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## Instructing Police Officers in the Criminal Law

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Not infrequently, legislatures in enacting criminal statutes, forbid the doing of certain acts but neglect to prescribe any punishment or designate the degree of crime. In such cases recourse must be made to other general sections covering the subject matter. In New York, the legislature has enacted Section 29 of the Penal Law which states in substance that where the performance of an act is prohibited by a statute, and no penalty is imposed in such statute, the doing of the act is a misdemeanor. Section 1937 of the same state law provides that where the statute declares the violation to be a misdemeanor and no other punishment is provided for, then such violation shall be punishable by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or by both. Section 541 of the United States Code Annotated provides that all offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonious. All other offenses are misdemeanors except those which do not exceed confinement in a common jail, without hard labor for six months, or a fine of not more than five hundred dollars, or both, which shall be deemed petty offenses.

The general rule applicable, therefore, is that if the punishment prescribed in the particular case exceeds a term of imprisonment for one year, the crime is a felony. This may be true despite the fact that the statute itself declares the crime to be a misdemeanor. The New York Court of Appeals in *People v. Bellinger*<sup>1</sup> held that a statute which prescribed a term of imprisonment for two years and designated the offense a misdemeanor, was in fact a felony entitling the defendant to a trial by jury. Such cases should not be confused with instances where the section makes the first offense a misdemeanor, and the second, a felony. Here the first offense may be punished by imprisonment for a term not exceeding one year, but the second, for a longer period of time.

The vital importance of knowing what are felonies and lesser crimes and offenses cannot be overemphasized. The police officer *must* be able to distinguish them. This is particularly true in relation to the law of arrest and the lawful use of force to be applied in effecting such arrests. Police officers are guardians of the public peace, health and welfare and as such are entrusted with the necessary powers to carry their functions and duties. These powers are not unlimited but are restricted by well defined statutory limitations. Abuse of these powers may lead to disciplinary measures either in the form of departmental action, criminal prosecution or civil proceedings.

<sup>1</sup>269 N. Y. 265.

### *Arrest Authority of the Police*

In many states, like New York, a peace officer may, without court process, arrest in the following cases: For any crime committed or attempted in his presence; when the person arrested has committed a felony, although not in his presence; when a felony has in fact been committed, and he has reasonable grounds for believing the person to be arrested has committed it. Under such circumstances, the officer may break into a building to make an arrest if, after notice of his office and purpose, he is refused admittance.

Force may be used in making an arrest when it is necessarily committed by a peace officer in the performance of a legal duty. Such force, however, must be reasonable in manner and moderate in degree depending on the circumstances. If the force used should result in death, a homicide is committed and unless justifiable, may result in criminal prosecution. Under Section 1055 of the Penal Law of the State of New York, a homicide is justifiable when committed by a public officer, necessarily, in retaking a prisoner who has committed, or has been arrested for, or convicted of a felony, and who has escaped or has been rescued, or in arresting a person who has committed a felony and is fleeing from justice; or in attempting by lawful ways and means to apprehend a person for a felony actually committed, or in lawfully suppressing a riot, or in lawfully preserving the peace.

It will be noted from the above that without court process a peace officer cannot arrest in the usual case, unless the crime was committed in his presence, except in the case of felonies under the conditions specified. In the case of justifiable homicide, the police officer is excused if the crime designated is a felony, lawfully suppressing a riot or lawfully preserving the peace. This section does not mention misdemeanors generally or other offenses. Hence, if as a result of the force used the death of the prisoner ensues, the police officer is subject to a charge of homicide. Peace officers, therefore, in order to properly uphold the law and protect themselves from criminal and civil proceedings, *must* acquaint themselves thoroughly with these provisions of law.

### *Crimes and Offenses Mala in se Mala Prohibita*

All statutes dealing with crimes and offenses may be said to fall into two general categories, viz. *mala in se* and *mala prohibita*. The latter class comprises a vast number of acts which would not be wrong were they not prohibited by statute. A crime *malum prohibitum* is not naturally an evil, but becomes so in consequence of its being forbidden by law. This class is made up largely of misdemeanors and offenses since in the majority of cases felonies are crimes which are naturally and inherently evil

and consequently fall into the *mala in se* group.

In the absence of any language in a *malum prohibitum* statute requiring proof of knowledge or intent, an offender may be convicted merely on a showing that he did the prohibited act. His intent, motive or even ignorance of the law constitutes no defense. This class of statutes does not make the liability of the accused depend on any factor other than the doing of the specified act. Other considerations such as good faith, lack of intent, ignorance of the law, etc., may be urged in mitigation of punishment, but are immaterial on the question of guilt or innocence. Instances of such statutes are conducting businesses without the required licenses, driving without a permit, gambling violations, violations of the liquor laws, etc.

*Mala in se* statutes on the other hand generally require proof of criminal intent. Failing this, a *prima facie* case cannot be established. An offense *malum in se* is properly defined as one which is naturally evil as adjudged by the sense of a civilized community. Since this class of crime generally involves infamy and moral turpitude, legislatures in enacting such criminal statutes provide that persons shall not be convicted of such violations unless it is clearly proven that they intended to commit such acts. A criminal intent may be inferred by the jury, or in the absence of the latter, by the court, from the facts in the case. *The criminal intent is generally inferable whenever the means used are such as would ordinarily result in the commission of the forbidden act.* The quantum of proof required in this group of crimes is, therefore, greater than that required in *mala prohibita* statutes.

#### *"Presence" As a Means of Establishing Knowledge*

The presence of the accused at the scene of the crime is usually sufficient to establish knowledge where the facts in the case show that the defendant was in a position to observe the violation or should have known about it. Knowledge in these cases is imputed from the factual situation. Difficulty arises, however, in proving knowledge, where the accused is not and ordinarily would not be present at the premises in question. These types of cases arise where the statute makes the owner, agent or lessee of the building liable for permitting the premises to be maintained in violation of law. Frequently, these designated persons know nothing of such conditions, transacting all their business by mail and not even visiting the premises except in isolated instances. The burden of proving knowledge in these cases is, without question, a troublesome one.

In New York City the Police Department has overcome the difficulty of proving knowledge in these cases to a considerable

extent. After an arrest takes place in the premises, whether it be the tenant, a patron or both, a police officer serves a notice on the landlord or his agent informing him of such arrest and calling on them to abate such unlawful conditions by dispossessing the tenant or by other lawful means. This notice is referred to as a *Liability Notice* and is usually served in instances where arrests have been made for violations of law with respect to public morals, gambling, intoxicating liquors and public nuisances. Printed on such notice is the section of law which places responsibility on the owner or agent to eliminate and suppress these violations of law. Police officers make personal service of these notices, and then file a copy with report in their Commands for future use.

Where several arrests resulting in convictions have been obtained in the tenant's premises and the owner or agent fails to take action to abate the condition, application is made to the proper criminal court for a court summons charging the owner or agent with knowingly permitting the premises to be used for unlawful purposes. The bases of such knowledge are the *Liability Notices* which were served by the Police Department after each occurrence.

In the interest of crime prevention, it is much more desirable to attack crime at its source by absolute suppression rather than to punish offenders after the law has been violated. In this respect police officers have found that ancient adage "an ounce of prevention is worth a pound of cure," abounding in wisdom and good common sense. The policy of the New York City Police Department, therefore, is to seek the cooperation of the landlord in securing the removal of such tenants rather than to prosecute him criminally. In this way, the breeding places of crime are eliminated and opportunity and temptation greatly curtailed. In keeping with this policy, if the landlord indicates his desire to cooperate by instituting action to oust the tenant in a civil court, an adjournment is requested for the case in the criminal court to give the owner or agent time and opportunity to complete the dispossess proceedings. If the landlord or agent in good faith proceeds to oust the tenant, whether successful or not, the criminal prosecution is dropped on motion to the court by the defense. Should the landlord prove uncooperative, the criminal action is then diligently prosecuted.

#### *Intent and Motive Distinguished*

Criminal knowledge or intent is often confused with motive by police officers. Motive may be defined as that which leads or tempts the mind to commit the criminal act. This is distinguishable from intent, the purpose of which is to use a particular means

to effect a certain result. Motive, although always relevant, is never essential in proving the guilt of the defendant. Motive is important only when the evidence in the case as submitted by the prosecution, is weak. However, it must be understood that an accused should not be acquitted simply because his motive for perpetrating the act cannot be ascertained.

*Principals, Accomplices and Accessories*

All persons concerned in the commission of a crime are either principals or accessories. This is true irrespective of what other name may be designated. A principal or an accomplice is a person who is concerned in the commission of a crime whether he directly commits the act or aids and abets its commission, and whether present or absent, directly or indirectly counsels, commands, induces or procures another to commit a crime. In some jurisdictions, to constitute a person a principal in a crime, he must be present aiding by acts, words or gestures and consenting to the commission of the crime. In New York, by statutory enactment, this is not essential as the statute, in express terms, makes it immaterial whether the accused is present or absent.

It is not sufficient to charge one with being a principal in a crime that the crime was in pursuance of his advice, counsel or encouragement unless it was induced thereby. Mere approval of an unlawful act about to be perpetrated, does not constitute the person who approved, a principal. A person who advises, counsels or induces another to commit a crime cannot escape criminal liability by simply withdrawing and abandoning the enterprise. He is placed in *pari delicto* with the other participants until he renounces the common purpose and clearly advises the others that he has done so and does not intend to participate further.

An accessory is a person who, having knowledge or reasonable cause to believe that another has committed a felony, harbors, conceals or aids the offender with intent that he may avoid or escape arrest, trial, conviction or punishment. It is to be noted from the definition that an accused can only be an accessory when a felony has been committed. In the absence of statutory enactment, the common law (by which all concerned in the commission of a misdemeanor may be convicted principals) prevails. One charged with a misdemeanor may be convicted either on proof of his being a principal or on proof of his being an accessory. In New York, by statute, all concerned in the commission of a misdemeanor are principals.

In some jurisdictions by legislation, an accessory to a felony may be tried in the county where he became an accessory or where the felony was committed and may be convicted regardless of whether the principal has or has not been convicted, or is not

amenable to justice, or has been convicted and pardoned, or otherwise discharged after conviction. It is not essential under this statute that a criminal proceeding be pending against the principal.

#### *Persons Liable for Criminal Responsibility*

Persons who have reached the age of criminal responsibility, who are mentally capable, and who act of their own free will, are liable for the commission of their criminal acts. This proposition is predicated on the free volition of the agent and does not include instances where the freedom of the will is impaired by surrounding consideration such as duress, self-defense, insanity, etc. The age of criminal responsibility varies throughout the country but the age of seven seems to have been adopted as a general rule. Consequently a child under the age of seven is conclusively presumed to be incapable of committing a crime. A child between the ages of seven and twelve is presumed to be incapable, but this presumption is rebuttable and may be overcome by proving that he has sufficient capacity to understand the nature of the act, and to know that it is wrong. A child between twelve and sixteen is presumed to be capable, but instead of being charged with a crime, he is charged with juvenile delinquency unless the act committed was one which may be punished by death or life imprisonment, in which case he is charged with the crime itself. This is the law in the State of New York, other jurisdictions varying in relation to the ages prescribed.

By Section 2186 of the New York State Penal Law, an adult concerned in the commission of a crime in which a child between the ages of seven and sixteen is also involved as principal or accessory in the same manner as if the child was over sixteen years of age at the time of the commission of the crime. Such a statute obviates any defense which might be offered to the effect that if one principal or accessory in a crime cannot be charged with the crime, then the other principal or accessory, being in *pari delicto*, likewise should not be held criminally responsible.

#### *What Constitutes an Attempt*

An attempt to commit a crime is defined as an act done with intent to commit a crime, and tending but failing to effect its commission. The question as to what constitutes an attempt is often intricate and difficult of determination. An attempt to commit a crime is any overt act done with the criminal intent in mind and which, if it were not for the intervention of some other cause preventing the carrying out of the intent, would have consummated in the commission of a crime.

An attempt consists of two essential elements, a criminal intent and an overt act. It follows, then, that mere preparation or intention to commit a specified crime does not amount to an

attempt. It would seem to follow from the definition of an attempt that a failure to consummate the crime is a material element and consequently, when the crime is completed, there could be no prosecution for the attempt. According to Section 260 of the Penal Law, in New York, a person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court, in its discretion, discharges the jury and directs the defendant to be tried for the crime itself.

In relation to an overt act, an attempt is an endeavor to do an act carried beyond mere preparation but falling short of execution. It is necessary to prove that the defendant, with the intent of committing the particular crime, did some overt act adapted to, approximating, and which in the ordinary and likely course of things, will result in the commission of such crime. The overt act necessary to constitute the attempt need not be the final one towards the completion of the offense. It must, however, approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement toward the commission of the offense after the preparations are made. The doctrine enunciated is that the acts would in all reasonable probability have resulted in the crime itself but for some interference in preventing it.

An excellent illustration of what does *not* constitute an attempt may be found in the case of *People v. Rizzo*.<sup>2</sup> In that case the defendant, with others, planned and intended to commit a robbery. Defendant started out with his companions who were armed, from a designated place looking for the intended victim who was carrying a pay-roll. Apparently knowing the route which the victim would take, they first went to the bank from which he was supposed to obtain the money and then went to various other buildings along the route. Their activities aroused the suspicions of two police officers who watched and followed their movements. When about to be apprehended, the defendant jumped from the car and ran into a building from which he was brought by the officers. The other occupants of the car were also arrested. The culprits had not found or seen the man they had intended to rob up to the time of their arrest. The court here held there was no attempt to commit the crime of robbery within the meaning of the law *because there was no act done which could be said to be in furtherance of the specified crime*. In view of the fact that the defendants did not overtake the intended victim and were never in his presence, there could have been no act committed by the defendants which could have been

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<sup>2</sup>246 N. Y. 334.

in furtherance of an assault and larceny, the components of robbery. The court ruled in substance that all the acts proven against the defendants only amounted to preparation.

It is understandable why cases such as this confuse and puzzle police officers. It is as much their duty to prevent crime as it is to detect crime and apprehend criminals after the crime has been committed. Any reasonable person would readily admit that the defendant in the Rizzo case, who was the only one to take an appeal from conviction, would have perpetrated a crime of violence except for the timely interference of the police officers. The only factor that saved him from committing a crime was the fact that he did not have sufficient time to overtake the intended victim before he was arrested. Police alertness saved the day for him. From a practical viewpoint it would seem to have been better for the police officers in question to have permitted him to continue on his nefarious mission, commit the robbery, and then to have made the arrest. In this way the defendant could not have escaped just retribution and would have been confined in prison to the great relief of society. But the police officers' creed could not permit this, for in committing the crime, there may have been bloodshed. Their sworn duty to prevent crime and protect life and property could not be sacrificed for a conviction.

The law underlying the decisions pertaining to an attempt to commit a crime is a salutary one. Very few people, sometimes throughout the course of their lives, are not tempted in some way to commit an act which is a violation of law. Not infrequently, the individual is formulating plans and making preparations to commit the crime before he realizes the meaning of his acts. Slight reflection on his contemplated course of action plus the possibility of ensuing criminal prosecution, causes such individual to immediately abandon his preparations and banish the scheme from his mind. A common illustration where even the most honest fall into temptation because of the opportunity afforded, is an instance where lost property is found in some public place and the law requires that it be deposited with some public custodian. Finders have often been tempted to appropriate such articles to their own use and have frequently secreted them in some temporary hiding place with that intent in mind. But the portent of their actions then manifests itself and causes them to make immediate restitution. In like manner, how many law abiding citizens have not at some time or other . . . and probably with good cause . . . felt the inclination to commit an assault on some obstreperous individual, and have gone so far as to clench their fists and stride toward the individual before checking their impulses. If the law governing attempts to commit crime was otherwise,

and only required the criminal intent plus preparation, all of these individuals would be guilty of a crime. The law as presently constituted does not indulge in such strict and harsh interpretations.

One further point should be stressed in discussing the law on attempts to commit crime. A defendant cannot protect himself from criminal responsibility by showing that by reason of some fact unknown to him at the time of his criminal attempt it could not be carried out. A common case demonstrating this rule is the pickpocket who puts his hand in another's pocket for the purpose of perpetrating a larceny but finds nothing there. The courts have found such defendants guilty on the theory that the accused has done his utmost to effect the commission of the crime but fails to accomplish it for some cause beyond his control or knowledge. The criminal intent to commit the particular crime plus some act performed tending to accomplish it, is all that is required in such cases.

#### *Entrapment*

The defense of entrapment occasionally arises in criminal cases because of some act that the police officer did in order to secure necessary evidence. Criminals are often protected in their activities by a large class of citizens because the latter do not favor certain laws which have been enacted for their protection. A typical example of such a case would be the laws pertaining to gambling. Consequently, police officers do not receive the same public cooperation usually forthcoming in other classes of crimes. On occasion, therefore, due to the fact that these criminals work in secrecy, they must resort to various artifices in order to enforce the law and arrest the violators. It often becomes necessary at such times for the officers to pose as criminals themselves in order to gain the confidence of such individuals and obtain the evidence necessary to convict. It is under these circumstances that the question of entrapment usually arises.

Police officers are not permitted to procure another to commit a crime in order to prosecute him for the crime committed. However, there is a very clear distinction between procuring or inducing another to commit a crime and setting a trap for him after he has executed a criminal act of his own design. If the criminal intent originated in the mind of the accused, the fact that police officers furnished the opportunity to commit the crime in order to prosecute him for it, is no defense. Artifice and stratagem may be employed to catch those engaged in criminal enterprise. If the criminal intent originated in the mind of a police officer and the accused is lured into committing the crime, no conviction can be had. If the defendant, according to a design of his own choosing commits the act with the cooperation of the

police officer, who does not participate in any act constituting the crime itself, no entrapment lies. A police officer who attempts to detect the commission of crime in others must himself stop short of lending assistance, or participation in the commission of the crime. It may, therefore, be stated as a general rule that if the criminal intent was present in the mind of the accused before the advent of the police officer, and then the criminal offense is completed, the fact that opportunity is furnished or that the accused is aided in the commission of the crime in order to secure the essential evidence to convict him, no defense or entrapment will prevail.

#### *When Prosecutions May be Initiated*

In the absence of some statutory limitation, a prosecution may be instituted at any time after the commission of the crime. The majority of states have enacted statutes limiting the time for the commencement of the criminal proceedings. These laws vary in their terms. In New York there is no limitation for murder and kidnaping. In felony cases the prosecution must be commenced within five years after the commission of the felony. In misdemeanor cases, a two year period of limitation is provided. In the same jurisdiction an action is deemed commenced when an information is laid before a magistrate charging the commission of a crime and a warrant of arrest is issued by him, or when an indictment is duly presented by the Grand Jury in open court, and there received and filed. Under such circumstances, an arrest may be made and the defendant prosecuted at any time. If at the time the crime is committed, the defendant is outside the boundaries of the state, the statute of limitations is tolled until he returns into the state. Likewise, if after the criminal act has been perpetrated, the accused departs from the state or remains within the state under a false name, the time for commencing the action is also tolled until his return or until he again lives publicly under his true name. In criminal cases statutes of limitation create a bar to prosecution if timely objection is made on the trial.

#### *Double Jeopardy*

The Constitution of the United States and the Constitutions of a majority of the states contain a provision that no person shall be subject to be twice put in jeopardy for the same offense. This provision, in many instances, has been carried over into statute law by the various legislatures throughout the country. The prohibition not only forbids a second punishment for the same crime, but it is more extensive in prohibiting a second trial for the same offense, without regard to whether the accused has suffered punishment, or has been acquitted or convicted.

The provision of the United States Constitution relating to

double jeopardy applies only to proceedings in the Federal courts over crimes committed within their respective jurisdictions and does not in any way bind the jurisdiction of the state courts over state crimes. Hence a single act which violates both federal and state criminal laws results in an offense against two separate sovereignties and, in the absence of statute to the contrary, may be prosecuted in both jurisdictions without subjecting the accused to double jeopardy. In New York, by Section 33 of the Penal Law, if it appears on the trial of an indictment that the defendant has been tried in a court of another jurisdiction and has been acquitted or convicted on the merits, such former acquittal or conviction is a sufficient defense to the charge.

The plea of double jeopardy is a defense which must be pleaded and proven. It may be waived expressly by stipulation, or impliedly, by not pleading it in due time. It can only be raised where the court had jurisdiction to hear and determine the issues at the former trial. Consequently, the discharge of a person accused of a criminal offense by a magistrate at the close of a preliminary examination is not such an adjudication in his favor as to bar a subsequent prosecution for the offense.

The defense of jeopardy can only be availed of where it is shown that the second prosecution is for the same act and crime, both in law and in fact for which the first prosecution was instituted. The crimes need not be identical; substantial identity is sufficient. As a general rule it may be stated that it must appear the defendant upon the first charge could have been convicted upon the offense in the second. The test of identity of offenses therefore, is whether the same evidence is required to sustain them, if not, then there are two separate and distinct offenses where two are defined by statutes.

Jeopardy attaches when the accused is put on trial before a court having jurisdiction of the subject matter and the person of the defendant, on an indictment or information sufficient in form to sustain a conviction and the jury has been impaneled and sworn. In the case of a non-jury criminal trial, the swearing of a witness and the giving of any actual testimony by him are considered as putting the accused in jeopardy. Under these circumstances an accused cannot again be tried for the same offense even though the trial is not carried through to completion, unless some statute permits such a procedure. Sections 428 and 430 of the New York Code of Criminal Procedure permits the court to discharge the jury before they have agreed on a verdict and to again try the case before another term of the court, where some casualty or injury occurs to the defendant, the jury or some one of them, or the court and this renders it inexpedient to keep them longer to-

gether; or the jury after a reasonable time is unable to reach a verdict; or the public prosecutor and counsel for the defendant consent to such discharge.

#### *Withdrawal of Complaint from Pending Case*

It frequently happens that police officers are confronted with situations where the complaining witness refuses to press the complaint against the accused and desires to entirely withdraw from the pending case. The reasons most often ascribed for this course of behavior is the fact that the accused has made or is willing to make complete reparation for the wrong committed, either in the way of a financial settlement in the case of personal injury or property damage, or some other benefit commensurate with the wrong perpetrated, such as a promise of marriage in rape and seduction cases. Under these circumstances, a police officer through ignorance of the law, might very well become a principal to compounding a crime by counseling or permitting these arrangements to take effect.

#### *Compounding a Crime*

The offense of compounding a crime consists in a person taking money or other property, gratuity or reward, or an engagement or promise therefor, upon an agreement or understanding, express or implied, to compound or conceal a crime, or a violation of statute, or to abstain from, discontinue, or delay, a prosecution therefor, or to withhold any evidence thereof, except in a case where a compromise is allowed by law. In some jurisdictions, if the agreement or understanding relates to a felony, then compounding such crime is a felony; otherwise, the crime is a misdemeanor. In New York, by statute, a crime may be compromised when a defendant is brought before a magistrate on a charge of misdemeanor, for which the person injured by the act constituting the crime has a remedy by a civil action except when the act was committed by or upon an officer or justice, while in the execution of the duties of his office, or riotously, or with an intent to commit a felony. The magistrate is empowered, in his discretion, on payment of costs and expenses incurred, to order all proceedings stayed and the defendant discharged. In such event the order issued is a bar to another prosecution for the same offense.

No course of instruction to police officers would be complete unless the specific criminal statutes which they are charged with enforcing are analyzed and completely discussed. Each crime should be broken up into its component parts and each element demonstrated and explained. Judicial interpretation of these criminal statutes should receive much attention. The quantum of proof and the type of evidence necessary to convict must be covered in the syllabus. Police officers should not be left to their own resources in interpreting criminal statutes. The more time and emphasis placed on this phase of the course, the more efficient the personnel undergoing the training.