

CRIMINAL LAW: IMPUTING INNOCENT PARTY'S LETHAL ACT UNDER THE FELONY MURDER RULE

A RECURRING PROBLEM in criminal law is the breadth of coverage to be given the felony murder rule. At common law a death occurring in the course of a felony was chargeable to the felon as murder.¹ Constricted variations of that rule have now been adopted by statute or through judicial construction in most jurisdictions.

The New York Court of Appeals in *People v. Wood*,² a recent case involving unusual facts, has limited the application of the rule. After taking part in a tavern quarrel, defendant Wood seriously wounded another participant with unprovoked pistol fire on the street outside. When Wood began to flee, the tavern owner attempted to prevent his escape and mortally wounded the driver of the get-away car and an innocent bystander. Wood was charged with first degree murder on the basis of New York's "felony murder" statute which provides, in part, that "The killing of a human being . . . is murder in the first degree, when committed by a person engaged in the commission of . . . a felony . . ."³ Affirming the lower court's dismissal of the murder indictment, the Court of Appeals held that the phrase "by a person engaged in the commission of a felony" excluded cases where the homicide was not immediately caused by the felon.

The New York statute is best analyzed when it is projected against the common law and compared with corresponding legislative and judicial treatments of the felony murder rule. The nine felonies at common law⁴ were regarded as extremely heinous crimes, to be deterred with strong sanctions. The felony murder rule was partially designed, therefore, to discourage commission of the felonies themselves. The fundamental reasons for creating this category of murder, however, were that most of the felonies were more dangerous to human life than were misdemeanors and that a felon who had created a foreseeable risk

¹ 4 BLACKSTONE COMMENTARIES § 201 (1770).

² 8 N.Y.2d 48, 167 N.E.2d 736, 201 N.Y.S.2d 328 (1960). This is the first New York decision on point, although dicta in previous cases indicated the court's position. See *People v. Udwin*, 254 N.Y. 255, 172 N.E. 489 (1930); *People v. Giro*, 197 N.Y. 152, 90 N.E. 432 (1910).

³ N.Y. PENAL LAW § 1044. [Emphasis added.]

⁴ These felonies were felonious homicide, mayhem, arson, rape, robbery, burglary, larceny, prison breach, and rescue of a felon. PERKINS, CRIMINAL LAW 10 (1957).

actually leading to death should be severely punished.⁵ Since, in legal theory, establishment of malice aforethought is requisite to a murder conviction, courts have viewed the defendant's intent in committing the felony as establishing fictionally his intent to cause death.⁶

The most sweeping modification of the common law has been the restriction of the rule's application in order to eliminate felonies which are not normally dangerous. In some jurisdictions this has been implemented by means of statutes which operate only on specific felonious crimes;⁷ in others, the courts have imposed on the common law a "dangerous felony" limitation.⁸ These limitations would seem to be founded primarily in reaction to the increasing number and types of crimes made felonies by statute.⁹ The increase in felonious crimes has necessitated exclusion of these modern felonies if the felony murder rule is to find its support in the foreseeability of harm notion.

The New York statute is unusual among those codifying some version of the felony murder rule, since on its face it would be applicable to any felony.¹⁰ Moreover, the inclusion of the phrase "by a person engaged in" is also a departure from most statutes.¹¹ In interpreting the

⁵ Larceny was the one common law felony which might be said to involve a lesser degree of risk to human life. This is acknowledged in many modern statutes which do not include larceny under the rule. See, e.g., CONN. GEN. STAT. REV. § 53-9 (1958); FLA. STAT. ANN. § 782.04 (Supp. 1960); LA. REV. STAT. § 14:30 (1950); MD. ANN. CODE art. 27, §§ 408-10 (1957); MICH. COMP. LAWS § 750.316 (1948); MO. ANN. STAT. § 559.010 (1953). *Contra* ARK. STAT. § 41-2205 (1947).

⁶ See, e.g., *People v. Luscomb*, 292 N.Y. 390, 55 N.E.2d 469 (1944); *Commonwealth v. Almeida*, 362 Pa. 596, 68 A.2d 595 (1949); *State v. King*, 24 Utah 482, 68 Pac. 418 (1902).

Aside from actual intent, another category of malice aforethought was reckless disregard for human life, as evidenced by an act probably causing death or grievous harm. In utilizing the transfer theory, the courts often have associated the felony murder rule with the "intent" category rather than with "probable death," which would seem more akin. See generally PERKINS, CRIMINAL LAW 30 (1957).

⁷ See, e.g., CONN. GEN. STAT. REV. § 53-9 (1958); FLA. STAT. ANN. § 782.04 (Supp. 1960); MD. ANN. CODE art. 27, §§ 408-10 (1957); N.C. GEN. STAT. § 14-17 (1953).

⁸ See, e.g., *People v. Stuart*, 47 Cal.2d 167, 302 P.2d 5 (1956); *People v. Pavlic*, 227 Mich. 562, 199 N.W. 373 (1924); *State v. Diamond*, 16 N.J. Super. 26, 83 A.2d 799 (App. Div. 1951); *State v. Streeton*, 231 N.C. 301, 56 S.E.2d 649 (1949).

⁹ Other factors are (1) a growing reluctance to invoke the death penalty generally and (2) doubt as to the effectiveness of felony murder as a deterrent to potential felons.

¹⁰ Typical is the Florida provision, "The unlawful killing of a human being, . . . , when committed in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, shall be murder in the first degree, and shall be punishable by death." FLA. STAT. ANN. § 782.04 (Supp. 1960).

¹¹ See statutes cited note 7 *supra* and the statute quoted note 10 *supra*.

statute, the New York courts have formulated a "res gestae" rule, which is enlightening with regard to cases in the *Wood* category because indicative of their general approach to the statute. The effect of "res gestae" is to exclude from the statute's operation cases where the fatal injury was inflicted immediately before or after the felony.¹² Quite possibly the "res gestae" restriction is motivated by a desire to ameliorate in some way an otherwise all-encompassing "any felony" statute. However, if the justification for the felony murder rule is that of foreseeability, it is questionable whether the New York law can be made consistent with this basis of the rule by interposing limitations which have no relationship to foreseeability.

The crucial issue facing courts in these unusual¹³ "innocent triggerman" cases is whether the action of the felon was the legally responsible cause of the death, since the criminal law will punish a defendant only for those social harms which in legal contemplation were the result of his actions. Many courts which refuse to hold the "innocent triggerman" responsible rely upon the proposition that one person's act can be imputed to another only if it was done in furtherance of their common purpose.¹⁴ Upon reflection, this approach to proximate cause based on irrelevant principles of agency seems to be rather illogical. While the "common purpose" test may be appropriate for holding the felon for the acts of his co-felon, to consider it exclusive is to take an unrealistic attitude toward cause and responsibility. Certainly there is reason to hold a man responsible for the consequences of actions which he was instrumental in effecting.

Pennsylvania cases upholding conviction¹⁵ utilize proximate cause tests common in tort law, where the concept is well developed. In this view an intervening act which is a normal response to the situation created by the felon's criminal conduct is not a superseding cause of the harm which the felon's conduct was a substantial factor in bringing about.¹⁶ The use of the proximate cause test in these unique *Wood*

¹² *People v. Lunse*, 278 N.Y. 303, 16 N.E.2d 345 (1938); *People v. Ryan*, 263 N.Y. 298, 189 N.E. 225 (1934); *People v. Smith*, 232 N.Y. 239, 133 N.E. 574 (1921).

¹³ Fewer than thirty-five cases were found involving a prosecution under the felony murder rule where the person performing the lethal act was not one of the felons.

¹⁴ See, e.g., *People v. Garippo*, 292 Ill. 293, 127 N.E. 75 (1920); *Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085 (1905); *Commonwealth v. Campbell*, 7 Allen 541 (Mass. 1878); *State v. Oxendine*, 187 N.C. 658, 122 S.E. 568 (1924).

¹⁵ *Commonwealth v. Almeida*, 362 Pa. 596, 68 A.2d 595 (1949); *Commonwealth v. Moyer*, 357 Pa. 181, 53 A.2d 736 (1947).

¹⁶ The use of a proximate cause approach is not a phenomenon of this narrow line of cases, for it is used extensively in other areas of criminal law. For a discussion of

situations under the felony murder rule draws an ambit of liability coincidental with the limits of the rule's basis, since both causation and responsibility are posited on the foreseeability of grievous harm. It is a commendable approach, therefore, which, if utilized, would bring a more reasoned result.

In New York the causation problem is overshadowed by the statutory provision which limits the operation of the felony murder rule to a killing committed by the felon. The *Wood* case illustrates the court's inclination to take a narrow view of that limitation. Since the court does not follow the statute literally in cases where the felon is held for the acts of his co-felon,¹⁷ it is arguable that the phrase might be read from a proximate cause standpoint to hold the felon. Concededly, however, the court is not open to serious attack in view of the general principle of strictly interpreting criminal statutes.¹⁸

In one important respect the New York statute is more in harmony than most¹⁹ to the foreseeability basis of the rule. Since the statute is not confined to enumerated felonies, if the courts were to read in a "dangerous act" limitation, the basis and the rule would mesh perfectly in cases where the felon himself has killed.¹⁹ This would produce a more flexible arrangement in which the jury would determine whether there was a foreseeability of death in the circumstances of the particular crime. However, a philosophical inconsistency appears when the narrow "by a person" clause is compared with the broad "any felony" clause. The "by a person" language, as interpreted in the *Wood* case, precludes the jury from considering foreseeability by employing a strict causal test which has no relationship to foreseeability. Its arbitrary nature serves only to widen the gap between principle and practice.

It may be true that the felony murder rule could be applied too harshly. Yet, adherence to the foreseeability standard would adequately handle difficult cases both where the lethal act was coincidental with the felony and cases where it was extremely remote from the felony. Ad-

proximate cause in criminal law, see generally PERKINS, CRIMINAL LAW 615-50 (1957); CLEMENTS, COMMENTS ON CRIMINAL LAW 310 (1952).

¹⁷ *People v. Ryan*, 263 N.Y. 298, 189 N.E. 225 (1934); *People v. Collins*, 234 N.Y. 355, 137 N.E. 753 (1922); *Ruloff v. People*, 45 N.Y. 213 (1871).

¹⁸ While this is an acknowledged rule of interpretation of criminal statutes, HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 39 (2d ed. 1960), New York does allow more latitude by virtue of a provision which expressly substitutes a "fair reading" standard of judicial interpretation. N.Y. PENAL LAW § 21.

¹⁹ Conceivably felony murder could be replaced by a test which would not be restricted to felonies and would operate on misdemeanors committed in a dangerous manner as well.

mittedly, cases where the victim was the co-felon seem to call for temperance, although a logical extension of the rule would cover even this situation.²⁰ In general, however, there seems to be no sufficient reason for restricting the felony murder rule on the basis of the actor's identity as was done by the New York court in *People v. Wood*.

²⁰ In *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958), the Pennsylvania Supreme Court reversed a murder conviction of the felon who had killed his co-felon. The court distinguished *Commonwealth v. Almeida*, 362 Pa. 596, 68 A.2d 595 (1949), on the ground that *Redline* involved the "justifiable" killing of a felon, which could not support a murder charge, while the "excusable" homicide in *Almeida* involved the killing of an innocent bystander by an innocent intervener.