accused shot the deceased while attempting to commit suicide, he was not doing an unlawful act, and hence not guilty of murder: *State* v. *Campbell* (Iowa 1933) 251 N. W. 717.

The question here presented is whether an attempt to commit suicide is an unlawful act in the sense that one who kills another while attempting suicide, is guilty either of murder or manslaughter. This particular question seems to have been raised but rarely in this country for only two cases were found to have decided the point before the present one: *State* v. *Levelle* (1891) 34 S. C. 120, 13 S. E. 321; *Commonwealth* v. *Mink* (1877) 123 Mass.

422, 25 Am. Rep. 109. Both courts decided that it was an unlawful act and allowed the conviction to stand, while the court in the principal case held to the contrary. At common law, under an early Act of Parliament, suicide was a felony and punishable by forfeiture of goods and chattels, ignominious burial, and in theory at least, since suicide was murder, by death. The attempt was correspondingly a felony. Forfeiture, being against general public policy in this country, is now abrogated by statute and the ignominious burial has either fallen into disuse or has been abolished by statute. Since the penalties for suicide are gone it is not in reality an offense with us. 1 *Bishop,* "Criminal Law" (9th ed. 1923) §511. The question of the criminality of the act thus remains important only incidentally in cases such as the present.

No general rule can be laid down since the decisions must rest upon the statutes of the particular state. If the attempt is specifically made a crime as it was in New York until 1919, there would be no trouble in sustaining the conviction. It is where there is no statute on the subject and the courts must decide whether the common law offense is in force in the state that difficulty arises. Two states have so interpreted their statutes as to recognize the attempt to commit suicide as retaining its common law character as a felony on the theory that all common law offenses not specifically dealt with in statutes are still in force: *State* v. *Carney* (1903) 69 N. J. L. 478, 55 Atl. 44; *State* v. *Levelle, supra.* Two other states have held the attempt to commit suicide not an indictable offense because no penalty now attaches to the suicide if actually committed: *May* v. *Pennell* (1906) 101 Me. 516, 64 Atl. 885; *Commonwealth* v. *Mink, supra.* But the effect of this reasoning is to make the penalty determine the existence of the crime rather than the crime to determine the penalty. It is to be noted that a distinction is drawn in this situation between an indictable offense and an unlawful act. In the *Mink* case, *supra,* the facts of which are almost identical with those in the present case, the court, admitting that the attempt to commit suicide was not an indictable offense, held that it was wrongful and criminal as *malum in se,* and therefore a homicide committed while attempting such an unlawful act was murder or manslaughter. The present decision refused to follow this reasoning, holding that it was not enough for the offense to be unlawful as *malum in se* but unless the statute made it so it was not unlawful, following *Darrow* v. *Family Fund Society* (1889) 116 N. Y. 537, 22 N. E. 1093. Inferentially, an Illinois decision supports this position, for in *Burnett v. People* (1904) 204 Ill. 208, 68 N. E. 505, it is stated that Illinois has never regarded the English law as to suicide applicable to the spirit of its institutions.

The view taken by the Iowa court would seem to be the better one. Today, statutes cover almost all of the common law offenses and it is only reasonable to infer that those which are omitted were intended to be excluded. This proposition is quite generally accepted: *People* v. *Cleary* (1895) 13 Wis. 546, 35 N. Y. Supp. 588; *Estes* v. *Carter* (1860) 10 Iowa 400. Especially should this be true when a man is on trial for his life and every doubt ought properly to be resolved in his favor.

A larger question is also raised here for, admitting that an attempt to commit suicide is a crime, should

a person who accidentally kills another while attempting to take his own life be deemed to come within the principle that one committing a homicide while perpetrating an unlawful act is guilty of murder or manslaughter? Criminal statutes should be strictly construed and not extended to include an offense not clearly within the fair scope of the language employed. It is doubtful whether state statutes of this type were intended to be directed against an offense of this nature. Rather are they directed toward unlawful acts against the person or property of third persons. In fact, some states avoid this uncertainty by specifically enumerating the unlawful acts. In the absence of such a statute, however, a court might prevent an unjust result by saying merely that the general statute was clearly not designed to include an offense such as the one under consideration.

STANLEY A. TWEEDLE.

FELONY—MURDER—CONVICTION OF ACCESSORIES TO THE FELONY.—[New York] Deceased was found shot in the back near the door of his store above which he had his place of residence. Although no eye witnesses of the shooting could be found four men were finally held for the murder. Fitzgerald and Croghan, the actual perpetrators of the crime, pleaded guilty of murder in the second degree and were sentenced to imprisonment. Ryan and Venetucci were brought to trial as accessories. There was evidence to the effect that the four men had planned to hold up deceased as he was opening his store. Fitzgerald and Croghan secured guns from Ryan and, with Venetucci driving Ryan's automobile, proceeded to the scene of the crime. After the killing they returned to Ryan's apartment, handed over the guns to Ryan and told him that they had been compelled to shoot deceased during their attempt to rob. On the theory that the defendants were accessories to a plot to commit robbery and that the murder had taken place in the furtherance of this plan, Ryan and Venetucci were adjudged guilty of first degree murder and sentenced to die. *Held:* on appeal, reversed. The evidence was not sufficient to show that the murder had been perpetrated in the execution of the felony and evidence of certain statements of the killers had been erroneously introduced: *People* v. *Ryan* (1934) 263 N. Y. 298, 189 N. E. 225.

On appeal the court said that the jury would be justified in finding that Fitzgerald and Croghan committed the murder, but that that alone was not sufficient to sustain the conviction of Ryan and Venetucci because in order to convict an accessory for a felony murder it must be free from reasonable doubt that the murder was committed in the execution of the conspired felony: *People* v. *Sobieskoda* (1923) 235 N. Y. 411, 139 N. E. 558. The fact that such a killing has taken place at the scene of the proposed robbery was said by the court to be important as evidencing a continuance of the original crime but since that circumstance was lacking here it might have been possible for the criminals to have shot deceased while attempting an escape. In support of the conviction below the prosecution argued that since deceased had been shot in the back and the bullet found in the store such a possibility was not present. The court, however, held that the question was debatable and therefore should have been sent to the jury

with appropriate instructions as to abandonment of the original plan. There was no necessity for deciding the question, however, since evidence had been admitted which if competent would decide the question and if incompetent was reversible error.

At the trial the prosecution had introduced evidence tending to prove that, on handing the guns to Ryan, the killers had confessed to having shot deceased during the attempt to rob. The majority, on appeal, held that this was incompetent as hearsay and could not be introduced as an admission, for the defendants could not be held to have admitted the truth of a statement made by a third person in their presence of which they had no personal knowledge. They further held that it would not be admitted on the ground that it was a declaration made by a co-conspirator in the prosecution of the enterprise for when the statement was made all attempt to carry out the conspiracy had been abandoned and the narration by one conspirator of events transpiring after the enterprise has come to an end is not admissible in evidence against another: *People* v. *Davis* (1874) 56 N. Y. 95; *Logan* v. *United States* (1891) 144 U. S. 263, 12 S. Ct. 617. Nor were the criminals acting as agents for the defendants when they made this explanation to them. The introduction of this evidence was therefore held reversible error.

In the dissenting opinion, Pound, C. J., laying stress on the fact that Ryan kept the guns and afterwards hid them, that the killers started from his apartment and returned to it, that his car was used and that Venetucci drove, pointed out that it was impossible to escape the conclusion that the felonious intent of the four conspirators had extended to the time of their return to the apartment. Therefore, he contended that the trial court had not erred in its failure to instruct upon abandonment: *People* v. *Sullivan* (1903) 173 N. Y. 122, 65 N. E. 989; *People* v. *O'Neil* (1932) 260 N. Y. 523, 184 N. E. 77; *People* v. *Raffaile* (1922) 233 N. Y. 590, 135 N. E. 930. The dissenting judge further argued that the evidence in question was competent since it was proper to show that the guns were returned to Ryan as tending to prove that they were conspirators, and that statements accompanying and explaining the act were admissible.

The taking of a human life while engaged in the execution of a felony is murder in the first degree in the state of New York. To convict an accessory of a felony murder it must be shown that the killing took place while the parties were engaged in carrying out the conspired felony. The determination of the time when the planned felony came to an end is therefore a question in many of such cases. From this arises the further inquiry whether this question must be sent to the jury with appropriate instructions or whether they may assume that the murder took place during the execution of the felony. It was held in *People* v. *Giro* (1910) 197 N. Y. 152, 90 N. E. 432, and *People* v. *Michalow* (1920) 229 N. Y. 325, 128 N. E. 228, that if the murder was committed on the premises of the original crime the jury might assume that it was done in the execution of the felony, but in *People* v. *Smith* (1921) 232 N. Y. 239, 132 N. E. 574, where a father and son overcame a burglar, handcuffed him and then turned their backs, giving him the opportunity to grasp a gun

and shoot, it was held that the circumstances were such that there was a question for the jury as to the abandonment of the enterprise. Similar to the *Smith* case is *People* v. *Walsh* (1933) 262 N. Y. 140, 186 N. E. 422, where the watcher for the two men conducting the holdup saw that they had been overpowered and in making his escape from the building shot a policeman. It was there held to be clear that the robbery had been abandoned and therefore it was a question for the jury whether the original plan had included the taking of all necessary measures to escape. According to these decisions, if the killing of deceased had been on the premises, even while attempting escape, the jury could have assumed that it was part of the commission of the conspired crime for there are no facts to bring it within *People* v. *Smith* and *People* v. *Walsh, supra.*

The court said that the criminals had the "express intention of holding up deceased when he opened the grocery store." The door of the store was closed and he was shot in the back only eight feet from the door. It is evident that the spot where he was shot was the scene of the original crime. Of course, if they had been in the store and while running out, intent upon escape, had shot the deceased, the killing would not have been on the premises: *People* v. *Marwig* (1919) 227 N. Y. 382, 125 N. E. 535, but it is hard to believe that either deceased or one of the killers stopped to shut the store door. There is a possibility that having escaped down the street the criminals turned and fired, but considering that the bullet entered through the back such a state of facts is highly improbable.

Therefore, it would seem that this case falls within the rule of the *Giro* and *Michalow* decisions, *supra,* but there is one very significant point of distinction which must and should have affected the decision. Here the actual perpetrators of the murder, evidently due to a "deal" with the prosecutor, received a sentence of imprisonment while the defendants, not even present at the scene of the crime, were sentenced to die.

DAVID KIMBALL HILL.