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Recent Cases

CRIMINAL LAW—HOMICIDE—MURDER
UNDER FELONY-MURDER RULE

Commonwealth v. Redline

Defendant and his co-felon perpetrated an armed robbery of the Midway Restaurant in Reading, Pennsylvania. During the attempted escape there ensued a gun battle in which the co-felon was killed by the police. Defendant was tried and convicted of first degree murder under the Pennsylvania felony-murder statute. On appeal, held, reversed. The court in holding that where the co-felon was killed by police, defendant could not be found guilty of first degree murder, specifically overruled Commonwealth v. Thomas, where on practically identical facts an opposite result was reached.

The felony-murder doctrine developed out of a need to protect society. Malice aforethought was the sine qua non of murder in Blackstone’s day and remains so today. Thus, without the doctrine of felony-murder, if one were committing a robbery and an accidental or unintentional killing ensued, it could not amount to murder. It was felt that the robber, being a felon committing a crime likely to result in death or great bodily harm, evidenced a malignant and depraved heart and was just as deserving of punishment as one who intentionally and designedly took the life of another. Accordingly, there developed the rule, the simplest statement of which was made by Blackstone, “if one intends to do another felony, and designedly kills a man, this is also murder.” The basis of the rule was that the malice present in the intended felony would transferred to the resulting death and would be sufficient to constitute murder. There are no indications or early cases indicating that the felony-murder doctrine was intended not only to supply or transfer malice, but also to be a rule of causation.

2. “All murder... committed in the perpetration of... robbery... shall be murder in the first degree.” PA. STAT. ANN. tit. 18, § 4701 (1945). Compare this with § 559.010, RSMo 1949, which provides, “Every homicide which shall be committed in the perpetration or attempt to perpetrate any... robbery... shall be deemed murder in the first degree.” (Emphasis added.)
3. Justice Bell dissented, adhering to the Moyer doctrine which is discussed later in this Case Note.
7. 4 BLACKSTONE, *COMMENTS* *200.
The Pennsylvania statute does not define murder, so the common law requirement that there must be an unlawful killing remains. The rule which was uniformly followed in Pennsylvania until the decision in Commonwealth v. Moyer, followed in Commonwealth v. Almeida and Commonwealth v. Thomas, was that in order to convict under the felony-murder doctrine, the killing must have been done by the defendant or an accomplice or confederate or by one acting in furtherance of the felonious undertaking. This rule was the same in other jurisdictions and continues to be so. However, the basic principle developed in the three Pennsylvania cases named above was that the felon should be held responsible for any death which results from the chain of events he has set in motion. The court in Commonwealth v. Moyer declared that this principle was recognized centuries ago by Blackstone when he stated, "if one shoots at A. and misses him, but kills B. [note that the actor himself is doing the killing], this is murder, because of the

9. The purpose of the statute was not to make something murder that was not already murder—this was taken care of by the common law felony—murder doctrine—but was to divide murder into degrees, which the common law did not do. 10. Commonwealth v. Buzard, 365 Pa. 511, 76 A.2d 394 (1930). See also 1 WARREN, HOMICIDE § 63 (1938); 1 WHARTON, CRIMINAL LAW § 419 (12th ed. 1932). 11. 357 Pa. 181, 53 A.2d 736 (1947). In this case an innocent victim was killed by the robbery victim who was shooting at the robbers. The majority opinion in this case admits that this question, i.e., whether or not these defendants can legally be convicted of murder if the bullet which killed the innocent third party came from the revolver fired by the robbery victim in an attempt to frustrate the attempted robbery, apparently had never before arisen in this jurisdiction. Id. at 189, 53 A.2d at 741. The majority in the Redline case declares that this is dictum, but the issue was squarely presented on an assignment of error and the court answered the question in the affirmative. 12. 362 Pa. 595, 68 A.2d 595 (1949). Here the evidence tended to show that the innocent victim was killed by one of defendant's confederates, but the trial judge, following the Moyer doctrine, instructed the jury that it was murder no matter who fired the shots. But see Commonwealth v. Bolish, 391 Pa. 550, 138 A.2d 447 (1958), which, though relied heavily on by the Almeida case, is clearly not in this line of cases and is no authority for this extension of the felony-murder doctrine, for as the court in the Bolish case points out, defendant was present and actually participated in the act which caused deceased's death. 13. The facts in the Thomas case are substantially the same as those of the Redline case, except that the co-felon was killed by the robbery victim rather than the police. Following the supreme court's remand of the record in the Thomas case, the district attorney moved the trial court for leave to nol-pros the murder indictment. The court approved the motion, and a nolle prosequi was duly entered. Defendant pleaded guilty to an indictment for armed robbery for which he was sentenced. 14. E.g., Commonwealth v. Wooding, 355 Pa. 555, 50 A.2d 328 (1947); Commonwealth v. Guida, 341 Pa. 305, 19 A.2d 88 (1941); Commonwealth v. Major, 198 Pa. 290, 47 Atl. 741 (1901). 15. E.g., Butler v. People, 125 Ill. 641, 18 N.E. 338 (1888); Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905); Commonwealth v. Campbell, 89 Mass. (7 Allen) 541 (1863); State v. Majors, 237 S.W. 486 (Mo. 1922); State v. Oxendine, 187 N.C. 658, 122 S.E. 558 (1924); People v. Udwin, 254 N.Y. 255, 172 N.E. 489 (1930). State v. Majors, supra, expressly decided that in Missouri in order for a defendant to be guilty of first degree murder where a killing took place during a felony, it must be proven that the shot was fired by defendant or someone acting in concert with him. See also 25 AM. JUR. CRIMINAL LAW § 37 (1940); 13 R.C.L. 753-54 (1916).
previous felonious intent, which the law transfers from one to another.\textsuperscript{16} (Emphasis added.) It is difficult to see how this example supports this principle; rather it shows the weakness of the authorities cited by this line of cases. It is readily apparent from a thorough examination of these authorities that the court seizes upon dictum discussion of the tort principle of proximate cause and completely divorces the language of the cases from their facts.\textsuperscript{17} In the great majority of the cases cited the act was committed by someone other than defendant it is true, but it was one who was acting in design with him in the furtherance of a common purpose.\textsuperscript{18}

The court in the Redline case, on the basis that there must be both an unlawful killing and a \textit{mens rea} and that the felony-murder doctrine supplies only the latter, reversed the conviction of defendant Redline and specifically overruled \textit{Commonwealth v. Thomas}. The court declared that the decision in the \textit{Almeida} case was an unwarranted judicial extension of the felony-murder doctrine and that its application should not be extended beyond facts such as those to which it applied. Hesitant to overrule the \textit{Almeida} case, the court distinguished it from the Redline case in that in the \textit{Almeida} case the killing was excusable, while in the Redline case it was justifiable.\textsuperscript{19} "How can anyone," the court asked, "no matter how much of an outlaw he may be, have a criminal charge lodged against him for the consequences of the lawful conduct of another person?"\textsuperscript{20} That is, how can there by any "unlawful killing" such as the common law requires, when the death is a justifiable homicide? The mere statement of the question carries with it its own answer. The only way such a rule could be justified is on the tort principles of causation. But the

\textsuperscript{16} 357 Pa. at 190, 53 A.2d at 741.

\textsuperscript{17} See \textit{Commonwealth v. Almeida}, \textit{supra} note 12, at 606, 68 A.2d at 601. The court in the \textit{Almeida} case cites \textit{Commonwealth v. Hare}, 4 Pa. L.J. 257, 2 Clark 467 (Ct. Quarter Sess. 1844), but the court in that case stated that the reason it was using proximate cause as a basis of guilt was because if it should be called upon to detect the particular slayer, where two opposing groups were engaged in a riot and an innocent bystander was killed, "it would perpetually defeat justice and give immunity to guilt." \textit{Id.} at 259, 2 Clark at 470. The language should be confined to the particular exigencies of the case.

\textsuperscript{18} \textit{E.g.}, \textit{Commonwealth v. Lowry}, 374 Pa. 594, 98 A.2d 733 (1953); \textit{Commonwealth v. Kelley}, 337 Pa. 171, 10 A.2d 431 (1940); \textit{Commonwealth v. Sterling}, 314 Pa. 76, 170 Atl. 258 (1934); \textit{Commonwealth v. Doris}, 287 Pa. 547, 135 Atl. 313 (1926); \textit{Commonwealth v. Robb}, 284 Pa. 99, 130 Atl. 302 (1925); \textit{Commonwealth v. Lessner}, 274 Pa. 108, 118 Atl. 24 (1922); \textit{State v. Badgett}, 37 S.C. 543, 70 S.E. 301 (1911). \textit{Commonwealth v. Lowry, supra}, which the dissent in the \textit{Redline} case went so far as to classify as affirming the principle of the \textit{Moyer, Almeida}, and \textit{Thomas} cases, can under no reasonable stretch of the mind be held as authority for this extension, for though there was dictum discussion of tort proximate cause principles, this language must be qualified by and limited to the facts of the case, i.e., the homicide was committed by one of defendant's co-felons.

\textsuperscript{19} At common law justifiable homicide and excusable homicide were classified as two different types, there being no guilt in the case of a justifiable homicide, and very little in the case of an excusable homicide. 4 \textsc{Blackstone}, \textit{Commentaries} *178. An unintentional, accidental killing was an excusable homicide while a killing that was intentional, but authorized by law, i.e., self defense or an executioner carrying out a sentence, was a justifiable homicide.

\textsuperscript{20} 391 Pa. at —, 137 A.2d at 483.
objectives of criminal law and tort are so divergent that principles cannot be used interchangably without resulting in a great deal of confusion in both fields of law, with consequent illogical and undesirable results.21

The end result of the Redline case would seem to be to bring the Pennsylvania application of felony-murder back in line with the majority rule, that the killing must be done by defendant or someone acting in concert with him, and to limit its application to those circumstances which caused such a doctrine to be developed in the first place. Although the distinction between the Almeida and the Redline cases seems weak, based on the thin line between excusable and justifiable homicide, the majority opinion will have practically the same result as if it had specifically overruled the Almeida case.

JOHN WM. RINGER

NUISANCE—PER SE AND PER ACCIDENTS— FILLING STATION IN A RESIDENTIAL AREA
Phillips v. Adams1

Plaintiff sought an injunction to restrain defendant from building a filling station on a town lot in Harrisburg, Arkansas, contending that it would be a nuisance. The defendant's property is located in an exclusively residential area of four square blocks located to the north of Jackson Street. State Highway 1 enters the town from the south, and dead-ends at Jackson Street which runs east-west. Defendant's property is an inside lot located slightly to the east and north of the intersection of Jackson Street and Highway 1. On the southwest corner of the intersection of Highway 1 and Jackson Street there is a filling station, and other businesses are located a few hundred feet to the south and east of the defendant's lot. The trial court found that lights on poles reflecting on plaintiff's residence, the noise and vibration of automobiles and diesel trucks starting from a stop, and the fumes from gasoline and oils and other volatile substances (even though the station was operated in a careful and prudent manner) would constitute recurring and irreparable damage to the adjoining owners. On this basis the trial court enjoined the further construction of the service station. On appeal, held, affirmed. A filling station in a residential area is not a nuisance per se and whether or not its construction will be enjoined is a question of fact to be determined by the chancellor and the findings of the chancellor will not be reversed unless clearly contrary to the weight of the evidence.

The number of automobiles traveling upon our nation's highways increases rapidly each year. Facilities for servicing these automobiles must be provided and the providing of these services has become a major business enterprise. A property owner wishes to use his property to meet this need and also to provide himself a benefit. The home owner, especially in a suburban area, has probably moved into the suburbs to escape the ever increasing noise and distraction of our cities. So

1. 309 S.W.2d 205 (Ark. 1958).
we have the conflicting interests of the residence owner (who feels that he cannot properly enjoy his property) and the business property owner (who feels that he would be denied a reasonable use of his property if he could not develop it as a service station). In many cases zoning ordinances restrict the building of commercial buildings in a residential district. In other cases there are use restrictions in the deeds to property that restrict the use of the land to residential purposes. This Case Note will be limited to the discussion of whether or not a filling station which is inappropriately located in a residential area is a common law nuisance. No attempt will be made to consider the cases where there are applicable zoning ordinances or use restrictions involved.

With the exception of Pennsylvania, the courts of the United States have been in accord that a properly operated drive-in gasoline filling station for the sale of gasoline, oil, and other like commodities is not a nuisance per se but may become a nuisance per accidens when improperly located or improperly operated. Pennsylvania has held that a filling station, when constructed in a residential area, becomes a nuisance per se. Since a filling station is not a nuisance per se, by the majority view, and is a lawful business, it would seem that under this view a person should not be restrained from operating a service station at all, rather he should only be restrained from operating it or carrying it on in an offensive or improper manner. Also the possibility that a gasoline station might become a nuisance in fact at some future time because of location, improper operation, or other reasons would not normally justify an order to prevent construction.

The chief difficulty, and where the opinions seem to be most conflicting, comes in determining whether in a given situation a service station is a nuisance in fact, or will become a nuisance per accidens. In the instant case, Phillips v. Adams, we have seen that lights reflecting on a residence, noise, vibration, and fumes from the oil and gas led the court to hold that the filling station would be a nuisance in fact and restrained construction. Very similar facts have led other courts to different results. In a Missouri case, Greene v. Spinning, it is said:

We are inclined to hold that plaintiffs cannot complain of the presence of the filling station as far as the noise, smells, and the like are concerned, or the fact that it depreciates the value of the plaintiffs' property, or that it constitutes, in a degree, a fire or explosion hazard.

The court held however that casting headlights into the sleeping quarters of plaintiff's family only a few feet away; improper location of a greasing rack; and setting

on fire gasoline, which had seeped into a well, causing an explosion, did constitute a nuisance. The court would not enjoin the operation of the station as long as the defendant would take corrective measures to correct the situations held to be a nuisance. The court further said:

It seems to be well settled that a filling station is not a per se nuisance, even when operated in a residence district. It may become one per accidens depending upon its location and the circumstances under which it is operated. 8

By enjoining the construction of a filling station in a residential district when there is no indication the filling station will be operated in other than the normal manner of operating any filling station, and the plaintiff has no other complaint than could be made against any other filling station built in a residential area, Arkansas seems to be coming close to the Pennsylvania view that a filling station in a residential area is a nuisance per se. If the filling station in the instant case, Phillips v. Adams, would have been a nuisance in fact why would not any filling station in a residential area be one? Undoubtedly the trial court which is familiar with the local situation and hears the testimony is in the best position to decide if a filling station is being operated in an improper manner, thereby becoming a nuisance. But where the allegations are the usual ones of excessive noise, flashing lights, vibration, fumes, danger of explosion, decreased property values, and increased insurance rates, should the trial court ever declare that the station will be a nuisance in fact before the station is constructed? Is it not violating the legal right a person has to operate a lawful business in a lawful manner? To hold the station to be a nuisance in fact before the defendant is given a chance to operate properly seems to be paying only lip service to the rule that a filling station is not a nuisance per se when located in a residential area.

Bobby J. Keeter

8. Id. at 58. For an interesting discussion of some Missouri nuisance cases, see Botkin, Nuisance—Parking on Public Street in Front of Plaintiff's House, 23 Mo. L. Rev. 95 (1958).

In researching the Missouri cases concerning filling stations as a common law nuisance only one case other than Greene v. Spinning seemed to be sufficiently similar in factual situation to be useful. In City of Spikardsville v. Terry, 274 S.W.2d 21 (K.C. Ct. App. 1954), the plaintiff city was seeking to prevent the defendant filling station operator from installing two large steel gas tanks above the ground. Residence owners in the vicinity were permitted to intervene in the action. The trial court dissolved a temporary injunction and judgment was entered for defendant. On appeal, held, affirmed. The court said, "The general rule is that mere fear or anticipation of a nuisance is insufficient to warrant the extension of equitable relief by injunction. It is necessary, in order to restrain future acts with respect to the construction or maintenance of gasoline or filling stations, upon this theory to allege and prove facts which show, with reasonable certainty, that such results would be likely to follow." Id. at 26.

Since the construction of gasoline tanks above ground was in controversy and not the regular operation of a filling station, it would seem that the paragraph just quoted would be merely dicta. It does tend to show that Missouri courts accept the majority view on the question under discussion and that this case approves the view set out in Greene v. Spinning.