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ADMISSION OF PRIOR UNRELATED CRIMES IN FIRST DEGREE MURDER CASES

The introduction into evidence of prior unrelated crimes in Pennsylvania has caused grave legislative and judicial concern. Our state courts have accepted and continue to accept the general rule that, "A distinct crime unconnected with that on trial cannot be given in evidence against a prisoner as proof of the crime on trial."¹ Prior convictions can be introduced, however, to show, among other things, intent,² scienter,³ motive,⁴ identity,⁵ plan,⁶ organization,⁷ chain of crimes,⁸ or sequence of crimes,⁹ part of the history of the events on trial,¹⁰ mental condition of the defendant where insanity is raised,¹¹ to rebut mistakes,¹² guilty knowledge,¹³ wilfulness,¹⁴ purpose,¹⁵ and credibility.¹⁶

It would appear then, on first blush, that prior convictions can be introduced for almost every conceivable reason and that the general rule is merely a convenient platitude used by the courts as window dressing. Yet the rule is still very much alive despite its emaciated condition. It is directly involved in the discussion which follows. This article concerns the admission of unrelated prior crimes before the conclusion of a murder trial, to assist the jury in determining the penalty once it decides the prisoner is actually guilty of first degree murder. This subject was recently discussed and passed on by the Pennsylvania Superior Court in *Commonwealth v. De Pofi*, 362 Pa. 229, —A.2d— (1949), in which the Amendment of 1947¹⁷ of the Act of 1911¹⁸ was held to be unconstitutional.

In this article an attempt has been made to trace the history of the use of such evidence in Pennsylvania and state the law today, as a result of the recent action of our Supreme Court.

Jury Determination Of Penalties In First Degree Murder Cases

Until the Act of 1925¹⁹ the legislature had felt that the courts, and not the jury, should determine the punishment in first degree murder cases. In practice it

1 *Commonwealth v. Williams*, 307 Pa. 134, 151, 160 A.602 (1932).

2 *Goersen v. Commonwealth*, 99 Pa. 388 (1881).

3 See note 2, *supra*.

4 See note 2, *supra*.

5 See note 2, *supra*.

6 *Commonwealth v. Weiss*, 284 Pa. 105, 130 A.403 (1925).

7 See note 2, *supra*.

8 See note 6, *supra*.

9 See note 2, *supra*.

10 See note 2, *supra*.

11 *Commonwealth v. Dorst*, 285 Pa. 232, 132 A.168, (1926).

12 See note 2, *supra*.

13 See note 2, *supra*.

14 See note 2, *supra*.

15 See note 11, *supra*.

16 See note 11, *supra*.

17 Act of July 3, 1947, P.L.1239, 19 PS 711 (Pa.).

18 Act of March 15, 1911, P.L.20, 19 PS 711 (Pa.).

19 Act of May 14, 1925, P.L. 759, 18 PS 2222 (Pa.).

had been found, however, that many juries returned verdicts of murder in the second degree because they feared the trial court would give the accused a death penalty if they returned a first degree murder verdict.

In the year 1939 this Act was repealed, but was reenacted in the same year.²⁰

This Statute provides:

"The jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether the person is guilty of murder of the first or second degree. Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict."

The problem was then created whether the jury should be informed of the past convictions of the defendant in determining his penalty. Chief Justice Moschizker answered in the affirmative when he wrote ". . . it should not necessarily be reversible error if the trial judge, in the exercise of his discretion, allows the jury the same sort of information that a judge has considered when deciding as to punishment for crime."²¹

Unfortunately, there is no provision under the statute for a second deliberation by the jury after arriving at a verdict of first degree murder.²² The evidence of prior crimes must be submitted before the jury determines whether the prisoner is guilty of the crime charged. Immediately the danger can be seen. Is the jury deciding the case on the facts or the past record of the accused?

Our courts have squarely faced this problem and have held that despite the danger of injustice, the evidence should be received. As expressed by our Supreme Court in *Commonwealth v. Parker*,²³ "The Amendment of 1925 was not passed to help habitual criminals and we take judicial notice of the fact that offenders of that designation have become so general that the law, not only *lex scripta*, but *non scripta*, must advance to protect society against them." This view was again expressed in *Commonwealth v. Williams*²⁴ where it was held, "The Act of 1925 cannot be used as a shield to protect men who scorn the laws of society, who murderously prey on it for profit, and who commit acts regardless of the consequences."

²⁰ Repealed by the Act of June 24, 1939, P.L. 872, Sec. 1201, and reenacted by Sec. 701 of the same Act, 18 P.S. 4701 (Pa.).

²¹ *Commonwealth v. Parker*, 294 Pa. 144, 152, 143 A.904, (1928).

²² See note 21, *supra*.

²³ *Commonwealth v. Parker*, 294 Pa. 144, 154, 143 A.904 (1928).

²⁴ *Commonwealth v. Williams*, 307 Pa. 134, 155, 160 A.602 (1932).

The Background And Effect Of The Amendment of 1947²⁵ On The Problem

The amendment of 1947 is almost an exact duplicate in verbiage of the English Criminal Evidence Act of 1898.²⁶ The English Act was designed to strictly limit the instances when evidence of prior crimes could be admitted. The substance of the Act is that a witness shall not be required to answer any question tending to show that he has been convicted or been charged with any offense other than the one he is being tried for unless;

1. The evidence would show him guilty of the offense charged, or
2. At the trial he asked witnesses for the prosecution questions designed to establish his own good reputation, or
3. He testifies at that trial against a co-defendant. In England this Act has been strictly construed.²⁷

In 1911 the Pennsylvania Legislature enacted the second and third section, but not the first section, of the English Act into law.²⁸

Our consideration of the judicial interpretation of the Act of 1911 is limited to its effect on the introduction in evidence of prior crimes for the purpose of determining the penalty in first degree murder cases under the Act of 1925. It must be remembered that the exceptions to the general rule persisted despite the Act of 1911. It is also important to know that the 1911 Act affected only cross-examination of the accused when testifying on his own behalf.²⁹ This was the state of the law prior to the passage of the Act of 1925.

The condition of the law after the enactment of the Act of 1925 is clearly stated in *Commonwealth v. Williams*.³⁰ Justice Kephart wrote:

"We must view this Act (1925) apart from its wisdom. Obviously, the legislature, in directing the jury to fix the penalty and providing a new penalty, intended that the jury should have some guide in determining which punishment to inflict. But, did the legislature intend anything more than the circumstances surrounding the homicide then on trial should be considered? . . . In this State we have . . . admitted evidence of prior convictions and other offenses in aggravation of the penalty in four cases³¹ . . . It is possible that a comparison of these cases with those decided before 1925 where prior convictions were admitted notwithstanding the Act of 1911, would show that all could be sustained

²⁵ See note 17, supra.

²⁶ *Commonwealth v. De Pofi*, 362 Pa. 229, 236, —A.2d— (1949).

²⁷ See note 26, supra.

²⁸ See note 18, supra.

²⁹ See note 1, supra.

³⁰ *Commonwealth v. Williams*, 307 Pa. 134, 150, 160 A.602 (1932).

³¹ a. *Commonwealth v. Parker*, 294 Pa. 144, 143 A.904 (1928).

b. *Commonwealth v. Mellor*, 294 Pa. 339, 144 A.534 (1928).

c. *Commonwealth v. Dague*, 302 Pa. 13, 152 A.839 (1930).

d. *Commonwealth v. Flood*, 302 Pa. 190, 153 A.152 (1931).

under the latter. But we definitely said . . . that evidence of prior convictions was admissible under the Act of 1925 in aggravation of the penalty."

The court says then, in effect, that these cases might come under the exceptions to the general rule; but even if they do not, evidence of prior convictions under the Act of 1925 is admissible. That was the state of our law until the passage of the Amendment of 1947 to the Act of 1911.

The Amendment of 1947 was an attempt by our legislature to add the omitted section of the English Criminal Evidence Act of 1898³² to our 1911 Statute. The Amendment repeated *verbatim* the first two sections of the 1911 Act and added a third section which was similar to, but not identical with, the omitted section of the English Criminal Evidence Act. The change in language of the new section proved to be fatal and eventually led to the entire Amendment being declared unconstitutional.

*Commonwealth v. De Pofi*³³ — *Death of A Policeman and An Amendment*

On the evening of March 5, 1948, De Pofi and an accomplice were burglarizing a home. While in the process they were captured by two policemen. In being led from the house, De Pofi, who had been caught on sixteen similar occasions, turned on his captors and held them at bay with a gun. One officer, while attempting to make a break, was shot by De Pofi and died four days later. During the trial the court admitted, over the defendant's objection, evidence of the sixteen previous convictions. The appellant contended that the Amendment of 1947 strictly limited the introduction of prior crimes to those related to or connected with the crime being tried. He further contended that the decisions under the Acts of 1911 and 1925 were no longer controlling. The Supreme Court in a thorough opinion, with but one dissenting vote, held the evidence of prior unrelated crimes to have been properly admitted. The Amendment of 1947 to the Act of 1911 was held to be unconstitutional.

The verbiage of Section 3 of the Amendment of 1947 is of great importance in understanding why the Court decided it to be unconstitutional.

The Amendment of 1947 states that no evidence shall be admitted which tends to show that the accused committed any other crime than the one charged unless; "The proof that he has committed or has been convicted of such offense is admissible evidence as to the guilt or the degree of the offense wherewith he is then charged."³⁴

At first reading, this section may not present any questions as to its meaning, but closer observation leads to considerable confusion. The difficulty seems to

³² See note 26, *supra*.

³³ *Commonwealth v. De Pofi*, 362 Pa. 229, —A.2d— (1949).

³⁴ See note 17, *supra*.

arise from the meaning given to the words "or the degree of the offense." The courts have held two views as to its meaning.

In the *De Pofi* case³⁵ the trial judge said that it meant the degree of the first degree murder. As the Supreme Court pointed out, the lower court must have believed that there was now to be not only first and second degree murder, but also "first degree first degree murder and second degree first degree murder."

The view taken by the minority in the *De Pofi* case is that the statute meant merely first and second degree murder; for no other crime is divided into degrees in Pennsylvania.³⁶ But to follow this latter view would be to permit the introduction of prior unrelated crimes, not to determine the penalty in first degree murder cases, but rather as evidence to whether the accused committed the crime of murder at all. Clearly this is directly opposed to the general rule that prior unrelated crimes cannot be introduced into evidence. Nor is it permitted by any of the recognized exceptions to the general rule.

The majority agreed with the minority that by the use of the Statutory Construction Act,³⁷ the words "or the degree of the crime" must be construed according to their common and approved usage. This would be first and second degree murder. However, by this view the jury would no longer have the record of the prisoner in first degree murder cases, so penalty fixing would be, by necessity, largely arbitrary.

Unfortunately, the confusion caused by the Amendment was not confined to the *De Pofi* case. On the very day the *De Pofi* case was decided, the Supreme Court faced the same Amendment in *Commonwealth v. Dacey*.³⁸ Chief Justice Maxey there wrote that the Amendment was, "vague, indefinite and uncertain", and that the most that can be expected of decisions based on it, would be a mere guess as to the legislature's intent in the adoption of this peculiar Amendment. The trial judge in this case guessed that the prosecution could still introduce other crimes having an independent relevancy.

Judge Arnold of the Superior Court in *Commonwealth v. Robinson*³⁹ believed that prior unrelated offenses could not be shown. His opinion of the Amendment was that it was open to even greater criticism than its mother, the Act of 1911.⁴⁰ Because of this Amendment's vagueness and uncertainty of meaning, it was held to be unconstitutional. In addition, the Amendment was held to be opposed to Article 3, Section 3 of our State Constitution.⁴¹ This article reads; "No bill . . . shall contain more than one subject which shall be clearly expressed in the title."

³⁵ See note 26, supra.

³⁶ See note 26, supra.

³⁷ Act of May 28, 1937, Sec. 33, Art. III, P.L. 1019, 46 PS 533 (Pa.).

³⁸ *Commonwealth v. Dacey*, 362 Pa. 259, —A.2d— (1949).

³⁹ *Commonwealth v. Robinson*, 163 Pa. Super. 16, —A.2d— (1949).

⁴⁰ *Commonwealth v. Robinson*, 163 Pa. Super. 16, Footnote on Page 23, —A.2d— (1949).

⁴¹ Constitution of January 1, 1874 as amended (Pa.).

The first two sections of the Amendment of 1947 have been held to purport to deal only with evidence solicited on cross-examination. The third section deals with direct examination. The majority in the *De Pofi* case felt the parts of the Amendment were not germane as is required by our judicial decisions.⁴² Although it is fully recognized that the title of an amendment need not be as inclusive as that of an act, it has been repeatedly held that the parts of an amendment, as well as those of an act, must be germane to each other.⁴³ In fact, the majority felt the sections of the amendment to be so unrelated that they said Section 3 should have been the subject of an entirely new act.

The Act's questionable punctuation, its effect on the Act of 1925,⁴⁴ and the insufficient notice given by the title to a change in long existing law also led the Court to hold it to be unconstitutional. The important question now before us is the state of the law today.

The Law Today

The effect of the *De Pofi* decision is to bring us back to the law prior to the Amendment of 1947.

1. The general rule that prior unrelated crimes cannot be introduced as proof of the crime on trial is still the law.
2. Evidence of prior crimes can still be introduced under the myriad of exceptions.⁴⁵
3. The Act of 1925 is still in force. Evidence of prior unrelated crimes can be admitted to assist the jury in first degree murder cases to determine the punishment. The crimes which can be introduced have been limited by decisional law to those involving violence, which create a grave menace to society, or which involve passion. It is at the trial court's discretion as to what crimes are to be received.

Suggested Amendment

In theory, the Act of 1925 appears to be sound. As Justice Sadler expressed it, in *Commonwealth v. Curry*,⁴⁶ "The Act of 1925 contemplates, first, a finding of guilt of first degree murder, and, thereafter, the exercise of discretion by the jurors." In practice, however, the theory of the Act has been frequently disregarded, despite clear instructions to the jury as to the use to be made of the past record of the accused given them.⁴⁷ This known abuse may have been the very reason for the legislative action in passing the Amendment of 1947. Nevertheless, our

⁴² *Page v. Suspender Co.*, 191 Pa. 511, 43 A. 345 (1899) also *Craig v. First Presbyterian Church*, 88 Pa. 42 (1878).

⁴³ *Philadelphia v. Railway Company*, 142 Pa. 484, 91 A 982 (1891).

⁴⁴ See note 19, *supra*.

⁴⁵ See notes 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16, *supra*.

⁴⁶ *Commonwealth v. Curry*, 287 Pa. 553, 558, 135 A.316 (1926).

⁴⁷ See note 23, *supra*.

courts have felt it better to take a chance on an injustice to an accused, than take away the jury's evidence of past crimes of the prisoner in determining whether their decision will be life imprisonment or death.

Yet there appears to be a simple solution to this problem. It was talked of by Chief Justice Moschzisker in *Commonwealth v. Parker*.⁴⁸ That solution would be to have the jury first determine the guilt of the prisoner, and then submit the record of his past criminal offenses to help the jury decide on the penalty. The comment of the Chief Justice was that there was no statute permitting jurors to render piecemeal verdicts. Chief Justice Maxey also commented on this solution in *Commonwealth v. Johnson*.⁴⁹ There the Chief Justice said, "It follows that when a jury adjudges a defendant guilty of murder in the first degree and fixes the penalty, all of the evidence must be heard in the presence of the defendant. It would obviously be error for a jury to separate after finding a defendant guilty of murder in the first degree and then reassemble and hear *ex parte* evidence, as to the defendant's record, before fixing the penalty." Still other objections could be raised. It might be argued that there would be added expense and delay as well.

It seems that all these objections can and should be answered. If the jury finds the prisoner guilty of murder in the first degree, they need not separate and later reassemble to hear the prisoner's record. All that can be done in the presence of the accused and his counsel immediately upon the finding of a verdict. Granted, it may take more time and money, but it must be remembered that the accused's life is at stake. There does not appear to be any constitutional objection to such a procedure in Pennsylvania. Therefore it appears that this problem can be solved by legislative action. It is most earnestly suggested that an act permitting piecemeal verdicts in first degree murder cases be added to our statute books at the next meeting of the legislature.

Albert E. Acker

⁴⁸ See note 23, *supra*.

⁴⁹ *Commonwealth v. Johnson*, 348 Pa. 349, 355, —A.2d— (1944).