RECENT CASES

Criminal Law—Judgment, Verdict, and Sentence—Jury's Recommendation to Mercy a Part of Verdict—[New York].—In a trial for murder, the judge charged the jury, under a New York statute allowing a recommendation to mercy in murder cases,[1] that they must first decide the question of the defendant's guilt and, having decided that, they could then consider the recommendation; if they were all agreed on such recommendation it should be brought in, but any disagreement on the mercy issue would not affect the verdict of guilty. The jury brought in a verdict of guilty, with no recommendation to mercy. On appeal, *held*, the instruction was prejudicial error, since the statute was intended to mean, as evidenced by the words "as part of [the] verdict," that there must be agreement not only on the question of guilt but also on the question of mercy in the verdict. Conviction reversed, three judges dissenting. *People v. Hicks.*[2]

At common law the jury had no power to make a recommendation to mercy; such a recommendation was mere surplusage.[3] The present statute, though it applies to all convictions of murder in the first degree, was enacted primarily with a view to accomplices in felony murder cases.[4] In a prosecution for murder in the first degree a jury can usually find the defendant guilty in a lesser degree;[5] but in a trial for murder in the commission of a felony, an accomplice to the felony not otherwise a party to the murder must be either acquitted or convicted of murder in the first degree.[6] Prior to the statute, a jury which felt that the death penalty was too harsh could only allow a defendant to go free. While it is the law that a jury shall not allow the punishment to influence their determination of guilt,[7] such considerations do, in fact, influence the jury. The statute was intended to make it easier to obtain convictions in felony murder cases by allowing the jury to fit the punishment to the degree of guilt. The majority of the court pointed out that the trial court's construction does not fully achieve this purpose of the statute, since a juror is still faced with the possibility that a defendant will be sentenced to death if the jury cannot agree upon the recommendation to mercy.

[1] "A jury finding a person guilty of murder in the first degree . . . . may, as part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life." N.Y. Penal Law (McKinney, 1938) § 1045-a.

[2] 38 N. E. (2d) 482 (N.Y. 1941).

[3] People v. Collins, 195 Cal. 325, 233 Pac. 97 (1925); Niezorawski v. State, 131 Wis. 166, 111 N. W. 250 (1907).

[4] People v. Hicks, 38 N. E. (2d) 482, 484 (N.Y. 1941), citing governor's letter to the legislature urging the passage of the statute and setting forth its purposes.

[5] N.Y. Penal Law (McKinney, 1938) § 610 is largely declaratory of the common law rule. People v. Schleiman, 197 N.Y. 383, 90 N. E. 950 (1910).

[6] People v. Schleiman, 197 N.Y. 383, 90 N. E. 950 (1910); People v. Seiler, 246 N.Y. 262, 266, 158 N. E. 615, 616 (1927).

[7] N.Y. Crim. Code (McKinney, 1939) § 420.

The minority, on the other hand, concluded that, since the jury by the permissive terms of the statute need not decide the question of mercy, a disagreement on the recommendation should have no effect on the verdict; the absence of agreement on a recommendation should mean merely that there was no verdict on that point, and none was needed.[8] In addition, the minority pointed out the possibility of repeated trials if disagreement on the question of mercy would necessitate a new trial.[9] Although the minority criticized the majority on the ground that under the latter's view one juror can cause a mistrial with the danger of subsequent acquittal, even when all are agreed on the guilt of the defendant,[10] it is to be noted that the minority view is subject to the criticism that where eleven jurors are agreed on the recommendation, one juror may bring about the defendant's sentence to death.

In some jurisdictions statutes give the jury in murder cases the duty of determining whether the punishment is to be life imprisonment or death. As a result, the court will not allow a jury which disagrees as to the punishment to bring in a verdict. This was the view expressly taken by the California court in *People v. Hall*.[11] The majority in the instant case thus reaches the same result as do cases construing such obligatory statutes, although the language of the New York statute is permissive rather than obligatory. On the other hand, a federal statute[12] which, like the New York statute, simply permits a recommendation to mercy in cases of rape or first degree murder has been construed as requiring agreement of the jury on the recommendation before they bring in a verdict.[13] In reversing the trial court on the basis of an instruction similar to that in the instant case, the federal court said, "if there be any doubt about the construction of the statute, that doubt should be resolved in favor of life, and not in favor of death."[14] As the federal court pointed out, the view adopted by the majority in the instant case is more in keeping with the policy of the criminal law of giving the accused the benefit of the doubt.

The majority view, however, does not accurately effectuate the policy of giving the defendant the benefit of the jury's indecision, in that it reopens the question of guilt where the doubt is merely as to punishment; nor does the majority meet the practical

[8] The minority argued that for the possibility of a recommendation to have any effect whatsoever the jury must act unanimously, "the only way in which a jury may act in a criminal case." People v. Hicks, 38 N. E. (2d) 482, 488 (N.Y. 1941).

[9] If a jury is discharged because of inability to agree, the defendant may be tried a second time, there being no former jeopardy. People ex rel. Bullock v. Hayes, 215 N.Y. 172, 109 N. E. 77 (1915); People v. Goodwin, 18 Johns. (N.Y.) 187 (1820); N.Y. Crim. Code (McKinney, 1939) § 430; see People ex rel. Stabile v. Warden, 202 N.Y. 138, 95 N. E. 729 (1911).

[10] A mistrial is also possible under the minority view, however. A juror may withdraw his agreement to the verdict for reasons satisfactory to himself. State v. Austin, 6 Wis. 206 (1858); People v. Orr, 138 Misc. 535, 246 N.Y. Supp. 673 (Co. Ct. 1930). N.Y. Crim. Code (McKinney, 1939) § 451 requires that the jury must agree at the time the verdict is recorded. Thus a juror dissatisfied with the absence of a recommendation might repudiate the verdict and eventually cause a mistrial.

[11] 199 Cal. 451, 249 Pac. 859 (1926); cf. Mays v. State, 143 Tenn. 443, 226 S.W. 233 (1920). But cf. Davis v. State, 51 Okla. Crim. 386, 1 P. (2d) 824 (1931).

[12] 35 Stat. 1152 (1909), 18 U.S.C.A. § 567 (1927).

[13] Smith v. United States, 47 F. (2d) 518 (C.C.A. 9th 1931).

[14] Ibid., at 520. A strong dissenting opinion was entered by Wilbur, J., at 521.

objections of the minority. This is perhaps the fault of the statute. A statute providing that a majority of the jury may make the recommendation to mercy might solve these difficulties.[15] A more effective measure, however, would be to make the punishment for first degree murder life imprisonment unless the jury recommends the death penalty.[16] It should be explicitly provided that a disagreement as to the punishment should result in a sentence of life imprisonment,[17] in order to avoid the application of the interpretation of the majority in the instant case. This, it is submitted, would achieve the purpose of the New York statute by making conviction easier where the jury is agreed as to the fact of guilt, while giving the defendant the benefit of what doubt does exist and no more.

Future Interests—Powers of Appointment—Revocability of Informal Appointment by Letter to Trustee—[Ohio].—A settlor transferred securities to the plaintiff trust company under a revocable and amendable trust agreement providing an annuity for his daughter and an income for his wife. On the death of the settlor's wife, the income was to be accumulated until the principal equalled $50,000. The principal was then to be paid to the "ultimate beneficiary," who was to be named by the settlor during his life, or, if he failed to do so, by the settlor's wife after his death, with a gift over in default of appointment to Dartmouth College to provide for scholarships. The settlor died without naming any beneficiary, although shortly before his death he wrote his wife that he did not intend to bind her in any way but that he wished Dartmouth to be the ultimate beneficiary. He set forth details of the purposes for which the college was to administer the fund. After the settlor's death, his wife sent a letter to the plaintiff to which she appended the letter of the settlor, stating that it represented her wishes and adding that she might change "the students and persons, who are to receive the benefit [of the education]." Several years later, the settlor's wife notified the plaintiff by a second letter that she wished to name Berea College as the ultimate beneficiary. After the settlor's wife died, the plaintiff sought instruction from the court. The common pleas court held[1] that the settlor's wife, in her first letter, reserved the right to revoke the appointment and that the second letter was effective in appointing the fund to Berea College. The court of appeals, after stating that the

[15] Such a provision is found in the Florida statute. Fla. Comp. Gen. Laws Ann. (Skillman, 1927) § 8401.

[16] The courts have held, under the New York statute, that the recommendation to mercy is not binding on the court. People v. Ray, 172 Misc. 1004, 16 N.Y.S. (2d) 224 (S. Ct. 1939); People v. Ertel, 283 N.Y. 519, 29 N.E. (2d) 70 (1940). Contra: People v. De Renna, 166 Misc. 582, 2 N.Y.S. (2d) 694 (Co. Ct. 1938). It is submitted that a revision of the statute should incorporate a provision making the recommendation binding upon the court. Without such a provision, a juror could not rely on the recommendation to keep the defendant from being sentenced to death.

[17] This is the result arrived at by the Oklahoma court under a statute providing that the jury must determine the punishment of a defendant whom they find guilty, where the trial court had accepted a verdict of guilty, with disagreement on the question of punishment. Davis v. State, 51 Okla. Crim. 386, 1 P. (2d) 824 (1931). It is also to be noted that Wilbur, J., dissenting in Smith v. United States, 47 F. (2d) 518, 521 (C.C.A. 9th 1931), notes 13 and 14 supra, suggested that such a statute would more truly reach the result desired by the court.

[1] Central Trust Co. v. Watt, 31 Ohio L. Abst. 467, 17 Ohio Ops. 456 (1940).