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INTERPRETATION OF WILFUL, DELIBERATE AND PREMEDITATED MURDER BY PENNSYLVANIA AND NEW JERSEY COURTS

The question is, what constitutes murder in the first degree? The killing must be malicious, but a murder is not of the first degree merely because committed with malice aforethought, for such malice is required in all degrees of murder.

The Pennsylvania statute¹ which has been a model for the statutes of most states provides: "All murder which shall be perpetrated by means of poison, or by lying in wait, *or by any other kind of wilful, deliberate or premeditated killing*, . . . shall be deemed murder in the first degree."² There is comparatively great confusion in the interpretation of the meaning of the words, "wilful, deliberate and premeditated." Some courts hold that the three words are synonymous; others say that they refer to one mental operation; a third view refers to three distinct mental operations.³

With knowledge that this confusion exists, it is the purpose of this note to show by a comparison of the Pennsylvania and New Jersey statutes and decisions how this confusion arises. Both the Pennsylvania⁴ and New Jersey⁵ statutes are identically worded. Under the statutes which require the killing to be wilful, deliberate and premeditated, all the elements must be present; that is, the elements of (a) wilfulness, (b) deliberation and (c) premeditation.⁶ From this it is apparent that the confusion does not exist because of the statutes but arises from the judicial interpretations of the statutes.

In commencing the survey of the Pennsylvania cases we find in the case of *Keenan v. The Commonwealth*⁷ that the defendant, without provocation, drew a knife and mortally wounded a street-car conductor. The court held:

". . . the true criterion of the first degree murder is the intent to take life. The deliberation and premeditation required by the statute are not upon the intent, but upon the killing. It is deliberation and premeditation enough to form the intent to kill, and not upon the intent after it has been formed. An intent distinctly formed, even 'for a moment' before it is carried into act, is enough."

Therefore, from this decision, it is apparent that a distinctly formed intent to kill carried into performance but a moment later, not in self-defense, and without adequate provocation, will constitute murder in the first degree.

Despite this unequivocal statement of the law on the meaning of the three mental elements of murder in the first degree, the Supreme Court, speaking through Chief Justice Agnew, in the case of *Commonwealth v. Drum*,⁸ held:

¹ Act of April 22, 1794, P.L. 175, 18 PS 4701.

² Italics supplied.

³ 51 DICK. L. REV. 183 (1947).

⁴ See footnote No. 1 *supra*.

⁵ P.L. 1898, p. 824, 2 N.J. COMP. ST. 1780, R. S. 1937, 2: 138-2.

⁶ 21 Cyc. 726.

⁷ *Keenan v. The Commonwealth*, 44 Pa. 55 (1862).

⁸ *Commonwealth v. Drum*, 58 Pa. 9 (1868).

"In murder if an intention to kill exists it is wilful; if the intention be accompanied by such circumstances as evidences a mind fully conscious of its own purpose and design, it is deliberate; and if sufficient time be afforded to enable the mind fully to frame the design to kill and to select the instrument, or to frame the plan to carry this design into execution, it is premeditated."

Hence we can see that an effort was made to assign to each of these words a distinct meaning, though probably the inventors of the phrase did not so intend.

In the later case of *Green v. Commonwealth*,⁹ the Court said: "That to have a fully conscious and a fully formed purpose to kill, and to kill, is to kill deliberately." Dean Trickett, in commenting on this problem, stated:

". . .the word. . .deliberate when said of an act, means formed or done with careful consideration and full intention, well weighed or considered; not sudden or rash. . .It is impossible, however, to say that this is the sense attributed to it by the decisions. . .It does not mean that the defendant shall have studied and brooded over the thought of taking the life of his victim. It means that he be found to have had a specific, fully formed intent to kill. That intent to kill need not exist for any particular length of time. . .If the intent in doing the act is discovered, the deliberation and premeditation are *ipso facto* discovered, for they always exist where the intent exists."¹⁰

The Supreme Court of Pennsylvania, apparently following this line of reasoning in the case of *Commonwealth v. Robinson*,¹¹ held that the instruction which the trial judge gave the jury had met all the requirements of the law. The judge charged: ". . .Before the jury can find the defendant guilty of murder in the first degree it must find beyond a reasonable doubt that the defendant had a specific intent to take life."

In accord with the commentary of Dean Trickett and the other reported authorities, *supra*, the Supreme Court, speaking through Justice Jones in the case of *Commonwealth v. Jones*,¹² left no doubts that the words "wilful, deliberate and premeditated," as used in the statute mean an intent to kill. It was therein stated:

"Apart from the felonious killings which are made murder in the first degree by statute because perpetrated by means of poison or by lying in wait, or committed in the perpetration of or the attempt to perpetrate one of the statutory enumerated felonies, the main distinction of murder in the first degree from that of second degree lies in the specific intent to take life required for the former. Such intent supplies the qualities of wilfulness, deliberation and premeditation otherwise essential, by the statute, to murder in the first degree."

In summarizing the Pennsylvania holdings, the analysis clearly shows that the statutory requirements of a wilful, deliberate and premeditated killing, taken together, amount to a specific intent to kill. In other words, the three elements have

⁹ *Green v. Commonwealth*, 83 Pa. 75 (1876).

¹⁰ Trickett, 2 PENNSYLVANIA CRIMINAL LAW 789, (1908).

¹¹ *Commonwealth v. Robinson*, 305 Pa. 302, 157 A. 689 (1931).

¹² *Commonwealth v. Jones*, 355 Pa. 522, 50 A. 2d 317 (1947).

but one meaning which constitutes murder in the first degree. This is further substantiated by the most recent opinion of the Supreme Court in the case of *Commonwealth v. Chapman*,¹³ wherein it was said that the elements of murder in the first degree are satisfied when there is a specific intent to take human life.

By an analysis of the New Jersey cases we find that the Court of Errors and Appeals had occasion to render a decision one year after the passage of the Statute of 1898,¹⁴ in the case of *Brown v. State*.¹⁵ As noted before, the statute is identical to that of Pennsylvania. However, the Court held:

"If the proved facts established that the defendant in fact did the killing wilfully, that is with intent to kill, and as a result of premeditation and deliberation, thereby implying preconsideration and determination, there is murder in the first degree. . ."

Therefore, in comparing this holding with the early Pennsylvania case of *Keenan v. Commonwealth*, cited *supra*, the New Jersey Court required more than merely an intent to kill as was required in the latter case. This proposition was further substantiated in the case of *State v. Bonofiglio*,¹⁶ wherein it was said: "On an indictment for murder, the presence of a specific intent to take life is not, standing alone, conclusive that the homicidal act was done with deliberation and premeditation." The Court gave greater emphasis to this conclusion in the case of *State v. Banusik*,¹⁷ in which the defendant formed the intent to kill two months before the homicidal act. The trial judge charged the jury that, "If an intent to kill be formed an instant prior to the act of killing, it is sufficient to render it an intent, and to make it wilful, deliberate and premeditated within the terms of the statute." Standing alone this excerpt might readily convey the idea that an intent to take life, so instantly carried into execution as to make it impossible that the homicidal act was either deliberate or premeditated, would nevertheless make the crime murder in the first degree. However, the appellate court, after making an extensive survey of the cases to date, held that an intent to kill, standing alone, is not sufficient. But in this case, although the charge was erroneous, it was rendered harmless because the evidence showed that the defendant had formed the intent to kill two months before the act.

With the fact in mind that the New Jersey courts require three distinct mental elements, the problem arises as to the order in which they must fall. Looking to the decisions we find that although the statute says, "wilful, deliberate and premeditated," actually they must arise in the reverse order: the premeditation, the deliberation, and then the intent to kill which renders the act wilful. This is best shown by quoting the decision of Justice Garrison, in the case of *State v. Deliso*.¹⁸

"...while the statute in its enumeration of the three mental states essential to murder in the first degree places the word 'wilful' before 'deliberate'

¹³ *Commonwealth v. Chapman*, 359 Pa. 164, 58 A. 2d 433 (1948).

¹⁴ See footnote No. 5 *supra*.

¹⁵ *Brown v. State*, 62 N.J.L. 666, 42 A. 811 (1899).

¹⁶ *State v. Bonofiglio*, 67 N.J.L. 239, 52 A. 712 (1902).

¹⁷ *State v. Banusik*, 74 N.J.L. 553, 64 A. 994 (1906).

¹⁸ *State v. Deliso*, 75 N.J.L. 808, 69 A. 218 (1908).

and 'premeditated', these mental states normally succeed each other in the inverse order; premeditation, both as a mental process and by force of its prefix, necessarily preceding the weighing of the mental content that is implied by the figurative term 'deliberate', both of which must precede the acceptance by the will of the matter thus previously premeditated upon and weighed."

Paraphrasing the above, the premeditation comes first. This is the entertainment by the mind of a design to kill. Next to be considered is the deliberation or weighing of the consideration pro and con, after which the actual killing, being determined on, becomes wilful, deliberate and premeditated in the sense intended by the statute. The above is the holding of the majority of the decisions. However, Justice Garrison confused the issue in the later case of *State v. Clayton*.¹⁹ wherein he said:

"The extreme penalty the legislature has declared in unmistakable language shall not be visited upon one who has committed the crime of murder unless it be found by a jury that he contemplated its commission (i. e., premeditated it) then determined upon its commission (i. e., intended it) and then weighed such intent before carrying it into effect (i. e., deliberated)."

Still keeping in mind that all three elements must be present and the order in which they must fall, it is strange to find the Court holding in the case of *Donnelly v. State*,²⁰ that no particular length of time need intervene between the formation of the purpose to kill and its execution. It is enough that the design be fully conceived and purposely executed. It was further held that the premeditation and intent to kill need not be for a day, or an hour, or even a minute. And even here the Court shows the dilemma which arises from this holding by stating: "To constitute murder in the first degree under this clause of the statute there must be an intention to take life." This latter case was cited in the case of *State v. Mangano*,²¹ wherein the Court held an instruction, ". . . that if defendant had formed in his mind an intent to kill, and then instantly he deliberately perpetrated the act to carry out the intention, that is the deliberation and premeditation which the law requires in order to make it murder in the first degree," as being erroneous on the theory that the word "instantly" precluded the idea of deliberation, and a mere intent to kill, without deliberation, was not sufficient to constitute murder in the first degree.

The Court in declaring that these requisites must be present removes the strength of this holding by further stating that no particular length of time need intervene between each mental act.

To bring the New Jersey holdings to date and to pin point their conclusions in this matter, the case of *State v. Lynch*²² clearly pronounces their stand. The

¹⁹ *State v. Clayton*, 83 N. J. L. 673, 85 A. 173 (1912).

²⁰ *Donnelly v. State*, 26 N.J.L. 601 (1857).

²¹ *State v. Mangano*, 77 N.J.L. 544, 72 A. 366 (1909).

²² *State v. Lynch*, 130 N.J.L. 253, 32 A. 2d 183 (1943).

following charge, ". . . whenever there is, in committing a homicide, a specific intention to take life, there is, in the language of the statute, a wilful, deliberate and premeditated killing, and the offense is murder in the first degree," was held plainly erroneous, for it utterly ignored the requisite elements of deliberation and premeditation within the meaning of the statute.

In order to sustain the holding that there must be three distinct mental acts, not satisfied by the finding of an intent to kill alone, the New Jersey courts should put teeth in what is seemingly an arbitrary ruling, and require by some method of calculation a definite period of time. But, if they do clarify their holding and require a definite time, for example one hour between each act, the problem is still not solved. What would be the result if a man intentionally killed and the required time intervention was not present? Assuming that he has no other defense, are we to permit him to scrupulously avail himself of this defense? Shall we even consider it as a defense? All these and other related problems must remain in the realm of indecision.

After the above comparison of the Pennsylvania law with the New Jersey law and the suggested changes in the latter, it is our opinion that the holding of the Pennsylvania Court is better, wherein it is held that a specific intent to kill is sufficient for a conviction of murder in the first degree. It is definitely easier for the jury to understand, and the judge can also instruct them in the law without finding himself on the horns of a dilemma by trying to lead them through a maze of definitions on the meanings of wilful, deliberate and premeditated as required by the statute.

In support of the reasonableness of the Pennsylvania holding, we cite Chief Justice Benjamin N. Cardozo, who in an address to the New York Academy of Medicine in 1928, discussed a similar statute on the degrees of murder in that state. Therein he said:

"The difficulty arises when we try to discover what is meant by the words deliberate and premeditated. . . To deliberate and premeditate within the meaning of the statute one does not have to plan the murder days or hours or even minutes in advance, as where one lies in wait for ones enemies or places poison in his food or drink. . . One may say, indeed, in a rough way that an intent to kill is always deliberate and premeditated within the meaning of the law unless the mind is so blinded by pain or rage as to make the act little more than an automatic or spontaneous reaction. . . I think the distinction is much too vague to be continued in our law. There can be no intent unless there is a choice. . . What we have is merely a privilege offered to the jury to find the lesser degree on the suddenness of the intent, or where the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them the disburysing power, but it should be given to them directly and not in a mystifying cloud of words. The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate

and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying psychology scores of men have gone to their death."²³

At another place in the same address he stated: ". . . all the statute requires is that the act must not be the result of immediate or spontaneous impulse. . . the presence of a sudden impulse is said to mark the dividing line." On this point the latest Pennsylvania decision has taken a contrary view. In the case of *Commonwealth v. Levin*,²⁴ a 17 year-old defendant who pleaded guilty to an indictment charging murder of a 12 year old boy whom he had enticed to defendant's home was adjudged by the court of being guilty of murder in the first degree. The court said:

"We have no thought that the defendant lured young Simons to his home for the purpose of killing him, and it may be conceded that the idea of doing so probably did not occur to him until the criminally sexual act was committed. For this reason the period of time that elapsed between the first thought of killing and the accomplishment of the deed was necessarily short, and in this sense, it was a somewhat impulsive, rather than a long and coldly planned, murder. Nevertheless, there was undoubtedly sufficient time for defendant to form the specific intent to kill, and to procure the means of carrying out his evil design. . . We think sufficient has been noted to justify our finding that, while this murder may have been quickly conceived and *impulsively executed*, it was clearly a wilful, deliberate and premeditated murder of the first degree, and we so adjudge it."²⁵

Although Cardozo in his address attempts to pronounce a dividing line on this matter, the Pennsylvania lower court decision disposes of it and adds strength to the proposition that the three elements as stated are satisfied with an intentional killing. From the facts in the *Levin* case, although the killing may have been impulsive, nevertheless it was clearly intentional. For this reason the court held that the defendant was guilty of murder in the first degree, and the result of this decision seems to emphasize the better view; that is, the three words have but one judicial meaning.

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*Since the foregoing was written the Supreme Court of New Jersey, in the case of *State v. Cordasco*, 66 A.2d 27 (May 9, 1949), held that though the New Jersey statute requires three mental operations which are not synchronous but successive, a charge which declared, "By deliberate and premeditated the law does not mean any particular length of time need intervene between the formation of the purpose to kill and its execution. Time sufficient to fully and clearly conceive the design to kill and purposely and deliberately execute it satisfies our statute", explicitly covered the three ingredients of murder in the first degree under the statute.

²³ CARDOZO, LAW AND LITERATURE, (1931).

²⁴ *Commonwealth v. Levin*, 66 D. & C. 55 (1949).

²⁵ Italics supplied.